

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.

APPENDIX
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Behalf of themselves and others similarly
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Property Owners Association, Inc.

Respondents

Professional Plastering & Stucco, Inc., Maria
Arias, and Miguel Rosales

Defendants

Of whom

Professional Plastering & Stucco, Inc. are
the

Appellants

Professional Plastering & Stucco, Inc.
Plaintiffs

Third Party

Maria Arias, Miguel Rosales, and APS
Enterprises Unlimited, Inc.
Plaintiffs

Third Party

FINAL RESPONSE BRIEF OF RESPONDENT APS ENTERPRISES UNLIMITED

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STATEMENT OF ISSUE ON APPEAL

- I. THE CIRCUIT COURT PROPERLY GRANTED RESPONDENT APS'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO S.C. CODE ANN. § 40-11-270 AND § 40-11-370.**

STATEMENT OF THE CASE

This appeal stems from alleged construction defects at the Twelve Oaks at Fenwick Plantation condominiums located on Johns Island, South Carolina. The buildings, (hereinafter referred to as the Fenwick project), were originally constructed as apartments and completed in 2002. In 2006, they were converted into condominiums, and sold as such. On or about January 4, 2008, Respondents Mark R. and Nan M. Teseniar, on behalf of themselves and others similarly situated, filed suit against the developers alleging design and construction defects and damages related to the buildings. The suit was later amended to include numerous other parties including Summit Contractors, the general contractor, the architect and various subcontractors related to both original construction and repairs conducted during the conversion to condominiums. Likewise, on March 28, 2008 the Twelve Oaks at Fenwick Plantation Property Owners Association, ("the POA"), filed a separate lawsuit alleging damages to the commonly owned areas as a result of design and construction defects. The suits by Tesinair and the POA were consolidated by court order on October 10, 2008. (Hereinafter the Tesinair and Fenwick POA respondents are referred to collectively as "Homeowner Respondents").

Both Appellant Professional Plastering, ("hereinafter Professional Plastering"), and Respondent APS Enterprises Unlimited, Inc., (hereinafter "APS"), were both named as direct defendants in the law suit. Professional Plastering was a stucco subcontractor based out of Florida, hired by the general contractor to performed stucco work during original construction as well as to conduct stucco repairs during the period when the apartments were being converted to condominiums. APS, on the other hand, was a sub-subcontractor hired by Professional Plastering during the conversion period to perform stucco repairs in the breezeways of the buildings.

On April 1, 2010, Professional Plastering filed a cross-claim against APS. Likewise, on May 20, 2010, APS filed a third party complaint against C&N Stucco and Plastering Inc, also a Florida corporation who also performed stucco repairs in the breezeways. ROA

On April 15, 2011, APS filed a motion for summary judgment as to Professional Plastering's cross claims based on the fact that Professional Plastering was not a licensed contractor in the state of South Carolina and therefore, was prevented by S.C. Code Ann. 40-11-370(c) from bringing any action at law or in equity¹. Following oral argument, on April 15, 2011, the circuit court issued an order granting APS's motion for summary judgment².

Prior to the May 9, 2011 start of trial of this case, APS settled with the Homeowner Respondents in exchange for payment of \$100,000. At the time of trial Professional Plastering was the only remaining defendant. The notice of dismissal of the Respondent Homeowners' claims against APS was filed with the circuit court on August 8, 2011.

On July 22, 2011, Professional Plastering filed a notice of appeal as to various trial issues, and as to the circuit court's order granting APS's motion for summary judgment on Professional Plastering's cross-claims. This appeal followed.

¹ C&N Stucco also filed a motion for summary judgment as to APS third party complaint based on the same reasoning.

² The circuit court also granted third-party defendant C&N Stucco's motion for summary judgment as to APS's claims based on the same reasoning. Out of an abundance of caution, APS filed a Rule 59 motion to alter or amend, which is still pending.

STATEMENT OF THE FACTS

APS settled with the Respondent Homeowners and was not involved in the trial of this matter. Its response brief and involvement in this appeal is limited solely to the issue regarding whether the circuit court judge properly granted APS summary judgment as to Professional Plastering's cross claims based on S.C. Code Ann. § 40-11-270, and 40-11-370.

As stated above, Professional Plastering was a stucco contractor hired by the general contractor responsible for the project, to perform stucco work during the original construction and stucco repairs during the conversion period of the Fenwick condominiums. (R.pp,126-198; R.p.1598, lines 13-25). APS was then hired by Professional Plastering as its subcontractor to perform limited stucco repairs in the breezeways of the buildings during the conversion period. (R.p.1598, lines 13-25).

In response to the lawsuit filed by the Homeowner Respondents, Professional Plastering asserted cross claims against APS relating to the work Professional Plastering had hired APS to perform. (R.pp. 210-216). During the course of the litigation, APS filed a motion for summary as to Professional Plastering's cross claims. (R.pp.223-225).

APS's argument is two-fold, beginning with the basic premise that South Carolina Code Ann. § 40-11-5 et al, governs the profession and occupation of contractors. First, pursuant to the Code, specifically, Section 40-11-270(c), as an unlicensed contractor in the State of South Carolina, Professional Plastering was not authorized to use unlicensed subcontractors to perform work. R.p.1600, lines 1-7). Second, as an unlicensed contractor, pursuant to S.C. Code Ann. § 40-11-370, Professional Plastering "may not bring an action either at law or in equity to enforce the provision of a contract." (R.p.1600, lines 1-7).

Following oral argument, Judge Harrington, granted APS's motion for summary judgment. In doing so, she correctly rejected Professional's Plastering's argument that because it was not the general contractor for the overall project, it was not subject to the licensing requirements of this State when hiring subcontractors to perform work.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY GRANTED RESPONDENT APS'S MOTION FOR SUMMARY JUDGMENT AS TO PROFESSIONAL PLASTERING'S CROSS CLAIMS.

A. Standard of Review

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the circuit court under Rule 56, SCRPC. *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Pringle v. SLR, Inc.*, 382 S.C. 397, 403 (S.C. Ct. App. 2009). Rule 56(c), SCRPC. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

However, the issue of interpretation of a statute is a question of law for the court. *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (S.C. 2007) citing *Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) ("The determination of legislative intent is a matter of law."). As such, the Court is "free to decide a question of law with no particular deference to the circuit court." *Id.*

In this case, there is no issue of material fact that Professional Plastering was not a licensed contractor in the State of South Carolina. Moreover, the plain and unambiguous language of the statute provides that unlicensed contractors may not bring an action at law or in equity. As such, Judge Harrington properly ruled that Professional Plastering, as an unlicensed contractor, could not maintain a cause of action against APS based on S.C. Code Ann. § 40-11-20 *et seq.*

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. *Catawba Indian Tribe, supra* at 525-526, 642 S.E.2d at 754.

South Carolina Code Ann. § 40-11-20 *et al*, governs the profession and occupation of contractors. At the onset of the chapter, in creating the South Carolina Contractor's licensing Board to oversee the administration of the chapter, the code states,

The purpose of this board is to protect the health, safety and welfare of the public through the regulation of businesses and individuals who identify, assess, and provide contract work to individuals or other legal entities through the administration and enforcement of this chapter and any regulation promulgated under this chapter

As such, in our state, [n]o entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or greater than five thousand dollars for mechanical

contracting without a license issued in accordance with this chapter³. S.C. Code § 40-11-30 (2011). "General Contractor is defined as "an entity which performs or supervises or offers to perform or supervise general construction." S.C. Code Ann. § 40-11-20(9). "General construction is further defined as "the installation, replacement, or repair of a building, structure, highway, sewer, grading, asphalt or concrete paving or improvement of any kind to real property."

In furtherance of this mission of "protect[ing] the health, safety and welfare of the public," the code specifically provides that only licensed contractors in the State may hire unlicensed subcontractors. Section § 40-11-270(c), states,

Licensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee's license group and license classification or sub classification; provided, the licensee provides supervision. The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the license.

As the code states, the reasoning for allowing the use of these unlicensed contractors is because "[t]he licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the license." *Id.*

A contractor who chooses not to become licensed in this state, proceeds at its own peril. S.C. Code Ann. § 40-11-370(C), specifically, unambiguously states, "An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract."

There is no dispute that Professional Plastering is not a licensed South Carolina Contractor. As such, the plain, unambiguous language of S.C. Code Ann. § 40-11-370(C), prevents Professional Plastering from asserting cross claims against APS.

³ There has been no dispute that the stucco repair work was not in excess of \$5,000.

Professional Plastering takes the position that S.C. Code Ann. § 40-11-370(C), is not applicable. Professional Plastering contends that it was not the general contractor for the Fenwick project; therefore, it was not required to obtain a license in the State of South Carolina. In essence, Professional Plastering argues that it had no duty or responsibility to oversee its own subcontractor, and that Summit had assumed that duty.

Summit was the general contractor for the Fenwick project and was licensed in the State of South Carolina pursuant to S.C. Code Ann. § 40-11-5 et seq. Pursuant to Section §40-11-270, as a "licensee," Summit was authorized to hire unlicensed subcontractors such as Professional Plastering. Under this scenario, Professional Plastering would not be required to become licensed in South Carolina to perform work on the project. Summit as the license holder and entity with the contractual relationship with Professional Plastering would be responsible for the work.

However, when Professional Plastering made the decision to hire its own subcontractor to perform the stucco repairs and entered into a contract with APS, its role expanded to that of "general contractor" defined by the code. *See* S.C. Code Ann. § 40-11-20(8) and (9). In this situation, Professional Plastering was required to become licensed not only to hire an unlicensed contractor, (such as APS), but also to avail itself of the privilege of utilizing the South Carolina court system to enforce any contracts in which it entered. Professional Plastering cannot shield itself from the licensing requirements of this State, and its responsibility to oversee its subcontractor by relying on the license of Summit, an entity that has no contractual relationship with APS.

In support of its argument that Summit had accepted responsibility for overseeing APS's work, Professional Plastering cites to testimony of Tacy McGinty, that "Summit agreed

to provide material supervision for work done at the breezeway and to accept responsibility of obtaining engineering approval for the work.” (Appellant’s final brief, p.48).

However, a full reading the testimony, reveals that Summit’s responsibility only extended to Professional Plastering.

Q. And that Summit will supply all material, supervision, and will be responsible for obtaining all engineering approval of the underlying flashing system; is that correct?

A. Correct.

Q. **And then Professional Plastering will install under Summit Contractors, Inc. direction and is not liable for this flashing or the installation of this flashing, correct?**

A. Correct.

(R.pp.239-246).

There is no evidence to support the argument that Summit Contractor’s agreed to relieve Professional Plastering of the duty and responsibility to supervise its subcontractors. Rather, McGinty’s testimony merely demonstrates that Summit was supervising Professional Plastering, the entity which it had a contractual relationship to do the work.

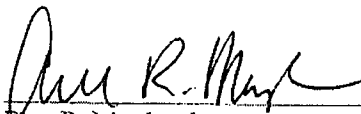
CONCLUSION

The clear and unambiguous language of S.C. Code Ann. § 40-11-270 and § 40-11-370(C), prevents Professional Plastering, an unlicensed contractor, from maintaining its cross claims against APS. Professional Plastering’s argument that it was not required to obtain a license under the Code ignores the Code’s plain and clear definition of the term “general contractor.” It also fails to acknowledge that its role in the Fenwick project was not limited to that of a subcontractor hired by the general contractor, but rather Professional Plastering’s role expanded when it made the decision to contract with and hire a subcontractor to perform work at

its direction. At this point, Professional Plastering, was required by S.C. Code Ann. § 40-11-5 et al, to obtain a South Carolina license.

The circuit court properly granted APS's motion for summary judgment as to Professional Cross claims, and accordingly the order should be affirmed.

Respectfully Submitted,



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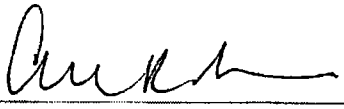
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Certificate of Counsel

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

February 18, 2013


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Plaintiffs,

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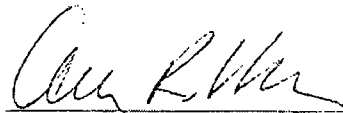
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**APPELLANT'S FINAL REPLY BRIEF TO
BRIEF OF RESPONDENTS MARK F. TESENIAR AND NAN M.
TESENIAR, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY
SITUATED & TWELVE OAKS AT FENWICK PROPERTY OWNERS
ASSOCIATION, INC.**

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ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO QUALIFY CHRIS DAWKINS AS AN EXPERT IN CONSTRUCTION AND ENGINEERING.

