THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

71062

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 201196386

Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc.,
Respondents,

v.

Professional Plastering & Stucco, Inc., Maria Arias, and Miquel Roasles
Defendants,

Of whom, Professional Plastering & Stucco, Inc. is the Appellant.

Professional Plastering & Stucco, Inc., Appellant,

v.

Maria Ariasm, Miquel Roasles, and APS Enterprises Unlimited, Inc., Third-Party Plaintiffs,

Of whom APS Unlimited, Inc. is Respondent.

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PETITION FOR REHEARING

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CERTIFICATE OF COUNSEL

Counsel for Respondents Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc., certifies that the Opinion upon which this Petition for Rehearing is based was filed by the Court of Appeals on January 8, 2014 (Opinion No. 5188), and this Petition for Rehearing has been filed within fifteen (15) days thereof pursuant to Rule 221(a), SCACR.

QUESTIONS PRESENTED

I. Whether the Court of Appeals overlooked and misapprehended the dispositive effect of Dawkins' proffered testimony where he found water intrusion at the roof-to-wall intersections was proximately caused by defects in construction, and the Record proves Professional violated the standard of care by contributing to and concealing those defects?

II. Whether the Court of Appeals overlooked and misapprehended the overwhelming evidence of Professional's negligence, which was admitted by its owner and president?

III. Whether the Court of Appeals' decision is in conflict with prior precedent applied in *Magnolia North* relating to admissions from corporate officers as to a defendant's defective construction?

IV. Whether the Court of Appeals overlooked or misapprehended the fact that Professional identified but elected not to call as a witness another engineering expert to testify on the same subjects as Dawkins, rendering any error harmless?

V. Whether Dawkins was qualified to give expert testimony?

VI. Whether the Court of Appeals overlooked and misapprehended the trial court's proper exercise of discretion to exclude Dawkins' due to Professional's discovery violation involving the failure to produce his investigative records prior to the trial.

STATEMENT OF THE CASE

Mark F. and Nan M. Teseniar, on behalf of themselves and others similarly situated ("Teseniar"), commenced this action on January 4, 2008, alleging construction defects caused damages to the buildings comprising the Twelve Oaks at Fenwick Plantation Horizontal Property Regime ("Fenwick"). (R. p. 75). The suit began against the developers, but Teseniar later

amended the Complaint to add the architect, general contractor, and various subcontractors, such as Professional Plastering & Stucco, Inc. ("Professional"). The Twelve Oaks Property Owners Association ("POA") (together with Teseniar, the "Respondents") later asserted claims alleging design and construction defects caused damages to the common areas of Fenwick. (R. p. 129). All pending actions were consolidated for trial pursuant to an Order dated October 20, 2008. (R. p. 4). The case was certified as a class action on October 20, 2008. (R. p. 50). Professional Plastering was the only defendant not to settle prior to trial.

The Honorable Kristi L. Harrington conducted the jury trial on May 9, 11, 12, and 13, 2011. The jury found for Respondents on the two surviving causes of action, negligence and breach of warranty of workmanlike service, awarding $7,723,225.00 in damages. (R. pp. 65, 1549:6-1550:22).

After the verdict, Professional made post-trial motions, which were denied by an Order filed June 17, 2011. (R. pp. 68, 288, 506, 700, 703, 733). Professional then filed Motions to Alter or Amend the Judgment, which were denied in an Order filed July 19, 2011. (R. pp. 749, 69). This appeal followed, and oral arguments were heard on October 17, 2013. The Court of Appeals thereafter reversed the final judgment of the trial court for: (1) its refusal to qualify Dawkins as an expert for Professional; and (2) its grant of summary judgment in favor of APS.[1] Respondents seek rehearing and reconsideration of that decision. All testimony and materials referenced herein, other than the Court's published Opinion, are contained in the previously filed Record on Appeal.

ARGUMENT AND CITATION OF AUTHORITY

Respondents proved their case at trial, but this Court reversed, finding prejudicial error in

[1] Respondents take no position insofar as the disposition of the appeal of APS's grant of summary judgment is concerned.

the trial court's refusal to allow Dawkins to testify as an expert for Professional. This Court should rehear and reconsider its decision, noting the points within as dispositive of the outcome in favor of Respondents. *See Owners Ins. Co. v. Clayton,* 364 S.C. 555, 563, 614 S.E.2d 611, 615 (2005) ("Error without prejudice does not warrant reversal."); *Fields,* v. *Reg.'l Med. Ctr.,* 363 S.C. at 26, 609 S.E.2d at 509 ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."). *Cf. Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967) (where the verdict of any fair jury would have been the same even if no error had been committed, the error is harmless and not prejudicial). In the alternative, this Court should remand the matter for the limited purpose of conducting a hearing to develop the record with the particular reasons the trial court refused to qualify Dawkins, rather than for a new trial.

