

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2014-000615

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

v.

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

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

Professional Plastering & Stucco, Inc., Respondent

v.

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

Of whom APS Unlimited, Inc. is the Petitioner.

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S.C. SUPREME COURT

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

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STANDARD AND SCOPE OF REVIEW FOR PETITION FOR WRIT OF CERTIORARI FROM DECISION OF THE COURT OF APPEALS

While not limiting the Court's discretion or power to grant review in general, the character of reasons which will be considered include:

1. Where there are novel questions of law.
2. Where there is a dissent in the decision of the Court of Appeals.
3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
4. Where substantial constitutional issues are directly involved.
5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), South Carolina Appellate Court Rules.

Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.

Rule 242(d)(2). An argument not made to an intermediate appellate court and ruled on by that court is not preserved for review by the Supreme Court *Linda Mc Company, Inc. v. Shore*, 390 S.C. 543, 558, 703 S.E.2d 499, 506 (2010). An issue first raised in a petition for rehearing in the Court of Appeals is not preserved for appellate review by the Supreme Court *Nelson v. QHC of South Carolina, Inc.* 362 S.C. 421, 427, 608 S.E.2d 855 (2005).

STATEMENT OF THE CASE

This is an alleged construction defect lawsuit involving the Twelve Oaks at Fenwick Plantation condominium complex located on Johns Island, South Carolina. Professional Plastering & Stucco, Inc. ("Professional Plastering" or Respondent) served as a stucco subcontractor during the construction of the project as apartments. The apartments were completed in 2002, and then converted to condominiums in 2006. On or about January 4, 2008, Respondents Mark F. and Nan M. Teseniar, on behalf of

themselves and others similarly situated, (“Teseniar”) filed a civil action alleging design and construction defects, and resulting water intrusion damages, within the buildings comprising the Twelve Oaks at Fenwick Plantation Horizontal Property Regime (“the project”) (App. 77-114 Teseniar Complaint). Teseniar filed the civil action initially against the developers but thereafter amended their complaint to include numerous other parties involved in the design and construction of the buildings, including the architect, general contractor, Summit Contractors, Inc. (“Summit”) and subcontractors. Respondent was one of those subcontractors. On March 28, 2008, the Twelve Oaks Property Owners Association (the “POA”) filed a separate lawsuit alleging design and construction defects, and resulting water intrusion damages to the buildings’ commonly held areas. The two suits by Teseniar and the POA (collectively Petitioners) were consolidated on October 10, 2008. (App. 4-53, Order of Consolidation). Respondent was the only defendant who had not settled at the time of trial.

The consolidated cases of the Petitioners against Respondent were tried by jury before the Honorable Kristi Lea Harrington on May 9, 11, 12, and 13, 2011. The jury returned a verdict in favor of the Petitioners on the two surviving causes of action, negligence and breach of warranty of workmanlike service, in the amount of Seven Million Seven Hundred Twenty-Three Thousand Two Hundred Twenty-Five and no/100’s Dollars (\$7,723,225.00) actual damages. (App. 69:9–70:18 Jury Verdict Form). Following the return of the jury verdict, Professional Plastering made an oral Motion for New Trial Absolute, Motion for Set-Off, Motion for Judgment Notwithstanding the Verdict, and Motion for New Trial Nisi Remittitur. (App. 1615:24-1617:13). Written Motions, Memoranda, and Reply in support of these motions were

filed by Professional Plastering. (App. 292-720) The motions were denied by Judge Harrington in an order filed on June 17, 2011. (App. 68 Order Denying Post-Trial Motions). Respondent subsequently filed Motions to Alter or Amend the Judgment (App. 763-787) which were denied by Judge Harrington in an order filed July 19, 2011. (App. 69 Order denying Rule 59(e) Motion). The matter was appealed to the South Carolina Court of Appeals on the following eight grounds:

1. DID THE TRIAL COURT ERR IN FAILING TO QUALIFY CHRIS DAWKINS, P.E. AS AN EXPERT WITNESS AND ERR IN FAILING TO PROPERLY APPLY RULE 702, SOUTH CAROLINA RULES OF EVIDENCE?
2. DID THE TRIAL COURT ERR IN NOT ADMITTING PROFESSIONAL PLASTERING'S STUCCO-ONLY ESTIMATE INTO EVIDENCE AND EXCLUDING EXHIBIT 4 FROM JURY DELIBERATIONS?
3. DID THE TRIAL COURT ERR IN DENYING PROFESSIONAL PLASTERING'S MOTION FOR SET-OFF AND FOR A NEW TRIAL REMITTITUR?
4. DID THE TRIAL COURT ERR BY INCLUDING THE SETTLEMENT AMOUNT RECEIVED BY PLAINTIFFS ON THE VERDICT FORM AND IN ITS JURY CHARGE REGARDING THE VERDICT FORM?
5. DID THE TRIAL COURT ERR IN NOT GRANTING PROFESSIONAL PLASTERING'S MOTION FOR DIRECTED VERDICT ON TESENIAR'S CLAIM OF BREACH OF WARRANTY OF WORKMANLIKE SERVICE?
6. DID THE TRIAL COURT ERR IN ITS INSTRUCTIONS TO THE JURY?
7. DID THE TRIAL COURT ERR IN DENYING PROFESSIONAL PLASTERING'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT?
8. DID THE TRIAL COURT ERR IN GRANTING APS' MOTION FOR SUMMARY JUDGMENT?