A. Dawkins satisfies the expert qualification requirements of Rule 702, SCRE.

1. Dawkins has the requisite knowledge, skill, experience, and education to qualify as an expert in engineering and construction.

Respondents argue that, based on the *voir dire* of Dawkins by Respondents' counsel, Dawkins lacks the requisite knowledge, skill and experience to qualify as an expert in engineering and construction. However, the evidence establishes that Dawkins' knowledge, skill, experience, training and education qualify him as an expert in engineering and construction, and these qualifications supported his proffer as Professional Plastering's expert. (R. p. 1064, line 24 - p. 1069, line 16); (R. p. 1087, line 12 - p. 1089, line 5). He holds a bachelor's degree in Civil Engineering from North Carolina State University and a master's degree in Civil Engineering with a construction management specialty from Georgia Tech. (R. p. 1065, lines 15-21). He is a licensed Professional Engineer in the states of Georgia and North Carolina. (R. p. 1066, lines 3-4). He has been qualified as an expert four times by Georgia courts and has never been found unqualified as an expert in these fields (R. pp. 1087-1088). Additionally, his experience in civil engineering and building construction systems spans nearly thirty years. (R. p. 1065, line 25 - p. 1066, line 1). Dawkins has evaluated and diagnosed stucco cladding issues, including water intrusion behind stucco, on fifty projects. One project involved more than 100 stucco-clad buildings. (R. p. 1068, line 18 - p. 1069, line 8). His construction and engineering experience includes the coastal areas of Georgia and South Carolina. (R. p. 1098, lines 1-6).

Respondents' arguments are not related to Dawkins' qualifications as an expert in engineering and construction. Rather, they contend he is unqualified for reasons that are beyond Rule 702's requirements. To meet the test proposed by Respondents, Dawkins would have to be a licensed architect, general contractor, and engineer who has designed multi-family buildings in Charleston, South Carolina. (See Respondents' Initial Brief pp. 9-10). Respondents' argument is akin to excluding an expert medical doctor in a personal injury case because he did not work in the same hospital where the plaintiff was treated. Respondents' own experts, Myles Glick and Robert Gallagher, would not qualify under this standard.¹ Professional Plastering's Initial Brief highlights Dawkins' construction and engineering qualifications and experience in detail, and Professional Plastering incorporates that discussion here. (Appellant's Brief pp. 12-18).

At trial, Professional Plastering established that Dawkins was being offered as an expert in the fields of engineering and construction. (R. p. 1370, lines 19-23). Dawkins has the requisite knowledge, skill and experience to qualify as an expert in engineering and construction, and the trial court's failure to qualify him as an expert was an abuse of discretion requiring reversal.

2. Dawkins' Testimony was Reliable.

Respondents also argue that Dawkins' testimony was not reliable. It is noted that Respondents did not challenge Dawkins as an expert based upon his reliability. In support of their position, Respondents state that Dawkins performed no destructive testing of his own. However, Dawkins used the same methodology as Respondents' expert Myles Glick. Although Dawkins did not actually perform the physical cutting and

¹ Myles Glick is an architect. He is not licensed as an engineer or general contractor. Robert Gallagher is a general contractor. He is not licensed as an architect or engineer.

removal of building material himself, he was on site for four days making observations at cuts performed by a licensed general contractor. (R. p. 1070, line 25 - p. 1072, line 2).

An expert may "base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions." *Hundley ex rel. Hundley v. Rite Aid*, 339 S.C. 285, 294, 529 S.E.2d 45 (Ct. App. 2000)(economist allowed to testify to future medical costs based on information contained in Life Care Plan prepared by nurse and provided to economist prior to trial); Rule 703, SCRE ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.").

Respondents also argue that Dawkins' testimony was unreliable because it contradicted the testimony of Professional Plastering's president Donnie King. Again, this argument goes to the weight of Dawkins' testimony not admissibility. It is for the jury to determine whether a contradiction exists and which witness to believe.

Significantly, King's testimony did not conflict with Dawkins' expert opinions. King testified about generalized construction conditions as opposed to those specifically related to the Project. King was not at the Project. (R. p. 868, lines 1-25). Dawkins, on the other hand, testified concerning what he observed specifically at this Project.

Professional Plastering's response to Respondents' arguments concerning Donnie King's so-called "admissions" is set forth fully in the next section and will be addressed *infra*.

Respondents have not provided any authority to support their proposition that an expert's opinions based upon direct observation of a project are not reliable when they conflict with the testimony of an individual who has not been to the project.

Respondents' arguments concerning the reliability of Dawkins' testimony are actually challenges to credibility and weight rather than reliability. The examples asserted in Respondents' brief do not deal with the methods or processes employed by Dawkins in making his observations and opinions, but instead deal with alleged conflicts in testimony and what weight should be given to who opened the wall to allow the experts of each party to observe the actual construction in the field. "Judging the credibility of the testimony of witnesses is a function of the jury, not the court, as is the weight to be given to such testimony." *Doe v. Asbury*, 281 S.C. 191, 194, 314 S.E.2d 849 (Ct. App. 1984). Dawkins satisfied the reliability requirement of expert testimony and should not have been excluded on this basis.

B. The Trial Court's Error in Refusing to Qualify Dawkins as an Expert was Highly Prejudicial to Professional Plastering.

Respondents cite the testimony of Donnie King in support of their argument that the error in refusing to qualify Dawkins was harmless. King's testimony does not contain "clear admissions." King was Professional Plastering's president. He was never at the Project.² (R. p. 868, lines 1-25). During King's cross-examination he was asked whether he saw stucco installation errors. King testified he "didn't see that." (R. p. 873, line 21 - p. 874, line 8).

Most of King's testimony addressed general construction conditions, not specifically related to the Project. For example:

Q. You saw the reverse weather lap in the photographs on Monday, correct?

A. I heard Mr. Glick talk about it.

² King relied upon his supervisors to handle the construction at multiple sites in several states. (R. p. 863, line 17 - p. 864, line 5)

Q. Each product you put on the structure is supposed to be layered to the outside, like shingles, so it sheds water, correct?

A. Yes, sir.

Q. And if it's not, it permits water to get behind it; correct?

A. If it's not shingled right, yes, sir.

Q. It permits water to get into the wood structure, correct?

A. Yes, sir.

(R. p. 894, line 14 - p. 895, line 1).

Further, with regard to the weep screeds, King was asked to admit that installing weep screeds would prevent wood rot. King did not agree. In fact, he testified that he disagreed with this question:

Q. And that J-bead for the system -- for a wall system to what we call weep or release water, has to have what's called a weep screed, correct?

A. Yes, sir.

Q. The weep screed is a series of holes that lets the wall breathe or allows the water to go downward and out, correct?

A. That's the theory of it, (affirmative nod).

Q. And you would agree that if water is not expelled from the system, it will cause rot behind the system, correct?

A. Uh, -- I've got a little different theory than Mr. Glick.

Q. So you agree that a properly-applied stucco system needs to be able to drain moisture that gets behind the stucco, correct?

A. They designed a weep screed to put down there

so the water can go out.

Q. And you agree that a properly-designed system needs that, correct?

A. Well, I find it difficult with all the holes in paper-backed lath and the Tyvek that the water's going to make it to the bottom of the building. I don't agree with that. Because on that particular job right there there was probably over two millions holes in that paper-backed lath and that Tyvek, if you add the numbers up for the square footage that is there.

Q. I ---

A. I think the number is something like two and half million holes in it.

Q. Do you deny previously testifying under oath that a properly-applied stucco system need to be able to drain moisture that gets behind the stucco?

A. No, they require you to put a weep screed there at the bottom.

(R. p. 888, line 1- p. 889, line 15)(emphasis added).

Also, King did not admit that Professional Plastering's work concealed the absence of kickout flashing, as Respondents suggest. He testified that when he saw the slides of plaintiff's expert, Myles Glick, it appeared there was no kickout flashing at the location where the stucco was applied. (R. p. 881, lines 9-11). However, he went on to testify that he did not know whether kickout flashing was called for on this job. (R. p. 882, lines 17-18). In fact, Tacy McGinty, the project manager for Summit, the general contractor, confirmed that the architect did not require the installation of kickout flashing. (R. p. 1306, lines 13-19). Summit and the subcontractors relied upon the architectural drawings which did not show kickout flashing, and therefore, kickout flashing was not installed. (R. p. 1307, lines 8-25). If anything, King's testimony shows his obligation to

follow the instructions of the general contractor. King testified, "my business is a customer service business. And when my customers ask me to do special things for them that they want on their job, that's what I do." (R. p. 891, lines 21-24).

Respondents contend that King admitted that Professional Plastering should have installed casing beads, but they were not installed as required. When King was asked if a casing bead was required at the window, King responded, "not very many times." (R. p. 887, lines 1-3). He said that "some people do away with a casing bead with that type of window." (R. p. 886, lines 22-23). Dawkins' testimony would have expanded upon this testimony. He determined that Professional Plastering's scope of work included the instruction to "install j-mold at all edges of the stucco not finished into a wall or jamb. . . If I come to a jam (sic) i.e. as in the jam (sic) of a window . . . Professional Plastering is not required to put a J mold at that location." (R. p. 1574, line 19 - p. 1575, line 6).

With regard to the failure to remove the excess paper between the laths, King testified that he "heard Mr. Glick say that." (R. p. 897, line 19). What follows is a generalized discussion concerning the subject. No specific reference to the Project is made. Other testimony of King included his disagreement that cracking in the stucco was caused by variations in the thickness of the stucco. (R. p. 893, lines 10-18); (R. p. 894, lines 11-13). When asked about the type of fasteners used, King testified that they did use corrosive resistant fasteners as required. (R. p. 895, lines 18-22); (R. p. 896, line 6).

Donnie King's testimony does not provide party admissions supporting the exclusion of Dawkins' expert testimony. Although King admits that the stucco application was not in strict compliance with the NER Report, he never agreed that the

stucco application was the proximate cause of any damages at the Project. Dawkins' expert testimony would have helped the jury understand Professional Plastering's explanation why none of the work by Professional Plastering proximately caused the damage alleged by Respondents.

The reliability of the opinions of Dawkins is not undermined by the testimony of King. The trial court erred in refusing to qualify Dawkins as an expert. Further, Professional Plastering was highly prejudiced by the Court's refusal to qualify Dawkins as an expert.

1. Dawkins' Proffered Opinions are not Cumulative.

Respondents argue that Dawkins' opinions are cumulative to the evidence in the record. However, the evidence in the record shows that Respondents are wrong. No testimony was presented by a construction engineer on Professional Plastering's behalf after Dawkins' opinions were barred. The failure to qualify Dawkins as an expert left a large gap in Professional Plastering's case, which was not filled by the testimony of others. No witness testified that Professional Plastering's work was not a proximate cause of the damages claimed by Respondents. This point was highlighted by Respondents' closing argument, when counsel stated that Professional Plastering had not put up any witnesses to contest that Professional Plastering was not a major cause of the problems. (R. p. 1496, lines 1-4). Dawkins' expert testimony would have refuted this argument.

In his proffer, Dawkins testified that based on their scope of work, Professional Plastering was not required to put a J mold at the window jamb. (R. p. 1574, line 25 - p. 1575, line 7). Dawkins also testified that kickout flashing was not in Professional

Plastering's scope of work, and was taken out of the scope of work of Johnson Roofing. (R. p. 1575, line 20 - p. 1576, line 15). This testimony was consistent with King's testimony that he did not think kickout flashing was required on the Project. When asked about the proximate cause of the damages at the Project, Dawkins testified:

There was water intrusion at the roof-to-wall terminations. The proximate cause was lack of kickout flashings. I mean they should have been there. At the windows, water was entering the head area of the windows because of the improper paper installation, compounded by the improper head flashing installation done by North Florida Framing. Then that situation was compounded even worse by lack of a sill flashing by North Florida framing at the sill of the window because there was no sill flashing installed, based on the evidence and what I could see from anybody's photos plus my own site visit.

There was water intrusion at the balcony-to-wall termination at the breezeways, which was also an integration of - a waterproofing/integration issue.

(R. p. 1576, line 25 - p. 1577, line 18).

Dawkins further testified that he did not find any water intrusion which would have been proximately caused by the work done by Professional Plastering. (R. p. 1577, lines 19-22). With regard to the weep screeds, Dawkins testified, "They had screeds. What is shown in many of the photos is correct, they had holes in them. I did find what he [Glick] found or showed in his report of some that didn't. But there was no water intrusion or damage caused by that condition." (R. p. 1578, lines 3-11).