I. THE COURT OF APPEALS OVERLOOKED AND MISAPPREHENDED THE HARMLESS EFFECT OF REFUSING TO QUALIFY DAWKINS BECAUSE HE TESTIFIED WATER INTRUSION WAS PROXIMATELY CAUSED BY DEFECTIVE CONDITIONS FOR WHICH PROFESSIONAL WAS RESPONSIBLE.

The four elements of a claim of negligence are (i) duty; (ii) breach; (iv) causation; and (iv) damages. *Magnolia North Prop. Owners' Ass'n v. Heritage Cmtys., Inc.,* 397 S.C. 348, 725 S.E.2d 112, (Ct. App. 2012) (citing *Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d. 245, 250 (2007)). In order to establish actionable negligence, a plaintiff is required only to prove that the negligence on the part of the defendant was at least one of the proximate, concurring causes of his injury. *Hughes v. Children's Clinic, P. A.*, 269 S.C. 389, 398, 237 S.E.2d 753 (1977). *See also Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972) ("[I]it is not necessary to prove that the defendant's negligence was the sole proximate cause of the injury."). It is sufficient if the evidence establishes that the defendant's negligence is "a concurring or a contributing

proximate cause." *Id.* at 606, 193 S.E.2d at 534. *See also Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97 (2006). An injury is considered foreseeable "if it is the natural and probable consequence of a breach of duty." *Hurd v. Williamsburg Cnty.*, 363 S.C. 421, 428, 611 S.E.2d 488, 492 (2005). "If the actor's conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not negative his liability." *Childers v. Gas Lines, Inc.*, 248 S.C. 316, 325, 149 S.E.2d 761, 765 (1966).

In its analysis on the issue of harmless error, the Court of Appeals found Dawkins was necessary for Professional to rebut Respondents' expert on the issue of proximate cause. The Opinion also notes testimony from Dawkins' concerning defects he found in the work of other trades, which he claimed Professional never would have seen. Importantly, however, the opinion fails to account for the admitted absence of kickout flashing along the roof-to-wall terminations. This critical testimony must have been overlooked or misapprehended, because it requires this Court to affirm the judgment below. This single issue, standing alone, resolves questions of proximate cause and foreseeability squarely against Professional using only the testimony given by Dawkins and Professional's owner.

Had Dawkins offered his opinions at trial, the jury would have heard the following:

> Q. ... Last question. Can you please state what is the probable cause of the water intrusion that you observed at Fenwick?
>
> A. Sure. **There was water intrusion at the roof-to-wall terminations. The proximate cause was the lack of kickout flashings**. I mean, they should have been there.

(R. pp. 1576:21-1577:3)(Emphasis added).

This is where the breadcrumb trail begins. Dawkins opined the kickout flashings should have been installed at the roof-to-wall terminations, and the lack thereof proximately caused

damages at Fenwick. Therefore, attention is drawn to the plethora of evidence demonstrating Professional's own concurring and contributing negligence pertaining to the roof-to-wall intersections and the stucco installation in that location.

The Record is replete with evidence of Professional's duties as they relate to the kickout flashing. For example, Professional's owner[2] testified about its duty to inspect the underlying work of other trades prior to installing its stucco:

> Q. Now, paragraph six of Exhibit B provides that your company must inspect the substrate, the surfaces, that you're going to apply your stucco to prior to application, to make sure that they are proper; correct?
>
> A. Yes, sir.
>
> Q. You heard Mr. Glick talk about that concept as an industry standard on Monday, correct?
>
> A. Yes, sir.

(R. p. 880:8-17). Removing any doubt, King acknowledged:

> Q. **As a matter of industry standard and as a matter of your contract, Exhibit B, paragraph six, you are not to cover up defective work of others; correct**?
>
> A. **Yes, sir**.