Following oral argument, the Court of Appeals found the failure to qualify Christian Dawkins, P.E. and the resulting exclusion of his testimony, was prejudicial

error and entered its opinion on January 8, 2014, reversing the trial court and remanding the case for a new trial. In addition, the Court of Appeals reversed the grant of summary judgment to APS which is not further addressed in this Return¹. As the reversal was based upon the first issue alone, the Court of Appeals did not address issues two through seven. (App. 2042)

FACTS

The primary issues at trial in this case were whether the stucco installer had properly installed the stucco, whether any errors in installation of the stucco proximately caused the Respondents' damage, and the cost to repair any proximately-caused damage to the project. Respondents presented two experts, Myles Glick, AIA, a "forensic architect," and Robert Gallagher, an estimator and repair contractor. Mr. Glick provided a detailed analysis of the alleged defects in the stucco application, including a) the application of stucco before kickout flashing was installed at roof to wall intersections, b) the application of stucco was too thin in some areas and too thick in others, c) the use of termination devices at dissimilar materials and the base of the wall was not in accordance with the manufacturer's instruction, and d) the wire mesh and paper backing of the paperback lath were not integrated properly. Mr. Glick then testified that these defects in the application of the stucco allowed water intrusion that resulted in damage to the building. Mr. Glick opined that in consideration of all construction issues, many unrelated to the stucco, a global repair to fix all problems at the project would require the complete removal and replacement of the entire building envelope including HardiPlank siding, stucco, and windows. Mr. Gallagher provided written estimates for the total repair of the project and an estimate for the repair of the

¹ APS has filed a separate Petition for Certiorari which is addressed by Respondent in a separate Return

stucco and stucco-related structures. The total cost of repair for the project was \$15,748,225 while the total cost for the stucco related repairs was \$8,761,443 (App. 935-1015):

In the case presented for Professional Plastering, the testimony of Mr. Claude McNabb, vice president for new development for Tarragon, the developer/owner of the original apartment complex, and an onsite representative and inspector, was given. Mr. McNabb testified to the inspections he performed of the stucco and his observations of the stucco operations and application at the project. Mr. McNabb testified to the responsibilities of Summit to Tarragon under their contract, and that the stucco application was proper and passed his inspections. (App. 1145:1-1174:8). Tacy McGinty, the project manager for Summit, testified to the work performed by Professional Plastering and the scope of responsibility for each subcontractor involved in the wall assembly. In addition, the approval and inspection process by the general contractor, owner, architect, and manufacturer of the stucco was explained. Ms. McGinty testified that the work performed by Professional Plastering was properly done in accordance with the contract documents (App. 1290:21-1382:19).

Mr. Robert Puschek, Professional Plastering's expert estimator, provided an estimate for repair of the entire project in the amount of \$4,978,000.00. In addition, Mr. Puschek testified that he had analyzed Mr. Gallagher's stucco-only estimate as applied to nine buildings. Mr. Gallagher's total repair for the nine buildings was \$8,068,000.00, and Mr. Puschek's comparative price was \$3,293,000.00. In addition, Mr. Puschek prepared Defendant Exhibit 4 (App. 1700) which was a stucco-related repair estimate for all 12 buildings in the amount of \$3,662,587.64 (App. 1193:1-

1289:8). Defendant Exhibit 4 was not allowed in to evidence as an exhibit and did not go to the jury.

Mr. Dawkins was offered by Professional Plastering as an expert in construction and engineering but was not allowed to testify as an expert. Mr. Dawkins was offered to testify to a) his forensic inspection of the buildings, b) the application of the building codes, c) whether the work of Professional Plastering met the code requirements, and the manufacturer's specification, d) the requirements of the contract documents, and e) that the work of Professional Plastering was not a proximate cause of the Petitioners' damages. He was only allowed to testify to his personal observations during his investigation of the buildings.

The Petitioners objected to Mr. Dawkins being qualified as an expert. (App. 1107:19-21). *Voir dire* of the witness was performed and following an overnight recess, the court ruled that Mr. Dawkins was not qualified as an expert. His testimony as a lay witness based upon his investigation was taken.(App. 1403:21-141434:12) The Court postponed the completion of the proffer of Mr. Dawkins' testimony until after the jury was charged and deliberating. The jury returned a verdict in favor of the Respondents on the negligence and breach of warranty causes of action in the amount of \$7,723,225.00 actual damages. (App. 69-70 Verdict Form).

