

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 201196386

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S.C. Supreme Court

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.

PETITION FOR A WRIT OF CERTORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc., certify the Petition for Rehearing was timely made and ruled upon by the South Carolina Court of Appeals on February 20, 2014. This Petition for a Writ of Certiorari is filed within thirty (30) days thereof pursuant to Rule 242, SCACR.

QUESTIONS PRESENTED

- I. **DID THE COURT OF APPEALS ERRONEOUSLY DETERMINE THE EXCLUSION OF A CONTRACTOR'S LIABILITY EXPERT WAS PRÉJUDICIAL ERROR WHERE THE EXPERT OPINED WATER INTRUSION AT THE ROOF-TO-WALL INTERSECTIONS WAS PROXIMATELY CAUSED BY DEFECTS IN CONSTRUCTION, AND THE OVERWHELMING EVIDENCE AT TRIAL PROVED THE CONTRACTOR VIOLATED THE STANDARD OF CARE BY CONTRIBUTING TO AND CONCEALING THOSE DEFECTS?**

- II. **SHOULD THIS COURT RESOLVE THE CONTRADICTORY RESULT IN THE PRESENT CASE AND THE COURT OF APPEALS' DECISION IN *MAGNOLIA NORTH*¹ WHERE THE CONTRACTOR'S OFFICER ADMITTED TO CONSTRUCTION DEFECTS IN BOTH CASES?**

- III. **DID THE COURT OF APPEALS ERRONEOUSLY INVADE THE TRIAL COURT BROAD DISCRETION TO EXCLUDE EXPERT TESTIMONY WHERE QUESTIONS EXISTED ABOUT HIS QUALIFICATIONS AND NONE OF HIS INVESTIGATIVE FILE WAS PRODUCED PRIOR TO TRIAL?**

INTRODUCTION

Petitioner requests this Honorable Court to issue a writ of certiorari to take further review of the decision of the South Carolina Court of Appeals reversing a \$7,723,225 judgment entered by the trial court in this construction defect case. At issue is the Court of Appeals' erroneous conclusion that the exclusion of expert testimony was prejudicial

¹ *Magnolia North Prop. Owners' Ass'n v. Heritage Cmtys., Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012).

given the overwhelming evidence of fault contained in the record. Also at issue is the Court of Appeals' encroachment upon the trial court's broad discretion to exclude certain testimony based upon a witness's qualifications and associated discovery violations.

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 buildings comprising the Twelve Oaks at Fenwick Plantation Horizontal Property Regime. (Appx. p. 79). The suit began against the developers, but Teseniar later amended the Complaint to numerous parties involved in the construction, including Professional Plastering & Stucco, Inc. ("Professional"). The Twelve Oaks Property Owners Association ("POA") also asserted claims for construction defects and related damages to the common areas of the regime. (Appx. p. 133). The POA and Teseniar (collectively "Fenwick") consolidated these actions for trial on October 20, 2008, and the case was certified as a class action. (Appx. pp. 8, 54). Prior to trial, Fenwick settled with all defendants except Professional. Thus, the trial focused solely on the exterior stucco installed by Professional and damages resulting from defects therein.

The Honorable Kristi L. Harrington conducted the jury trial on May 9, 11, 12, and 13, 2011. The jury found in favor of Fenwick on two causes of action, negligence and breach of warranty of workmanlike service, awarding \$7,723,225.00 in damages. (Appx. pp. 69, 1585:6-1586:22). The trial court submitted the issue of punitive damages to the jury, and the jury inquired as to who would receive the money without awarding any. (Appx. p. 1855).

After the verdict, Professional made post-trial motions, which were denied by an Order filed June 17, 2011. (Appx. pp. 72, 292, 520, 714, 717, 747). Professional filed Motions to Alter or Amend the Judgment, which were denied in an Order filed July 19, 2011. (Appx. p. 73, 763). Professional appealed those rulings. The South Carolina 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.² (Fenwick timely filed a Petition for Rehearing, which was denied. (Appx. pp. 2047, 2096). This Petition for a Writ of Certiorari follows.

STATEMENT OF THE FACTS

A. Basic Background.

The Fenwick Petitioners represent the interests of the POA and, in a representative capacity, the homeowners of Fenwick. (Appx. pp. 1051:19-25, 1071:1-15). Fenwick is a condominium regime consisting of 216 residential units within 12 separate buildings. (Appx. pp. 1051:19-25, 1057:8-12). As a subcontractor during the original construction, Professional installed about one-quarter million square feet of stucco at Fenwick. (Appx. pp. 838:15-19, 873:6-883:16, 988:2-12). Professional returned to Fenwick in 2003 to perform repairs to its stucco after leaks were reported. (Appx. pp. 882:12-16, 923:17-24). Professional ceased doing business under that entity the same year this lawsuit was filed. (Appx. pp. 873:6-883:16).

² Fenwick takes no position insofar as the disposition of the appeal of APS's grant of summary judgment is concerned.