(R. p. 881:1-5) (Emphasis added). Following this breadcrumb trail, Dawkins testified the lack of kickout flashing was a defective condition that proximately caused water intrusion at Fenwick. Professional's owner conceded it had a duty not to cover up such defective conditions. Not only should it not cover up such defects, Professional owed a duty to inspect for the kickout flashing. Professional's owner admitted:

> Q. And so, returning to the contract, at paragraph six of Exhibit B, it doesn't just say to say to inspect the job for proper conditions prior to the stucco being installed. **It**

[2] Donnie King was the sole owner and president of Professional. (R. p. 863:9-18).

actually says, "inspect any component associated with water tightness," correct?

A. **Yes, sir**.

(R. p. 885:2-9). Professional's owner acknowledged kickout flashing is a necessary component for waterproofing roof-to-wall intersections.

Q. You agree that kickout flashing serves an important function, correct?

A. Oh, yes, I think so.

Q. **Kickout flashing is often located at the intersection of a low roof and an upper wall; correct**?

A. **That's correct**.

Q. **And the kickout flashing is to get the water away from the wall, correct**?

A. **That's correct**.

Q. **To make sure the water does not go behind the wall, correct**?

A. **Yes, sir**.

(R. pp. 881:12-24) (Emphasis added). This testimony takes the breadcrumb trail a bit farther. Prior to installing its stucco, Professional had a duty to inspect for components associated with water tightness,[3] which included the duty to not cover up any defective conditions with its stucco. Professional knew kickout flashing was important to ensure water did not enter the roof-to-wall intersection, and the lack of kickout flashing was a defective condition that proximately caused water intrusion at Fenwick according to Dawkins. The trail does not stop there.

[3] Dawkins never testified Professional had no duty inspect for the absence of kickout flashing at the roof-to-wall terminations. Dawkins also never testified that Professional did not have a duty to not cover up this defective condition with its stucco.

Not only did Professional know the importance of kickout flashing and have a duty to not cover up areas of the work where it was missing, Professional's owner confessed his company did, in fact, apply stucco covering up the roof-to-wall intersections despite the missing kickout flashing.

> Q. **But your company did cover up the locations on these buildings with the missing kickout flashing, did it not**?
>
> A. **It appeared that way when I seen the slides, that there was no kickout flashing there**.

(R. p. 881:6-11) (Emphasis added).

Again, Professional's negligence becomes clearer. Professional's owner admitted it covered up a defective condition[4] it knew and understood was necessary to the water tightness of the structures, and Dawkins opined this condition proximately caused the water intrusion at Fenwick. Unlike other defects Dawkins attributed to other tradesmen (such as the hidden conditions around the windows this Court noted in its Opinion), there simply is no suggestion Professional could not readily observe and recognize the absence of kickout flashing at the roof-to-wall intersections. In fact, the converse is true—Professional's owner admitted:

> Q. **Now, kickout flashing, can you see kick-out flashing**?
>
> A. **You can see kickout flashing**.
>
> Q. **When you walk by a roof and look up, can you tell whether there's kickout flashing there**?
>
> A. **I can, but I've been in construction all my life**. Sometimes it's a little hard for people to see three stories up, you know.

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[4] In fact, King's testimony reveals his workmen installed the stucco such that it was in direct contact with the roof shingles, a condition that violates Magna Wall's installation instructions. This is the same portion of the work that Dawkins said was a proximate cause of water infiltration. King even recognized, "That's where the kickout flashing should have been." (R. pp. 891:5-892:7).

Q. Would an architect designing a building know whether or not there was kickout flashing?

A. I would think so.

Q. How about the general contractor? Would he be able to tell whether or not there was kickout flashing?

A. I believe so.

(R. pp. 903:16-904:13) (Emphasis added).[5] The lack of kickout flashing was not a concealed condition incapable of detection by Professional. King could see it from the ground just walking by. An architect or contractor would have seen it as well. Dawkins never testified that Professional was unable to know of this particular defect before covering it up with its stucco. In fact, as to the kickout flashing Dawkins simply testified to confusion he saw in the construction documents as to which contractor had this waterproofing component in its scope of work. (R. pp. 1575:20-1576:16). That testimony does not change Dawkins' opinion that the absence of kickout flashing was a proximate cause of water intrusion, nor does it relieve Professional of its admitted duties to both inspect for such components and to not cover up defective conditions. In fact, it is axiomatic that the purpose of requiring Professional to inspect the substrate is to ensure it does not cover up defective work of other tradesmen. Thus, it is irrelevant which contractor should have installed the kickout flashing when reviewing Professional's own concurring and contributing negligence for covering up this deficiency with stucco. Both Dawkins and Professional's owner agreed the flashing "should have been there." The fact that it was not should not have been covered up by Professional. The Court of Appeals has overlooked this critical, dispositive point.

