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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
COURT OF COMMON PLEAS

The Honorable Bentley D. Price,
Circuit Court Judge

Appellate Case No. 2023-001832
Case No.: 2018-CP-08-02423

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200 River Landing Drive Phase I Condominium Association, Inc., and Steven Garcia and Janis Zomber, individually and on behalf of all others similarly situated…… Respondents

v.

Watkins Services, Inc., First Exteriors, LLC, Getulio Perela Chagas, FBM Construction LLC d/b/a Fernando Monteiro, and John Doe Subcontractors or Material Suppliers 12-50……Defendants

of Getulio Perela Chagas is the Appellant.

RESPONDENTS' INITIAL BRIEF

THURMOND KIRCHNER & TIMBES, P.A.
Michael A. Timbes (SC Bar No. 69730)
Jesse A. Kirchner (SC Bar No. 70479)
Thomas J. Rode (SC Bar No. 77480)
Sarah D. Baum (SC Bar No. 104544)
15 Middle Atlantic Wharf
Charleston, SC 29401
Phone: 843-937-8000
michael@tktlawyers.com
jesse@tktlawyers.com
thomas@tktlawyers.com
sarah@tktlawyers.com
Attorneys for Respondents

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ISSUE ON APPEAL

I. Should this Court reject Appellant's argument for the adoption of a new rule applicable to default damages hearings which requires a plaintiff, who has suffered indivisible damages at the hands of several joint tortfeasors, to take on the additional burden of proving what portion of his damages are attributable to a defaulting defendant, even though this burden would not have been required of the plaintiff had the defendant not defaulted, and where the Appellant cites no authority to support this new approach?

STATEMENT OF THE CASE

In this construction defect case, Respondents[1] filed and served their Second Amended Complaint, (the "Complaint") against several parties, including Appellant Getulio Perela Chagas ("Chagas"), who performed construction work on the large-scale project. The Complaint alleged Chagas, among others, was negligent, grossly negligent, and proximately caused indivisible damage to five condominium buildings, which required extensive repair.

Prior to the deadline to respond to the Complaint, Respondents twice notified Chagas's insurance carrier of the lawsuit. (Memo in Opposition, Exhibits A and B; Supplemental Memo in Opposition). However, Chagas failed to answer,[2] and the Circuit Court issued entry of default against Chagas on May 7, 2020. (Entry of Default). Chagas's insurance carrier appointed counsel for Chagas, who entered an appearance nearly one year later, in April, 2021. Eight months after appearing (and more than 18 months after the entry of default), Chagas's counsel finally moved

[1] Respondents consist of the owners' association as well as a certified class of unit owners.

[2] Chagas's initial brief refers to his Affidavit stating he was unaware of the lawsuit. (App. Br., p. 5). This affidavit was an exhibit to Chagas failed motion for relief from default, and it is interesting that the brief would reference this affidavit since the denial of this motion was not appealed. Thus, it is not relevant to the issue before this Court. Ostensibly, reference to this affidavit is an effort by Chagas's insurer to divert blame for the default. However, if there were any merit to the suggestion that the default was excusable, one would assume Chagas would have appealed the denial of its motion for relief from default. However, he did not. Perhaps this decision was made because the record plainly shows that Chagas's insurance carrier was aware of the suit in time to avoid default but did not to appoint defense counsel for more than a year. (Memo in Opposition, Exhibits A and B; Supplemental Memo in Opposition).

for relief from entry of default in December, 2021. The Circuit Court denied this motion in a final order entered May 6, 2022, which Chagas has not appealed. (Form 4 Order; Final Order).

The Circuit Court subsequently held a damages hearing on October 18, 2023. (Motion for Damages Hearing). Respondents presented evidence, through two expert witnesses, that it suffered $37,939,523 in indivisible damages in connection with the cost to repair the damages to their five condominium buildings. Respondents also informed the Circuit Court that they had previously recovered $15,460,000.00 in settlements from other defendants named in the action.

Chagas did not dispute that Respondents suffered total damages in the amount presented, nor did Chagas object to the respective qualifications or substantive testimony and reports from Respondents' experts. Instead, Chagas took the narrow position that no award of damages against Chagas was proper because Respondents' damages were indivisible, and Respondents did not present evidence establishing *what portion* of the $37.9 million in unchallenged damages was specifically attributable to Chagas's work.

The Circuit Court properly rejected this argument and found Respondents suffered $37,939,523.00 in damages, and after set-off of $15,460,000 for settlements received from other defendants, the Circuit Court entered judgment against Chagas for $22,479,523. Chagas appealed.

STATEMENT OF FACTS

This appeal arises from the default judgment entered against Chagas. Therefore, the facts are taken primarily from the allegations of Respondents' Complaint in addition to the testimony from the damages hearing.

A. The allegations of the Complaint admitted by Chagas's default.

200 River Landing Drive Phase I is a large residential condominium development located on Daniel Island, South Carolina (the "Development"). (Complaint, ⁋⁋ 1-5, 10; Transcript, pp. 9-

10). The Development includes five separate residential buildings containing 94 Units that are a part of the 200 River Landing Drive Phase I Horizontal Property Regime. (Complaint, ¶¶ 2, 3).

Respondents' claims arose from "numerous construction deficiencies, building code violations, and substantial resulting damages" caused to the five buildings in the Development. The Complaint alleged Chagas[3] performed defective work on this project as a subcontractor pursuant to a Joint Scope of Work for 200 River Landing Drive Phase I. (Complaint, ¶ 35, 39-58). According to the Complaint:

> Chagas, as a subcontractor to ACR, performed various portions of the Joint Repair Scope of Work, including but not limited to installation of windows and related flashings, handrails, guardrails and columns, fire stops, metal awnings, deck sheathing, balcony ceilings, balcony waterproofing and related flashings.