B. Professional's subcontract agreement for the work at Fenwick.

The stucco product installed by Professional is the Magna Wall system, which is a proprietary "water management" stucco system. (Appx. pp. 1095:17-20, 1152:15-18, 1606:2-4). A water management system should control any water that gets behind the exterior cladding so it escapes before causing damages. (Appx. pp. 833:10-835:5). Magna Wall stucco must be installed in accordance with the manufacturer's installation instructions, and Professional was a certified installer. (Appx. pp. 823:19-824:10).

Professional entered into a subcontract agreement with the general contractor on the project, Summit Contractors, Inc. ("Summit"). (Appx. pp. 1722-1742). The duties arising under its contract are relevant to the issues on appeal. Attachment B to Professional's contract, entitled "Scope of Work," imposed the following requirements on Professional, which is identified in the contract as "SUBCONTRACTOR":

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

....

6. All parties hereby agree that SUBCONTRACTOR **shall inspect all framing, windows, doors, flashings, and any dry-in associated with water tightness** prior to start of the work. All parties further agree that SUBCONTRACTOR will report to CONTACTOR's Jobsite Superintendent **any discrepancies or potential concerns that he may have related to water-tightness not being sufficient.**

...

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.**

...

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

(Appx. pp. 1741-1742)(All emphasis added). Paragraph 9 of Attachment “A” to the contract provides that Professional was responsible for all work listed in Attachment “B.” (Appx. p. 1737). Article 5 of the contract defines the “Contract Documents” for the Fenwick project and specifically notes, “If anything in the Contract Documents is inconsistent with this Subcontract Agreement, this Subcontract Agreement shall govern and then the highest or fullest level of performance and installation shall govern.” (Appx. p. 1725).

Under Article 15, Professional warranted and guaranteed its work would be free from all faults and defects and that its work would comply with all federal, state, and local codes and requirements. (Appx. p. 1728). In fact, paragraph 29 of Attachment “A” provides:

All parties hereby agree that all applicable Federal, State, and Local **Codes take precedence over project plans and specifications** and any cost to make the required changes to comply with said codes is hereby included in this Subcontract Agreement.

(Appx. pp. 890:18-25, 1739)(Emphasis added). Paragraph 42 of Attachment “A” 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.

(Appx. pp. 892:17-24, p. 1740) (Emphasis added). Under Paragraph 22 of Attachment “A,” Professional must pay “all associated cost for repairs to all damages any buildings or the work of others resulting from [its] negligence....” (Appx. p. 1739).

C. Magna Wall's installation instructions, the applicable building codes, and Professional's admitted duty to install the stucco correctly.

To comply with its contract, Professional had to install the stucco in strict accordance with the Magna Wall installation instructions. (Appx. pp. 1741, 1788-1803). Sections 1.02, 2.02, and 3.03 of the Magna Wall instructions incorporate the International Conference of Building Officials Evaluation Services, Inc. ER-4776 ("ICBO") and National Evaluation Services, Inc. NER-459 ("NER") reports. (Appx. pp. 1799, 1801, 1802). Thus, to comply with Magna Wall's instructions, the stucco had to be installed in accordance with the NER Report.³ (Appx. pp. 1743-1749, 1750-1768, 1769-1783). Per Section 7.0 of the NER Report, installation of a Magna Wall stucco system in accordance with the NER Report is sufficient to satisfy the requirements of the International Building Code. (Section 7.0, Appx. p. 1760).

In terms of installation procedures, Section 3.2.7 of the NER Report requires:

3.2.7 Flashing, trim and accessories: All flashings, trim, weep screeds, and corner reinforcement shall be of corrosion-resistant metal or approved plastic. **Flashings shall be designed to and installed to direct moisture from behind the system to the exterior of the cladding.** Flashings shall be installed at the perimeter of all penetrations of the system....

(Appx. p. 1753)(Emphasis added). Section 4.1 provides, "Flashing, corner reinforcement, metal trim and weep screeds shall be installed as shown in this report." (*Id.*) Where the stucco exterior meets a roof, Figure 2 of the NER Report requires the stucco to be separated from the roof with flashing as shown. (Appx. p. 1765). This method of installation is required by the code.

³ The ICBO and NER have the same requirements.

Fenwick called Professional's owner, Donnie King, as a witness during its case in chief to elicit admissions against Professional.⁴ King, admitted Professional's duties arose both as a matter of law and under its contract. He testified:

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 (sic) the force and effect of law, correct?

A. Yes, sir.

Q. It also [sic] 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.

(Appx. pp. 892:4-16; pp. 1725, 1728, and 1740). King admitted Professional had a duty to install the stucco in strict accordance with Magna Wall's installation instructions. (Appx. pp. 892:25-894:6). King also understood and agreed that applicable laws and codes take precedence over any provision within Professional's contract. (Appx. p. 890:18-25).

King agreed Professional owed a duty to inspect the underlying substrate for defects prior to installing its stucco and to not cover up defective conditions. He testified:

⁴ In its published decision, the Court of Appeals suggested Donnie King testified "on behalf of [Fenwick]." This is incorrect and misleading. King was Professional's owner and president and was Professional's representative at the trial. In fact, he was identified as an expert to testify "on behalf of" Professional in its discovery responses. (Appx. p. 737).

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.

(Appx. p. 881:1-5) (Emphasis added). This duty to inspect the substrate specifically applied to waterproofing concerns (i.e., flashing) as noted in paragraph 6 of Attachment “B” to its contract.