Following the return of the jury's verdict, Respondent made motions for a new trial absolute, set-off, JNOV, and new trial nisi remittitur. Each motion was denied by the trial court in a Form 4 order, and Respondent filed motions to alter or amend the judgment, which were also denied by the trial court. Respondent appealed 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. The Court of Appeals held the trial

court erred in failing to qualify Mr. Dawkins as an expert witness. (App. 2031-2044) The Court of Appeals noted Mr. 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. (App. 2038). The Court of Appeals found that Mr. Dawkins "held the prerequisite experience needed to testify as an expert under Rule 702, SCRE." (App 2038). Further, the Court of Appeals found "Dawkins had technical and specialized knowledge that would assist the trier of fact to understand the proximate cause of the water intrusion . . ." (App. 2039). The error committed by the trial court in not qualifying Mr. Dawkins was prejudicial, as it left Respondent with no witness to rebut Petitioners' expert witness testimony concerning the proximate cause of the water intrusion. (App. 2040). The Court of Appeals found that when the trial court declined to qualify Mr. Dawkins, it did not mention the alleged discovery violation as a basis for its decision and that "it was not appropriate here." (App. 2041).

Petitioners filed a Petition for Rehearing (App. 2047-2069) from the Court of Appeals, alleging that the Court of Appeals overlooked or misapprehended the following:

1. The harmless effect of refusing to qualify Dawkins because he testified water intrusion was proximately caused by defective conditions for which [Respondent] was responsible.
2. The numerous building code violations admitted by [Respondent].
3. In contrasting the testimony of [Respondent] against [Respondent's] expert as a basis for prejudicial error, the Court [of Appeals] abandoned its reasoning in *Magnolia North*.

4. Refusal to qualify Dawkins did not prevent Respondent from presenting expert testimony.
5. The trial court's refusal to qualify Dawkins was not error.
6. The proper course should be to remand to the trial court for a hearing to articulate the trial courts particular reasons for refusing to qualify Dawkins
7. [Respondent's] discovery abuse was a sufficient ground upon which to affirm the trial court's decision.

The Court of Appeals denied Petitioner's Petition for Rehearing. Petitioner filed a Petition for Writ of Certiorari and posed the following three questions:

DISCUSSION AND ARGUMENT

Respondent presents the following argument in support the Court denying Petitioners' Petition for Writ of Certiorari and a restate of the questions present for review.

- I. SHOULD THE COURT REVIEW THE COURT OF APPEAL'S DETERMINATION THAT THE EXCLUSION OF RESPONDENT'S EXPERT WAS PREJUDICIAL WITH THE KNOWLEDGE THAT THE EXPERT OPINED THAT WATER INTRUSION AT THE ROOF-TO-WALL INTERSECTIONS WAS PROXIMATELY CAUSED BY LACK OF KICKOUT FLASHING WHICH WAS OMITTED FROM THE PLANS, AFFIRMATIVELY REMOVED FROM THE CONTRACT BY THE GENERAL CONTRACTOR, AND NOT WITHIN RESPONDENT'S SCOPE OF WORK?

- A. Waiver of Argument Not Previously Made to the Court of Appeals.

Petitioners first raised the issue that Mr. Dawkins' testimony of the kickout Flashing being a proximate cause of water intrusion made Mr. Dawkin's exclusion as a witness harmless error in their Petition for Rehearing before the Court of Appeals. Prior to that time Petitioners had argued that the exclusion of Mr. Dawkins was harmless error on the following grounds:

1. His testimony would be cumulative to other witnesses.

2. Respondents could have called a different witness.
3. Mr. Dawkins testimony would have contradicted Mr. King's testimony.
4. Mr. Dawkins lack the proper qualifications to be an expert witness.
5. His exclusion was an appropriate sanction for a discovery violation.

For the first time, the Petitioners claim in their Petition for Rehearing that stucco in contact with the shingles covered up the lack of kickout flashing, and/or the condition of stucco in contact with the shingles occurred as a result of the kickout flashing not being present. There is no expert testimony or other support for the allegations. It appears this new set of factual allegations are based upon Mr.Kings' testimony that the picture of stucco in contact with the shingles was at the same location as the kickout flashing, and that stucco on the shingles is not in accordance with the Manufacturer's recommendations. This geographic reference by King is the only reference to a correlation of stucco touching the shingles to the lack of kickout flashing.

The issue of Mr. Dawkins' testimony providing the missing proximate in support of Petitioners' Petition for Writ of Certiorari is waived. The argument was not made to the Court of Appeals and was not ruled on by the Court of Appeals. The argument is not preserved for review by the Supreme Court. *Linda Mc Company, Inc. v. Shore*, 390 S.C. 543, 558, 703 S.E.2d 499, 506 (2010) Further the Petitioners cannot rely on having raised the issue for the first time in Petitioners' petition for rehearing in the Court of Appeals. The issue is not thereby preserved for appellate review by the Supreme Court. *Nelson v. QHC of South Carolina, Inc.* 362 S.C. 421, 427, 608 S.E.2d 855 (2005).