To avoid any suggestion the kickout flashing was somehow going to be installed after

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[5] It was counsel for Professional (not the Respondents) who elicited this testimony from Professional's owner. The Court of Appeals overlooked these points.

Professional installed its stucco at the roof-to-wall intersections, Professional's owner made clear that cannot be done.

> Q. And once your stucco is installed, you can't install kickout flashing; correct?
>
> A. No, sir. You can, but you've got to go take the assembly apart.
>
> Q. You've got to take stucco back out, correct?
>
> A. Yes, sir.
>
> Q. **So, essentially, once the stucco's installed, you can't install kickout flashing, correct**?
>
> A. **Not without removing/replacing the stucco, yeah**.

(R. pp. 881:25-882:11) (Emphasis added).

In light of the combined testimony of Professional's owner and that proffered by its expert, the trail is now complete and it leads to the inescapable conclusion that Professional is liable to Respondents, just as the jury determined. Prior to installing its stucco, Professional had a duty to inspect for components associated with water tightness. Professional knew kickout flashing was important to ensure water did not enter the wall system at the roof-to-wall intersection and that kickout flashing had to be installed prior to the stucco in the sequencing of the work. Further, the fact that kickout flashing was not in place was plainly observable to Professional before its work began. Nevertheless, Professional proceeded to put stucco over these locations despite the missing kickout flashing in disregard of its duty to not do so. And as Professional's own expert proffered, "There was water intrusion at the roof-to-wall terminations. The proximate cause was the lack of kickout flashings." (R. pp. 1576:21-1577:3).

Within the context of duty, breach, causation, and damages, this testimony is akin to driving a perfectly round peg into a perfectly round hole. Professional's owner agreed:

Q. **Sir, you would agree with me that one or more of the aspects of the stucco installation at Fenwick are not in compliance with the NER report, correct**?

A. **Yes, sir**.

Q. **And that constitutes a building code violation, correct**?

A. **Yes, sir**.

...

Q. **The only question for the jury is how many violations and how much, correct**?

A. **Yes, sir**.[6]

Q. Thank you, sir.

(R. pp. 898:13-20; 899:12-15) (Emphasis added). The jury answered that question in the amount of $7,723,225.00, and that result should stand. The Court of Appeals overlooked and misapprehended this evidence[7] in the record in concluding the exclusion of Dawkins' opinions was prejudicial error, and the Court's Opinion fails to address these points. The Court should reconsider its decision and write to affirm[8] the judgment below on the basis of harmless error, if there was error at all.

II. THE COURT OVERLOOKED, MISAPPREHENDED AND FAILED TO ADDRESS THE NUMEROUS BUILDING CODE VIOLATIONS ADMITTED BY PROFESSIONAL'S OWNER.

According to its owner and president, Professional had a duty to conform its work to the

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[6] See *Magnolia North,* 397 S.C. at 369, 725 S.E.2d at 123 (finding directed verdict in favor of Plaintiff supported in part by testimony from contractor's chief operating officer and president regarding problems in the work). That is precisely what happened here.

[7] The sole focus of this section is Professional's negligence in connection with the missing kickout flashings simply because Dawkins so pointedly stated that defect was a proximate cause of the damages at Fenwick. As discussed elsewhere herein, this was not the limit of Professional's admitted negligence.

[8] The result between APS and Professional reversing the grant of summary judgment in favor of APS has no effect on the proper outcome of this appeal in favor of Respondents.

building code, the Magna Wall installation instructions, and the project's contractual requirements. (R. pp. 859:1-873:7, 876:18-880:13). However, Professional's work was littered with defects in violation of these requirements and industry standards. Professional's owner admitted this at trial. In addition to the testimony quoted above, Professional's owner testified it had a duty to install casing beads where its stucco terminated at any dissimilar material, such as an aluminum window jam. (R. p. 890:4-17). But the record reveals this was not done.