(Complaint, ¶ 24). By virtue of his default, Chagas has admitted these facts. (Transcript, p. 23 (where Chagas's counsel stated, "*Even though its admitted* he worked on the job and he did this scope of work . . . .") (emphasis added)).

The Complaint alleged the widespread defects and resulting damages arose from work performed by Chagas and others. The Complaint specifically alleged that, "Further, the negligence of each Defendant named herein [*i.e.*, including Chagas] resulted in damage to the work of the other contractors, subcontractors and trades and in damage to 200 River Landing Drive Phase I, [Respondents'] property, and [Respondents] use and enjoyment of 200 River Landing Drive Phase I." (Complaint, ¶ 55). Notably, balconies within the Development were damaged to the point that they were deemed by code officials as unsafe for use by residents. (Transcript, pp. 10-11).

[3] For organizational purposes, the Complaint sometimes collectively referred to Chagas and certain other defendants as the "Subcontractors." (Complaint, ¶ 31).

The Complaint asserts that Chagas was negligent, negligent *per se*, grossly negligent, careless, reckless, willful and wanton in performing the Joint Repair Scope of Work, and that Chagas breached the implied warranty of workmanlike service. (Complaint, ¶¶ 113-118, 121-124). The Complaint also asserts that as a proximate result of these construction deficiencies, Respondents would incur significant damages for the repair and replacement of the defects and damages, professional fees to investigate and design remediation plans and specifications and to implement the corrective work, among other damages. (Complaint, ¶¶ 56-58, 113-118, 121-124). Furthermore, the Complaint specifically prayed for an award of actual and punitive damages against the Defendants, jointly and severally, including Chagas. (Complaint, Prayer for Relief).

Having defaulted, Chagas has admitted all the allegations of the Complaint related to duty, breach, and causation. Therefore, all that remained to be resolved was the issue of Respondents' damages, which came before the Circuit Court for a damages hearing on October 18, 2023.

B. Undisputed testimony and evidence that Respondents suffered in excess of $37.9 million in damages.

At the damages hearing, Respondents presented testimony from two separate expert witnesses to establish their damages.

First, Respondents presented Forrest Lott, FAIA, as an expert as to the scope of repair that was necessary to remedy the "significant amount of damage to, all the buildings, resulting from two primary sources, water intrusion and termite damage." (Transcript, p. 10). He further testified that Chagas' scope of work, as alleged in the Complaint and admitted by default, caused damage to the buildings in the Development. Specifically, Mr. Lott testified:

> Items you have listed [as alleged in Paragraphs 24 and 48 of the Complaint] are all components of the water management system.

> The water gets behind the building (indiscernible),[4] and it has to be controlled and essentially escorted to the outside of the building to avoid damage and all those elements that you listed, as well some others, are part of that water management system and their failures with all of those items.

(Transcript, p. 11 and pp. 5-6). As Mr. Lott explained, the damage to the buildings was significant due to failures of the various components of the building envelope to keep water out of the wood frame buildings, which led to moisture intrusion, wood rot, and termite damage. (Transcript, p. 10). Mr. Lott's opinion regarding the scope of repairs needed to correct the substantial damages was admitted into evidence *without objection* from Chagas. (Exhibit 1; Transcript, pp. 12-13). Chagas likewise never objected to Mr. Lott's qualifications as an expert witness.

Second, Respondents offered testimony from John DeWitte, a licensed general contractor, who established it would cost $37,939,523 to perform Mr. Lott's recommended scope of work. Given the extent of the damages, Mr. DeWitte explained it would take *two-and-a-half years* to complete the repairs. (Transcript, pp. 16-20). Mr. DeWitte's opinion regarding the cost of repairs was also admitted into evidence *without objection* from Chagas. (Exhibit 2; Transcript, pp. 18-19). As before, Chagas never objected to Mr. DeWitte's qualifications as an expert witness.

When afforded the chance, Chagas did not cross-examine Mr. Lott regarding the scope of necessary repairs, nor did Chagas cross-examine Mr. DeWitte regarding his opinion of the cost of those repairs. (Transcript, pp. 9-15, 18-21). Simply put, the record is devoid of any challenge by

[4] There are numerous references in the hearing transcript to portions of the testimony and arguments that are "(indiscernible)." (Transcript, *passim*). The hearing was conducted by WebEx without a court reporter. (Transcript, p. 13). As the appealing party, it was Chagas's responsibility to provide an adequate record for review. "The Appellant bears the burden of providing a sufficient record on appeal from which this court can make an intelligent review." *Moore v. Moore*, 435 S.C. 706, 715, 869 S.E.2d 868, 872-73 (Ct. App. 2022); *Sweatt v. Norman*, 283 S.C. 443, 448, 322 S.E.2d 478, 481 (Ct. App. 1984) (noting the appealing party has the burden of furnishing a sufficient record from which this court can make an intelligent review).

Chagas to the experts' testimony demonstrating that Respondents suffered more than $37.9 million in damages to repair the construction defects and resulting damages.

Instead, Chagas only questioned *how much* of Respondents' damages Chagas should be responsible for. (Transcript, pp. 14-15, 20-21). To this point, Respondents' experts testified the damages from water intrusion were indivisible such that they could not be allocated between the negligent parties, including Chagas. Specifically, Mr. Lott testified the damages suffered by Respondents was an "indivisible" damage:

> Q. And when water gets into the building envelope and rots plywood, is, is that considered indivisible damage? In other words, there's, there's no way to go in and tell all right, this four way sheet of plywood has been rotted because of this percentage of this person's work?
>
> A. No. There's no way to, to segregate that because all of these elements work in concert and, and one sheds water onto another and the failures to one can lead to, to failures of the other and is impossible to, for one, isolate which drop of water was allowed in by which component of the building and which resultant portion of damage may of come from that.

(Transcript, pp. 11-12).

