

**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

**RECEIVED**  
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SC Court of Appeals

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.

**RESPONDENTS' REPLY TO APPELLANT'S RETURN TO PETITION FOR REHEARING**

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Fenwick Property Owners Association, Inc.*

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., hereby submit this Reply to the Appellant's Return to Petition for Rehearing, showing as follows:

**I. WHETHER THE PLANS AND SPECIFICATIONS EXPRESSLY REQUIRED KICKOUT FLASHING, CASING BEADS, OR OTHER NECESSARY WATERPROOFING COMPONENTS HAS NO BEARING WHATSOEVER ON PROFESSIONAL'S NEGLIGENCE.**

In its Return, Professional attempts to avoid its own negligence by claiming the plans and specifications did not require kickout flashing or other waterproofing components,<sup>1</sup> and all that was required of it was to install the work in accordance with the plans and specifications. (See Professional's Return, pp. 2-5 and footnote 2). This argument completely ignores Professional's own contract requirements, the testimony in the Record on Appeal, as well as the fundamental premise that this is a negligence action, not a claim for breach of contract.

**A. Professional Admitted the Installation of its Stucco in Contact with the Roofing Shingles was a Defective Condition Irrespective of the Plans and Specifications.**

Professional's Owner admitted its duties were not limited to those expressly contained within the plans and specifications. Moreover, the Professional's contract confirms this fact. Paragraph 42 of Exhibit A to its contract states:

**All parties hereby agree that each item required by all Federal State and Local governing authorities may not be specifically shown on the Plans and Specifications, however, all requirements imposed by these governing authorities are hereby included in this Subcontract Agreement.**

(R. pp. 878:17-24, p. 1704) (All emphasis added). In other words, what matters is whether the duty exists, not whether it was expressly stated in the plans or specifications. Professional's

<sup>1</sup> This defies common sense for several reasons: (1) the lack of kickout flashing caused water to leak into the wall system per Dawkins; (2) the requirements of the building code, Magna Wall installation instructions, and the NER report go well beyond the plans and specifications; and (3) Professional's contract expressly required it follow all of the foregoing. The plans and specifications are not the "be-all and end-all" of its duties as Professional contends.

attempt to distract this Court from this reality is a red herring. For example, Professional's owner admitted it had a duty to comply with the requirements of both the NER and the Magna Wall installation instructions as part of its contract. (R. pp. 878:25-880:6). Attachment B to Professional's contract, entitled "Scope of Work," expressly states:

1. All parties hereby agree that [Professional] shall install all materials **in strict accordance with manufacturer's recommendations....**

(R. p. 1705)(Emphasis added).

For Professional to suggest the "lack of kickout flashing was not a defective condition" is, frankly, absurd. Magna Wall's installation instructions forbid the installation of Professional's stucco in contact with the roofing shingles, which is precisely the defective condition found by Dawkins when he opined the kickout flashing "should have been there."

Professional's owner agreed during the trial:

- Q. Sir, Mr. Glick showed the jury a photograph of stucco in contact with shingles on Monday. Do you recall that?
- A. I believe so, yes.
- Q. **That's an improper construction condition, correct?**
- A. **That's where the kickout flashing should have been.**
- ...
- Q. Magna Wall installation instructions do not permit stucco in contact with shingles, correct.
- A. I don't believe so.
- Q. **Under the Magna Wall installation instructions that condition is, in fact, an improper construction condition; correct?**
- A. Yes, sir.

(R. p. 891:5-892:7)(Emphasis Added).

If there is any question about whether the lack of kickout flashing was a "defective" condition, Professional's owner plainly admits it was. Magna Wall's instructions forbid stucco in contact with the roofing shingles where the kickout flashing should have been. King admitted Professional's contract required it to follow Magna Wall's installation instructions. King further admitted Professional's stucco was, in fact, installed in contact with the roofing shingles. Last, but not least, Dawkins admitted the kickout flashing should have been there, and that its absence proximately caused the water intrusion at Fenwick. Again, this is a round peg in a round hole. There is no basis for Professional to represent to this Court that no defect existed. Professional and this Court overlooked these points.

Another important issue was overlooked. Donnie King admitted Professional's duties arose both as a matter of law and under its contract. King stated:

Q. And when you take on a South Carolina job each subcontractor has an independent duty on that job site to comply with the building codes, correct?

A. Yes, sir.

Q. And you understand the building codes has the force and effect of law, correct?

A. Yes, sir.

Q. It also the force and effect of a contract, because to make sure there's no mistake the general contractor actually puts that requirement into your contract.