> Q. Of course, we saw on Monday that there were not casing beads at the intersection of dissimilar materials at the windows, correct?
>
> A. That's correct.
>
> Q. **The photos that we saw on Monday with no casing bead at the intersection of the plaster and the aluminum window is in contravention of the last two paragraphs we just read in Attachment B to your former company's contract for the application of the stucco at Twelve Oaks; correct**?
>
> A. **Yes, sir**.

(R. p. 890:18- 891:4) (Emphasis added). Although Dawkins opined Professional may not have seen a reverse lap behind the window installations, this fact fails to explain how Professional is somehow excused from installing the required casing bead between dissimilar materials at the window's outer edge. Professional cannot claim it did not "see" its own defective work. Besides, the reverse lap and the missing casing bead each are but a part of the overall construction sequencing and integration that have little to do with one another, except that both are concurring defects. *Player*, 259 S.C. 600, 193 S.E.2d 531. ("[I]it is not necessary to prove that the defendant's negligence was the sole proximate cause of the injury."). Moreover, Professional understood its duty to comply with the building code is independent of its fellow subcontractors. (R. p. 877:18-22). A long list of other admissions about Professional's work made by its owner

was raised to the Court of Appeals in Respondents' brief on appeal but never addressed. (See generally, R. pp. 891:5-892:7 (admitting stucco in contact with roof shingles was a violation); R. pp. 892:11-893:9 (admitting lack of weep screeds was a violation); R. p. 895:7-14 (admitting building code violation for reverse lap of paper backed lath); R. p. 898:13-20 (admitting Professional's stucco installation violated the building code)).

The foregoing failures relate to tasks that were entirely within Professional's ability to control and for which it is responsible. No one else prevented Professional from installing casing beads, j-molds, or weep screeds as required, among its other shortfalls. In light of these admitted errors, it cannot be said a reasonable jury would have been influenced by the excluded testimony of Dawkins. *Fields v. Reg'l Med. Ctr.,* 363 S.C. at 26, 609 S.E.2d at 509; *Cf. Powers*, 250 S.C. 149, 156 S.E.2d 759 (if the verdict of any fair jury would have been the same even if no error had been committed, the error is harmless). These admissions should have entitled Respondents' to a directed verdict at trial. *See Magnolia North,* 397 S.C. at 369, 725 S.E.2d at 123 (finding admissions of defects by corporate officer supported grant of summary judgment). This is especially true after Dawkins proffered that defects in the roof-to-wall intersection were a proximate cause of the water intrusion. The Court overlooked these matters.

III. In Contrasting the Testimony of Professional's Owner Against Professional's Expert as a Basis to Demonstrate Prejudicial Error, the Court has Abandoned without Explanation its Reasoning in *Magnolia North.*

In *Magnolia North*, this Court relied on admissions from the corporate defendant's officer as a basis to support the trial court's grant of a directed verdict in favor of the plaintiff. Just as in this case, *Magnolia North*, involved clear proof of negligent construction and a breach of the implied warranty of workmanlike service. *Id.* at 368-369, 725 S.E.2d at 123. Viewing the trial in its entirety the Court in *Magnolia North* held, "Here, there was overwhelming evidence of

[the defendants'] failure to meet the industry standard of care in several aspects." *Id.* Part of that overwhelming evidence consisted of admissions of the defendant's officer. "Gwyn Hardister, [the defendant's] chief operating officer and president, also acknowledged construction problems." *Id.* The Court's decision in the present case conflicts with this well-reasoned logic.

Here, Professional's owner and president, Donnie King, admitted over and over to numerous construction defects and code violations in Professional's work at Fenwick. Several examples from the Record are contained in this Petition. Instead of adhering to the reasoning in *Magnolia North* and properly treating these admissions as conclusive of Professional's failure to adhere to the standard of care required of it, this Court found the concessions of Professional's owner about its shoddy work only heightened the need to allow its expert, Dawkins, to testify. This is nonsensical—King and Dawkins play for the same team: Professional.[9] The Court overlooked or misapprehended this point and should rewrite to affirm the judgment below on the basis of harmless error.

IV. THE REFUSAL TO NOT QUALIFY DAWKINS AS AN EXPERT DID NOT PREVENT PROFESSIONAL FROM PRESENTING EXPERT TESTIMONY.

It is incorrect that Professional had no expert witness to rebut the testimony of Respondents' expert. Robert Puschek was qualified as an expert in the area of construction, which is one of the same areas Professional sought to qualify Dawkins. However, this Court's opinion discounts Puschek's utility because he was unqualified to testify as an "architectural engineer". This is a distinction without a difference, because Dawkins testified he also had no architectural experience.