Based on Chagas's admissions by his default and the expert testimony and evidence presented as to the scope and cost of repair to the five condominium buildings involved, Respondents requested judgment against Chagas in the total amount of $22,479,523, which represents the more than $37.9 million cost of repairs less a setoff of $15,460,000 for settlements received from other joint tortfeasors. (Transcript, p. 22). After reviewing the record and considering the evidence and testimony presented, the Circuit Court properly entered default judgment against Chagas for $22,479,523. Chagas appealed.

STANDARD OF REVIEW

When entering a default judgment "[t]he trial judge has considerable discretion regarding the amount of damages, both actual or punitive." *Austin v. Specialty Transp. Servs*., 358 S.C. 298, 310, 594 S.E.2d 867, 873 (Ct. App. 2004). On appeal, this Court should affirm if there is any evidence to support the judgment. *See Solley v. Navy Fed. Credit Union, Inc*., 397 S.C. 192, 203, 723 S.E.2d 597, 602 (Ct. App. 2012) (the Court's "task in reviewing a damages award is not to weigh the evidence, but to determine if there is **any evidence** to support the damages award.") (emphasis added); *see also Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (Ct. App. 2008).

ARGUMENT AND CITATION OF AUTHORITY

As a threshold point, it is the law of this case that Chagas defaulted, because Chagas did not appeal the denial of his motion to set aside his default. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed finding is the law of the case). By defaulting, Chagas is deemed to have "admitted the allegations in the complaint concerning liability." *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 546, 633 S.E.2d 497, 500 (2006); *Roche v. Young Bros.*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) ("It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability."); *State ex rel. Medlock v. Love Shop, Ltd.,* 286 S.C. 486, 489, 334 S.E.2d 528, 530 (Ct. App. 1985) ("The defendant, by waiving a contest and suffering a default to be taken against him, admits the truth of the allegations, set out in the plaintiff's declaration or complaint[.]"); *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978) ("By defaulting, a defendant forfeits his 'right to answer or otherwise plead to the complaint[]'" and "has conceded liability.") (citations omitted).

Here, this means Chagas has admitted the truth of Respondents' allegations on the issues of duty, breach, and causation regarding Respondents' claims, including those alleging Chagas was negligent and grossly negligent, among other things. Moreover, Chagas admitted that his negligence and gross negligence was the proximate cause of damages to Respondents five condominium buildings. (Complaint, ⁋⁋ 48, 113-118, Judgment, ⁋⁋ 5-6, 13). *See Dixon v. Besco Eng'g*, 320 S.C. 174, 180, 463 S.E.2d 636, 639 (Ct. App. 1995) (observing that proximate cause is a question of fact, and holding that "[i]n defaulting, [the defendant] admitted its negligence was the proximate cause of [plaintiff's] loss of tools"). Chagas also has admitted that he is jointly and severally liable for the indivisible damages caused by his negligence and gross negligence as alleged. (Complaint, Prayer for Relief; Judgment, ⁋⁋ 7, 13).[5]

Thus, the only issue remaining for the Circuit Court was to determine the monetary value of that indivisible harm. *See Jackson v. Midlands Human Res. Ctr*., 296 S.C. 526, 529, 374 S.E.2d 505, 506 (Ct. App. 1988) ("In a default case, the plaintiff must prove by competent evidence the amount of ***his damages***, and such proof must be by a preponderance of the evidence.").

Respondents' two experts presented testimony and reports, without objection or contradiction, which established by preponderance of the evidence that Respondents suffered damages exceeding $37.9 million. *See DuBose v. DuBose*, 259 S.C. 418, 420, 192 S.E.2d 329, 329 (1972) ("A preponderance of the evidence, stated in simple language, is that evidence which

[5] It is also the law of this case that Chagas is jointly and severally liable, because Chagas did not appeal this finding, nor did Chagas appeal the Circuit Court's finding that Respondents suffered "indivisible damages," the very nature of which gives rise to joint and several liability. (Judgment, ⁋ 13) *See, e.g.*, S.C. Code Ann. § 15-38-15(A) (discussing apportionment of joint and several liability where "indivisible damages are determined to be proximately caused by more than one defendant"); *ML-Lee Acquisition Fund*, 327 S.C. at 241, 489 S.E.2d at 472 (an unappealed finding is the law of the case).

convinces as to its truth."); *Austin*, 358 S.C. at 310, 594 S.E.2d at 873 (in a default case, "[t]he trial judge has considerable discretion regarding the amount of damages, both actual or punitive.").

Importantly, Chagas has neither appealed nor taken exception with the Circuit Court's finding that Respondents suffered over $37.9 million in total damages ($22.4 million after the setoff), making this finding the law of this case as well. *See ML-Lee Acquisition Fund*, *supra*. Instead, Chagas asserts he should not be responsible for the full amount of this judgment because the Circuit Court's order does not "distinguish between or otherwise delineate damages fairly and equitably attributable to the work performed by [Chagas]." (App. Br. p. 9, 12). Simply put, Chagas argues, seemingly in equity, that a plaintiff has the burden of apportioning damages among joint tortfeasors at a default damages hearing. Chagas is just wrong.

This appeal arises from an action at law, not equity. *See Austin*, 358 S.C. at 310, 594 S.E.2d at 873 (in an appeal from a default damages award, this Court's review is limited to the correction of errors of law). Further, entitlement to apportionment is an entirely separate question than whether or not there is evidence to support Respondents' damages of $37.9 million. The simple yet fatal flaw in Chagas's argument is that the law does not require a plaintiff to apportion his damages to a particular defaulting party.

I. The law does not require a Plaintiff to apportion damages, either at trial or in a default hearing, and even if it did, Chagas is not entitled to apportionment because he defaulted and admitted he was grossly negligent.

