THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELY COUNTY
COURT OF COMMON PLEAS

The Honorable Bentley D. Price
Circuit Court Judge

Appellate Case No. 2023-001832
Case No.: 2018-CP-08-2423

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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 Service, 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 which Getulio Perela Chagas is the Appellant.

FINAL BRIEF OF APPELLANT

August 19, 2024

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STATEMENT OF ISSUES ON APPEAL

Whether the trial court erred in awarding a $22,479,523.00 judgment against Appellant, when the preponderance of the evidence did not support the judgment, thus making the judgment a harsh and unwarranted outcome which is not in relation to the facts of the case.

STATEMENT OF CASE

This class action was commenced December 5, 2018 when the Plaintiffs filed a Summons and Complaint in the Court of Common Pleas for Berkeley County. (R. pp. 46-73). The Plaintiffs include a property association comprised of unit owners from 5 condominium buildings, consisting of 94 residential units commonly known as "200 River Landing." (R. pp. 48-49). The Plaintiffs also include individually situated owners at 200 River Landing. (R. p. 49, lines 14-17). The Plaintiffs' summary of the allegations is the "matter arises out of the design and construction associated with the Joint Repair Scope of Work for 200 River Landing Drive Phase I, located in Berkeley County." (R. p. 52, lines 2-3).

The Plaintiffs' Complaint included claims against fifty-seven (57) defendants ranging from the developer of 200 River Landing to "John Doe" material suppliers. (R. pp. 49-51). Notably, Appellant was not a named defendant or otherwise specifically identified in the Plaintiffs' Complaint. The Plaintiffs' alleged the defendants "performed work in connection with the Joint Repair Scope of Work for 200 River Landing Drive Phase I or provided materials to the Project." (R. p. 51, lines 14-21). The Plaintiffs further alleged the defendants "performed and provided materials for, inter alia, framing, WRB installation, brick veneer installation and repairs, concrete installation and repairs, caulking, and private balcony deck waterproofing installation and repairs." (R. p. 51, lines 14-21).

Watkins Services, Inc. ("Watkins") was identified as one of the named defendants in the Plaintiffs' Complaint. (R. pp. 50-51). On February 1, 2019, the Plaintiffs filed an Amended Summons and Complaint. (R. pp. 74-102). In the Amended Complaint, the Plaintiffs added ACR Construction of SC, Inc. and Antonio Ribeiro (collectively "ACR") as defendants. (R. pp. 79-80).

The Plaintiffs allege ACR was a subcontractor to Watkins and that 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." (R. pp. 79-80). On May 28, 2019, ACR filed its Third-Party Summons and Complaint. (R. pp. 103-121). ACR identified four (4) individual defendants, including Appellant. (R. pp. 103-121). ACR admitted it had been hired by Watkins to work at 200 River Landing. (R. p. 119, lines 14-15). ACR, however, affirmed it was only hired for a limited scope of "work related to window installation and decking waterproofing." (R. p. 119, lines 14-15). ACR then alleged the four individual defendants it identified each "performed work at the subject property as subcontractors to ACR." (R. p. 119, lines 19-22). At no point, did ACR distinguish in any manner the scope of work, time of work or any other details regarding the generic allegation Appellant and three other individual defendants allegedly "performed work at the subject property as subcontractors to ACR."

In response to ACR's Third-Party Complaint, on January 21, 2020 the Plaintiffs filed their Second Amended Summons and Complaint and directly named Appellant as a defendant. (R. pp. 122-161). The Plaintiffs also named as defendants the other three individuals identified by ACR in the Third-Party Complaint.

With regard to Appellant, the Plaintiffs allege "*[u]pon information and belief*, [Appellant], 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." (R. p. 129, lines 12-17 (*emphasis added)*). The Plaintiffs further allege "[u]pon information and belief, Defendants First Exteriors, LLC, ARC, ACR, DaSilva, [Appellant], Rodriguez, FBM, ACP, Superior,

Premier, and John Doe Subcontractors 11 through 50 provided services, labor and material to 200 River Landing Drive Phase I as set forth above as subcontractors or material suppliers to Watkins Services, Inc. and may hereinafter be referred to collectively as 'Subcontractors.'" (R. p. 131, lines 6-10). Thereafter, for the remainder of the 31 page, 131 paragraph very detailed Complaint, the Plaintiffs do not again specifically mention Appellant nor make any allegations directly against Appellant. Instead, at all times, the Plaintiffs' claims against Appellant are included in general allegations against Watkins and the 50+ other defendants who "upon information and belief," may have worked at 200 River Landing. The Plaintiffs' Second Amended Complaint is unliquidated.