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[9] Although Donnie King is not named personally as a Defendant in the underlying action, it is incorrect to suggest in the opinion that he testified "on behalf of the Respondents". King was Professional's owner and president. Respondents' decision to call him as a witness in its case in chief to elicit admissions about Professional's faulty construction does not make him Respondents' witness. Lest there be any doubt, Professional identified Donnie King in discovery as one of its own testifying experts. (R. p. 723).

Q. Sir, and as an engineer, you've never designed a multi-family project, like Twelve Oaks Condominium. Is that correct?

A. I have not designed -- I'm not a building designer, no.

Q. And you've never designed any building in Charleston, South Carolina. Is that correct?

A. That's correct.

Q. And you've never designed any building anywhere in South Carolina, correct?

A. Not buildings, no.

Q. You're not a licensed architect. Is that correct?

A. I am not a licensed architect.

Q. Have you ever been qualified as an expert in a court of law here in South Carolina?

A. No.

(R. pp. 1075:9-22; 1076:25-1077:2). If the Court's concern stems from Dawkins' experience as an engineer, it overlooked the fact that Professional also designated Wade Anderson, another professional engineer, as a proposed expert witness. (R. p. 723). In fact, Anderson and Dawkins were designated as experts on the identical subject matter, and both were expected to testify as "to both liability and damage issues." It was Professional's decision not to call Anderson. Thus, Professional caused any prejudice it claims to have suffered at trial by Dawkins' exclusion.

V. THERE WAS NO ERROR IN THE TRIAL COURT'S REFUSAL TO QUALIFY DAWKINS AS AN EXPERT.

Although the focus above pertains to the harmless nature of any error resulting from Dawkins' exclusion, Respondent's preserve their position that he was not qualified to give opinions. It is correct that defects in a purported expert's education or experience generally go to

the weight of his testimony and not its admissibility, but that is not the complete test.

"[T]he trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, SCRE, whether the evidence is scientific or non-scientific." *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009). While executing the gatekeeping role in determining admissibility, the trial court must assess the foundational requirements of qualifications and reliability and further find that the testimony will assist the trier of fact. *Id.* at 275, 676 S.E.2d at 689. The Supreme Court stated,

> [t]he familiar tenet of evidence law that a continuing challenge to evidence goes to "weight, not admissibility"[10] has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability. Nonscientific expert testimony must satisfy Rule 702 both in terms of expert qualifications and reliability of the subject matter.

Id. at 273, 676 S.E.2d at 688. *See also Watson v. Ford Motor Co.*, 389 S.C. 434, 446-447, 699 S.E.2d 169, 175 (2010) ("[O]nly after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate."). "The qualification of an expert witness and the admissibility of his or her opinion are matters within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion and a showing of prejudice." *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 423, 717 S.E.2d 765, 775 (Ct. App. 2001). *See also Manning v. City of Columbia*, 297 S.C. 451, 377 S.E.2d 335 (1989); *McDill v. Mark's Auto Sales, Inc.*, 367 S.C. 486, 626 S.E.2d 52 (Ct. App. 2006).

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[10] Professional Plastering never argued at trial that Dawkins' shortcomings went to the weight of his testimony, not its admissibility. This argument first appeared in the *Reply* brief filed in support of its post-trial motions. (R. p. 733). A party cannot use a Rule 59(e) motion (much less a Reply supporting that motion) to present an issue to the court for the first time. *Fields v. Reg'l Med. Ctr.*, 363 S.C. at 27, 609 S.E.2d at 510.