B. The Lack of Kickout Flashing Not the Responsibility of Respondent.

The primary focus of Petitioners' argument is that the exclusion of Dawkins' testimony was not prejudicial, as Dawkins "opined that water intrusion at the roof-to-wall intersections was proximately caused by defects in construction, and the overwhelming evidence at trial proved the contractor violated the standard of care by contributing to and concealing those defects." In reality, Dawkins actually stated that the lack of kickout flashing was a proximate cause of water intrusion. Petitioners interpret this statement as an admission that Professional Plastering was responsible for the lack of kickout flashing based upon a contractual duty to inspect an area prior to starting work, and the statement of Mr. King in response to general questions concerning the function of kickout flashing. (Petition for Writ of Cert. p. 15-16 and App. 895:12-24). Under paragraph 6 of Attachment B to Respondent's subcontract, Respondent was to "inspect all framing, windows, doors, flashings, and any dry-in associated with water tightness prior to the start of work. All parties further agree that SUBCONTRACTOR **will report** to CONTRACTOR'S Jobsite Superintendent any discrepancies or potential concerns that he may have related to water-tightness not being sufficient." (emphasis added)

The purpose of that section of the Subcontract is to prevent defective work from being hidden from view or covered up, such that the General Contractor would be unaware of the condition, and thus not have the opportunity to correct it. The lack of kickout flashing was not a hidden condition of which Summit was not aware; as admitted by Petitioners, kickout flashing is an open and obvious protrusion from the exterior of the building beyond the edge of the roof at the termination of the roof to wall intersection. (Petition for Writ of Certiorari p. 15) Kickout flashing is observable

from the ground unless it has not been installed then its absence is easily ascertained (Petition for Writ of Certiorari p. 15 and App. 917:16- 918:5).

Mr. King did not admit that Respondent's work concealed the absence of kickout flashing, as Petitioner suggested. Mr. King 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. (App. 895: 9-11). Ms. McGinty, the project manager for Summit, confirmed that the architect did not require the installation of kickout flashing. (App. 1330: 13- 1332: 8). The requirement for "water diverters," or kickout flashing, was removed from Johnson Roofing's contract with Summit.(App. 1611:20-1612:16) Thus, Summit was well aware that kickout flashing was not installed at the roof to wall intersection. The omission of the kickout flashing was an intentional act by Summit and the Architect over whom Respondent had no control and no authority to modify the design of the project.

Even Petitioners' expert, Mr. Glick, voiced his opinion of the obligation when he testified, "If they weren't supposed to do the kick-out flashing, they should have told the superintendent that there's none there. . ." (App. 857:8-11). It is clear the purpose and intent of the contract provision was to insure that Summit's superintendent knew of the lack of kickout flashing, such that Summit could make a decision on how to handle the issue. It is equally clear that Summit and the Architect knew there was no kickout flashing and made a conscious decision to not have it installed. Summit removed the installation from the contract of Johnson Roofing.(App. 652) The purpose of paragraph 6 of Attachment B to Professional Plastering's subcontract was fulfilled. Contrary to Petitioners' suggestion in footnote 6 of the Petition at page 17, the application of stucco to the area lacking kickout flashing would not have needed an

amendment of Respondent's subcontract or any other additional writing as it was handled as an amendment of the contract with Johnson Roofing.

The Petitioner states, "The issue is not whether Professional was the contractor responsible for its installation; rather, the question is whether installing the stucco in direct contact with the roofing shingles due to the absence of kickout flashing was a construction defect in violation of Magna Wall's install instructions. It was." (Petition for Writ of Certiorari p. 18). No one, not even Petitioners' own expert, testified to stucco on the shingles as being a proximate cause of any damages, or to stucco on the shingles being the result of the kickout flashing not being present. There is no evidence in the record to support the Petitioners' claims. Further it is noted that stucco is separated from the shingles by a J-weep screed not kickout flashing. See NER459. (App. 1765)

Petitioners state, "[i]t is therefore paramount to acknowledge that Dawkins testified the lack of kickout flashing where Professional installed its stucco in contact with the roofing shingles was the proximate cause of the water intrusion at Fenwick." (App. 1612:21-1613:18)" (Petition for Writ of Certiorari p. 20) The actual quote from testimony from Mr. Dawkins from the page and line designation cited by Petitioners is as follows:

Q: 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 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 ever worse by lack of a sill flashing by North Florida framing at the sill of the window because there was no

sill blashing 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 terminations at the breeze ways, which was also an integration of - - a waterproofing/integration issue.

(App. 1612:21-1613:18)

Mr. Dawkins further testified:

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.

(App. 1613:19-22)

Again, there is no mention of stucco on the shingles or that the proximate cause of water intrusion involved stucco on the shingles until it was raised by Petitioners in their Petition for Rehearing following the issuance of the Court of Appeals' opinion.