At a damages hearing, a plaintiff is only required to prove the amount of damage *he or she* suffered. *See Jackson*, 296 S.C. at 529, 374 S.E.2d at 506 ("In a default case, the plaintiff must prove by competent evidence the amount of ***his damages***, and such proof must be by a

preponderance of the evidence."). By defaulting Chagas conceded both causation[6] and liability, with the nature of this liability being joint and several as alleged in the Complaint. Furthermore, the uncontracted evidence in the record establishes that Respondents' damages were indivisible, and Chagas has not appealed that finding. (Judgment, ¶ 13; Transcript, pp. 11-12). Thus, by demonstrating by a preponderance of the evidence the amount of their total damages, Respondents met their burden, and Chagas became jointly and severally liable for that amount. This is the end of the story as it concerns the default judgment.

Chagas contends Respondents must also present additional evidence to apportion what part of their total damages are attributable only to Chagas as among others. (App. Br., p. 13) (Transcript, p. 24) (arguing, "I think that's incumbent for the Court to then have that understanding from the Plaintiff to then fairly look at the number put up by the plaintiff, 42 (sic) million, and **to determine <u>what of that [damages figure]</u> Mr. Chagas, in fact, did**.") (emphasis added). However, this is an *entirely* separate question for which Chagas (not Respondents) would bear the burden, and it raises a matter that is neither applicable nor relevant given the context of Chagas's default and his admission of gross negligence.

The fallacy of Chagas's argument is exposed by comparing the present appeal (where apportionment is *not proper*) to circumstances where the Legislature determined apportionment *is proper*. When a plaintiff obtains a verdict at trial for indivisible damages against joint tortfeasors, S.C. Code Ann. § 15-38-15, provides the at-fault defendants (if they are not grossly negligent), with the right to request apportionment of the total verdict based on each defendant's respective

[6] *See Dixon*, 320 S.C. at 180, 463 S.E.2d at 639; *see also Schenk v. National Health Care*, 322 S.C. 316, 321, 471 S.E.2d 736, 738 (Ct. App. 1996) ("With respect to the damages award, the company argues the court erred in awarding damages to Schenk because she 'failed to establish causally related damages by a preponderance of the evidence.' . . . . However, by defaulting, the company conceded liability if not necessarily the amount of the liability.").

percentage of fault. This right arises upon motion of a defendant only *after* the initial verdict determining the total amount of the plaintiffs' indivisible damages is rendered against two or more joint tortfeasors. *See* S.C. Code Ann. § 15-38-15(C)(3) (requiring that apportion must be requested "upon a motion by at least one defendant"); *see, e.g., Palmetto Pointe at Peas Island Condo. Prop. Owners Ass'n v. Island Pointe*, 440 S.C. 190, 199, 890 S.E.2d 603, 608 (Ct. App. 2023) (where *after* the verdict was received, the trial judge crafted a special verdict form for the jury to apportion among the remaining defendants their percentage of responsibility for the $6.5 million award given to the plaintiff). Plain and simple, a plaintiff's total damages award is determined first, before the opportunity to seek apportionment can arise upon the motion of a defendant. S.C. Code Ann. § 15-38-15(C)(1-3) (directing the issue only arises upon motion of a defendant after the plaintiff's damages are determined). Here, no such motion was made. Accordingly, this issue was never raised and is not before this Court on appeal. *Elam v. S.C. Dep't of Transp.,* 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.").

Regardless, the right to apportionment of a plaintiff's total damages is available only to a joint tortfeasor *who is not grossly negligent*. Here, Chagas could not require apportionment of Respondents' total damages for the simple reason that Chagas admitted he was grossly negligent and did not appeal this finding by the Circuit Court. (Complaint, ⁋ 114; Judgment, ⁋ 13.). *See Solley*, 397 S.C. at 212, 723 S.E.2d at 607-08 (by defaulting the bank admitted the plaintiff's allegation that it was grossly negligent); *ML-Lee Acquisition Fund*, 327 S.C. at 241, 489 S.E.2d at 472 (unappealed finding is the law of the case). This alone forecloses any right of apportionment Chagas might have had if he appeared in the action and made a motion. *See* S.C. Code Ann. § 15-38-15(F) (stating apportionment does not apply to a defendant whose conduct is grossly negligent).

In this case, after Respondents established their damages through expert testimony, Chagas merely argued that Respondents failed to present evidence of what portion of those total damages were attributable to Chagas.[7] (Transcript, pp. 23-24). This is contrary to the law. Chagas ignores that Section 15-38-15(C)(3) provides that when apportionment of the total damages is made in proper cases, no additional evidence is allowed. Accordingly, as a grossly negligent joint tortfeasor in default, Chagas expects Respondents to satisfy an even higher bar than the law would require of Respondents had this matter proceeded to trial against parties who appeared in the action and defended themselves.

Embracing such an odd result would almost certainly encourage parties to default in cases involving indivisible injury, because the net result of Chagas's argument is that by virtue of his own default, Chagas is relieved of his burden to establish a right to apportionment, and Respondents' burden to prove damages becomes greater than it would have been before a judge or jury. Such an absurd result is contrary to the law and policy of this State. *Limehouse*, 404 S.C. at 116, 744 S.E.2d at 578-79 ("If our courts were to allow a defaulting defendant to fully participate in a post-default hearing, we believe there would be no consequence of default."); *see also Oaks at Rivers Edge Prop. Owners Ass'n v. Daniel Island Riverside Developers, LLC*, 420 S.C. 424, 442 n.5, 803 S.E.2d 475, 485 (Ct. App. 2017) (finding no error in refusing to allocate damages

[7] Ostensibly, had he not defaulted, at trial Chagas could have offered whatever evidence he may have to try and mitigate his role in causing the substantial damages to Respondents' buildings. However, the opportunity to present such evidence is foreclosed to him in a default damages hearing. *See Limehouse v. Hulsey*, 404 S.C. 93, 116, 744 S.E.2d 566, 578-79 (2013) (reaffirming the well-settled premise adopted in *Howard*, 271 S.C. at 241, 246 S.E.2d at 882 that limits a defaulting defendant to cross-examination and objection the plaintiff's evidence). By suggesting that *Respondents* were required to then present such evidence at the default damages hearing in addition to proving their total damages, Chagas is not only trying to shift his own defense burden to Respondents, but Chagas is also seeking to reap the benefit of evidence he could not have introduced even if he actually defended the action and sought apportionment post-verdict. *See* S.C. Code Ann. § 15-38-15(C)(3) (no new evidence is allowed).

pursuant to S.C. Code Ann. § 15-38-15(A) because the appellant was found grossly negligent, foreclosing the right to allocation by virtue of Section 15-38-15(F)).