When the substance of Dawkins' proffer is compared to the admissions of Professional's owner as to Professional's numerous code violations, it is evident his opinions are not reliable. On the issue of proximate cause, even Dawkins opined the roof-to-wall terminations were defective and caused water intrusion at Fenwick. Professional's concurring and contributing negligence in relation to that installation is undeniable. In other areas of the work (where Dawkins attempted to pin fault on other trades, such as around the windows), Dawkins' proffered testimony does nothing to excuse Professional's admitted failure to install casing beads at the intersection of Professional's stucco with the aluminum window jambs. (R. p. 890:4-21). Professional's owner conceded these were violations of the standard of care. Thus, testimony from Dawkins about the failure of other trades cannot insulate Professional from liability for its concurring negligence. *State v. White*, 382 S.C. at 274, 676 S.E.2d at 689 (expert testimony must satisfy Rule 702 both in terms of expert qualifications and reliability); *see also Player v. Thompson*, 259 S.C. at 606, 193 S.E.2d at 534 (noting defendant is responsible if its negligence is "a concurring or a contributing proximate cause."). Further, due to the necessity of calling certain witnesses out of order, the trial record was essentially complete by the time the trial court made a final determination. Under these circumstances, the trial court completed a "broad inquiry" as envisioned by *Fields v. Haynes Waters Builders, Inc.*, 376 S.C. 545, 558, 658 S.E.2d 80, 87 (2008). Under these circumstances, there was no abuse of discretion.

Considering the overall defects in Dawkins' qualifications,[11] the numerous admissions from Professional's owner, the jury's complete knowledge that other trades also were at fault,

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[11] Dawkins was subjected to extensive *voir dire* on his qualifications and his failure to produce files. (R. pp. 1074:18-1103:13; 1359:6-1374:10). Respondents' counsel identified a particular list of reasons to disqualify Dawkins, which included the discovery violation. (R. pp. 1089:10-1090:22). Any other considerations arising from the Court's *in camera voir dire* are not contained in the Record beyond the trial court's reference to that conference as part of its decision.

too, and the trial court's broad discretion, this Court should reconsider its opinion and rewrite to affirm.

VI. IN LIEU OF REVERSING FOR A NEW TRIAL, THE PROPER COURSE SHOULD BE TO REMAND TO THE TRIAL COURT TO CONDUCT A HEARING TO ARTICULATE THE PARTICULAR REASONS IT REFUSED TO QUALIFY DAWKINS.

The Court of Appeals' decision criticizes the trial court for its failure to state with particularity the reasons for its decision to not qualify Dawkins. The trial court noted:

> The request was whether or not Mr. Dawkins would be qualified as an expert at this time based upon my review the voir dire – ***in camera voir dire*** as well as the background of the case. I am declining to grant your request to have Mr. Dawkins qualified as expert in the areas of engineering and construction. **I am not relying solely on the fact that he is not licensed in South Carolina. I am taking all of the information as a whole, in its entirety, in order to make my decision.**

(R. pp. 1095:14-24, 1372:21-1373:7) (emphasis added). The trial court stated it considered "all the information as a whole, it its entirety..." and further referenced an *in camera voir dire* as a basis for its decision. In fairness to the Court of Appeals' point, the Record does not clearly articulate each particular point the trial court relied upon. However, this is not required. "We do not require a lower court to set out findings on all the myriad factual questions arising in a particular case." *Cf. In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338 (2002) (*citing Golf City, Inc. v. Wilson Sporting Goods, Co., Inc.*, 555 F.2d 426 (5th Cir. 1977). However, the appropriate remedy where the Court of Appeals is unable to determine from the record the basis for the trial court's decision on a matter is to remand, not reverse for an entire new trial. *See Hamm v. South Carolina Public Service Com.*, 298 S.C. 309, 380 S.E.2d 428 (1989) (remanding case to PSC for factual findings to support its conclusions where order gave no basis for its decision).

Here, the trial court indicated the decision to exclude Dawkins was based on the entirety

of the circumstances. In lieu of reversing for a new trial (and subject to the points above recommending the Court rewrite to affirm), Respondents request that this Court remand the matter of Dawkins' exclusion to the trial court for a hearing on that issue alone. The trial court should have an opportunity to articulate the particular reasons it refused to qualify Dawkins given that is the sole basis used to reverse the final judgment.

VII. PROFESSIONAL'S DISCOVERY ABUSE IS A SUFFICIENT ADDITIONAL SUSTAINING GROUND UPON WHICH TO AFFIRM THE TRIAL COURT'S DECISION.

"When it appears a violation of [discovery] has occurred, it lies within the discretion of a trial court to decide what sanction, if any, should be imposed." *Bensch v. Davidson*, 354 SC 173, 182, 580 S.E.2d 128, 133 (2003). The Court of Appeals rejected Respondents' additional sustaining ground that Dawkins was properly excluded due to discovery violations. In setting forth its reasons, this Court overlooked and misapprehended several points, and reconsideration is warranted.