Petitioners, in their discussion of stucco in contact with the shingles, have conveniently omitted paragraph 27 of Attachment B of the contract between Summit and Respondent which states:

"27. All parties agree that SUBCONTRACTOR shall sequence the installation of stucco to complete gable end walls at areas above roof areas **prior to roof shingles installation, . . .**"

(App. 1742).

This is the very area identified by Mr. Glick as "the place where the truss of the gable comes together with a wall . . . because of what we call the lack of kickout flashing. . ." (App. 853: 15 - 22). The stucco application at the gable end walls would have been complete when the shingles were installed. The final coat of the stucco

application was performed by another subcontractor, Los Campos, who was also responsible for the waterproofing of the stucco.²

Stucco on the shingles was not identified as a proximate cause of any damages in the trial proceedings, nor is there any testimony that the kickout flashing separates the stucco from the roof shingles. Any improper relationship between the stucco and shingles would be the roofer's responsibility, as the roofer would have performed the installation of the shingles after the stucco was in place in accordance with the contract.(App. 1742) Under Petitioners' theory, Summit should have been notified by the roofer to have the condition corrected.³

Petitioners make the identification of the requirement for kickout flashing in the code sound obvious and easily found. Petitioners also claim that the lack of kickout flashing was a code violation and, contrary to Figure 2 of the NER459 (App. 1765). However, kickout flashing is not illustrated in Figure 2. The NER459, Figure 2 requires the flashing installation and materials to be in accordance with the code.⁴ (App. 1765). Section 1405.3 of the 2000 IBC states in part that, "Flashing shall be installed so as to prevent moisture from entering . . . at roof and wall intersections with the step-flashing method; . . ." There is no specific mention of "kickout" flashing in the 2000 IBC or the NER 459. It is not an unambiguous requirement that is clearly stated in the 2000 IBC code and the NER459 as Petitioners would suggest. The code requires

² Paragraph 4 of Attachment B to subcontract between Summit and Los Campos:
It is the intent of the this SUBCONTRACT to convey to the SUBCONTRACTOR that the exterior waterproofing of all stucco is the responsibility of the SUBCONTRACTOR. This is to include but not limited to all areas where stucco meets like or unlike surface where paint may or may not be applied. (App. 626, 1719)

³ The roofer was Johnson Roofing from whose contract the requirement for kickout flashing was removed.

⁴ Applicable building code to the Fenwick project was the 2000 IBC (App. 1455:10-22)

step flashing at roof to wall intersections, and the NER459 does not specify the type of flashing except by a generic depiction that is not kickout flashing.

Petitioners contend that Mr. King admitted that Respondent should have installed casing beads, but these were not installed as required. Mr. King's alleged admission was based upon a question concerning whether an aluminum window jamb is a dissimilar material to stucco.(App. 904: 4-17). When Mr. King was asked if a casing bead was required at the window, Mr. King responded, "not very many times." (App. 900:24 – 901:3). He further testified that "some people do away with a casing bead with that type of window." (App. 900:15-23). Mr. Dawkins' testimony would have expanded upon this testimony. He determined that Respondent'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." (App. 1610:19-1611:6). Paragraph 22 of Attachment B to the contract between Summit and Respondent was omitted by the Petitioner from the petition. Paragraph 22 states:

22. All parties hereby agree that SUBCONTRACTOR shall furnish and install "J" mold at all edges of stucco not finished into a wall or jamb including the bottom edge of the vertical walls at the ground level where stucco ends at the edge of the horizontal concrete slab or foundation wall.

(App. 1742)

Petitioners attempt to confuse the use of the terms J mold and casing bead. This issue is resolved by Petitioners' own expert, Mr. Glick, in the following testimony:

- Q. Can you tell us what a sealant joint is?
- A. A sealing joint is where the stucco stops. And it's supposed to stop with a bead, a j-bead. It's basically an end cap. So the stucco goes into the end cap. You caulk between the end cap and the window, two dissimilar materials, to stop water from intruding.

(App. 847:24-848:1)

Petitioners and Mr. Glick flatly ignore paragraph 22 of attachment B to Professional's contract.

It is apparent that the general directions given in paragraph 25 of Attachment B to the subcontract (App. 1742), would require casing bead to be installed at any intersection with dissimilar materials but the specific direction given in paragraph 22 of Attachment B to the subcontract (App. 1742) modifies the requirement for a wall or jamb. (App 904:4-17). In relation to the kickout flashing, the contractual duty to report and inform Summit of the deficiencies was fulfilled. In light of the new issues raised for the first time by Petitioners a new trial as directed by the Court of Appeals would be the proper next step. The Court of Appeals realized the conflict between the parties included both proximate cause issues and a determination of what the standard of care should be and therefore what duty was owed. The prejudice of the exclusion of Mr. Dawkins is clear when his status as Respondent's only expert able to testify to the obligations of the Respondent under the contract and the code is considered. Under these circumstances the Petition for Writ of Certiorari should not be granted on this basis.