Within 76 days, by April 6, 2020, the Plaintiffs had served Appellant via publication and had the trial court enter an Entry of Default against Appellant. (R. pp. 3-5). Appellant was not aware, however, of the existence of this action until July 13, 2021. (R. p. 203, lines 9-13). This was true because in 2011 Appellant was deported from the United States to Brazil, and since that time has not returned to the United States. (R. p. 203, lines 17-20).

In the years which followed the April 6, 2020 Entry of Default against Appellant, the Plaintiffs were successful in securing hefty settlements with many of the other defendants in this action. (R. pp. 21-30; R. pp. 31-40). In total, the Plaintiffs recovered $15,460,000.00. (R. p. 22; R. p. 33). Those settlements included settling claims against Watkins for $10,000,000.00 and settling claims against ACR for $1,925,000.00. (R. p. 22; R. p. 32). Recall, the Plaintiffs allege Appellant was hired by ACR, who was hired by Watkins. The large settlements with Watkins and ACR do not include any breakdown or delineation as to which damages of the Plaintiffs are covered by the $11,925,000.00. (R. pp. 21-30; R. pp. 31-40).

On August 15, 2023, the Plaintiffs filed a Motion for Damages Hearing as against Appellant. (R. pp. 266-277). On October 18, 2023, the trial court held a hearing with regard to damages as against Appellant (the "Hearing"). (R. pp. 161-187). At the Hearing, the Plaintiffs moved for the entry of a judgment against Appellant in the amount of $22,479,553.00. (R. p. 182, lines 9-19). This amount is the "full amount" of the Plaintiffs' damages expert's repair estimate less $15,640,000.00 in settlement proceeds already received by the Plaintiffs. (R. p. 182, lines 9-19).

At the Hearing, the Plaintiffs presented two witnesses, both experts hired by the Plaintiffs. (R. p. 163, lines 2-9). Notably, the Plaintiffs did not present any evidence or witness testimony from Watkins or ACR, the parties who allegedly hired and paid Appellant to work on 200 River Landing.

The Plaintiffs' first witness at the Hearing was Forrett Lott, a licensed architect. (R. p. 163, lines 2-9). In response to inquiry from counsel for the Plaintiffs, Mr. Lott provided general testimony regarding his expert scope, the large size of 200 River Landing and the damage to the numerous condominium buildings due to "two primary sources, water intrusion and termite damage." (R. p. 168- 170). Mr. Lott further testified regarding his written report which included repairs for *all* of 200 River Landing. (R. p. 173). Again, 200 River Landing includes 5 separate condominium buildings and 94 residential units. (R. p. 125, lines 10-15).

Mr. Lott was not able to provide any testimony regarding Appellant, Appellant's scope of work, the dates Appellant allegedly worked at 200 River Landing, nor any distinctions between Appellant's work and the work of at least 49 other defendants. (R. p. 174, lines 6-25). Ultimately, Mr. Lott was not able to provide any testimony to the trial court as to a monetary damage amount in any way attributed to Appellant. (R. p. 175, lines 9-17).

The Plaintiffs' second witness at the Hearing was John DeWitte. (R. p. 175, lines 18-25). Mr. DeWitte served as the Plaintiffs' construction and cost fee expert. (R. p. 180, lines 8-25; R. p. 181, lines 1-25). Mr. DeWitte was not able to provide any testimony regarding Appellant, Appellant's scope of work, the dates Appellant allegedly worked at 200 River Landing, nor any distinctions between Appellant's work and the work of at least 49 other defendants. (R. p. 180, lines 8-25; R. p. 181, lines 1-25). Ultimately, Mr. DeWitte was not able to provide any testimony to the trial court as to a monetary damage amount in any way attributed to Appellant. (R. p. 181, lines 15-24).