Dawkins was the only witness to testify that the work of Professional Plastering was not a proximate cause of the damages. Dawkins' expert testimony explained the actual proximate causes of the damages, and he identified which subcontractor was responsible for the work in his opinion. This testimony provided the link between the observations by Tacy McGinty and Claude McNabb of what occurred during construction and the reported condition of the project today.

The testimony of Chris Dawkins was not cumulative, and Professional Plastering was highly prejudiced by his exclusion.

2. The Prejudice to Professional Plastering was not Preventable Despite Multiple Expert Designations.

Respondents suggest that any prejudice to Professional Plastering was preventable because Professional Plastering had designated other experts. However, the other experts designated by Professional Plastering did not have the same qualifications as Dawkins and did not spend four days on site examining the conditions that were present in the field. Donnie King, although designated as an expert, is not an engineer like Dawkins and he was not on site. His testimony was different from Dawkins' testimony.

Respondents contend Professional Plastering's designation of Wade Anderson as an expert makes Dawkins' exclusion harmless at best. Although Professional Plastering designated Wade Anderson as an expert in April 2010, more than a year prior to trial, he did not possess the knowledge and experience that Dawkins acquired during his investigation. Professional Plastering had decided that Dawkins was the expert whose testimony they would rely on in the trial of this matter. Dawkins visited the Project and performed observations of the destructive test cuts, not Wade Anderson. Dawkins reviewed Glick's report and photographs. Dawkins was present and prepared to provide expert testimony at trial, not Wade Anderson.

Professional Plastering did not have another expert to fill Dawkins' place and was highly prejudiced by the trial court's refusal to qualify Dawkins as an expert.

The trial court's refusal to qualify Dawkins as an expert was highly prejudicial to Professional Plastering and warrants reversal.

C. Dawkins' Testimony was not properly excluded based on Professional Plastering's Alleged Discovery Violations.

Respondents contend as an additional sustaining ground that Dawkins' testimony was properly excluded based on an alleged discovery violation by Professional Plastering. Dawkins should not be excluded as an expert on this basis for the following reasons: 1) There was no bad faith discovery violation; 2) there was no prejudice to Respondents resulting from Professional Plastering's alleged discovery violation; and 3) any perceived prejudice was cured by the 24 hour delay provided by the court in which the "notes" of Dawkins were reviewed by Respondents and their expert witness and a deposition of Dawkins was offered by Professional Plastering but the offer was not accepted. Further, an interview with Dawkins was provided to Respondents upon their request. The photographs of Dawkins were provided for the review and use of the Respondents, and Professional Plastering did not use the photographs at any point in its examination. Professional Plastering's Initial Brief discusses in detail the reasons why Dawkins could not have been excluded based upon an alleged discovery violation, and that argument is incorporated in the response set forth below. (App. Brief pp. 20-24).

"The sanction of excluding a witness should never be lightly invoked." *Bensch v. Davidson*, 354 S.C. 173, 182, 580 S.E.2d 128 (2003). "Before so ruling, the trial court should ascertain the type of witness involved, the content of the evidence, the explanation for the failure to name the witness in answer to the interrogatory, the importance of the witness' testimony, and the degree of surprise to the other party." *Id.* (citing *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d (1974)); *Jumper v. Hawkins*, 348 S.C. 142, 152, 558 S.E.2d 911 (2001).

The *Bensch* and *Reed* cases cited by Respondents do not deal with the exclusion of an expert for lack of notice of the contents of the expert's file but deal with the exclusion of an expert for failing to identify the expert in response to discovery. See *Reed v. Clark*, 277 S.C. 310, 315, 286 S.E.2d 384 (1982); *Bensch v. Davidson*, 354 S.C. at 181-182. There is a significant distinction between those cases and the present.

Bensch concerns the exclusion of an expert witness after the party had previously stated in their answers to interrogatories that they did not intend to use any expert witnesses. *Bensch v. Davidson*, 354 S.C. at 181-182. In determining whether to exclude the expert in *Bensch*, the Court considered the factors set forth in *Laney v. Hefley*. The Court determined that the expert's proposed testimony was irrelevant and the content of the testimony was already provided by another witness. *Id.* at 182. The Court further considered the degree of surprise to the opposing party and found that by not identifying the witness as an expert the opposing party was prevented from hiring their own expert. *Id.* at 183. That was not the case here, as Respondents hired multiple experts.

In *Laney*, which involved a motor vehicle accident, the Supreme Court determined that the trial court did not abuse its discretion in refusing to exclude a witness who had not previously been identified in discovery. *Laney v. Hefley*, 262 S.C. 54, 60, 202 S.E.2d 12 (1974). In reaching its decision, the Court found that "[t]he fact that the opposing party has independent knowledge of the existence of such witness prior to trial is a major consideration." *Id.* Through other depositions, defendant had knowledge of the presence of the witness in the home at the time of the accident. *Id.* The Court determined, "While the defendant was given no information as to what, if anything, she knew about the accident, we do not think the defendant was warranted in assuming that

she knew none of the details surrounding the accident, or that she was not [in possession] of any information of probative value as to how the accident occurred, even though she did not see it." *Id.* at 61. *Laney* also refers to *Buckler v. Sinclair Refining Company*, 68 Ill. App. 2d 283, 216 N.E.2d 14, in which the testimony of an undisclosed doctor, who defendant was aware treated the plaintiff, was not excluded. *Id.* "If there was prejudice or surprise it was, at least in part, due to failure of the defendant to inquire more fully into the nature and significance of the examination." *Id.* (citing *Buckler v. Sinclair Refining Company*, 68 Ill. App. 2d 283, 216 N.E.2d 14 (1966)).

In this case, Dawkins was identified as an expert more than a year prior to trial. In the thirteen months before trial when Respondents knew Dawkins was Professional Plastering's expert witness, no deposition was taken, no acceptance of the invitation to review Professional Plastering's files was made, no motion to compel production of documents was filed, and no subpoenas were issued. Respondents did nothing. (App. Brief p. 23). Their allegations of discovery abuse are meritless.

The subject of the alleged discovery violation in this matter is the contents of Dawkins' file. Contained in Dawkins' file were the following items:

- Notations regarding Glick's photographs
- Notations of test cuts observed
- Photographs

(R. p. 1104, lines 1-9). Respondents are unable to show any prejudice as a result of not having notice of the contents of Dawkins' file. Furthermore, Dawkins' file was made available again to Respondents' attorneys on May 12, 2011. That same day, Respondents' expert Myles Glick was able to analyze Dawkins' file and discuss the

contents with Respondents' counsel. (R. p. 1104, lines 6-9); (R. p. 1106, lines 16-19). The trial court afforded Respondents' counsel an opportunity to depose Dawkins that evening. (R. p. 1371, lines 11-18). The trial court did not make a decision on whether to qualify Dawkins as an expert until the next morning. Furthermore, Dawkins did not testify to or rely upon the photographs or notes which had not been produced. (R. p. 1373, lines 9-18). There is no evidence in the record that Respondents suffered any prejudice from their strategic decision to ignore Dawkins' file until trial. In fact, counsel for Respondents attempted to use the notes when cross-examining Dawkins' fact witness testimony. (R. p. 1408, line 23 - p. 1409, line 7).

As stated previously in Professional Plastering's Initial Brief, several steps could have been taken by Respondents: they could have deposed Dawkins, sent him a subpoena, contacted Professional Plastering's counsel to review the contents of his file, or filed a motion to compel. None of these steps were taken by Respondents, as they would rather create another red herring to distract the Court from the substantive issue. (App. Brief p. 23).

Dawkins should not have been excluded as an expert on this basis and a new trial is required.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN EXCLUDING PROFESSIONAL PLASTERING'S STUCCO-ONLY ESTIMATE.

The trial court's exclusion of Professional Plastering's stucco-only estimate was an abuse of discretion resulting in prejudice to Professional Plastering. In support of their argument that any error by the Court in excluding the stucco-only estimate was harmless, Respondents cite *Clark v. Cantrell*, 332 S.C. 433, 504 S.E.2d 605 (Ct. App. 1998) (*aff'd*

339 S.C. 369, 529 S.E.2d 528 (2000). The facts of *Clark* are distinguishable from those in the present case.

The issue in *Clark* involved the defendant's attempt to admit a diagram prepared by her expert after the court's denial of her request to admit a video animation of the scene of the collision. In denying the defendant's request to admit the diagram, the Court determined that the diagram did not indicate the relative speeds of the vehicles and by admission of the expert the diagram did not accurately portray the testimony concerning the positions of the vehicles prior to the collision. *Clark*, 332 S.C. 433, 450 (Ct. App. 1998). Unlike *Clark*, there was no issue of the accuracy of the excluded estimate in the present case. Respondents did not object to the content or accuracy of the exhibit. Their only objection alleged a late production of the estimate prepared in rebuttal to Respondents' estimate. Further, *Clark* did not involve a competing diagram that was being rebutted. Professional Plastering's stucco-only estimate was prepared to rebut Respondents' estimate. The exhibit showed the repair costs estimates. The cost figures included in the exhibit were previously provided to Respondents. As Respondents admit in their Brief, Respondents already had an estimate from Pusheck with the breakdown of costs. (Respondents' Initial Brief p. 25). The only thing different in this estimate was it showed what percentage of Procon's and CRW's estimates were fees, and it placed the two estimates side by side so that it was easy for the jury to compare the two estimates. There was no prejudice to Respondents. Professional Plastering's Initial Brief is relied upon for further argument on this issue.

Respondents argue that the stucco-only estimate was an impermissible pitting of witnesses. The impermissible pitting of witnesses is the act of examining a witness in

such a manner as to force the witness to attack the veracity of another witness. *State v. Kelsey*, 321 S.C. 50, 69, 502 S.E. 2d 63 (1998). The stucco-only estimate prepared by Pusheck did not attack Gallagher's veracity but rather compared the methods used by Gallagher to those used by Pusheck to calculate the cost of repair, therefore, the stucco-only estimate did not constitute pitting of witnesses.

Professional Plastering was prejudiced by the trial court's exclusion of the stucco-only estimate. The cost of repair was a contested issue between Professional Plastering and Respondents, and exclusion of the estimate left the jury with only Respondents' estimate in the jury room to consider. The trial court erred in excluding Professional Plastering's stucco-only estimate and should be reversed.

III. THE TRIAL COURT ERRED IN DENYING PROFESSIONAL PLASTERING'S MOTIONS FOR SET-OFF AND A NEW TRIAL *NISI REMITTITUR*.

A. The Record does not Support the Trial Court's Decision to Deny Professional Plastering's Motion for Set-Off.

Respondents argue that Professional Plastering consented to the issue of set-off being dealt with by the jury by not objecting to the theme of Respondents' case. This is not accurate. Professional Plastering has explained on appeal why and how the trial court erred in its decision to include the settlement amount on the verdict form, and in denying Professional Plastering's motion for set-off. Professional Plastering properly objected when Respondents presented their proposed verdict form. (R. p. 1471, lines 2-24). Prior to that point, the issues of set-off or the verdict form had not been addressed. Further, there was no prior indication that the trial court would fail to perform the post-verdict assessment and evaluation necessary when application is made for set-off. The record

shows that there was no indication that the court would allow the set-off issue to be addressed by the jury. This was a question of law, not a finding of fact for the jury.

"[B]efore entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury," *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188 (Ct. App. 2012). "When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." *Id.* (citing *Ellis v. Oliver*, 335 S.C. 106, 112, 515 S.E.2d 268, 271-72 (Ct. App. 1999)).

S.C. Code Ann. § 15-38-50 provides:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

- (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
- (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15-38-50.

"Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." *Vortex Sports v. Ware*, 378 S.C. 197, 210, 662 S.E.2d 444 (Ct. App. 2008)(citing *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999)). "This court has previously recognized a strict application of the statute may lead to unintended results; however, this is a matter for the legislature to

correct if our interpretation is contrary to its intent.” *Id.* “Our supreme court made clear that a statutory set-off is a mandate, not an allowance that the benefitting party must establish.” *Ellis v. Oliver*, 335 S.C. 106, 111 (Ct. App. 1999).