II. SHOULD THIS COURT ADDRESS THE CLEAR DISTINCTIONS BETWEEN THE COURT OF APPEALS' DECISION IN *MAGNOLIA NORTH* FROM THE CASE AT BAR?

Petitioners' reading and reliance on *Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) is misplaced. Proximate cause and liability were not issues in *Magnolia North*, as they are in the present case. The facts of the two cases are different in the

parties' responsibilities and positions on the projects. In *Magnolia North* the defending parties were the vendor, general contractor, and parent corporation of both, whereas in the case at bar, the party is the stucco subcontractor. In *Magnolia North* a verdict was directed against the defending parties on the claims for negligence and breach of warranty of workmanlike services, while in the case at bar the Petitioners' directed verdicts were denied. In *Magnolia North* the Court of Appeals stated a standard for directed verdict motions: "The trial court should deny the motions when either the evidence yields more than one inference or its inference is in doubt." *Id.* at 368. In the case at bar, however, the trial court found the evidence yielded more than one inference or doubtful inferences and properly denied the Petitioners directed verdict motions.

"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, supra at 368, 123.* 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 all aspects of the case were contested. Petitioners' reliance on Mr. Dawkins statement concerning the kickout flashing ignores the obvious conflict over not only proximate cause but the existence of a duty owed by Respondent beyond notification to Summit that the kickout flashing was not present. The requirement to alert Summit would not exist as the plans omitted kickout flashing. Mr. King's acknowledgment that kickout flashing should have been installed does not impose an additional duty upon Respondent to perform the installation or take other

action after receiving instructions from Summit. Knowledge of defects held by a vendor, general contractor and developer who are responsible for the entire project imposes a different set of obligations than the obligation that would be imposed on a single trade subcontractor. The circumstances in the case at bar are far different from those in *Magnolia North*. In the present case, liability was contested and as set forth in Respondents appeal briefs and the testimony contained in the Record on Appeal the statements of Mr. King were not admissions of liability. Mr. Dawkins' proffered testimony was clear that the work of Respondent at the project was **not** the proximate cause of any damages.(App.1613:19-22). The clear distinctions between the case at bar and *Magnolia North* should not be the basis for a grant of the Petition for Writ of Certiorari.

III. DID THE COURT OF APPEALS ERRONEOUSLY DETERMINE THAT RESPONDENT'S EXPERT WAS IMPROPERLY EXCLUDED BY THE TRIAL COURT, IN LIGHT OF THE EXPERT HAVING TECHNICAL AND SPECIALIZED KNOWLEDGE THAT WOULD ASSIST THE TRIER OF FACT TO UNDERSTAND THE PROXIMATE CAUSE OF WATER INTRUSION AND WHO WAS KNOWN TO PETITIONERS FOR THIRTEEN MONTHS PRIOR TO TRIAL?

Petitioners make lip service to their objections to Mr. Dawkins' qualifications as an expert witness thereby abandoning the issue. *Biales v. Young*, 315 S.C. 166, 432 S.E. 2d 482 (1993); *Mixson v. Westinghouse Elec. Corp.* 304 S.C. 31; 402 S.E.2d 893 (1991). Instead Petitioners have chosen to focus on the issue of whether the exclusion of Mr. Dawkins was proper in light of a discovery violation.

The alleged discovery violation was a failure on the part of Respondents to produce Mr. Dawkins' file. The chronology of the discovery requests and responses is revealing. Mr. Dawkins was called as the first witness at 9:00 a.m on May 12, 2011.

(App.1088). During Mr. Dawkins qualification as a witness, the failure to produce documents was raised for the first time by the Petitioners(App. 1114) The file, and all its contents, were turned over to Petitioners in the morning of May 12, 2011.(App. 1127:4-8) The court postponed Mr. Dawkins' testimony and took Mr. Dawkins' qualification under advisement and recessed for the night on May 12, 2011. Prior to the recess Respondents were given the opportunity to depose Mr. Dawkins.(App. 1395:19-22) The offered deposition was accepted. The contents of the file included a chart that paired comments to photographs from Mr. Glick that Mr. Dawkins had reviewed. The comments to the photographs were notes as to whether there was visible moisture damage. (App. 1128:1-9) There was also a list of test cuts observed by Mr. Dawkins. Petitioners were in possession of the chart and list from the morning of May 12, 2011 until the court reconvened on May 13, 2011. Mr. Glick was present to go over the contents of the file with counsel.

Mr. Dawkins was identified as an expert more than a year prior to trial on April 1, 2010. (App.754-762) In the thirteen months before trial, when Petitioners knew Mr. Dawkins was Respondent's expert witness, Petitioner did not take the deposition of Mr. Dawkins or make any inquiry concerning Mr. Dawkins, informally or through discovery.

Although Petitioner initially informed the court that there had not been a response to the discovery request, the Respondents had responded to Petitioners discovery request on August 20, 2010. The response to the discovery requests stated that material subject to the request for production would be made available upon

request at an agreed to time.⁵ Petitioners never followed up to this response. Until the objection made at trial, Petitioners had not taken the deposition of Mr. Dawkins, had not filed a motion to compel, and had not issued any subpoenas. Petitioners did nothing for the thirteen months from learning of the identity of Dawkins and nothing for the eight months following the notice of availability of the documents.