On October 25, 2023, the trial court entered a Judgment in favor of the Plaintiffs and against Appellant (the "Judgment"). (R. pp. 41-45). The Judgment is in the amount of $22,479,523.00. (R. p. 44, lines 10-15). As requested by the Plaintiffs, the Judgment acknowledges the amount awarded is equal to the full amount of the Plaintiffs' cost to repair less the $15,460,000.00 in settlement. (R. p. 44, lines 5-15). The Judgment does not identify any damages attributable to Appellant. (R. pp. 41-45). The Judgment does not identify what amount of the settlement proceeds paid by Watkins and ACS (those who the Plaintiffs allege hired Appellant) are attributable to Appellant. (R. pp. 41-45). Instead, the Judgment attempts to correlate the $22,479,523.00 award to Appellant by noting Appellant is a "joint tortfeasor." (R. p. 44, lines 10-11).

On November 21, 2023, Appellant filed his Notice of Appeal with this Court.

STANDARD OF REVIEW

"The trial judge has considerable discretion regarding the amount of damages, both actual or punitive. Because of this discretion, our review on appeal is limited to the correction of errors of law. Our 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.*" *Solley v. Navy Federal Credit Union*, 397 S.C. 192, 203 (Ct.App. 2012) (*quoting Austin v. Specialty Transp. Servs. Inc.*, 358 S.C. 298, 310-311 (Ct.App. 2004)) (*emphasis added*).

ARGUMENT

The Judgment should be set aside because the preponderance of the evidence did not support the Judgment, thus making the Judgment a harsh and unwarranted outcome which is not in relation to the facts of the case. This issue has been recently and routinely addressed by the Court with guidance to trial courts for the proper handling of inflated default damage awards like the present matter.

"The entry of default is an official recognition of the failure to appear or otherwise respond, but is not a judgment by default." *5 Star Life Ins. Co. v. Peek Performance, Inc.*, 434 S.C. 334 (Ct.App. 2021) (*quoting Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241–42 (1978)). "[T]here is a difference between a defendant being declared in default and subsequently having judgment entered against him for damages." *5 Star* (*citing* Alex Sanders & John S. Nichols, *Trial Handbook for South Carolina Lawyers* § 4:10 (5th ed. 2020)).

Because there is a difference between an entry of default and a monetary judgment, "[w]hether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount recoverable *based on the proof*." *Renney v. Dobbs House, Inc.*, 275 S.C. 562 (1981) (emphasis added). Therefore, "[p]articipation 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." *Id.* at 568. Moreover, "the trial court and this court should closely scrutinize the award to prevent harsh, unwarranted results." *Renney* at 568. Ultimately, in *Renney*, the Court opined "this award is patently so greatly out-of-proportion to the wrongs alleged in the complaint that this court, as a matter of common law, and independent of s 15-27-130, should not allow the same to stand. We raise the issue ex mero motu." *Id.* at 567.

"The amount of damages in a default action must be proved by the preponderance of the evidence." *Solley v. Navy Federal Credit Union, Inc.*, 397 S.C. 192, 203 (Ct.App. 2012) (*citing Renney supra*). "A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered." *Id.* (*quoting Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 529 (Ct.App.1988)). In *Jackson*, the Court held the trial court's judgment for the full price of a contract was clearly excessive and did not account for deductions which should have been made given the facts of the case. 296 S.C. 526.

In 2014, the Court noted the "line of cases" in which the South Carolina Supreme Court "criticized trial courts for awarding default damages in the inflated amounts sometimes found in the prayer for relief in a complaint." *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 90 (Ct.App. 2014). The Court further noted "[i]t is common knowledge ... that in a tort action the amount stated in the prayer for relief often bears little relation to the amount which the plaintiff is entitled to recover." 408 S.C. at 90. Concluding, the Court reminded trial courts, "[a]s *Solley* demonstrates, therefore, the principle that a plaintiff must prove his damages even when the defendant is in default applies to all damages claims in default cases." *Id.*

Here, the Judgment is a harsh and unwarranted result which is not supported by the pleadings, the evidence or testimony at the Hearing. Neither the Plaintiffs nor the trial court made an attempt to distinguish between or otherwise delineate damages fairly and equitably attributable to the work performed by Appellant. Instead the Judgment summarily awards against *only* Appellant the entire

amount of damages as pled by the Plaintiffs against 50+ defendants. Defendants which included the developer, general contractor and major subcontractors.

The amount of damages presented by the Plaintiffs at the Hearing are the exact same damages which the Plaintiffs sought to repair the entirety of 200 River Landing, all 5 Condominium Buildings and 94 residential units. Appellant is an individual alleged to have worked as a third or fourth tier subcontractor, at some unknown alleged point in time. The Judgment is harsh and unwarranted.