Respondents argue that set-off is not required as a matter of law when there are questions of fact concerning the settlement agreement for the jury’s determination. This is incorrect as the interpretation of a settlement agreement, like any contract interpretation issue, is a question of law for the court. There were no questions of fact regarding the settlement agreements for the jury’s determination. As stated in *Vortex Sports v. Ware*, 378 S.C. 197, 210 (Ct. App. 2008)(internal cites omitted), “The plaintiff contended because the measure of damages was different for the two causes of action, then two different injuries occurred. This court noted that plaintiff’s ‘claims against Richland Memorial and Dr. Oliver arose out of the same factual scenario’ and found the plaintiff ‘confuse[d] the concept of damages with the meaning of the word injury as used in the statute.’ Injury, as used in the statute, is broad enough to include all damages.” *Vortex Sports v. Ware*, 378 S.C. 197, 210 (Ct. App. 2008). Any interpretation obligation was part of the court’s analytical responsibility to decide whether the equitable relief of set-off was appropriate. This decision is ordinarily reserved by the judge for a post-trial determination of the set-off. There are no fact questions regarding the settlement agreements for the jury’s determination. Further, as noted in Professional Plastering’s brief, the settlements had been approved by the Court prior to the trial.

An application to the Court is the only proper method for applying set-off. Respondents argue that they have not received a double recovery, and therefore a set-off is not warranted. However, this argument is without merit. The double recovery is

readily apparent in the list of settlements provided in Professional Plastering's Motion for Set-off. (R. p. 508). This issue was addressed by the Court in *Ellis v. Oliver*. The plaintiff argued that at trial she did not present any evidence of medical expenses attributable to Richland Memorial (the settling party) which were the exact amount of the settlement, and therefore the jury's verdict did not take into consideration her Richland Memorial bills or settlement with Richland Memorial. *Ellis v. Oliver*, 335 S.C. 106, 111, 113 (Ct. App. 1999). The Court determined, "Application of the settlement credit was statutorily mandated in this case. Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." *Id.*

Respondents' assertion that the jury was not required to award damages to Respondents if they found in their favor is incorrect and contrary to Respondents' position in trial. Professional Plastering requested an additional jury charge that the jury was not required to award damages in excess of the settlements already received. (R. p. 1533, line 22;- p. 1534, line 21). In response to Professional Plastering's request, counsel for Respondents stated that "... if we are asking for something here that it is a curative instruction, that if you do find for the plaintiff that you must award something." (R. p. 1536, lines 3-7). Although the trial court's instructions to the jury contained the language concerning "damages, if any," Respondents objected to "if any" being included on the verdict form. (R. p. 1529, line 24- p. 1530, line 8); (R. p. 1533, line 19 - p. 1537, line 20). Despite Professional Plastering's objection to the change, the trial court then struck the words "if any" from the verdict form, requiring the jury to award damages to Respondents in an amount above the \$8,025,000 already received if the decision favored

Respondents. (R. p. 1537, lines 14-20). The verdict form was the trial court's final written instruction to the jury, which accompanied them to the jury room. It stated in part,

"The Plaintiffs have received a total of \$8,025,000 in settlements in this matter from other parties. Therefore, any damages that you award Plaintiffs would be in addition to those damages already received.

4. If you found in favor of Plaintiffs on either cause of action, please state the amount of damages sustained by the plaintiff."

(R. p. 65-66).

Respondents also argue that the settlement amounts should not be considered by the Court because they were not included in the trial record. The settlements were presented at the appropriate time, when Professional Plastering made their post-verdict motion for set-off. (R. pp. 506-699). The settlement amounts were set forth in the motion, and the settlement agreements were attached as exhibits. Prior to that time, the issue of set-off was not before the court.

Respondents argue that Professional Plastering suffered no prejudice from the settlement amount being included on the verdict form. This is not true. Professional Plastering was highly prejudiced. The Court, by including the settlement amount on the verdict form, endorsed the settlements and Respondents' argument that the settlement was insufficient compensation. There was no provision for taking evidence on the issue of common damages as would have been done in a proper judicial review under a motion for set-off. Professional Plastering was highly prejudiced by the trial court's decision to not review the verdict and settlement for dual payment of common damages as required.

The trial court erred in denying Professional Plastering's motion for set-off, by including the settlement amount on the verdict form, and in its instructions to the jury, therefore the trial court should be reversed.

B. The Record Does Not Support the Trial Court's Decision to Deny Professional Plastering's Motion for New Trial *Nisi Remittitur*.

Professional Plastering's Initial Brief addresses this issue, and Professional Plastering relies on the argument set forth in its initial brief in support of this issue.

The trial court abused its discretion in denying Professional Plastering's motion for new trial *nisi remittitur*, and therefore should be reversed on this ground.

IV. THE TRIAL COURT'S JURY CHARGES ON BREACH OF IMPLIED WARRANTY OF WORKMANLIKE SERVICE, COST TO REPAIR TO EXISTING CODE, DEPRECIATION, AND NEGLIGENCE WERE ERRONEOUS.

Professional Plastering's Initial Brief addresses this issue in detail, and Professional Plastering relies on the argument set forth in its initial brief in support of this issue.

The trial court's jury charges on breach of implied warranty of workmanlike service, cost to repair to existing code, depreciation and negligence were erroneous, and therefore the trial court should be reversed on this issue.

V. THE TRIAL COURT ERRED IN DENYING PROFESSIONAL PLASTERING'S MOTION FOR DIRECTED VERDICT ON RESPONDENTS' CLAIM FOR BREACH OF WARRANTY OF WORKMANLIKE SERVICE AND ITS MOTION FOR JNOV.

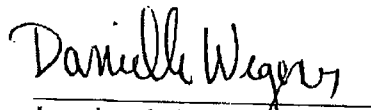
Respondents cite the case of *Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) for the position that the warranty of workmanlike service claim applies in this case. However,

Magnolia North does not contain an analysis of this issue. Professional Plastering relies on its previous argument on the issue set forth in its Initial Brief.

CONCLUSION

For the reasons set forth above and those set forth in Professional Plastering's Initial Brief which are incorporated herein by reference, Professional Plastering respectfully requests the decision of the trial court be reversed for a new trial.

Respectfully submitted,



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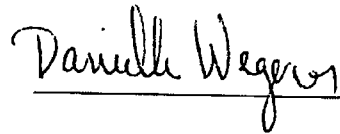
February 8, 2013

Charleston, South Carolina

CERTIFICATE OF COUNSEL

I certify that this Final Reply Brief of Appellant to Brief of Respondents Mark F. Teseniar and Nan M. Teseniar on behalf of themselves and others similarly situated & Twelve Oaks at Fenwick Property Owners Association, Inc. complies with Rule 211(b).

ANDERSON REYNOLDS & STEPHENS, LLC

A handwritten signature in cursive script, reading "Danielle Wegener", is written over a horizontal line.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2011196386

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 Rosales,
Defendants,

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

Professional Plastering & Stucco, Inc., Appellant

v.

Maria Arias, Miquel Rosales, and APS Enterprises Unlimited, Inc., Third-Party
Plaintiffs,

Of whom APS Unlimited, Inc. is Respondent.

APPELLANT'S FINAL REPLY BRIEF TO
BRIEF OF RESPONDENT APS ENTERPRISES UNLIMITED, INC.

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ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING RESPONDENT APS' MOTION FOR SUMMARY JUDGMENT AS TO PROFESSIONAL PLASTERING'S CROSS CLAIMS.

APS contends that the language of the statute provides that an unlicensed contractor may not bring an action at law or in equity, and therefore Professional Plastering could not maintain an action against APS. This is not correct. Under the clear and unambiguous language of the statute, Professional Plastering was not required to obtain a license. S.C. Code Ann. § 40-11-370(c).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993)). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Id.* "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.*

S.C. Code Ann. § 40-11-370(c) provides, "An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract." Professional Plastering was not required to hold a license under the statute therefore they should not be prohibited from bringing an action to enforce a contract.

Under S.C. Code Ann. § 40-11-270, "Licensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee's license group and license classification or sub classification; provided, the licensee provides

supervision.” S.C. Code Ann. § 40-11-270. Summit was the general contractor for the Project, and Professional Plastering properly worked under them and was not required to hold a license. APS does not dispute that Summit was the licensed general contractor for the Fenwick project. (Respondent’s Initial Brief p. 11). APS also agrees that Summit was authorized to hire unlicensed subcontractors such as Professional Plastering, and Professional Plastering would not be required to become licensed to perform work on the Project. (Respondent’s Initial Brief p. 11). However, APS argues that Professional Plastering became a general contractor when it hired APS as its subcontractor. This argument is without merit.

Pursuant to S.C. Code Ann. § 40-11-30, a person or entity acting as a general contractor is required to obtain a license if the work to be performed is of greater value than \$5,000. S.C. Code Ann. § 40-11-30. The statute defines general contractor as “an entity which performs or supervises or offers to perform or supervise general construction.” S.C. Code Ann. § 40-11-20(9). Professional Plastering does not satisfy this definition. Professional Plastering did not provide supervision of the work performed by APS. APS was hired by Professional Plastering to perform repairs to the stucco at the breezeways at the Project. (R. p. 227.) They were hired as labor only. Professional Plastering was not responsible for supervising the work performed by APS. In her deposition, Tacy McGinty, the project manager for Summit, testified as follows:

Q. Okay. Now, in the fax that you wrote you have that the installation of flashing under the Magna Wall stucco and paper backed lath at the breezeway bottom edges will be the responsibility of Summit Contractors, Inc., correct?

A. Correct.

Q. And then you go on to state that you are requesting the use of labor only from your company, Professional Plastering, correct?

A. Correct.

Q. And that Summit will supply all material, supervision, and will be responsible for obtaining all engineering approval of the underlying flashing system, is that correct?

A. Correct.

(R. p. 245, line 17 - p. 246, line 11).

Summit, the general contractor, was responsible for the supervision of the repairs at the breezeways not Professional Plastering. APS argues that McGinty's testimony does not show that Summit was responsible for APS' work. Professional Plastering does not agree. Her testimony does not limit Summit's supervision of the work at the breezeways to Professional Plastering. The supervision would encompass APS as well because Summit was requesting labor only. (R. p. 245, line 23 - p. 246, line 1). Additionally, APS' argument regarding supervision highlights Professional Plastering's contention that summary judgment is inappropriate. The issue of whether or not Summit provided supervision is a question of material fact to be decided by the jury, making summary judgment inappropriate. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537 (1991); (R. p. 1601, line 25 - p. 1602, line 6).

Under the statute, the term subcontractor includes both those hired by the general contractor and the subcontractors hired by the subcontractors. S.C. Code Ann. § 40-11-20(22) defines subcontractor as an "entity who contracts to perform construction services for a prime contractor or another subcontractor." S.C. Code Ann. § 40-11-20(22). Therefore, Professional Plastering would not fall under the definition of general contractor. They would still fall under subcontractor. See S.C. Code Ann. § 40-11-

20(22). Under a clear reading of the statute, Professional Plastering was not required to have a license in order to maintain its claims against APS.

In short, Professional Plastering is not within the class to whom the prohibition of S.C. Code Ann. § 40-11-370(c) applies and the order granting summary judgment should be reversed.

Additionally, the initial brief of APS fails to address the issue of whether the non-contractual claims brought by Professional Plastering against APS should be dismissed. Therefore, APS waives any objection to this issue. *First Union National Bank v. FCVS Comms.*, 321 S.C. 496, 469 S.E2d 619 (Ct. App. 1997)(*reversed on other grounds* 328 S.C. 290)(appellate court may treat a failure to respond as a confession that the appellant's position is correct.)

CONCLUSION

For the reasons set forth above and those set forth in Professional Plastering's Initial Brief which are incorporated herein by reference, the Order of the trial court granting APS summary judgment should be reversed.

Respectfully submitted,

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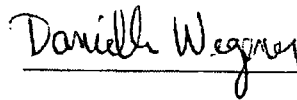
February 8, 2013

Charleston, South Carolina

CERTIFICATE OF COUNSEL

I certify that this Final Reply Brief of Appellant to Brief of Respondent APS Enterprises Unlimited, Inc. complies with Rule 211(b).

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The South Carolina Court of Appeals

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Re: Mark Teseniar v. Professional Plastering
Appellate Case No. 2011-196386

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

A handwritten signature in black ink, which appears to read "Jenny Abbott Kitchings". The signature is stylized and includes a flourish at the end.

CLERK

cc: Justin O'Toole Lucey, Esquire
Roy Pearce Maybank, Esquire
Jesse A. Kirchner, Esquire
Jason Alan Daigle, Esquire
Amanda R. Maybank, Esquire
Michael A. Timbes, Esquire
John T. Chakeris, Esquire
Phillip Ward Segui, Jr., Esquire
W. Jefferson Leath, Jr., Esquire
The Honorable Kristi Lea Harrington

**THE STATE OF SOUTH CAROLINA
In The 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 Rosales, Defendants,

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

Professional Plastering & Stucco, Inc., Appellant,

v.