Q. And so, returning to the contract, at paragraph six of Exhibit B, it doesn’t just say to inspect the job for proper conditions prior to the stucco being installed. **It actually says, “inspect any component associated with water tightness,” correct?**

A. **Yes, sir.**

(Appx. p. 899:2-9, 1741).

Per its contract and King’s admissions, Professional had a duty to install casing beads anywhere its stucco terminated with a dissimilar material, such as the aluminum window frames. (Appx. p. 904:4-17). These admissions establish Professional’s duties. Other admissions that it beached these duties are noted in the discussions that follow.

D. Fenwick’s Witnesses on Liability and Damages

After homeowners discovered various problems associated with water intrusion in the buildings, Fenwick retained Miles Glick, a forensic architect, to investigate for construction defects. Glick performed destructive testing to evaluate the causes and extent of the water intrusion and damages. (Appx. pp. 820:8-822:8). He determined numerous deficiencies existed in the overall construction, which pervaded many different construction trades, including the stucco installed by Professional. (Appx. p. 822:3-8).

At trial, Glick testified to the building codes, Magna Wall's installation instructions, and industry standards applicable to Professional's stucco installation. (Appx. pp. 822:18-828:13, 836:15-838:6, 848:10-23). He found Professional's work violated these requirements in numerous ways. (Appx. pp. 820:8-870:23, 1436:9-1450:17, 1469:5-22). Glick also found Professional covered up defective work of other tradesmen, exacerbating the problems. (Appx. pp. 857:5-858:5). Everywhere Glick tested, he found the buildings at Fenwick were rotting. (Appx. pp. 854:24-855:5). He testified, "I didn't find any place that didn't have improper installation of the stucco system or rotted wood." (Appx. pp. 862:4-19, 865:2-5). Glick testified Professional failed to install casing beads as required by its contract. He also discovered missing weep screeds, which should have been installed to allow water entering the Magna Wall water management system to drain from the wall. (Appx. pp. 838:5-841:10).

Glick also opined about the scope of repairs needed to remedy the defects and resulting damages. (Appx. pp. 862:25-866:6). Fenwick presented Robert Gallagher to testify to the cost of repairs. (Appx. p. 942:11-24). Gallagher testified the costs to repair 100% of the problems at Fenwick, including the stucco defects, was \$15,748,225.00. Because Professional was the sole remaining defendant at trial, Gallagher prepared a "stucco-only" estimate for the cost to repair the stucco related damages only, which he said would equal \$8,761,443.00. (Appx. pp. 978:23-985:18, 1804).

E. Professional's Defense Witnesses

Professional introduced testimony, via deposition, from Claude McNabb and Tacy McGinty. McNabb was the Vice President of the developer of Fenwick when the regime was constructed. According to McNabb, Professional Plastering's stucco

application was proper and passed his inspections. (Appx. pp. 1121:1-1150:10). McGinty was Summit's project manager during construction. He testified Professional's work was done in accordance with the contract documents. (Appx. p. 1266:21-1358:20).

Professional introduced its own expert regarding the cost of repair, Robert Puscheck, who testified it would cost \$3,662,587.64 to repair any stucco related damages. (Appx. p. 1700).

Another defense witness, Chris Dawkins, testified about personal observations he made during an investigation of the defects at Fenwick. Professional tendered Dawkins as an expert in the fields of construction and engineering. (Appx. p. 1098:8-13). Professional intended to use Dawkins to challenge the issue of proximate cause. (Appx. pp. 1884-1885). However, after lengthy voir dire, and an *in camera* voir dire, the trial court had not decided whether to qualify him. (Appx. pp. 1098:20-1127:13) In addition, it was discovered Professional had failed to produce Dawkins's investigative file to Fenwick in discovery, despite having been requested to do so. (Appx. pp. 1114:13-1128:25). Dawkins' testimony was delayed so Fenwick could inspect his investigative file. After presenting testimony via deposition of two fact witnesses, Professional called its damages expert, Puscheck, to testify. It was immediately discovered Professional had once again failed to produce portions of its expert's file, and the trial court called all counsel into chambers. (Appx. pp. 1175:1-1177:5) After an overnight recess the trial court refused to qualify Dawkins as an expert. (Appx. pp. 1383:5-1398:10).

After the verdict in favor of Fenwick, Professional proffered Dawkins outside the presence of the jury to elicit the opinions he would have given had he been qualified as an expert. Dawkins concluded his testimony as follows:

Q. All right. Now, after your review and seeing these conditions, **can you state the most probable cause, to a reasonable degree of engineering certainty**, what was the – sorry, Your Honor, 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.** ... There was water intrusion at the balcony-to-wall terminations at the breezeways, **which was also an integration of – a waterproofing/integration issue.**

(Appx. pp. 1612:21-1613:18)(Emphasis added).

ARGUMENT AND CITATION OF AUTHORITY

Fenwick proved its case at trial with overwhelming evidence of Professional's defective construction and resulting damages. Much of Fenwick's proof came in the form of multiple admissions from Professional's owner, Donnie King, about Professional's failure to meet the building code requirements and comply with Magna Wall's installation instructions. Ignoring this evidence, the Court of Appeals reversed because of the trial court's refusal to qualify Dawkins as an expert. In doing so, the Court of Appeals has erred. Nothing in Dawkins's proffered testimony would have affected the outcome of this trial; thus, any error in excluding his opinions was harmless. In fact, Dawkins's opinion on the issue of proximate cause actually helped seal Professional's fate.