A. The Pleadings bear little relation to the Judgment.

The pleadings and record are devoid of evidence which identifies the exact scope of work performed by Appellant and the damages attributable to Appellant's scope of work. In fact, when the Plaintiffs initially filed this action they did not specifically include Appellant as a defendant. (R. pp. 46-73). Even before knowing of Appellant's existence, the Plaintiffs already alleged the defendants at that time had "performed and provided materials for, inter alia, framing, WRB installation, brick veneer installation and repairs, concrete installation and repairs, caulking, and private balcony deck waterproofing installation and repairs." (R. p. 51, lines 14-21).

On February 1, 2019, the Plaintiffs filed an Amended Summons and Complaint. (R. pp. 74-102). In the Amended Complaint, the Plaintiffs added ACR as a defendant. (R. p. 79, lines 17-24; R. p. 80, lines 1-3). The Plaintiffs alleged ACR was a subcontractor to Watkins and that 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." (R. p. 79, lines 17-24; R. p. 80, lines 1-3).

On May 28, 2019, ACR filed its Third-Party Summons and Complaint. (R. pp. 103-121). ACR identified four (4) individual defendants, including Appellant. (R. pp. 103-121). ACR admitted it had been hired by Watkins to work at 200 River Landing. (R. p. 119, lines 14-15). ACR, however, affirmed it was only hired for a limited scope of "work related to window installation and decking waterproofing." (R. p. 119, lines 14-15). ACR then alleged the four individual defendants it identified each "performed work at the subject property as subcontractors to ACR." (R. p. 119, lines 19-22). At no point, did ACR distinguish in any manner the scope of work, time of work or any other details regarding the generic allegation Appellant and three other individual defendants allegedly "performed work at the subject property as subcontractors to ACR."

On January 21, 2020, after being alerted to the mere existence of Appellant by virtue of ACR's Third-Party Complaint, the Plaintiffs filed their Second Amended Summons and Complaint and directly named Appellant as a defendant. (R. pp. 122-160). The Plaintiffs also named as defendants the other three individuals identified by ACR in the Third-Party Complaint.

With regard to Appellant, the Plaintiffs alleged "*[u]pon information and belief*, [Appellant], 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." (R. p. 129, lines 10-17 (*emphasis added*)). The Plaintiffs further alleged "[u]pon information and belief, Defendants First Exteriors, LLC, ARC, ACR, DaSilva, [Appellant], Rodriguez, FBM, ACP, Superior, Premier, and John Doe Subcontractors 11 through 50 provided services, labor and material to 200 River Landing Drive Phase I as set forth above as subcontractors or material suppliers to Watkins Services, Inc. and may hereinafter be referred to collectively as 'Subcontractors.'" (R. p. 131, lines 6-10). Thereafter, for the remainder of the 31 page, 131 paragraph very detailed Complaint, the

Plaintiffs do not again specifically mention Appellant nor make any allegations directly against Appellant. Instead, at all times, the Plaintiffs' claims against Appellant are included in general allegations against Watkins and the 50+ other defendants who "upon information and belief," may have worked at 200 River Landing. The Plaintiffs' Second Amended Complaint is unliquidated.

The Plaintiffs' Second Amended Complaint provides no support for the Judgment. The Judgment, therefore, bears little relation to the amount which the Plaintiffs are entitled to recover and is so greatly out-of-proportion to the wrongs alleged in the pleadings it respectfully should be set-aside by this Court.

B. The Hearing did not provide sufficient evidence of damages against Appellant.

At the Hearing, neither the Plaintiffs nor the trial court made an attempt to distinguish between or otherwise delineate damages fairly and equitably attributable to the work performed by Appellant. (R. pp. 161-187). During the Hearing, the Plaintiffs did not produce evidence or testimony which identified the exact scope of work performed by Appellant and the damages attributable to Appellant's scope of work. (R. pp. 161-187). Even though they had been paid $11,925,000.00 by Watkins and ACR, the Plaintiffs called no witnesses from Watkins or ACR, the two parties the Plaintiffs allege hired Appellant and directed his scope of work. (R. pp. 161-187).