Maria Arias, Miquel Rosales, and APS Enterprises
Unlimited, Inc., Third-Party Plaintiffs,

Of whom APS Unlimited, Inc. is the Respondent.

Appellate Case No. 2011-196386

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5188
Heard October 17, 2013 – Filed January 8, 2014

REVERSED

Jonathan J. Anderson and Danielle Beck Wegener, both of Anderson Reynolds & Stephens, LLC, of Charleston; Everett Augustus Kendall, II, and Christy Elizabeth Mahon, both of Sweeny Wingate & Barrow, PA, of Columbia; for Appellant Professional Plastering & Stucco.

W. Jefferson Leath, Jr., of Leath Bouch & Seekings, LLP, of Charleston; Phillip Ward Segui, Jr., of Segui Law Firm, of Mt. Pleasant; John T. Chakeris, of Chakeris Law Firm, of Charleston; Jesse A. Kirchner and Michael A. Timbes, both of Thurmond Kirchner Timbes & Yelverton, PA, of Charleston; Justin O'Toole Lucey, of Mt. Pleasant; all for Respondents Mark F. and Nan M. Teseniar & Twelve Oaks at Fenwick.

Roy Pearce Maybank, Amanda R. Maybank, and Jason Alan Daigle, all of Maybank Law Firm, LLC, of Charleston, for Respondent APS Enterprises.

LOCKEMY, J.: In this civil appeal arising out of the defective construction of an apartment complex, Professional Plastering & Stucco, Inc. (Professional) appeals the jury's verdict in favor of Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and other similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc. (POA) (collectively referred to as Respondents) on the claims of negligence and breach of warranty of workmanlike service. Professional asserts the trial court committed reversible error by (1) failing to qualify Chris Dawkins as an expert witness, (2) failing to admit Professional's stucco-only estimate, (3) denying Professional's motion for set-off and motion for a new trial nisi remittitur, (4) including the settlement amount received by Respondents on the verdict form and in its jury charge, (5) giving improper jury instructions, and (6) denying Professional's motion for a directed verdict and judgment notwithstanding the verdict (JNOV) on the claim of breach of warranty of workmanlike service. Professional also appeals the trial court's grant of summary judgment in its cross-claim against APS Unlimited, Inc. (APS). We reverse.

FACTS

Respondents represent the interests of the POA, and, in a representative capacity, the individual homeowners of the units at Twelve Oaks at Fenwick Plantation (Fenwick) on John's Island, South Carolina. Fenwick was originally an apartment complex, but the units were converted to condominiums in 2006. Fenwick contained 216 units within twelve buildings. After discovering various problems in the buildings, Respondents retained Miles Glick, a practicing architect, to investigate the source of the problems. Glick determined there were numerous deficiencies in the overall construction attributable to various contractors and sub-contractors.

The Teseniars filed a civil action alleging design and construction defects resulting in water intrusion in the buildings at Fenwick. The POA filed a separate lawsuit, but the two suits were consolidated on October 10, 2008. While the lawsuit initially involved numerous defendants, all of the defendants, with the exception of Professional, settled with Respondents. Thus, the trial focused solely on the exterior stucco installed by Professional and the resulting damage.

Summit Contractors, Inc. (Summit) operated as the general contractor for Fenwick. Professional was hired as a subcontractor for the original construction project,¹ and it installed about one-quarter million square feet of stucco at Fenwick using a form of stucco called the Magna Wall system. The Magna Wall system is a proprietary stucco system that must be installed pursuant to the manufacturer's instructions. It is a water management system designed to control water that gathers behind the cladding by allowing it to escape before damage occurs, as opposed to a barrier system, which does not allow water behind the cladding. Professional was certified by the manufacturer to install the system.

At trial, Respondents presented Glick who was qualified as an expert in architecture, forensic architecture, and construction. He testified to numerous deficiencies in Professional's work that constituted a violation of building codes, the installation instructions, and industry standards. Glick stated there was improper flashing and lapping, which allowed water to damage the underlying sheathing and studs in the wall. Further, Glick testified there were missing weep screeds, which should have been installed to allow water entering the system to drain from the wall to avoid causing damage.

¹ Professional ceased doing business the same year this lawsuit was filed.

Donnie King, sole owner of Professional at the time of Fenwick's construction, testified on behalf of the Respondents regarding Professional's stucco application. Respondents also presented Robert Gallagher, who was qualified as an expert in the fields of general contracting and estimating. Gallagher offered opinions about the associated costs of Glick's suggested repairs. Gallagher prepared a \$15,748,225.00 estimate that he alleged would remedy 100% of the problems, including the stucco defects. However, because Professional was the sole remaining defendant at trial, Gallagher also prepared a "stucco-only" estimate, which he alleged would equal \$8,761,443.00.

In response to the evidence and testimonies presented by Respondents, Professional offered the testimony, via deposition, of Claude McNabb and Tacy McGinty. McNabb was the vice president of the developer of Fenwick when it was constructed, and he stated Professional's stucco application was proper and passed his inspection. McGinty, the general contractor's project manager during Fenwick's construction, testified that Professional's work was properly done in accordance with the contract documents.

Professional presented Christian Dawkins and attempted to qualify him as an expert in construction and engineering, but Respondents objected to his qualification. In addition to contending Dawkins was not qualified to testify as an expert, Respondents also argued his testimony should be excluded based on a discovery violation. After voir dire and a subsequent overnight recess, the trial court ruled against qualifying Dawkins. Dawkins was only allowed to testify to his personal observations during his investigation of Fenwick, and he could not give any opinions.

Professional presented Robert Pushek as an expert in construction and restoration, and he was qualified without objection. Pushek offered testimony regarding the cost to repair the damages at Fenwick. In response to Gallagher's stucco-only estimate, Pushek asserted it would only cost \$3,662,587.64 to repair any stucco-related damage. Professional was allowed to display a document that reflected the price comparison between Gallagher's and Pushek's stucco-only cost estimates on an overhead projector. However, when Professional requested the document be admitted into evidence as Defendant's Exhibit 4, Respondents objected. The trial court sustained Respondents' objection.

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The jury found in favor of Respondents on the two causes of action, negligence and breach of warranty of workmanlike service, awarding actual damages in the amount of \$7,723,225.00. Following the return of the jury's verdict, Professional made motions for a new trial absolute, set-off, JNOV, and new trial nisi remittitur. Within ten days of the trial, Professional filed written motions, memoranda, and replies in support of its motions. Each motion was denied by the trial court in a Form 4 order filed on June 17, 2011. Professional subsequently filed a motion to alter or amend the judgment, which was also denied by the trial court on July 19, 2011.

During the ongoing lawsuit between Professional and Respondents, Professional filed a cross-claim on April 1, 2010, against its subcontractor, APS, asserting claims for negligence, breach of warranties, breach of contract, and indemnity. Professional had hired APS as a sub-contractor to perform stucco repairs in the breezeways of the buildings during Fenwick's conversion into condominiums. APS was also included as a defendant in Respondents' suit and settled for the amount of \$100,000.

APS filed a motion for summary judgment on the basis that Professional was not a licensed stucco installer, and, therefore, Professional could not maintain these claims pursuant to statutory law. The trial court granted APS' motion on May 11, 2011. Professional subsequently filed a Rule 59(e), SCRCP motion to alter or amend the judgment, and the trial court denied it.

Professional now appeals the jury verdict, as well as the trial court's denial of its motions for a new trial, directed verdict, JNOV, set-off, and to alter or amend the judgment in its suit with Respondents. Professional further appeals the order granting APS's motion for summary judgment and the subsequent denial of its Rule 59(e), SCRCP motion.

LAW/ANALYSIS

Qualification of Chris Dawkins

Professional argues the trial court erred in failing to qualify Dawkins as an expert witness. We agree.

"The qualification of a witness as an expert is a matter largely within the trial court's discretion and will not be reversed absent an abuse of that discretion."

Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008) (citing *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997)). "An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." *Id.* at 555, 658 S.E.2d at 85-86 (citing *Gooding*, 326 S.C. at 252, 487 S.E.2d at 598).

Pursuant to Rule 702, SCRE, a person may be qualified as an expert based upon "knowledge, skill, experience, training, or education." Rule 702, SCRE, does not set forth mandatory requirements for the qualification of an expert witness, acknowledging that "there are a variety of ways in which a person can become so skilled or knowledgeable in a field that their opinion in a scientific, technical, or specialized area can assist the trier of fact in determining a fact or in understanding the evidence." *Fields*, 376 S.C. at 556, 658 S.E.2d at 86.

Because a specific licensing requirement is potentially inconsistent with the variety of ways a person may gain specialized knowledge, [our supreme court has recognized] that a trial court's decision to refuse to qualify a person as an expert based solely on the failure to meet a licensing requirement arguably impairs the truth-seeking function of courts.

Id.; see *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 374-75 635 S.E.2d 97, 104 (2006).

"At the same time, however, [the appellate court's] jurisprudence emphasizes the role of the trial court as the gatekeeper in determining both the qualifications of an expert and whether the expert's testimony will assist the trier of fact." *Fields*, 376 S.C. at 556, 658 S.E.2d at 86. While "non-compliance with licensing requirements or with the statutory law in specialized areas should not require, *a fortiori*, a trial court to refuse to qualify a witness as an expert," a trial court can consider it as a factor "when judging a purported expert's qualification." *Id.* When a trial court is "determining a witness's qualification as an expert, [it] should make an inquiry broad in scope." *Id.*

Specifically, the trial court ought to take into account the factors delineated in the rules of evidence, the statutory law, and any other sources of authority that may be

relevant to a purported expert witness's level of skill or knowledge; and the trial court must further determine whether the offered testimony will assist the trier of fact.

Id. "Although lack of licensing and violations of statutory law may often coincide with a lack of specialized skill or knowledge, these attributes are not always bedfellows." *Id.* at 556-57, 658 S.E.2d at 86.

Professional attempted to qualify Dawkins in the field of engineering and construction. Dawkins held a bachelor's degree in civil engineering from North Carolina State University and a master's degree in civil engineering with a construction management specialty from Georgia Tech. He was licensed in Georgia and North Carolina, but he was not licensed in South Carolina. He had nearly thirty years of experience in civil engineering and construction. He asserted his current practice typically involved diagnosing problems with buildings, including stucco issues. Dawkins observed testing for four days at the building site, and a licensed professional engineer did the testing for him. The trial court requested Professional present Dawkins' particular skills and understanding of South Carolina licensure and building codes. Dawkins stated he was familiar with the applicable building code, the International Building Code of 2000, because it was also used in Georgia. He worked in the coastal region of Georgia, and he asserted there was no distinction in his analysis of construction in Georgia versus construction in South Carolina. However, he admitted he was not familiar with any local modification to the International Residential Code of 2000 (IRC).

Respondents opposed his qualification for several reasons, asserting (1) he was an out-of-state professional, (2) he had only been qualified as an expert four times, and only in Georgia, (3) he was not licensed in South Carolina which is a violation of statutory law, (4) he has never designed a building of the type at issue in this case nor has he ever designed a building in South Carolina, (5) he only observed testing in this case and did not conduct any testing of his own, and (6) while he is titled a construction consultant, he has no certification for that designation. The trial court did not qualify Dawkins, stating that it was considering all the information as a whole, "in its entirety," and not relying solely on the fact that he was not licensed in South Carolina.

We find the trial court abused its discretion because it did not delineate any particular reason for its decision to not qualify Dawkins and we believe he held the prerequisite experience needed to testify as an expert under Rule 702, SCRE. *See*

Wilson v. Rivers, 357 S.C. 447, 452-53, 593 S.E.2d 603, 605-06 (2004) (finding the trial court erred in not qualifying an expert in the field of biomechanics when he was a medical doctor with a doctorate in human physiology and training in biomechanics and he had been qualified as an expert in the field of biomechanics in other states). Dawkins had a lengthy career in the construction business and explained his extensive educational background. Respondents argue that Dawkins' lack of familiarity with the IRC is a factor to consider in whether he should be qualified; however, Respondents' own expert witness, Glick, stated the IBC was the appropriate code, not the IRC. Thus, Dawkins' familiarity with the IRC or lack thereof should have no bearing upon his qualification as an expert witness. As to Respondents' remaining arguments against Dawkins' qualification, "[a]ny defects in the amount of his education and experience, if any, go to the weight of his testimony and not its admissibility." *Id.* at 453, 593 S.E.2d at 605. We find Dawkins had technical and specialized knowledge that would assist the trier of fact to understand the proximate cause of the water intrusion, and we hold the trial court erred in failing to qualify Dawkins.