I. DAWKINS TESTIFIED WATER INTRUSION AT FENWICK WAS PROXIMATELY CAUSED BY DEFECTIVE CONDITIONS PROFESSIONAL HAD A DUTY TO DISCOVER AND WHICH PROFESSIONAL ADMITTED WERE CODE VIOLATIONS; THUS, EXCLUSION OF HIS TESTIMONY WAS HARMLESS, IF IT WAS ERROR AT ALL.

At bottom, Professional claimed, and the Court of Appeals agreed, that Dawkins' testimony was necessary to oppose Fenwick's expert, Glick, on the issue of proximate cause. Therein lies the error. During his proffer, Dawkins opined that a proximate cause of the water intrusion at Fenwick was the lack of kickout flashing where stucco covered walls intersected with the roof. (*Id.*). This testimony is fatal to Professional, because it failed to inspect for and covered up this defective condition in violation of its contract. Professional further improperly installed its stucco in direct contact with the roof shingles, which violates Magna Wall's installation instructions, the NER Report, and the building code.

Donnie King admitted to these defects at trial, and Dawkins found this to be the source of water intrusion during his post-trial proffer. Duty—breach—causation—damages; all four elements are easily satisfied. *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). This Court should issue a writ of certiorari to correct the error of the Court of Appeals and restore Fenwick's \$7,723,225 verdict.

A. The Court of Appeals Ignored the overwhelming evidence of Professional's negligence, which was admitted by its owner and president.

In addition to finding Professional breached the implied warranty of workmanlike service, the jury found Professional was negligent. (Appx. pp. 69-71). To establish a claim for breach of the implied warranty of workmanlike services, the plaintiff must show the builder failed to perform its work in a careful, diligent, and workmanlike manner. *Magnolia North Prop. Owners' Ass'n v. Heritage Cmty., Inc.*, 397 S.C. 348, 368-69, 725 S.E.2d 112 (Ct. App. 2012). The four elements of a claim of negligence are (i) duty; (ii) breach; (iv) causation; and (iv) damages. *Id.* (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 the defendant's negligence 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). Proximate cause requires proof of both causation in fact and legal cause. *Hurd v. Williamsburg Cnty.*, 363 S.C. 421, 429, 611 S.E.2d 488, 492 (2005). *Oliver v. South Carolina Dep't of Hwys. & Pub. Transp.*, 309 S.C. 313, 422 S.E.2d 128 (1992). Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence. *Id.* at 316, 422 S.E.2d at 130. Legal cause is proved by establishing foreseeability. *Id.* An injury is foreseeable if it is the natural and probable consequence of a breach of duty. *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001). "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). “[I]t is not necessary to prove that the defendant's negligence was the sole proximate cause of the injury.” *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972). 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).

Fenwick easily proved each of the elements of its claims at trial. In fact, the evidence against Professional is extraordinary.

B. Professional admitted it owed a duty to install the stucco correctly

As noted, Professional’s owner conceded it owed duties both as a matter of law and under its contract to install the Magna Wall system correctly. (Appx. pp. 892:4-16; pp. 1725, 1728, and 1740). This included the duty to install the work in strict accordance with Magna Wall’s installation instructions⁵ to comply with the building code. (Appx. pp. 892:25-894:6, 1741). In fulfilling this obligation, Professional’s contract unambiguously provided that Professional’s responsibilities were not limited to just those items listed in the plans and specifications. All requirements imposed by law had to be required,

⁵ Before the Court of Appeals, Professional downplayed its negligence, claiming it needed only to install the work per the plans and specifications, which it argued did not require kickout flashing or other waterproofing components. (Appx. pp. 2000-2001). This argument epitomizes Professional’s disregard for the Magna Wall installation instructions, its contract, and the NER Report. Its contract made clear, “all applicable Federal, State, and Local Codes **take precedence over project plans and specifications.**” (Appx. pp. 890:18-25, 1739). Likewise, Paragraph 42 of Exhibit “A” provides that the requirements to be met “**may not be specifically shown on the Plans and Specifications,**” but are nevertheless required of Professional. (Appx. p. 1740) (All emphasis added). The NER Report established the minimum requirement to comply with the building code, not the plans and specifications.

including those set forth in the NER Report. (Appx. pp. 890:18-25, 1739, 1740-41).

This is not contested.

Considering Fenwick must only prove Professional's work was a concurring cause of the water intrusion, attention is focused on the missing kickout flashing, which Dawkins' found was the proximate cause of damage. For starters, it is undisputed the kickout flashing was not installed, and this deficiency was observable by Professional from three stories below.

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.

(Appx. pp. 917:16-918:5) (Emphasis added). It is further undisputed that kickout flashing is an important waterproofing feature which should have been installed at the roof-to-wall terminations. King acknowledged:

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.