Petitioners' method of handling the matter was nothing short of an ambush. Petitioners did nothing for more than a year to determine any information about Mr. Dawkins. After not even calling to set up a time to review documents, Petitioners rose in court to complain. The trial court made inquiry into the matter in chambers. It was determined that there were the two documents in Mr. Dawkins that Petitioners' counsel had not seen and which had not been delivered to Respondent's counsel.

Pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, a party is required to turn over documents in response to a request for production "which are in the possession, custody, or control of the party upon whom the request is served." Rule 34, SCRPC; *Reiland v. Southland Equipment Service*, 330 S.C. 617 (1998) (finding that plaintiff did not violate discovery rules when there was no evidence that he had received any of the disputed documents. The defendant could have deposed the individual to gain access to his documents). Counsel for Respondent had not received the two documents in question and informed the Court that they had never received the

⁵ The Plaintiff's Memorandum quoted their discovery request, however, it failed to quote the Defendant's discovery response to Request for Production 9. The Defendant's discovery responses as to Respondents' Request for Production 9 dated August 20, 2010 stated: "The Defendant objects to this request on the grounds that it may violate attorney/client privilege and the work-product doctrine. In addition, the requests are overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, all non-privileged items, which may be responsive to this request, will, upon request, be made available for review at a mutually agreeable time at the offices of Sweeny, Wingate & Barrow, located at 1515 Lady Street, Columbia, South Carolina 29211." (App 759).

documents from the file of Mr. Dawkins. (App. 1125: 16-21). Petitioners complain that the responses from Respondent's counsel that the documents in question were not in their possession is inconsistent with the Respondent's discovery response to set up a time for review of Respondent's documents. It is not inconsistent but addresses three different issues. First, it corrects the totally inaccurate representation of Petitioners to the trial court that Petitioners had not responded to Petitioners discovery. Second, it illustrates Petitioners complete lack of interest in Respondent's documents. Petitioners were unaware of what was available for review as they never asked to see the documents. Third, it makes clear that the two documents were not in the possession of Respondent's counsel to turnover.

Petitioners complain that the withholding of use of the documents is not a satisfactory resolution of the matter. But depending on the item withheld it places the parties in the position they would have been had the item not existed or the position the complaining party thought they were in prior to the discovery. In the current case, it was Mr. Dawkins photographs that were withheld with the caveat that counsel for Petitioners could use any of the photographs should they desire to do so.

Petitioners take exception to the Court of Appeals conclusion that the trial court did not base its exclusion of Mr. Dawkins as an expert witness on the alleged discovery violation. As support the Petitioners refer to the inquiry that is required of the trial court upon a discovery issue being raised. Petitioners base their conclusion that the discovery issues were or could have been the basis of its decision to exclude Mr. Dawkins as an expert on the trial courts use of the phrase *in camera voir dire* (App. 1396:24.) Petitioner contends that those words refer to the discovery inquiry. However, when read in its entirety the trial court is referring to the examination of Mr.

Dawkins on his qualifications that occurred outside the presence of the jury. On the morning of May 13, 2011 the trial court stated:

THE COURT: The question was whether or not Mr. Dawkins would be qualified as an expert at this time based upon my review of 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 an 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. I note your exception.

(App. 1396:21-1397:8)

The ruling is framed by the trial court as whether Mr. Dawkins would be qualified as an expert and not in terms of whether there was a discovery violation that would exclude him from the case. The trial court makes reference to voir dire but then as a correction or clarification uses the term *in camera voir dire* delineate questioning outside the presence of the jury and not the discussions that took place off the record in the trial court's chambers. Voir dire would be an unusual term to describe such a conference with counsel.

Petitioners were concerned the trial court might base its ruling on the fact that Mr. Dawkins did not have a license as they had emphasized in argument that it would be a criminal violation of South Carolina law for Mr. Dawkins to testify.(App. 1393:3-23). Just prior to recessing for the evening on May 13, 2011, Mr. Kirshner, counsel for the petitioner, stated:

MR. KIRCHNER: And, Your Honor, I'm not saying that this statute is the sole basis for you to exclude him. It's all those other factors, I just mentioned.

The factors just mentioned by Mr. Kirchner were the ones unrelated to Mr. Dawkins not holding a South Carolina license.⁶ The trial court's statement was an attempt to include "those other factors, I just mentioned" and did not relate to the alleged discovery issue.