Even though we find error in the trial court's decision, Professional must show it was prejudiced by this error to warrant reversal. *See Fields*, 376 S.C. at 557, 658 S.E.2d at 86 (stating that to "warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice"). Respondents allege any testimony given by Dawkins would have been cumulative, and, thus, the exclusion of his testimony was harmless.

Professional proffered Dawkins testimony after the jury returned its verdict. Dawkins gave in-depth testimony regarding the water intrusion, which he claimed was caused by incorrect installation of items surrounding the windows, a duty that was not within the scope of Professional's work. Dawkins explained that North Florida Framing was responsible for the improper installation and stated Professional would never have seen the problems when it completed its work. Moreover, he gave definitive testimony in which he said the water intrusion was not proximately caused by Professional's work.

Professional presented another witness, Robert Puschek, for qualification in the areas of construction and restoration with no objection. Respondents claim even if it was error to not qualify Dawkins as an expert, Puschek's testimony mirrored Dawkins' proffered testimony in many ways, and thus, Dawkins' testimony would have been cumulative and its exclusion was harmless. We disagree. Puschek was prevented from critiquing any of Glick's work as an architect because Respondents

successfully argued that Pushek was not qualified as an architectural engineer. Pushek was limited in testifying to the needed repairs of the buildings and the pricing of the repairs. Pushek made an estimate of repair and a proposal, but he did not do a forensic analysis of the buildings. Thus, we do not believe Dawkins testimony would have been cumulative. *Compare Fields*, 376 S.C. at 558, 658 S.E.2d at 87 (finding the plaintiffs' expert's testimony would have been cumulative to their other two experts' testimonies, and further, the trial court ruled the other experts would be permitted to say that they relied on the excluded witness's report in reaching their conclusions). The trial court's decision to qualify Respondents' expert witness who testified to the proximate cause of the water intrusion while declining to qualify Dawkins' created a situation where Professional had no expert witness to rebut Respondents' expert witness's testimony.

Respondents argue that Donnie King gave testimony indicating Professional's fault in causing the water intrusion and that considering King's contradictory testimony, it strained "credibility to suggest the verdict would have been any different had Dawkins been allowed to take the stand and essentially disagree with the admissions of the party who hired him to testify." However, any contradictory testimony from King only further highlights the prejudicial nature of excluding Dawkins' testimony.

For the reasons listed above, we find the failure to qualify Dawkins and the resulting exclusion of his testimony was prejudicial error. Accordingly, we reverse the trial court.

Dawkins Discovery

As an additional sustaining ground for affirming the trial court's decision to exclude Dawkins' testimony, Respondents argue it was an appropriate discovery sanction in response to Professional's failure to produce Dawkins' files, which included field notes. We disagree.

"A trial court's decision on whether or not to impose discovery sanctions is reviewed for abuse of discretion." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 82, 716 S.E.2d 877, 885 (2011) (citing *Jamison v. Ford Motor Co.*, 373 S.C. 248, 270, 644 S.E.2d 755, 766 (Ct. App. 2007)). "In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice." *Jamison*, 373 S.C. at 270, 644

S.E.2d at 767 (quoting *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997)). "A failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion." *Id.* (citing *Samples*, 329 S.C. at 112, 495 S.E.2d at 216).

This court has held a trial judge is required to consider and evaluate the following factors before imposing the sanction of exclusion of a witness: (1) the type of witness involved; (2) the content of the evidence emanating from the proffered witness; (3) the nature of the failure or neglect or refusal to furnish the witness' name; (4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and (5) the prejudice to the opposing party. *Jumper v. Hawkins*, 348 S.C. 142, 152, 558 S.E.2d 911, 916 (Ct. App. 2001). "[T]he sanction of exclusion of a witness should never be lightly invoked." *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 592, 586 S.E.2d 572, 574 (2003) (quoting *Jackson v. H & S Oil Co.*, 263 S.C. 407, 411, 211 S.E.2d 223, 225 (1975)).

Professional explained it did not realize it had failed to produce some of the materials until it received an email from Respondents regarding the matter. Professional stated it would avoid using any material that was not produced. Further, it stated Dawkins was designated as an expert on liability for over a year prior to trial, and, therefore, Respondents had ample time to depose him and determine the subject of his testimony. Finally, Professional asserted it would be severely prejudiced if Dawkins was not allowed to testify. When the trial court adjourned the trial for the day to make its decision, Professional offered to make Dawkins available to Respondents for depositions. One of the Respondents' attorneys accepted the offer and deposed Dawkins. When the trial resumed, the trial court declined to qualify Dawkins but did not mention the discovery violation as a basis for its decision at that time.

We do not think it is proper to sustain the trial court's decision under this ground for the following 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. The sanction of excluding a witness's testimony should not be invoked lightly, and we find it was not appropriate here. Accordingly, we adhere to our decision to reverse the trial court's decision to exclude Dawkins' testimony.

Because we reverse based upon Professional's first issue, we need not reach its remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) ("[A]n appellate court need not address remaining issues when disposition of prior issue is dispositive.").

Summary Judgment in Favor of APS

Professional contends the trial court erred in granting APS's motion for summary judgment. Professional maintains it lawfully operated as an unlicensed subcontractor under Summit's license pursuant to section 40-11-270(C) of the South Carolina Code (2011), and therefore is not barred from bringing an action at law or in equity against APS under section 40-11-370(C) of the South Carolina Code (2011). We agree.

Section 40-11-370(C) states that "[a]n entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract. . . ."

Section 40-11-30 of the South Carolina Code (2011) provides the licensing requirements for the chapter, and it provides:

No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.

A contractor is defined as a general or mechanical contractor regulated under this chapter. S.C. Code Ann. § 40-11-20(4) (2011). A general contractor is an entity that performs or supervises or offers to perform or supervise general construction. § 40-11-20(9).

However, Professional claims it did not need a license pursuant to section 40-11-270(C), which states:

Licensees may utilize the services of unlicensed subcontractors to perform work within the limitations

of the licensee's license group and license classification or subclassification; provided, the licensee provides supervision. The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee.

(emphasis added). A subcontractor is an entity who contracts to perform construction services for a prime contractor, which is one who contracts directly with an owner to perform general or mechanical construction, or another subcontractor. § 40-11-20(17), (22).

McGinty, one of Summit's project managers for Fenwick, acknowledged that Summit would provide the materials and supervise the work at the breezeway. Pursuant to section 40-11-270(C), Summit, as the licensee, was permitted to utilize Professional's services even though Professional was unlicensed. Further, Summit was allowed to utilize APS's services even though it was unlicensed. Moreover, we note the pertinent licensing statutes are intended to protect the public interest. S.C. Code Ann. § 40-1-10(A)-(B) (2011). The purpose of protecting the public interest by denying enforceability does not exist when dealing with claims between contractors. *See Kennoy v. Graves*, 300 S.W.2d 568 (Ky. App. 1957) ("The statute involved, and similar ones, are designed to protect the public from being imposed upon by persons not qualified to render a professional service. The reason for the rule denying enforceability does not exist when persons engaged in the same business or profession are dealing at arm[s] length with each other. In the case before us, appellant was in a position to know, and did know, the qualifications of appellee. No reliance was placed upon the existence of a license, as presumptively would be the case if appellee was dealing with the general public.").

Accordingly, we find Professional was not required to have a license under the applicable statutory chapter, and, thus, section 40-11-370(C) does not preclude Professional from bringing a claim against APS. For these reasons, we reverse the trial court's grant of summary judgment.

CONCLUSION

For the foregoing reasons, we reverse the trial court on the first issue regarding the qualification of Professional's expert witness, Dawkins, and remand this case for a

new trial. In regard to the trial court's grant of summary judgment in favor of APS, we also reverse.

REVERSED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The 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 Rosales, Defendants,

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

Professional Plastering & Stucco, Inc., Appellant,

v.

Maria Arias, Miquel Rosales, and APS Enterprises
Unlimited, Inc., Third-Party Plaintiffs,

Of whom APS Unlimited, Inc. is the Respondent.

Appellate Case No. 2011-196386

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5188
Heard October 17, 2013 – Filed January 8, 2014

REVERSED

Jonathan J. Anderson and Danielle Beck Wegener, both of Anderson Reynolds & Stephens, LLC, of Charleston; Everett Augustus Kendall, II, and Christy Elizabeth Mahon, both of Sweeny Wingate & Barrow, PA, of Columbia; for Appellant Professional Plastering & Stucco.

W. Jefferson Leath, Jr., of Leath Bouch & Seekings, LLP, of Charleston; Phillip Ward Segui, Jr., of Segui Law Firm, of Mt. Pleasant; John T. Chakeris, of Chakeris Law Firm, of Charleston; Jesse A. Kirchner and Michael A. Timbes, both of Thurmond Kirchner Timbes & Yelverton, PA, of Charleston; Justin O'Toole Lucey, of Mt. Pleasant; all for Respondents Mark F. and Nan M. Teseniar & Twelve Oaks at Fenwick.

Roy Pearce Maybank, Amanda R. Maybank, and Jason Alan Daigle, all of Maybank Law Firm, LLC, of Charleston, for Respondent APS Enterprises.

LOCKEMY, J.: In this civil appeal arising out of the defective construction of an apartment complex, Professional Plastering & Stucco, Inc. (Professional) appeals the jury's verdict in favor of Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and other similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc. (POA) (collectively referred to as Respondents) on the claims of negligence and breach of warranty of workmanlike service. Professional asserts the trial court committed reversible error by (1) failing to qualify Chris Dawkins as an expert witness, (2) failing to admit Professional's stucco-only estimate, (3) denying Professional's motion for set-off and motion for a new trial nisi remittitur, (4) including the settlement amount received by Respondents on the verdict form and in its jury charge, (5) giving improper jury instructions, and (6) denying Professional's motion for a directed verdict and judgment notwithstanding the verdict (JNOV) on the claim of breach of warranty of workmanlike service. Professional also appeals the trial court's grant of summary judgment in its cross-claim against APS Unlimited, Inc. (APS). We reverse.

**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.

RECEIVED

JAN 23 2014

PETITION FOR REHEARING

SC Court of Appeals

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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]t 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 owner² 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 condition⁴ 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.

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

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 evidence⁷ 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 affirm⁸ 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

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]t 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.

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, SCORE, 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).

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,

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, in 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.

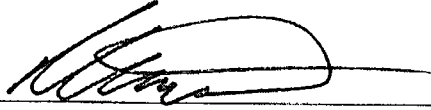
CONCLUSION

For the reasons set forth herein, the Respondents respectfully request that this court grant this Petition for Rehearing and Reconsider its ruling, withdraw its opinion⁹, 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.

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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

RECEIVED

JAN 23 2014

SC Court of Appeals

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:

THE STATE OF SOUTH CAROLINA

In the 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 Rosales, Defendants,

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

v.

Maria Arias, Miquel Rosales, and APS Enterprises
Unlimited, Inc., Third Party Plaintiffs,

Of whom APS Unlimited, Inc. is the Respondent.

Appellate Case No. 2011-196286

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5188
Heard October 17, 2013 – Filed January 8, 2014

PETITION FOR REHEARING

TO: THE JUSTICES OF THE SOUTH CAROLINA COURT OF APPEALS

Respondent, APS Unlimited (herein after "Respondent" or "APS"), by and through its undersigned attorneys, petition the South Carolina Court of Appeals for a Rehearing in the above-captioned matter. This petition is based upon the grounds as follows:

I. MISSTATEMENT IN THE FACTS.

The Order in this matter states that "APS filed a motion for summary judgment on the basis that Professional was not a licensed stucco installer, and, therefore, Professional could not maintain these claims pursuant to statutory law." Rather, APS's argument is not based on any specific licensure. APS contends that Professional Plastering does not have any licensure in the State of South Carolina, therefore, under South Carolina law, was not (1) permitted to use unlicensed contractors pursuant to S.C. Code Ann. §40-11-270(c), or (2) authorized to bring an action either in law or in equity to enforce provisions of a contract pursuant to S.C. Code Ann. § 40-11-370(C).