It is neither fair nor logical to punish Respondents and reward Chagas for his own default. This is why Chagas is unable to cite any authority supporting the idea that a plaintiff is required to apportion damages attributable to a grossly negligent defendant at a default hearing.

II. None of the authorities relied upon by Chagas' support his argument that Respondents had to demonstrate "what exactly Mr. Chagas did[.]"

The substance of Chagas's argument relies on only four cases,[8] none of which support the idea that a plaintiff is required to satisfy the additional burden to allocate or apportion default damages *after* proving by a preponderance of the evidence the total amount of damages suffered. (App. Br., pp. 8-9) (Transcript, pp. 23-24). If anything, these cases demonstrate that Respondents met every requirement and proved their damages through unopposed expert testimony of the kind routinely relied upon to value damages in construction defect cases. To demonstrate this, Respondents address each of the four cases relied upon by Chagas.

The issue in *Renney* was that the defendant was never notified of the damages hearing and had no ability to participate. The Supreme Court remanded the case for a damages hearing to allow the defendant that opportunity. In reaching its decision, the Court explained "When the defaulting party is not given an opportunity to participate in the damages hearing, the trial court and this court should closely scrutinize the award to prevent harsh, unwarranted results." *Renney*, 275 S.C. at 568, 274 S.E.2d at 293. Here, Chagas does not (and cannot) claim he lacked notice of the hearing—Chagas participated through counsel and had every opportunity to cross examine Respondents'

[8] Chagas primarily relies upon *Renney v. Dobbs House, Inc*., 275 S.C. 562, 568, 274 S.E.2d 290, 293 (1981); *Wells Fargo Bank, Nat'l Ass'n v. Marion Amphitheatre, LLC*, 408 S.C. 87, 92, 757 S.E.2d 557, 560 (Ct. App. 2014); *Jackson v. Midlands Human Res. Ctr*., 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App. 1988); and *Solley v. Navy Fed. Credit Union, Inc*., 397 S.C. 192, 203, 723 S.E.2d 597, 602 (Ct. App. 2012). (App. Br., passim).

experts and object to evidence. *Id.* at 568, 274 S.E.2d at 293 ("Participation by the defending party will give to the judge and/or jury a broader understanding of the amount which should be awarded and will tend to insure a more fair verdict and judgment."). Because that occurred here, *Renney* lends no help to Chagas. Furthermore, considering Chagas never challenged that Respondents' five buildings require more than $37.9 million and two and a half years to repair, it rings hollow to suggest that the judgment should not stand, as the damages award is plainly in keeping with wrongs alleged in Respondents' Complaint. (App. Br., p. 9).

In *Wells Fargo*, the Court of Appeals reversed because the special referee wrongfully concluded the requested damages were liquidated and awarded damages without ever conducting a damages hearing. *Wells Fargo Bank*, 408 S.C. at 92, 757 S.E.2d at 560. Here, Chagas appeared and participated in the hearing, but counsel neither objected to nor meaningful cross examined the experts' testimony and reports as to the scope and total cost of repair, which established Respondents' indivisible damages in an amount exceeding $37.9 million. (Transcript pp. 14-15, 20-21). *Wells Fargo* is inapplicable to the argument Chagas attempts to make.

Likewise, in *Jackson*, the plaintiff sought and received an award of special damages in addition to general damages. However, because the plaintiff "presented no evidence" from which the alleged special damages could be calculated, the Court of Appeals reversed that portion of the award and remanded for entry of a judgment for general damages only. *Jackson*, 296 S.C. at 529, 374 S.E.2d at 507. Here, unopposed evidence of Respondents' cost of repair supports the Circuit Court's award of damages, which were the only damages Respondents requested at the hearing. *Jackson* does not apply, especially considering that this Court's scope of review is limited to determining whether *any evidence* supports the award. *Solley*, 397 S.C. at 203, 723 S.E.2d at 602.

In *Solley*, the appellant bank allegedly placed a $233,000 mortgage on property co-owned by the plaintiff without her knowledge. The plaintiff brought a claim for slander of title against the bank, which then defaulted. A special referee held a default hearing, and the Circuit Court then adopted the special referee's recommendation to award $230,000 in actual damages and $400,000 in punitive damages. The bank appealed, arguing the plaintiff's testimony revealed she had suffered *no damages* because she admittedly never attempted to sell or mortgage her interest in the home that was encumbered by the mortgage at issue. Because the record contained *no evidence* that the plaintiff had suffered any loss related to *her interest* in the home, this Court reversed as to that portion of the award related to the $233,000 mortgage, which is the correct result under the "any evidence" standard of review. However, this Court found the plaintiff was entitled to an award of attorney's fees and remanded the case for the special referee to determine the amount to award, together with an instruction to reevaluate the punitive damages award in light of the adjusted figure for actual damages. *Solley*, 397 S.C. at 213, 723 S.E.2d at 608.