(Appx. pp. 895:12-24) (Emphasis added). King agreed kickout flashing was necessary to install. (Appx. p. 896:17-23). Although King acknowledged its necessity, Professional has argued kickout flashing was not its responsibility to install. (Appx. pp. 2000-2003). This is a distinction without a difference, as explained below.

C. Professional admittedly breached its duty to install the stucco correctly.

Regardless of who was to install the kickout flashing, Professional had an admitted duty to comply with its contract and accepted industry standards by inspecting for deficiencies in the substrate before installing its stucco, in particular those components related to waterproofing. (Appx. p. 895:1-5). Professional understood the importance of kickout flashing as a waterproofing feature at the roof-to-wall terminations. (Appx. pp. 895:12-24, 1741-1742). Viewed in a different way, the NER Report and Magna Wall's instructions forbid installation of the stucco in contact with roofing shingles. King admitted Professional owed a duty to comply with these instructions. (Appx. pp. 899:2-9, 905:5-906:7). Thus, installation of the stucco in contact with the roofing shingles was a construction defect prohibited by Magna Wall's installation instructions. The record is undeniable in this regard:

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.**

(Appx. p. 905:5-906:7)(Emphasis Added). To repeat, Professional's owner admitted the installation of its stucco in contact with the roof shingles was as a defective condition prohibited by the Magna Wall installation instructions.⁶ That someone else may have been responsible for its installation is irrelevant to the analysis.

⁶ Reiteration is necessary because Professional claims there was no defect because this component was intentionally omitted from the work. (Appx. pp. 2080-2081). First, King admitted it was a defect. Nowhere has Professional or its experts explained how installation of stucco in contact with shingles complied with the building code as stated in the NER Report, because they cannot. The testimony of McNabb, McGinty and Dawkins cannot alter the requirements of the NER Report and building code or Professional's contract. Professional's contract unambiguously required these components, and Professional admitted at trial it had no proof the contract was amended as it now claims.

Q. And Page 15, Paragraph 7, provides that any clarifications to any of the agreements or the installation procedures must be in writing, correct?

A. Yes, sir.

Q. And you don't have such a document, do you?

A. No, sir .

(R. pp. 931:9-932:3).

The issue is not whether Professional was the contractor responsible for its installation; rather, the question is whether installing the stucco in direct contact with the roofing shingles due to the absence of kickout flashing was construction defect in violation of Magna Wall's installation instructions. It was. And, by installing its stucco over this defective condition, Professional violated not only Magna Wall's instructions but also its duty to not cover up defective conditions in the substrate. Professional's owner confessed:

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.**

(Appx. p. 895:6-11) (Emphasis added).

Even the NER Report notes the flashing may be installed "by others." (Appx. pp. 1765, 1779). Debate over who should do it does not eliminate the requirement that the stucco be installed correctly at roof-to-wall intersections without the stucco contacting the shingles. If Professional were to dodge liability so easily, it would render the NER Report (which in this instance is the building code standard) meaningless. As a practical matter, it is impossible for Professional's stucco to contact the shingles if the installation is proper. "Strict" compliance with the installation instructions was required. (Appx. pp. 1741). This was an obvious breach of the standard for care required. But it was not Professional's only breach by far.

King admitted Professional's work violated the applicable building codes and Magna Wall's installation instructions in numerous other particulars as well. (Appx. pp. 883:9-913:11). For example, missing weep screeds constituted a building code violation.

(Appx. pp. 906:11-906:9). Professional also had a duty to install casing beads anywhere its stucco terminated with a dissimilar material, such as the aluminum window frames.

(Appx. p. 904:4-17). Again, Professional admittedly breached this duty, conceding the casing beads were not installed.

Q. Of course, we saw on Monday that there were not (sic) 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.**

(Appx. pp. 912:13-20, 913:12-15) (All emphasis added). He also acknowledged "reverse lap" installations of the paperbacked lath, which is improper. (Appx. pp. 908:14-909:14).

In the end, no reasonable jury could have concluded Professional properly installed the stucco, regardless of Dawkins's proffered testimony. Professional's owner, King, summed it up best:

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.**

Q. Thank you, sir.

In terms of establishing Professional's failure of due care, that is a perfectly round peg in a perfectly round hole. The only remaining element to prove is proximate cause of the damages.

D. Professional's negligence proximately caused damages at Fenwick.

From opening statements onward, Professional never disputed the buildings at Fenwick were damaged as a result of construction defects. (Appx. p. 1863:21-1864:2). Considering the numerous, admitted defects in its work, Professional focused its defense on the issue of proximate cause. (Appx. pp. 1864:3-19, 1885-1886, 2003). Again, this argument is fatally flawed. It was Dawkins who sounded the death knell to Professional's defense.

The discussions above reveal Professional's admitted failure to inspecting the substrate for potential (or in this case actual) waterproofing concerns and its failure to install the stucco in accordance with the code at the roof-to-wall terminations. It is therefore paramount to acknowledge that Dawkins testified the lack of kickout flashing where Professional installed its stucco in contact with the roofing shingles was the proximate cause of the water intrusion at Fenwick. (Appx. pp. 1612:21-1613:18). Therefore, even if Dawkins had been qualified as an expert, he would have given the jury further proof that Professional's work was, in the very least, a concurring and contributing proximate cause of damages at Fenwick. That is all that is required to support the jury's verdict. *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972)

(holding a plaintiff need only show the defendant's negligence is "a concurring or a contributing proximate cause.").