II. THE ORDER MISAPPREHENDS THE FACT THAT SUMMIT DID NOT CONTRACT WITH APS TO PERFORM WORK OR AGREE TO SUPERVISE APS's WORK ON THE PROJECT.

The order states "Summit was allowed to utilize APS's services even though it was unlicensed." That statement is correct if Summit had contracted with APS, or had undertaken the duty to supervise and to be responsible for APS's work. However, that is not what occurred in the present situation. Professional Plastering contracted with APS. Summit had no contractual relationship with APS and did not agree to supervise or be responsible for APS's work.

South Carolina Code Ann. § 40-11-270(C) explicitly states that only "(l)icensees may utilize the services of unlicensed subcontractors to perform work . . . provided the licensee

provides supervision. The licensee is fully responsible for any violations of this chapter resulting from the actions of the unlicensed subcontractors performing work for the license."

There is no dispute that Professional was not licensed in the State of South Carolina. Second there is no evidence that can satisfy the supervision requirement of S.C. Code 40-11-270 (C). The only evidence in the record is that Summit, the licensee, was providing supervision for the work of Professional Plastering. As cited in APS's brief, the full testimony of McGinty, one of Summit's project managers for Fenwick, provides:

Q. And that Summit will supply all material, supervision, and will be responsible for obtaining all engineering approval of the underlying flashing system, is that correct?

A. Correct.

Q. And then Professional Plastering will install under Summit Contractors, Inc. direction and is not liable for this flashing or the installation of this flashing, correct?

A. Correct.

(R.239-246; Final Brief of Respondent APS, p.12). There is no evidence that Summit agreed to assume the duty to supervise APS, or to be responsible for the work. Even if there was, it stands to reason that Summit as the entity responsible for the work, not Professional Plastering, would retain the rights to bring the legal suit to enforce any breach or remedy any defect in the work.

The Court's opinion, as it stands, allows Professional Plastering, and all unlicensed contractors, to avail themselves of all of the privileges of being licensed contractors while avoiding the responsibilities of supervision of the work. As such, this matter should be reheard.

III. THE ORDER MISAPPREHENDS THE APPLICATION OF S.C. CODE ANN. § 40-11-5 *et. seq.*, IN THAT IT HOLDS THE STATUTE IS INAPPLICABLE TO A CONTRACT BETWEEN CONTRACTORS DUE TO LACK OF AFFECT ON PUBLIC INTEREST.

The opinion improperly holds that the licensing statute was not applicable to a contract between contractors because it did not affect the "public interest."¹

The Court relied on *Kennoy v. Graves*, 300 S.W.2d 568 (Ky. App 1957), a case from the Kentucky Court of Appeals, which involved a cause of action by a professional engineer to recover \$900 for services rendered to a contractor. The contractor's only defense for failure to pay for the services rendered was the fact that the engineer was not licensed in the state. Accordingly, the Kentucky court held that this was an "arms length" transaction between professionals that did not involve the public, and as such the licensing statutes did not apply. Unlike the situation in the present case, the dispute in *Kennoy* was over a monetary fee between the two professional parties to the contract. It had no bearing whatsoever on the quality of the work or product, or structure provided, and likewise, the suit had no bearing or implications for anyone but the two individuals involved in the monetary dispute.

The present case involves allegations of improper work, negligence and failure to supervise, all of which affect the public and have broader implications that are not just limited to Professional Plastering and APS. There certainly is a public interest in ensuring that an unlicensed contractor's work on a project is being supervised by a licensed contractor. However, as the order currently stands, an unlicensed contractor can hire another unlicensed contractor, who could hire another unlicensed contractor, and right on down the line, to perform work on a construction project, and disclaim any responsibility to supervise the work as long as the general contractor is licensed under the statute. If the unlicensed contractor, (Professional Plastering) is

¹ I note that this issue was not raised or argued by Professional Plastering.

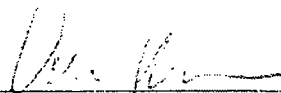
not supervising the work of its unlicensed subcontractor (APS), and the general contractor (Summit), is not supervising the work of the subcontractor (APS), who is?

Not only is there a "public interest" in ensuring unlicensed contractors are supervised by contractors licensed by the State of South Carolina, but the Court's interpretation of the statute is in direct conflict with the statute itself and with the evidence in the record. Particularly, S.C. Code Ann. § 40-11-360, specifically provides "Exemptions from application of the chapter." Nowhere in this section is there an exemption for contracts between contractors. If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. *Catawba Indian Tribe*, 372 S.C. 519, 525-526, 642 S.E.2d 751, 754 (2007).

CONCLUSION

For the foregoing reasons, Respondent APS respectfully requests that the Court rehear this matter.

Respectfully submitted:



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January 22, 2014

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Mark F. Teseniar and Nan M. Teseniar, on behalf of
themselves and others similarly situated, and Twelve
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Appellate Case No. 2011-196286

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5188
Heard October 17, 2013 – Filed January 8, 2014

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing of Respondent APS Enterprises
Unlimited by depositing a copy in the U.S. Mail, postage paid on January 22, 2014 addressed to

Appellant's attorneys and Co-Counsel as set forth below:

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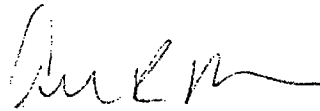
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2011196386

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 Rosales,
Defendants,

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

Professional Plastering & Stucco, Inc., Appellant

v.

Maria Arias, Miquel Rosales, and APS Enterprises Unlimited, Inc., Third-Party
Plaintiffs,

Of whom APS Unlimited, Inc. is Respondent.

**APPELLANT'S RETURN TO RESPONDENTS MARK F. TESENIAR AND
NAN M. TESENIAR ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY
SITUATED & TWELVE OAKS AT FENWICK PROPERTY OWNERS
ASSOCIATION, INC.'S PETITION FOR REHEARING**

Pursuant to Rule 240(e), SCACR , Appellant Professional Plastering & Stucco, Inc. (hereinafter "Appellant") hereby submits this Return to Respondents Mark F. Teseniar and Nan M. Teseniar's, on behalf of themselves and others similarly situated, & Twelve Oaks at Fenwick Property Owners Association, Inc.'s (hereinafter "Respondents") Petition for Rehearing.

STANDARD FOR REHEARING

"The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Kennedy v. S.C. Retirement System*, 349 S.C. 531, 532 (2001) (citing Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999)). In order to prevail on a petition for rehearing, the moving party "must demonstrate the Court overlooked or misapprehended their argument." *Id.* (citing Rule 221(a), SCACR).

ARGUMENT

After extensive briefing and oral argument, this Court correctly reversed the judgment of the trial court based on (1) the trial court's error in refusing to qualify Christian Dawkins, P.E. as an expert on behalf of Appellant and (2) the granting of summary judgment in favor of APS Enterprises Unlimited, Inc. In response to the Court's reversal of the trial court decision, Respondents, Teseniar et al., filed a Petition for Rehearing. Respondents purport to state seven grounds for rehearing. However, Respondents' petition is simply a restatement of legal arguments and facts previously presented at length to the Court. Appellant submits that Respondents' contentions are without merit and their Petition for Rehearing should be denied. In support of this Return, Appellant relies on and invites the Court's attention to the arguments set forth in Appellant's Final Brief, Final Reply Brief, and Record on Appeal.

I. THE COURT OF APPEALS DID NOT OVERLOOK OR MISAPPREHEND THE EFFECT OF DAWKINS' PROFFERED TESTIMONY BUT PROPERLY DETERMINED THE TRIAL COURT'S ERROR IN REFUSING TO QUALIFY DAWKINS AS AN EXPERT WAS NOT HARMLESS.

Respondents argue that the trial court's error in refusing to qualify Dawkins was harmless because Dawkins testified that water intrusion was proximately caused by defective conditions for which Appellant was responsible. Specifically, Respondents cite the testimony of Dawkins regarding water intrusion due to the lack of kickout flashing at the roof-to-wall terminations and argue that Appellant was responsible for this condition by covering up the lack of kickout flashing.¹ This argument is without merit.

The plans and specifications which Appellant was obligated to follow on this project², did not call for kickout flashing to be installed at the project. As stated in Appellant's Reply Brief:

Donnie King did not admit that Professional Plastering's work concealed the absence of kickout flashing, as Respondents suggest. He testified that when he saw the slides of plaintiff's expert, Myles Glick, it appeared there was no kickout flashing at the location where the stucco was applied. (R. p. 881, lines 9-11). However, he went on to testify that he did not know whether kickout flashing was called for on this job. (R. p. 882, lines 17-18). In fact, Tacy McGinty, the project manager for Summit, the general contractor, confirmed that the architect did not require the installation of kickout flashing. (R. p. 1306, lines 13-19). Summit and the subcontractors relied upon the architectural drawings which did not show kickout flashing, and therefore, kickout flashing was not installed. (R. p. 1307, lines 8-25).

McGinty further testified that the drawings which do not show kickout flashing would have been supplied to the subcontractors, including the exterior cladding subcontractor. (R. p.

¹ Respondents quote Dawkins testimony concerning water intrusion at the roof-to-wall terminations but omit his follow up testimony: "Q. Did you find any water intrusion which would have been proximately caused by the work done by Professional Plastering?

A. I did not. I did not find that. (R1577, lines 19-22).

² Appellant's contract with Summit required that Appellant "complete all work per Plans, Specifications, and approved shop drawings." (R.p.1694).

1308, lines2-8). Appellant would not be covering up a defective condition, as argued by Respondents, if the drawings provided by the contractor did not call for kickout flashing to be installed. Appellant's contract with Summit required that Appellant "complete all work per Plans, Specifications, and approved shop drawings." (R.p.1694).

Further, Dawkins testified that based upon his review of the contracts of subcontractors, the installation of kickout flashing was not included in Appellant's scope of work and was removed from Johnson Roofing's scope of work:

Q. Were you able to do a review of the contract with North Florida Framing and Professional Stucco in relationship to the kickout flashing?

A. Yes. Well, I also looked at Johnson Roofing. I did not see it. I did not see the kickout flashing in Professional Plastering's scope of work, and I did not see it in North Florida Framing's. It was mentioned in Johnson Roofing's scope, item number six. But then there was a notation that said -- that basically said "provide and install water diverters per drawings." Then someone, it appeared a sub-contractor with the same initials -- actually both parties initialed it actually. It says "None on drawings." A little statement there.

Q. Okay.

A. Which I surmised means that the kickout flashings were taken out of the scope for Johnson Roofing.

(R. p. 1575, line20- 1576, line16).

The lack of kickout flashing was not a defective condition that was covered up by Appellant but rather a feature that was consciously and intentionally omitted from the project by the architect and the general contractor. Respondents correctly stated in their Petition that the lack of kickout flashing was not a concealed condition. As stated by Appellant's owner, Donnie

King, kickout flashing would be visible when you walked by a roof and looked up. (R. p. 903, line 22 – p. 904, line 13).

The above brief recitation of facts clearly shows that there was no concealment of the kickout flashing as the architect did not include it in his plans, and the general contractor took affirmative action to exclude the installation of kickout flashing from the contract documents. In addition, the kickout flashing when installed is visible from the ground. The Court of Appeals did not overlook or misapprehend the effect of this evidence.

In response to Section I of Respondents' Petition for Rehearing, Appellant further relies on and invites the Court's attention to the argument set forth in its Final Brief, Final Reply Brief, and testimony contained in the Record on Appeal.

II. THE COURT DID NOT OVERLOOK, MISAPPREHEND OR FAIL TO ADDRESS THE TESTIMONY OF APPELLANT'S OWNER.

Respondents argue that the Court overlooked and failed to address building code violations allegedly admitted by King. Appellant's Final Reply Brief addresses at length Respondents' assertion that King's testimony contains admissions of building code violations, and Appellant relies on and invites the Court's attention to the argument set forth in Appellant's Final Reply Brief (p. 4-8).

Respondents argue that Appellant was negligent in failing to install a casing bead between dissimilar materials at the window's outer edge and cite the testimony of King in support of this argument. The cited testimony elicits responses to two very specific questions about what photos show and what was previously read to King. The content of language read is omitted. However, when King was asked if a casing bead was required at the window, King responded, "not very many times." (R. p. 887, lines 1-3). He said that "some people do away with a casing bead with that type of window." (R. p. 886, lines 22-23). Further, Dawkins,

through his testimony, clarified that Appellant's contract did not require a casing bead to be installed at that location:

Q. Look at item twenty two.

A. Yeah, twenty-two discusses the j-molds again, "...install J-mold at all edges of stucco not finished into a wall or [jamb] including the bottom edge of vertical walls at ground level." So ---

Q. What does that instruction tell you?

A. It tells me that if I come to the inside corner of a wall that I don't have to put a [J mold] at the inside corner of the wall. If I come to a [jamb], i.e. as in the [jamb] of a window, I'm not required—or Professional Plastering is not required to put a J mold at that location.