Solley does not speak to, much less support, the notion that a plaintiff, after establishing his or her total damages, must nevertheless then go further and offer additional evidence to apportion what degree or portion of his or her indivisible damages is specifically attributable to a joint tortfeasor in default. Here, the evidence in the record demonstrates that Respondents proved the amount of their damages exceeded $37.9 million as shown through expert testimony and reports. (Transcript, *passim*; Exhibits 1 and 2). Neither by objection nor by cross-examination has Chagas *ever* cast doubt upon Respondents' evidence of the total cost of repair, nor has Chagas argued it was error to find Respondents' damages were "indivisible" in nature.[9] (Judgment, ¶¶ 12,

[9] Once again, by not appealing either of these two findings, it is the law of this case that Respondents suffered "indivisible" damages of $37,939,523. *ML-Lee Acquisition Fund*, 327 S.C. at 241, 489 S.E.2d at 472 (unappealed finding is the law of the case).

14). In fact, Chagas argued that because the damages are indivisible, this meant Respondents could not prove any amount of the damages were attributable to Chagas. (Transcript, p. 24).

Because Chagas admitted he proximately caused Respondents' indivisible damages in the amount established at the hearing, the Circuit Court entered judgment against Chagas in the net amount of $22,479,523.00, after accounting for the $15,460,000.00 set off for settlements received from other defendants.[10] (Judgment, ¶ 16) (Transcript, p. 22). Therefore, unlike the lack of evidence of damages in *Solley*, here the record contains evidence in the form of Respondents' cost of repair and related expert testimony supporting the Circuit Court's award of damages.

Nothing in *Solley*, nor any of the authorities cited by Chagas, lends credence to the notion that Respondents were required to put forth evidence to somehow "**determine <u>what of that</u> [$37,939,523.00] Mr. Chagas, in fact, did**" as Chagas argued to the Circuit Court. (Transcript, p. 24). *Renney, Wells Fargo, Solley,* and *Jackson* were all correctly decided and confirm two fundamental themes that are not in dispute: First, Chagas was entitled to cross examine witnesses and object to Respondents' evidence. Second, Respondents needed to prove their damages by a preponderance of the evidence. The record reflects that both of these requirements were fulfilled. Chagas has not cited any authority that supports his naked assertion that Respondents were required to do more, such as attempting to somehow delineate what portion of Respondents' uncontested damages were attributed to Chagas's exact scope of work. Chagas's conclusory reliance upon cases that do not stand for the proposition argued is tantamount to citing no authority

[10] Chagas cannot have his cake and eat it too. Chagas received the benefit of 100% of this significant set off because the damages were shown to be indivisible in nature, a finding which Chagas did not appeal. If this was *not* true, Chagas would not be entitled to the entire set off. *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012) (noting that where the settlement is for the same injury as a matter of law, "the right to setoff arises as an operation of law, and the circuit court must award a setoff.").

whatsoever. *Oaks at Rivers Edge Prop. Owners Ass'n*, 420 S.C. at 445 n.7, 803 S.E.2d at 486 (noting when an appellant fails to cite any authority for their position and makes conclusory arguments, the issue is abandoned on appeal). This Court should affirm the Circuit Court for this reason alone.

III. The default judgment should be affirmed because it is in keeping with the allegations of the Complaint and supported by competent evidence in the record.

Generally, a default judgment must relate to allegations of the complaint and the amount must be supported by evidence. Relying on these general principles, the argument Chagas presents in his brief is divided among three headings: First, heavily relying on prior versions of the pleadings that have no relevance to this appeal,[11] Chagas makes the conclusory allegation that the operable Complaint bears little relation to the judgment. (App. Br., pp. 3-5,10-11). Second, he asserts there "is not sufficient evidence *against [Chagas]*" (App. Br. p. 12) (emphasis added). Third, he contends the judgment "does not provide sufficient evidence of damages *against [Chagas.]*" (App. Br. p. 13) (emphasis added).

At the risk of being repetitive, Chagas' argument relies on a false premise. As explained above, Respondents are not required to provide evidence to prove *what portion* of their total damages are attributable "against Chagas." This argument conflates issues of causation and apportionment (neither of which were before the Circuit Court) with Respondents' obligation to provide proof sufficient to establish *their total damages* by a preponderance of the evidence. By

[11] Chagas was placed in default of Respondents' Second Amended Complaint, which is the operable pleading, and Chagas' reference to prior pleadings is irrelevant. *Schein v. Lamar*, 284 S.C. 252, 255, 325 S.E.2d 573, 574 (Ct. App. 1985) ("Since the First Amended Complaint has been superseded by the Second Amended Complaint, it is no longer the operative pleading in the case. Thus, any questions as to the sufficiency of the First Amended Complaint are now moot."); *see also*, Rule 209, SCACR ("A party shall not include any matter in his Designation which is not relevant to the appeal.").

trying to distinguish himself from other joint tortfeasors, Chagas is attempting to litigate his liability and issues of causation, both of which are conceded by his default. This entirely misses the mark. The question is *not* whether the allegations of the complaint and the evidence of damages support a finding of *what portion* of Respondents' total damages are attributable to Chagas. Instead, the question is whether the allegations of the complaint, and the evidence presented to and relied upon by the Circuit Court, support the finding that Respondents suffered total damages in excess of $37.9 million ($22.4 million after setoff). As explained above, the answer to this question is easily, "yes." Nonetheless, for the sake of completeness Respondents address the three topics raised by Chagas.

A. The allegations of the Complaint are in keeping with the award of damages.

The Respondents' well-pled Complaint sets forth the factual allegations and causes of action that support the judgment. (Complaint). Citing no case law whatsoever, Chagas makes the conclusory argument[12] that Respondents' Complaint—despite being admittedly "very detailed"—provides no support for the judgment. (App. Br., pp. 5, 10-11). Even a cursory review of the Complaint reveals that Chagas is grasping at straws.