For his sake, King acknowledged Glick's photographs of rotted wood where water had gotten behind the reverse lap of Professional's paperbacked lath.

Q. And you saw the photographs on Monday **where the water had gotten between the paper-backed lath layers of the reverse lap and rotted the woods structure, correct?**

A. **I've seen that picture.**

Q. And that condition, that reverse lap condition of any of your products, including the paper-backed lath is, in fact, a violation of the NER report, correct?

A. I believe it is.

Q. Which constitutes a violation of the building code, correct?

A. I believe so.

(Appx. pp. 908:14-909:14). These damages also were proximately caused by Professional's defective installation.

Further, there is no credible concern that the "foreseeability" component of proximate cause was in doubt, as evidenced by King's testimony that he fully understood kickout flashing was necessary to prevent water from entering the wall system. King and Dawkins both plainly stated, it "should have been there." (Appx. pp. 905:5-906:7, 1612:21-1613:3). To avoid any suggestion the kickout flashing was somehow going to be installed after Professional installed its stucco at the roof-to-wall intersections, King made clear that cannot be done.

Q. So, essentially, once the stucco's installed, you can't install kickout flashing, correct?

A. Not without removing/replacing the stucco, yeah.

(Appx. pp. 895:25-896:11).

There is no logic to the Court of Appeals' harmless error analysis considering Professional's owner and its experts provided proof of duty, breach, proximate causation, and damages sufficient to support the jury's verdict.

Only after a trial court finds an expert's testimony is necessary to assist the jury in resolving factual questions need it consider whether the expert is qualified and reliable. *Watson v. Ford Motor Co.*, 389 S.C. 434, 446-447, 699 S.E.2d 169, 175 (2010). Given that Dawkins's testimony directly implicates an area of the work where Professional failed to follow the building code by installing its stucco in contact with the roof without the necessary flashing in place, the jury needed no assistance. Instead, Fenwick contends the only error was in declining to grant a directed verdict on the issue liability.

To be fair, at the time Fenwick moved for a directed verdict, Dawkins's post-trial proffer had not been heard. However, had he testified similarly during Professional's case in chief, Fenwick was entitled to a directed verdict. *See Magnolia North*, 397 S.C. at 368-70, 725 S.E.2d at 123-24. Therein lies the harmlessness of any error. *See* Rule 61, SCRCPP; *Owners Ins. Co. v. Clayton*, 364 S.C. at 563, 614 S.E.2d at 615; *Fields, v. Reg. 'l Med. Ctr.*, 363 S.C. at 26, 609 S.E.2d at 509 (appellant must prove both the error of the ruling and resulting prejudice, *i.e.*, that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof).

E. The Court of Appeals ignored dispositive facts.

The Court of Appeals chased many red herrings and ignored the substance of Dawkins's proffer. For example, the Court of Appeals cited Dawkins' testimony that

Professional would not have seen defective work of other trades around the window installations. (Appx. p. 2039). In so finding, the Court overlooked Professional's admitted duty to inspect the substrate before installing its work and report any deficiencies, especially those relating to waterproofing components. The court below overlooked entirely Dawkins's testimony regarding the knockout flashing. If it was significant that underlying defects could not be seen by Professional, as the Court of Appeals claims, one is left wondering how the Court of Appeals gave no mention to those defects Professional could not deny. The knockout flashing is an obvious choice—Donnie King could spot it from three stories down. There also was no explanation for how Professional would not have known the casing beads were not installed at the window frames,⁷ considering its contract required Professional to install them and Donnie King admitted they were missing. (Appx. pp. 904:4-905:4, 1742).

In the end, neither Dawkins nor the Court of Appeals can explain how water intruded where the knockout flashing was missing without involving Professional's defective work. King admitted it was improper to install the stucco in contact with the roof shingles. Dawkins never testified Professional's installation of the stucco at this location was proper.

The question before the jury was never about whether Professional was the sole party that caused all of the damages. The entire trial was structured around informing the jury that many other trades actually contributed. Additional testimony by Dawkins that

⁷ Any suggestion Professional did not have to install the casing beads where its stucco intersected with dissimilar materials is directly contradicted by the plain language of its contract. Both casing beads and j-molds were provided for in separate provisions of the Professional's contract, *to wit*, Paragraphs 21 and 25. (Appx. p. 1742). The Court of Appeals did not attempt to explain this flaw in Professional's argument.

others were at fault would have been cumulative to the undisputed evidence presented at trial. *Fields v. Haynes*, 376 S.C. at 558, 658 S.E.2d at 87; Rule 61, SCRPC. What matters is that Professional's admitted defects played a contributing role in the water intrusion and resulting damages. Even if it was but a concurring cause, liability nevertheless attaches. This Court should reverse the Court of Appeals and take further review of this matter, reinstating the judgment of the trial court holding Professional responsible for its careless construction.

II. THE COURT OF APPEALS DECISION CONFLICTS WITH ITS REASONING IN *MAGNOLIA NORTH* RELATING TO ADMISSIONS BY CORPORATE OFFICERS ABOUT CONSTRUCTION DEFECTS.