Instead, at the Hearing, the Plaintiffs proceeded without regard to the directives and instructions set forth in *Renney*, *Wells Fargo*, *Solley* and *Jackson*. And to the contrary, the Plaintiffs directly moved the trial court for entry of a judgment for the "full amount" of their damages ($37,939,523.00) less $15,460,000.00 in settlement, for a judgment in the amount of $22,479,553.00. (R. p. 182, lines 1-25). The Plaintiffs did not present documentary evidence nor witness testimony to the trial court with regard to Appellant, Appellant's scope of work, the dates Appellant allegedly worked at 200 River Landing, nor any distinctions

between Appellant's work and the work of at least 49 other defendants. (R. p. 174, lines 6-25; R. p. 180, lines 9-25; R. p. 121, lines 1-25). Ultimately, the Plaintiffs were not able to provide testimony to the trial court as to a monetary damage amount in any way attributed to Appellant. (R. p. 174, lines 6-25; R. p. 180, lines 9-25; R. p. 121, lines 1-25).

Thus the Hearing does not provide support for the Judgment. The Judgment, therefore, bears little relation to the amount which the Plaintiffs are entitled to recover and is so greatly out-of-proportion to the wrongs alleged it respectfully should be set-aside by this Court.

C. The Judgment does not provide sufficient evidence of damages against Appellant.

The Judgment does not provide the proof and evidence commanded by *Renney*, *Wells Fargo*, *Solley* and *Jackson*. The Judgment is in the amount of $22,479,523.00. (R. pp. 41-45). As requested by the Plaintiffs, the Judgment acknowledges the amount awarded is equal to the full amount of the Plaintiffs' cost to repair less the $15,460,000.00 in settlement. (R. p. 44, lines 1-18). The Judgment does not identify any damages attributable to Appellant. (R. pp. 41-45). The Judgment does not identify what amount of the settlement proceeds paid by Watkins and ACR (those who the Plaintiffs allege hired Appellant) are attributable to Appellant. (R. pp. 41-45). Instead, the only attempt the Judgment demonstrates in attempting to correlate the $22,479,523.00 award to Appellant is by noting Appellant is a "joint tortfeasor." (R. p. 44, lines 10-11).

Simply put, the Judgment is not the "fair verdict and judgment" which has been "closely scrutinized" as commanded by *Renney*. The Judgment does not include the proof to warrant an award of $22,479,523.00 as commanded by *Solley*.

The quick fix label of a "joint tortfeasor" slapped on the Judgment does not solve the problem. First, the label "joint tortfeasor" does not satisfy the proof and evidentiary standard set forth in *Renney*, *Wells Fargo*, *Solley* and *Jackson*. Second, this logic defies the purposes set forth in *Renney*, *Wells Fargo*, *Solley* and *Jackson*. As noted in *Wells Fargo*, "[i]t is common knowledge

... that in a tort action the amount stated in the prayer for relief often bears little relation to the amount which the plaintiff is entitled to recover." 408 S.C. at 90. This statement makes clear the Court does not intend for plaintiffs and trial courts to side-step *Renney*, *Wells Fargo*, *Solley* and *Jackson* with a simple allegation that a defendant is a "joint tortfeasor" with other defendants. This is true because it is also "common knowledge" that in tort construction defect actions, plaintiffs routinely throw a wide net with allegations and allege any number of defendants are "joint tortfeasors." A review of the Plaintiffs' Summons and Complaint, Amended Complaint and Second Amended Complaint demonstrate the vastly sweeping allegations that Appellant along with dozens of unidentified "John Doe" defendants are "joint tortfeasors." This is not the outcome envisioned by *Renney*, *Wells Fargo*, *Solley* and *Jackson.*

What the Plaintiffs pled here is no different. Recall, the Plaintiffs started with 57 defendants, not specfically including Appellant. The Plaintiffs' specific claims against Appellant were only added years later after ACR brought claims against Appellant. ACR's claims against Appellant were limited to the allegation Appellant was an ACR subcontractor hired to perform the limited scope of "window installation and decking waterproofing." (R. p. 119, lines 19-22). Nevertheless, at all times the Plaintiffs have asserted generic allegations against all 50+ defendants. The Judgment does not identify any evidence related to damages attributable to the work allegedly performed by Appellant. The Judgment, therefore, bears little relation to the amount which the Plaintiffs are entitled to recover and is so greatly out-of-proportion to the wrongs alleged it respectfully should be set-aside by this Court.

CONCLUSION

For all of the foregoing reasons, Appellant request the Judgment be set aside.

August 19, 2024

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