The Complaint explains that the claims arise from construction deficiencies associated with the Joint Repair Scope of Work for 200 River Landing Drive Phase I. (Complaint, ¶ 32). By undertaking and performing work on this large-scale project, the Complaint alleges that Chagas owed a duty to Respondents to complete the Joint Repair Scope of Work at 200 River Landing Drive Phase I free from defects, in a good and workmanlike manner, and in accordance with

[12] Because Chagas's claim about the sufficiency of the Complaint is conclusory, it should be deemed abandoned, and not considered. *Oaks at Rivers Edge Prop. Owners Ass'n*, 420 S.C. at 445 n.7, 803 S.E.2d at 486 (explaining abandonment of conclusory arguments on appeal).

applicable building codes, industry standards, and approved plans and specifications. (Complaint, ⁋ 44). As to Chagas, the Complaint alleges that he performed various portions of the work as a subcontractor, including, but not limited to, installation of windows and related flashings, handrails, guardrails and columns, fire stops, metal awnings, deck sheathing, balcony ceilings, balcony waterproofing and related flashings. (Complaint, ⁋⁋ 24, 31).

The claims arose after Respondents experienced numerous instances of water intrusion and termite damage throughout Respondents' *five separate condominium buildings comprising 94 dwelling units*. (Complaint, ⁋⁋ 2-3, 46). Upon investigation, the defects and damages were found to be substantial. (Complaint, ⁋⁋ 47-48, 53-55). In light of these large-scale and widespread problems, the Complaint alleged that Respondents would be forced to spend significant sums of money to repair the damage, to pay for professional fees to investigate the full extent of the problems and to design remediation plans and specifications to correct the deficiencies, and to implement the remediation plan to make the Development safe and habitable, among other damages. (Complaint, ⁋⁋ 56, 58). The Complaint alleged that Respondents had suffered and would continue to suffer loss of use and enjoyment of its common areas, limited common areas, parking areas, and individual units, which would continue for the duration of time needed to complete the repairs. (Complaint, ⁋ 57). The Complaint also sought punitive damages. (Complaint, ⁋ 59).

The Complaint set forth causes of action against Chagas for negligence and gross negligence, as well as for breach of the implied warranty of workmanlike service. (Complaint, ¶¶ 110-124). This included allegations that Chagas was careless, reckless, willful, and wanton in failing to complete the Joint Repair Scope of Work at 200 River Landing Drive Phase I in accordance with the applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner, free from latent defects.

(Complaint, ¶ 113). As to these causes of action, Respondents sought damages for the necessary costs associated with investigating and repairing the deficiencies and resulting damages to the buildings, in addition to other damages. (Complaint, ¶¶ 114-115, 118, 122-124).

Considering the Circuit Court awarded damages to Respondents for the cost of repair damages requested in the Complaint, the total amount of which was established by Respondents' experts without objection, it frankly strains credibility for Chagas to now suggest the Circuit Court's award of damages somehow is *not* "in keeping . . . with the allegations of the complaint[.]" *Solley*, 397 S.C. at 204, 723 S.E.2d at 603 (citing *Jackson*, 296 S.C. at 529, 374 S.E.2d at 506).

B. The evidence in the record supports the trial court's award of damages, such that this Court should affirm under the applicable standard of review.

At the damages hearing, Respondents only needed to prove the amount of *their* damages by a preponderance of the evidence, and on appeal this Court's review is limited to determining whether any evidence in the record supports the award. *Solley*, 397 S.C. at 203, 723 S.E.2d at 602; *Austin*, 358 S.C. at 310, 594 S.E.2d at 873. Here, that is certainly the case.

As explained herein, *supra*, Respondents established their damages with expert testimony and reports from Messers. Lott and DeWitte, both without objection. Mr. Lott established the significant scope of repairs needed to repair the five buildings within the Development. (Transcript, pp. 7-15; Exhibit 1). Mr. DeWitte testified to the significant cost of making those needed repairs, which were so substantial that it would take two and a half years to complete them. (Transcript, pp. 15-21; Exhibit 2). Nothing more is required of Respondents, considering that reliance upon the anticipated cost of repair is a *widely* accepted means of proving damages in a construction defect action. *Accord Scott v. Fort Roofing & Sheet Metal Works, Inc.*, 299 S.C. 449, 451, 385 S.E.2d 826, 827 (1989) ("Cost of repair or restoration is a valid measure of damages for injury"); *Oaks at Rivers Edge Prop. Owners Ass'n*, 420 S.C. at 446, 803 S.E.2d at 487 (where

damages were based on expert testimony as to the scope and cost of repair); *Magnolia N. Prop. Owners' Ass'n v. Heritage Cmtys., Inc.*, 397 S.C. 348, 375, 725 S.E.2d 112, 126-27 (Ct. App. 2012) (finding testimony from the POA's experts in building diagnostics and estimating construction repair costs "provides a sufficiently reasonable basis of computation of damages to support the trial court's submission of damages to the jury"); *Roland v. Hills*, 308 S.C. 283, 286, 417 S.E.2d 626, 628 (Ct. App. 1992) ("the cost of repair or restoration is a valid measure of damages for injury to a building."); *May v. Hopkinson*, 289 S.C. 549, 559, 347 S.E.2d 508, 514 (Ct. App. 1986) (affirming the award of damages based on the contractor's repair estimate even though the exact repairs needed could not be determined because the removal of defective wood was expected to reveal additional problems).

Having neither objected to nor meaningfully cross-examined *either* of Respondents' experts regarding the scope of the construction defects and the costs of repairing them, it is difficult to conceive how Chagas can claim that Respondents failed to offer proof of their damages in the amount awarded. Only by showing the record is devoid of evidentiary support for these damages can Chagas prevail under the standard of review. *Solley*, 397 S.C. at 203, 723 S.E.2d at 602 (citing the "any evidence" standard of review in relation to damage awards and remanding because the record proved the plaintiff suffered no loss beyond the costs of her litigation for slander of title).