This case is similar to the issues in *Magnolia North Prop. Owners' Ass'n v. Heritage Cmty., Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). In *Magnolia North*, the Court of Appeals 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, "[h]ere, 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.* Professional's owner, Donnie King, made such admissions as well.

There is another common thread. Like Professional, the defendant in *Magnolia North* argued admitting the existence of defects is not the same as admitting those defects

caused damages. *Id.* at 368-369, 725 S.E.2d at 123. Citing the “overwhelming evidence of [the defendant’s] failure to meet the industry standard of care in several aspects” the Court of Appeals affirmed the grant of the plaintiff’s directed verdict notwithstanding this argument. *Id.* The same is true here.

There is more. In *Magnolia North*, the defendant’s counsel admitted to only some of the alleged defects. Hence, the trial involved competing experts on the cost of repair, just as in the present case where Professional claimed the repairs would only cost \$3,662,587.64 (Appx. pp. 1700, 2035). The Court of Appeals held, “An admission of counsel or evidence supporting less than all of the complaint’s specifications of negligent conduct is sufficient to support a directed verdict for the POA.” *Id.* Applying that logic, once Dawkins opined the proximate cause of water intrusion was the lack of kickout flashing where Professional’s stucco intersected with the roof in violation of the code, Fenwick was entitled to a directed verdict.⁸ The Court of Appeals overlooked *Magnolia North* and these points in reversing for an entire new trial.

III. THE COURT OF APPEALS ERRED IN REVERSING FOR A NEW TRIAL ON THE MERITS WHERE THE EVIDENCE SUPPORTS THE TRIAL COURT’S DISCRETION TO EXCLUDE DAWKINS’ EXPERT TESTIMONY.

“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 Fenwick’s additional sustaining ground that Dawkins was properly excluded as an

⁸ At the initial directed verdict stage, the trial court acknowledged Donnie King had admitted to violating the building code, but he did not testify that his violation was the proximate cause of any damage at Fenwick. The court thus concluded, “So **based upon that**, I deny [Fenwick’s] motions for directed verdict **at this time**.” (Appx. p. 1087:5-14) (Emphasis added). Dawkins had not yet testified to his opinions on proximate cause. That occurred after the trial.

exercise of the trial court's discretion due to discovery violations. (Appx. p. 2035). It cited four reasons:

(1) Professional stated it would avoid using the materials that were not produced, (2) the trial court did not state its decision to exclude Dawkins' testimony was based on a discovery violation, (3) Professional made Dawkins available for depositions overnight prior to taking the stand, and (4) only one of the Respondents accepted the offer to depose or interview Dawkins.

(Appx. p. 2041). None of these reasons hold water when the facts are considered.

First, it is of no consequence that Professional offered to not use the materials it failed to produce in discovery. That is not how justice works. This Court has firmly but appropriately reminded members of the Bar that in South Carolina,

"The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed." *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999). The entire thrust of our discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party. *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997). In this respect, the discovery process is designed to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S. Ct. 983, 986-87, 2 L. Ed. 2d 1077 (1958).

In re Anonymous Mbr. of S.C. Bar, 346 S.C. 177, 552 S.E.2d 10 (2001). The discovery rules are designed to promote full disclosure before trial. *Bensch v.*, 354 SC at 182, 580 S.E.2d at 133 (citing *Reed v. Clark*, 277 S.C. 310, 286 S.E.2d 384 (1982)). The approach embraced by the Court of Appeals below allows a party to ignore this policy.

The only item Dawkins disclosed before trial was his *curriculum vitae*. (Appx. pp. 1114:14-22, 1124:21-1125:11, 1128:14-1129:3). Professional never produced the rest of his file. Further, the withholding of evidence was not an isolated occurrence at trial.

Instead, a pattern was uncovered where Professional had failed to produce complete files for its testifying experts. (Appx. pp. 11:75:18-1177:4). Citing to the Court of Appeal's decision in this case, a party may hold on to the element of surprise yet avoid a sanction by simply agreeing not to use what it did not disclose. This approach 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), the Court of Appeals' decision has created a slippery slope that should be corrected upon further review.

Second, the Court of Appeals' conclusion that the trial court did not rely upon Professional's discovery abuse as additional ground to exclude Dawkins is manifestly incorrect. It cannot be denied the trial court was focused on this issue. During arguments over whether to allow Dawkins to testify as an expert, the Court stated:

THE COURT: Your response to that issue only, Mr. Anderson, not whether or not he's an expert, **but as to whether or not the information was provided in discovery.**

...

But [the trial court's] concern now is that there's information that he's going to testify to that he has indicated a couple of times he had electronically sent to you that has not been provided to [Fenwick].

...

If he's saying he sent photos and Ms. Mahon is shaking her head in disagreement, **then we've got some other issues that we need to be concerned about before I even make that leap to qualify him as an expert.**

(Appx. pp. 1124:21-1126:21). Further, the discovery violation issue continued with an *in camera* discussion, which the trial court then put on the record:

And, Mr. Kirchner [counsel for Fenwick], we have **had some discussion in Chambers** that it is your representation

to the Court that you have not received what is contained in that file. Is that correct?