A. Yes, sir.

(R. pp. 878:4-16; pp. 1689, 1692, and 1704) (Article 6, noting obligations not limited to plans and specifications); p. Articles 9, 15, and Exhibit A, paragraph 42 (work must comply with all laws ordinances, rules and regulations);. If fact, King admitted that applicable laws and codes take precedent over any provision within Professional's contract. (R. p. 876:18-25, p. 1703

(Attachment A, paragraph 29, stating “all applicable Federal, State, and Local codes take precedence over the project plans and specifications...”)) (Emphasis added). Contrary to Professional’s incomplete analysis, the testimony of Tacy McGinty and Dawkins cannot alter the plain language of Professional’s contract or King’s recognition of Professional’s failure to install the work in accordance with the applicable codes, NER report, Magna Wall instructions, and Professional’s contract.

Although King stated he did not know<sup>2</sup> whether kickout flashing was required at Fenwick, he immediately conceded it was necessary to install. (R. p. 882:17-23). This is important, because once again Professional’s contract mandated:

17. All parties hereby agree that [Professional] is to furnish all necessary corner beads, stops, expansion joints, and other miscellaneous trim and accessories necessary to install this scope of work in accordance with applicable codes and manufacturer’s recommendations.

(R. p. 1706)(Emphasis added).

Dawkins likewise testified, “There was water intrusion at the roof-to-wall terminations.<sup>3</sup> The proximate cause was the lack of kickout flashings. I mean, they should have been there.” (R. pp. 1576:21-1577:3)(Emphasis added). It is nonsensical for Professional to suggest this was not a necessary component or that the manner in Professional installed its stucco in contact with the shingles (where the flashing should have been) was not a construction defect—King and Dawkins both said it was.

**B. The Lack of Casing Beads was a Defective Condition Irrespective of the Plans and Specifications.**

<sup>2</sup> Not knowing whether kickout flashing was required is a far cry from knowing that it was not required.

<sup>3</sup> To avoid any confusion, the “roof-to-wall termination” is the point where Professional’s stucco on the wall was installed in contact with the roofing singles.

The logic above applies to other areas of the work as well.<sup>4</sup> An example is the missing casing beads where the stucco intersected with the windows. Regardless of the arguments suggested by Professional in its Return, the Record is clear—Casing beads were required and they were not installed. Professional's contract mandates:

25. All parties hereby agree that [Professional] is to furnish and install all casing beads where stucco terminates at any dissimilar materials.

(R. p. 1706) (All emphasis added). This requirement is unambiguous. Donnie King admits Professional did not install casing beads where its stucco contacted the window frames. Professional's suggestion that it did not need to at pages 4 and 5<sup>5</sup> of its Return is belied by the quoted text above, and Professional gives no explanation for how it avoids this plain language from its contract. Respondents already pointed the following testimony:

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.

<sup>4</sup> A host of admissions about Professional's negligent work was raised 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)).

<sup>5</sup> Professional shifts in its discussion from casing beads to j-molds (See Professional's Return, pp. 4-5). It matters not. Both casing beads and j-molds were provided for in separate provisions of the Professional's contract, to wit, Paragraphs 21 and 25. (R. p.1706).

All four elements necessary to a claim for negligence were established at trial, and the verdict below should stand. *Magnolia North Prop. Owners' Ass'n v. Heritage Cmty., Inc.*, 397 S.C. 348, 725 S.E.2d 112, (Ct. App. 2012). See also *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972) (“[I]t is not necessary to prove that the defendant's negligence was the sole proximate cause of the injury.”). Respectfully, the Court overlooked these material facts and issues in reversing the circuit court below.

**C. Incorporation of Additional Arguments**

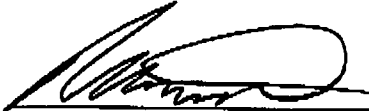
Respondents incorporate the arguments previously raised in its Petition for Rehearing and Final Brief and respectfully show the Court overlooked or misapprehended the arguments raised therein.

**CONCLUSION**

For the reasons set forth herein, the Respondents respectfully request that this Court grant its 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.

Respectfully submitted this 10<sup>th</sup> day of February, 2014.

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Charleston, South Carolina

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**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' Reply to the Appellant's Return to Petition for Rehearing to the following counsel of record, in the manner provided below:

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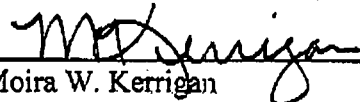
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February 10, 2014  
Charleston, South Carolina

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February 10, 2014

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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' Reply to Appellant's Return to Petition for Rehearing and Affidavit of Service. 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)