The Petitioners suggest that another discovery violation with another witness should be considered when reviewing the exclusion of Mr. Dawkins. The second discovery issue raised involved an estimate created by Defendant's expert estimator Robert Puscek on January 13, 2011, for \$5.6 million dollars.(App. 1175:18-1177:2). In January 2011 there were a series of estimates that priced various groups of buildings, ranging from 9 buildings to 12 in number, with various scopes of repairs. Petitioners' objection was that one of these multiple estimates was not produced to them. There were five estimates/budgets done by Mr. Puscek on June 10, 2010, January 13, 2011, January 14, 2011, and May 12, 2011, (App. 1182:19-1183:9) The estimate in question is the January 13 estimate.for \$5.6 million. Mr Pushcek did not know if he had transmitted the January 13 estimate to Respondent's counsel or not. (App. 1188:24-1189:2) Counsel for Respondent were also uncertain, however it is the only estimate that was claimed to have not been produced. Following a discussion of the various estimates and the *voir dire* of Mr. Puscek, Petitioners asked the trial court that the one \$5.6 million estimate be excluded, and the request was granted. All parties had

⁶ Mr. Kirchner: Very briefly Your Honor, In the *Watkins v. Ford Motor Company* case that Ms. Mahon cited where that particular expert admitted that he had no professional experience, it's exactly what we have here. Mr. Dawkins has admitted that he's not a licensed architect. He has this -- he calls himself a construction consultant, but has not certification for it. He has never, ever designed a project like the one that is at issue here. He's never designed anything in coastal South Carolina, never anything in Charleston County or anything in all of South Carolina, for that matter. And again, he's never been qualified as an expert in a court of law in South Carolina. Again, the crux of the rule on experts is to determine whether or not that witness will assist the trier of fact. You have someone who is testifying in violation of South Carolina law about technical issues. It absolutely is prejudicial to our case, and should not be allowed. (App. 1392:11- 1393:9)

multiple estimates as the case evolved and the scopes of repair narrowed or expanded. Petitioners did not issued their final stucco-only estimate until May 5, 2011, the Thursday before trial began on May 9, 2011. The last-minute production required Respondents' expert to respond with a stucco-only estimate in rebuttal to Petitioner's May 5, 2011 estimate.⁷

Petitioners casually comment on remanding the case for further hearing on the discovery issue only. The record before the Court of Appeals was sufficient for the Court of Appeals to perform its analysis. This request of Petitioners is not a basis for the issuance of a writ of certiorari but an attempt to have the trial court defends its position.

Petitioners assert that excluding Mr. Dawkins testimony is an appropriate sanction for this discovery violation. "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 v. Ford Motor Co.*, 373 S.C. 248, 270, 644 S.E.2d 755, 767 (Ct. App 2007). "The sanction of excluding a witness should never be lightly invoked." *Jenkins v. Few*, 391 S.C. 209, 219, 705 S.E.2d 457 (Ct. App. 2011). Before excluding a witness as a sanction for violating the continuing duty to disclose information, the trial court should ascertain (1) the type of witness involved, (2) the content of the evidence, (3) the explanation for the failure to name the witness in answer to the interrogatory, (4) the importance of the witness's testimony, and (5) the degree of surprise to the other party. *Id.* (quoting and applying *Bensch v. Davidson*, 354 S.C. 173, 182, 580 S.E.2d 128 (2003)). There has been no evidence of prejudice to

⁷ The rebuttal estimate is the subject of issue 2 in the Respondent's appeal. (App. 1891-1895).

Petitioners. When applying the five factors set forth in *Jenkins*, Id. We find the following information:

1. **Type of witness:** expert witness on liability
2. **Content of the evidence:** a) his forensic inspection of the buildings, b) the application of the building codes, c) whether the work of Professional Plastering met the code requirements, and the manufacturer's specification, d) the requirements of the contract documents, and e) that the work of Professional Plastering was not a proximate cause of the Petitioners' damages.
3. **Failure to name the witness:** No failure. The witness was named 13 months prior to trial.
4. **Importance of witness's testimony:** Only defense witness on proximate cause of the damages in relation to Respondents work and to rebut Petitioners expert witness.
5. **Degree of surprise:** None as witness was identified 13 months prior to trial

The Court of Appeals was correct in determining the trial court did not exclude Mr. Dawkins on the basis of a discovery violation, and that it would not have been appropriate in this case. (App. 2041)

CONCLUSION

The improper and highly prejudicial exclusion of Mr. Dawkins by the trial court was properly addressed and redressed by the reversal of jury's verdict and remand of the case for a new trial by the opinion of the Court of Appeals in conformance with existing case law. The Petitioners have not presented a case in which there are novel questions of law, or a dissent in the decision of the Court of Appeals, or a decision of the Court of Appeals that is in conflict with a prior decision of the Supreme Court, no substantial constitutional issues are directly involved, and there is no federal question and the decision of the Court of Appeals is not in conflict with the U. S. Supreme

Court. Based upon the above it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2014-000615

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

v.

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

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

Professional Plastering & Stucco, Inc., Respondent

v.

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

Of whom APS Unlimited, Inc. is the Petitioner.

PROOF OF SERVICE

I certify that I have served Respondent's Return to Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc.'s Petition for Writ of Certiorari on this date to the following counsel of record in the manner specified below:

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April 21, 2014