MR. KIRCHNER: That is absolutely correct, Your Honor. This is the first time I've seen this.

THE COURT: And you had requested that information from [Professional] pursuant to your discovery requests. Is that correct?

MR. KIRCHNER: That's correct .

(Appx. pp. 1128:14-25). When the trial court announced its decision not to qualify Dawkins, it expressly referenced the foregoing discussion in chambers about the discovery violation, stating:

... 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.

(Appx. pp. 1119:14-24, 1396:21-1397:7)(Emphasis added). Any suggestion by the Court of Appeals that the trial court did not consider Professional's discovery violation in its ruling is plainly contradicted by the record. Moreover, by the time the trial court ruled, Fenwick had revealed yet another discovery violation by Professional concerning its damages expert, Pusheck. When this occurred, the trial court demanded yet another in chambers meeting with counsel.

MR . LUCEY: Your Honor, we've just been handed a thumb drive from the defendants with Mr. Pusheck's file portions⁹ of which have never been previously produced.

...

⁹ Unlike Dawkins, who produced none of his investigative files, at least Pusheck had previously produced some of his records. As a fair balance, Pusheck was allowed to offer his opinions, while Dawkins was not.

MR. ANDERSON: The only thing I can say, Your Honor, is it was our understanding that this material had been produced. If it hasn't been, then ---

THE COURT: I'm going to Chambers. Let me see you in Chambers.

(Appx. pp. 11:75:18-1177:4). When confronted squarely with a pattern of discovery abuses, the trial court exercised its broad discretion to exclude certain testimony. The court's reasoning was based upon "all of the information" and specifically referenced her *in camera* voir dire, which concerned the discovery violations. It was manifest error for the Court of Appeals to overlook this clear evidence in the record, considering the Court's based its reasoning on a contrary, and incorrect understanding.

Third, the fact that Professional made Dawkins available overnight for questioning in the middle of the trial is no a basis to invade the trial court's discretion on this evidentiary matter. 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. *Bensch v. Davidson*, 354 S.C. at 182, 580 S.E.2d at 133. In contrast, there is no affirmative duty on Fenwick to take the deposition of a witness. In effect, the decision of the Court of Appeals shifts the sanction for discovery abuses away from Professional and rests it upon the shoulders of Fenwick, forcing it to undertake efforts the rules do not require in order to obtain information Professional was obligated to provide. This turns the discovery rules upside down.

The fourth reason articulated by the Court of Appeals, i.e., "only one of [Fenwick's] lawyers" interviewed Dawkins, is perplexing at best. Rule 43(h), SCRCP mandates, "**One counsel only** for each party shall examine or cross-examine a witness."

(Emphasis added). It is plainly evident from the record that Mr. Kirchner handled the examination of Dawkins for Fenwick and he participated in the inspection of Dawkins' unproduced file and the interview of him. (Appx. pp. 1098:18- 1107:21, 1126:12-1129:3, 1395:3-23). Why it matters that only one of Fenwick's lawyers interviewed Dawkins remains a mystery—Fenwick is only allowed one lawyer for this witness. The Court of Appeals offers no explanation whatsoever for why other lawyers assisting Fenwick in the trial should have met with Dawkins to resolve his own failure to produce his file. This rationale is not only arbitrary but also contrary to the Rules of Civil Procedure. Besides, the very point of providing the information during discovery is to avoid the surprise to the opposing party during the trial. Here that happened twice.

It is worth noting that Professional also had given inconsistent and contradictory reasons for failing to produce Dawkins's files. In one breath, Professional blamed Fenwick because, “[Fenwick] never contacted defense counsel **to arrange a review of documents**” possessed by them. (Appx. p. 1888)(Emphasis added). In the next moment, Professional claimed, “Counsel for Professional Plastering informed the Court that they had **never received documents** from the file of Mr. Dawkins.” (Appx. pp. 1125:16-20, 1126:6-11, 1888). These assertions cannot coexist, and it is self-evident that Fenwick cannot come to review documents that Professional never had. That there was more than one discovery violation casts sufficient doubt upon the matter to support the trial court's discretionary rulings, and this Court should review the decision of the Court of Appeals and vote to affirm the judgment in favor of Fenwick. The record demonstrates the trial court performed a broad inquiry and properly exercised the discretion, under the

circumstances, to exclude Dawkins. *Fields v. Haynes Waters Builders, Inc.*, 376 S.C. 545, 558, 658 S.E.2d 80, 87 (2008).

Even if there is any question about the totality of the circumstances relied upon by the trial court, a new trial is not warranted. There is no requirement that a trial judge articulate the reasons for every decision it is called upon to make during a trial. "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 appellate court 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).

CONCLUSION

For the reasons set forth herein, Fenwick respectfully requests the Court to grant its Petition for a Writ of Certiorari.

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**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 201196386

RECEIVED
MAR 21 2014
S.C. Supreme Court

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 Writ of Certiorari and Appendix to the following counsel of record, in the manner provided below:

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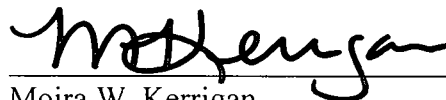
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