At bottom, it was within the Circuit Court's broad discretion to weigh and accept the testimony and evidence presented by Respondents' experts as to the amount of Respondents' damages. *See Solley*, 397 S.C. at 202, 723 S.E.2d at 602 ("Questions regarding credibility and weight of evidence are exclusively for the trial court."); *see also Austin*, 358 S.C. at 310, 594 S.E.2d at 873 (nothing that in a default case, "[t]he trial judge has considerable discretion regarding

the amount of damages[.]"). Here, the Circuit Court did just that, and the evidence in the record comports with the award and is in keeping with the allegations of the Complaint.

Perhaps this explains why Chagas resorts to arguing, without supporting authority, that Respondents were required to put forth additional evidence of exactly *what portion* of their demonstrated damages were caused by Chagas. (App. Br., pp. 9-10, 12-13) (Transcript, pp. 23-24). This being the only argument Chagas attempts, this Court should affirm because South Carolina law does not impose any such requirement on Respondents. If Chagas was correct, precedent would provide that in addition to proving the *amount* of a plaintiff's damages by a preponderance of the evidence (to establish the *total* damages value),[13] a plaintiff must then also go further in a case of indivisible damages to prove *what portion* of that total amount is attributable to the defaulting defendant. However, there is zero precedent to support this Hail Mary theory, which presumably is why Chagas has cited none. Had Chagas responded to the Complaint and defended the action with others instead of defaulting, he ostensibly could have asked—*after the $37.9 million verdict issued*—for apportionment in relation to others found at fault, but that would require his motion, would involve no additional evidence offered, and would assume a key fact not present here, *to wit*, that Chagas was *not* found grossly negligent.

C. The judgment refers to the evidence in the record to support the award of damages to Respondents.

Chagas's argument that the judgment does not provide sufficient evidence of damages against Chagas is utterly without merit, revealing Chagas' continued confusion about what Respondents were required to prove at the damages hearing.

[13] Again, Chagas did not appeal the Circuit Court's factual finding that Respondents suffered $37,939,523 in damages—he has only argued that Chagas should not be held responsible for all of it because other joint tortfeasors were involved in the work. Having conceded the amount of Respondents damages, this exercise is purely academic.

The Circuit Court found "Chagas has admitted the allegations of [Respondents'] Second Amended Complaint" including the allegations that Chagas performed work on Respondents' buildings that involved "installation of windows and related flashing, handrails, guardrails and columns, fire stops, metal awnings, deck sheathing, balcony ceilings, balcony waterproofing and related flashings." (Judgment, ¶ 5). On account of his default, the Circuit Court further found that Chagas admitted that defects, deficiencies and omissions *in his work* proximately caused indivisible damage to Respondents' buildings. (Judgment, ¶ 6).

The judgment cites the evidence put forth by Respondents' two experts establishing that Respondents' cost of repair totaled more than $37.9 million and the repairs would take two and half years to complete. (Judgment, ¶¶ 8-12). Based on Chagas's admissions and the evidence presented, the Circuit Court found, "Chagas' negligence and gross negligence contributed to the indivisible damages to the buildings comprising 200 River Landing Drive Phase I and that Chagas is jointly and severally liable to the Plaintiffs for those damages." (Judgment, ¶ 13). The Circuit Court then found "that a fair measure of the Plaintiffs' damages is the cost to repair the buildings" in the amount of total estimated repair costs. (Judgment, ¶ 14). After finding Chagas was entitled to a set off in the amount collected from other settling joint tortfeasors,[14] the Court entered judgment against Chagas in the net amount of $22,479,523.00. (Judgment, ¶ 16).

[14] Chagas admits the damages requested by Respondents "are the exact same damages" which Respondents sought to repair their five buildings. (App. Br., p. 10). This is no surprise—it is the hallmark of "indivisible damages" and precisely why Chagas received the full set off for settlements paid by others. *Oaks at Rivers Edge Prop. Owners Ass'n*, 420 S.C. at 436, 803 S.E.2d at 482 (noting the court must reduce the verdict to account for funds previously *paid toward the same injury* by a settling defendant). However, Chagas remained liable for these damages. *See* S.C. Code Ann. § 15-38-50 (noting a release of one tortfeasor does not release another tortfeasor from liability for the same injury). Complaining that the judgment does not account for what portion of the funds paid by others related to Chagas misses the point. (App. Br., pp. 12-13).

In other words, Chagas participated in the hearing and was afforded the opportunity to object to evidence and cross-examine witnesses during the damages hearing. The record contains competent, reliable evidence that Respondents suffered damages in the amount of $37,939,523 as shown by Respondents' experts. Neither by objection nor cross-examination did Chagas cast any doubt on whether this figure was appropriate to remedy the construction defects and damages caused to Respondents' five buildings. Pursuant to South Carolina law, including every case cited by Chagas, Respondents met every requirement to prove the amount of their damages at the default hearing, as awarded by the Circuit Court.

CONCLUSION

For the reasons set forth herein, Respondents respectfully request this Court to affirm the judgment below.

[Signatures of Counsel on Following Page]

Chagas received the benefit of the set off for those amounts. Moreover, our Supreme Court has made clear that:

> A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. **This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it**. Settlements are not designed to benefit nonsettling third parties.

Oaks at Rivers Edge Prop. Owners Ass'n, 420 S.C. at 438, 803 S.E.2d at 483 (emphasis added). The entirety of Chagas's argument would turn this settled premise on its head, requiring Respondents to apportion damages in a manner *advantageous to Chagas*, even where precluded by his own gross negligence.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

Michael A. Timbes (SC Bar No. 69730)
Jesse A. Kirchner (SC Bar No. 70479)
Thomas J. Rode (SC Bar No. 77480)
Sarah D. Baum (SC Bar No. 104544)
15 Middle Atlantic Wharf
Charleston, SC 29401
Phone: 843-937-8000
michael@tktlawyers.com
jesse@tktlawyers.com
thomas@tktlawyers.com
sarah@tktlawyers.com
Attorneys for Respondents