(R. p. 1574, line 15-1575, line 16). The Court did not overlook or misapprehend the significance of this evidence.

In response to Section II of Respondents' Petition for Rehearing, Appellant further relies on and invites the Court's attention to the argument set forth in its Final Brief, Final Reply Brief, and testimony contained in the Record on Appeal.

III. THE COURT DID NOT ABANDON ITS REASONING IN *MAGNOLIA NORTH*.

Respondents' reliance on *Magnolia North* is misplaced. Proximate cause and liability were not issues in *Magnolia North*, as they are in the present case. "In order to establish a claim for negligence, a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages." *Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 368, 725 S.E.2d 112, 123 (Ct. App. 2012). In *Magnolia North*, counsel for the general contractor conceded liability in his opening statement. *Id.* The Court in *Magnolia North*

found that “viewing the trial in its entirety, Appellants merely contested the extent of damages.”

Id. In the present case, liability was contested and as set forth in our Final Brief, Final Reply Brief, and testimony contained in the Record on Appeal the statements of King were not admissions of liability. Dawkins’ testimony demonstrated that Appellant’s work at the project was not the proximate cause of any damages. The Court did not overlook or misapprehend the significance of this evidence or *Magnolia North*.

In response to Section III of Respondents’ Petition for Rehearing, Appellant relies on and invites the Court’s attention to the arguments set forth in its Final Brief, Final Reply Brief, and the testimony contained in the Record on Appeal.

IV. THE REFUSAL TO QUALIFY DAWKINS AS AN EXPERT PREVENTED APPELLANT FROM PRESENTING EXPERT TESTIMONY.

The Respondents repeat the assertion that proffered testimony of Dawkins would be cumulative to Robert Puschek’s testimony. The Court does not overlook or misapprehend this point made by Respondents but notes the Respondents’ success in preventing Puschek from criticizing the analysis and opinions of Respondents’ expert, Myles Glick, left Appellant without an expert witness to rebut Respondents’ expert witness, Glick.

In further response to section IV of Respondents’ Petition for Rehearing, Appellant relies on and invites the Court’s attention to the argument set forth in its Final Brief, Final Reply Brief, and testimony contained in the Record on Appeal.

V. THERE WAS ERROR IN THE TRIAL COURT’S REFUSAL TO QUALIFY DAWKINS AS AN EXPERT.

Section V of Respondents’ Petition for Rehearing is a summary or compilation of Respondents’ previous arguments. As Appellant’s reply to those allegations from Sections I through IV of Respondents’ Petition for Rehearing would be the same as those previously made

above, Appellant craves reference to Appellant's responses set forth above. In essence, Appellant submits that as the Court found that Dawkin's experience and education meets the requirements of Rule 702 SCRE and his technical and specialized knowledge would assist the trier of fact in determining proximate cause, the Court did not overlook or misapprehend that the failure to qualify Dawkins and the resulting exclusion of Dawkins as an expert witness for Appellant was prejudicial error.

In further response to section V of Respondents' Petition for Rehearing, Appellant relies on and invites the Court's attention to the argument set forth in Appellant's Final Brief, Final Reply Brief, and testimony contained in the Record on Appeal.

VI. THE COURT PROPERLY REVERSED THE DECISION OF THE TRIAL COURT AND REMANDED FOR A NEW TRIAL.

Respondents assert that this case should not be remanded to the trial court for a new trial but rather for the purpose of allowing the trial court to articulate the particular reasons why the trial court refused to qualify Dawkins as an expert. The Court's reversal of the trial court's decision is the proper course of action at this time, as the Court correctly found that Dawkins held the prerequisites necessary to testify as an expert under Rule 702, SCRE and that it was prejudicial error for Dawkins to be excluded.

The Record on Appeal contained sufficient evidence for the Court to evaluate Dawkins' qualifications as an expert witness guided by Respondents' objection to Dawkins' qualifications. The Record on Appeal also contained sufficient evidence to gage the prejudicial effect Dawkins' exclusion as a witness had upon the Appellant's case. Respondents are not asking that this matter be remanded to obtain the factual basis for the trial court's determination but asking to have the trial court defend its decision.

Further, this is the first time that this issue has been raised on appeal. There has been no

prior indication of any deficiency in the Record on Appeal and the trial court had two prior opportunities to clarify or further enunciate its rulings. The first was during post trial motions, and the second was upon Appellant's Rule 59(e), SCRCP motions to alter or amend the judgments.

In further response to section VI of Respondents' Petition for Rehearing, Appellant relies on and invites the Court's attention to the argument set forth in Appellant's Final Brief, Final Reply Brief, and testimony contained in the Record on Appeal.

VII. THE COURT PROPERLY REJECTED RESPONDENTS' ARGUMENT THAT DAWKINS WAS PROPERLY EXCLUDED DUE TO A DISCOVERY VIOLATION.

The Court did not overlook or misapprehend any evidence or argument of counsel when the Court determined that it was not appropriate for Dawkins to be excluded as an expert witness based upon a discovery violation. In response to Section VII of Respondents' Petition for Rehearing, Appellant relies on and invites the Court's attention to the arguments and facts set forth in Appellant's Final Brief, Final Reply Brief, and Record on Appeal.

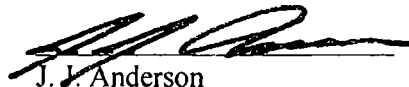
CONCLUSION

For the reasons set forth above, Appellant respectfully requests that the Court deny Respondents' Petition for Rehearing.

Signature appears on following page.

Respectfully submitted,

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February 3, 2014

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2011196386

Mark F. Teseniar and Nan M. Teseniar, on
behalf of themselves and others similarly
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Property Owners Association, Inc.,
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v.

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

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

Professional Plastering & Stucco, Inc., Appellant

v.

Maria Arias, Miquel Rosales, and APS Enterprises Unlimited, Inc., Third-Party
Plaintiffs,

Of whom APS Unlimited, Inc. is Respondent.

**APPELLANT'S RETURN TO RESPONDENT APS UNLIMITED, INC.'S
PETITION FOR REHEARING**

Pursuant to Rule 240(e), SCACR , Appellant Professional Plastering & Stucco, Inc. (hereinafter "Appellant") hereby submits this Return to Respondent APS Enterprises Unlimited, Inc.'s (hereinafter "Respondent APS") Petition for Rehearing.

STANDARD FOR REHEARING

"The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Kennedy v. S.C. Retirement System*, 349 S.C. 531, 532 (2001) (citing Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999)). In order to prevail on a petition for rehearing, the moving party "must demonstrate the Court overlooked or misapprehended their argument." *Id.* (citing Rule 221(a), SCACR).

ARGUMENT

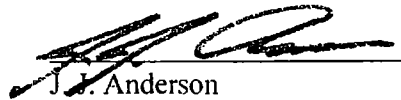
After extensive briefing and oral argument, this Court correctly reversed the judgment of the trial court based on (1) the trial court's error in refusing to qualify Christian Dawkins, P.E. as an expert on behalf of Appellant Professional Plastering and (2) the granting of summary judgment in favor of APS Enterprises Unlimited, Inc. In response to the Court's reversal of the trial court decision, Respondent APS filed a Petition for Rehearing. Respondent APS' petition is simply a restatement of legal arguments and facts previously presented at length to the Court. Appellant submits that Respondent's contentions are without merit and their Petition for Rehearing should be denied.

The Court did not overlook or misapprehend any evidence or argument of counsel for APS when the Court correctly found that since Appellant was not required to have a license

under Chapter 11 of the statute, Appellant is not precluded by §40-11-370(c) from bringing a claim against Respondent APS. Therefore, in response to Respondent APS' Petition for Rehearing, Appellant relies on and invites the Court's attention to the arguments and facts set forth in Appellant's Final Brief, Final Reply Brief, and Record on Appeal.

Respectfully submitted,

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February 3, 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.

**RESPONDENTS' REPLY TO APPELLANT'S RETURN TO PETITION FOR
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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,¹ 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

¹ 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 know² 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.”³ 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 which 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.

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

³ 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.⁴ 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 5⁵ 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.

⁴ 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)).

⁵ 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 Cmtys., 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 10th day of February, 2014.

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

February 10, 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' Reply to the Appellant's Return to Petition for Rehearing to the following counsel of record, in the manner provided below:

**FOR PROFESSIONAL PLASTERING
& STUCCO, INC:
VIA HAND-DELIVERY**

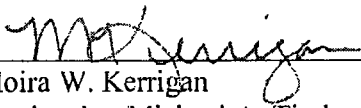
Jonathan J. Anderson, Esquire
Danielle B. Wegener, Esquire
Anderson Reynolds & Stephens, LLC
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VIA US MAIL

Everett A. Kendall, Esquire
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Columbia, South Carolina 29402

**FOR APS ENTERPRISE
UNLIMITED:
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Roy P. Maybank, Esquire
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Moira W. Kerrigan
Paralegal to Michael A. Timbes

February 10, 2014
Charleston, South Carolina

23/

The South Carolina 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 Rosales, Defendants,

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

Professional Plastering & Stucco, Inc., Appellant,

v.

Maria Arias, Miquel Rosales, and APS Enterprises
Unlimited, Inc., Third-Party Plaintiffs,

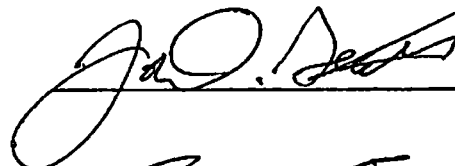
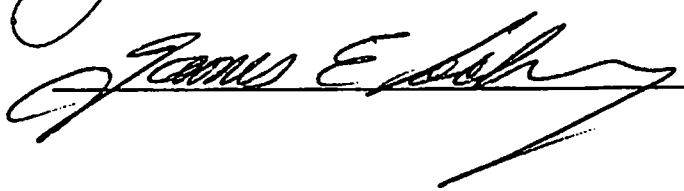
Of whom APS Unlimited, Inc. is the Respondent.

Appellate Case No. 2011-196386

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, Professional Plastering & Stucco, Inc.'s petition for rehearing is denied.

Thomas E. Luff J.


J.

J.

Columbia, South Carolina

cc:

Everett Augustus Kendall, II, Esquire
Justin O'Toole Lucey, Esquire
Christy Elizabeth Mahon, Esquire
Roy Pearce Maybank, Esquire
Jesse A. Kirchner, Esquire
Jason Alan Daigle, Esquire
Amanda R. Maybank, Esquire
Michael A. Timbes, Esquire
John T. Chakeris, Esquire
Phillip Ward Segui, Jr., Esquire
W. Jefferson Leath, Jr., Esquire
Jonathan J. Anderson, Esquire
Danielle Beck Wegener, Esquire

FILED

February 20, 2014

The South Carolina 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 Rosales, Defendants,

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

Professional Plastering & Stucco, Inc., Appellant,

v.

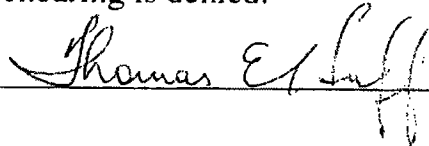
Maria Arias, Miquel Rosales, and APS Enterprises
Unlimited, Inc., Third-Party Plaintiffs,

Of whom APS Unlimited, Inc. is the Respondent.

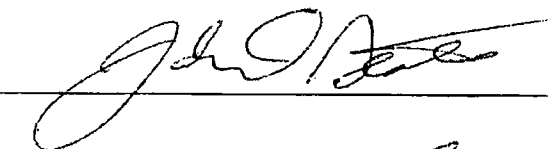
Appellate Case No. 2011-196386

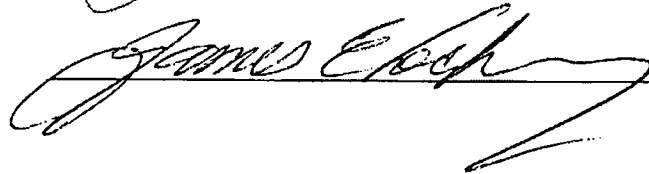
ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, APS Unlimited, Inc.'s petition for rehearing is denied.



J.



J.


J.

Columbia, South Carolina

cc:

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FILED

February 20, 2014