First, although the trial court may not have expressly stated its decision to exclude Dawkins was based upon the discovery violation, this Court has already observed the trial court did not state any of the particular grounds relied upon. It cannot be assumed the discovery violation did not factor into the trial court's exercise of discretion without the trial court stating as much on remand. It easily could be among "all of the information as a whole" as described by the trial court under the circumstances.

Second, there is a continuing, affirmative duty on the part of a party from whom information is sought through discovery to supplement its responses to discovery with documents or information. *Id.* In contrast, there is no affirmative duty on the part of Respondents to take the deposition of a witness. This Court would have allowed Dawkins to testify regardless of the discovery violation. Under the facts of this case, this shifts the sanction

for discovery abuses away from the party at fault (i.e., Professional) and rests it upon the shoulders of Respondents, forcing them to undertake efforts the rules do not require of them in order to obtain information Professional was obligated to provide. This result turns the process on its head and should be revisited.

It is also of no consequence that Professional offered to not use the materials it failed to disclose. The only item that was disclosed was Dawkins' *curriculum vitae*. (R. pp. 1090:14-22, 1100:21-1101:11, 1104:14-1105:3). Plus, this was not the only discovery violation revealed at trial. The discovery rules are designed to promote full disclosure before trial. *Id.* (*citing Reed v. Clark*, 277 S.C. 310, 286 S.E.2d 384 (1982)). The approach endorsed by the Court of Appeals in its published Opinion allows a party cherry pick what it will produce rather than adhere to full disclosure as the Rules mandate. Citing to this case, a party may keep the element of surprise yet avoid a sanction by simply agreeing not to use what it did not disclose. This situation is ripe for abuse. Regardless of the factors set forth in *Jumper v. Hawkins*, 348 S.C. 142, 152, 558 S.E.2d 572, 574 (2003), this Court has created a slippery slope for the Bar with its published opinion. Reconsideration is warranted.

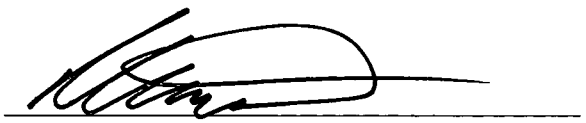
CONCLUSION

For the reasons set forth herein, the Respondents respectfully request that this court grant this Petition for Rehearing and Reconsider its ruling, withdraw its opinion, and issue a new opinion reversing the decision of the trial court and/or remanding this matter for further proceedings on the limited issue of Dawkins' qualification as described herein.

Signature of Counsel to Follow

Respectfully submitted this 23rd day of January, 2014.

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.



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January 23, 2014
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 201196386

Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc., Respondents,

v.

Professional Plastering & Stucco, Inc., Maria Arias, and Miquel Roasles Defendants,

Of whom, Professional Plastering & Stucco, Inc. is the Appellant.

Professional Plastering & Stucco, Inc., Appellant,

v.

Maria Ariasm, Miquel Roasles, and APS Enterprises Unlimited, Inc., Third-Party Plaintiffs,

Of whom APS Unlimited, Inc. is Respondent.

AFFIDAVIT OF SERVICE

I, Moira W. Kerrigan, an employee of Thurmond Kirchner Timbes & Yelverton, P.A., attorneys for the Respondents, do hereby certify that Respondents have on this date, served Respondents' Petition for Rehearing to the following counsel of record, in the manner provided below:

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January 23, 2014

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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Columbia, South Carolina 29211

Re: ***Case Tracking No.: 2011196386***
Mark F. Teseniar &Nan M. Teseniar v. Professional Plastering & Stucco, et al.;
Case No.: 2008-CP-10-0049

Dear Ms. Kitchings:

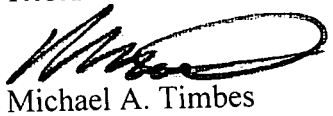
This firm represents the Respondents in connection with the above appeal. Enclosed for filing please find the original and seven (7) copies of Respondents' Petition for Rehearing and Affidavit of Service. Also enclosed is a check in the amount of $25.00 to cover the applicable filing fee. Please file with the Court and return a file-stamped copy to me via our courier.

Should you have any questions or concerns, please do not hesitate to contact our office.

With kindest regards, I remain,

Very truly yours,

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.



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/mwk
cc: All Counsel of Record (w/ enclosure)