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S.C. SUPREME COURT

**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. 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.**

**FENWICK PETITIONERS' REPLY TO RETURN
TO PETITION FOR WRIT OF CERTORARI**

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REPLY ARGUMENT AND CITATION OF AUTHORITY

The Petitioners, Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc. (collectively, "Fenwick") herewith submit their Reply to the Respondent's Return to Petition for Writ of Certiorari.

1. Fenwick has not waived the harmless error analysis.

Fenwick has relied upon a harmless error analysis at every phase of this appeal, citing to the likes of *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. 19, 26, 609 S.E.2d 506, 509 (2005) ("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."); *Fields v. Haynes*, 376 S.C. 545, 558, 658 S.E.2d 80, 87 (2008); *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); Rule 61, SCRPC.

As part of that analysis, Fenwick plainly pointed out in its Initial Respondents' Brief the numerous admitted failures of Professional Plastering & Stucco, Inc. ("PPS") to adhere to the building code as well as its own contract for the work. (Appx. pp. 1937-1940). Fenwick also argued Dawkins attributed deficiencies in the stucco installation to problems inherent with the building substrate in an effort to shield PPS from liability. (Appx. pp. 1939). Should there be any doubt, Fenwick specifically directed the Court of Appeals in its Initial Brief to Donnie King's numerous admissions, including PPS's

installation of the stucco at the roof-to-wall terminations despite the missing kickout flashing. (Appx. pp. 1939). For PPS to suggest these arguments were not addressed, and that there is no evidence to support a finding that damages at Fenwick were proximately caused by defects at the roof-to-wall terminations where PPS's stucco was installed without kickout flashings having properly been in place is, frankly, absurd. PPS's owner admitted:

Q. Sir, Mr. Glick showed the jury a photograph of stucco in contact with shingles on Monday. Do you recall that?

A. I believe so, yes.

Q. **That's an improper construction condition, correct?**

A. **That's where the kickout flashing should have been.**

...

Q. **Magna Wall installation instructions do not permit stucco in contact with shingles, correct.**

A. **I don't believe so.**

Q. **Under the Magna Wall installation instructions that condition is, in fact, an improper construction condition; correct?**

A. **Yes, sir.**

(Appx. p. 905:5-906:7)(Emphasis Added). This is the same defect PPS's own expert said was a proximate cause of damages at Fenwick. No reasonable jury would have accepted Dawkins' assertion that PPS was not at fault when PPS had already conceded to violation after violation of the applicable building codes and its own contract. This is not a new argument. Any change in the tenor or presentation of the

analysis by Fenwick is simply in reaction to the decision of the Court of Appeals as the case has unfolded on appeal. *See, e.g.*, Rule 242(d)(1) (“A question presented will be deemed to include every subsidiary question fairly comprised therein.”). This Court should take further review and reverse the decision of the Court of Appeals on the issue of harmless error.

2. PPS owed a duty not to cover up construction defects in violation of the building code and Magna-Wall’s installation instructions.

It is of no consequence whether kickout flashing was required of PPS under its contract. What matters is whether PPS was required to install the Magna Wall stucco system in accordance with the building code and its contract. It was.

The combined testimony of Dawkins and PPS’s owner reveals that the installation of the stucco at the roof-to-wall terminations violated the code and Magna Walls instructions. To suggest there was no violation because someone else was supposed to install the kickout flashing is a distinction without a difference – Dawkins and King both admitted kickout flashing is a necessary component of waterproofing and both admitted it should have been there. Further, it is undisputed that PPS installed its stucco on the Fenwick exterior with plain knowledge the necessary flashing was missing. (Appx. pp. 895:12-24, 896:17-23). It poses the question given necessity of this waterproofing feature: What did PPS think would happen? Dawkins provided the answer: it was a proximate cause of water intrusion at Fenwick. (Appx. pp. 1612:21-1613:18).

PPS argues its duty to inspect the substrate for defects, including the missing flashings, was simply to alert the superintendent, and because the missing flashing was obvious, nothing more was required of it. Nothing in the building code or the Magna Wall installation instructions creates a notice exception for what is required of a builder.

Contrary to PPS's argument on page 10 of its Return, the real "purpose" of PPS's contract, which incorporates the requirements of the building code, is to ensure PPS correctly performed the work so that the end result is free of defects. As King repeatedly admitted, that did not occur at Fenwick. (Appx. pp. 1939-194; 2053-2060).

PPS's failure to install casing beads is yet another admitted defect that failed to adhere to the building code and PPS's contract. The record is clear in this regard, despite PPS's assertions at pages 15 and 16 of its Return. The plain, unambiguous language of the contract required a casing bead at the intersection of the stucco and the aluminum window. Again, Professional admittedly breached this duty, conceding the casing beads were not installed.

Q. Of course, we saw on Monday that there were not (sic) casing beads at the intersection of dissimilar materials at the windows, correct?

A. That's correct.

Q. **The photos that we saw on Monday with no casing bead at the intersection of the plaster and the aluminum window is in contravention of the last two paragraphs we just read in Attachment B to your former company's contract for the application of the stucco at Twelve Oaks; correct?**

A. **Yes, sir.**

(Appx. pp. 912:13-20, 913:12-15) (All emphasis added). PPS's suggestion that it did not have to install the casing beads where its stucco intersected with the windows is directly contradicted by King's admissions and PPS's contract. (Appx. p. 1742).

3. *Magnolia North* is instructive of the proper outcome in this action.

PPS's analysis of *Magnolia North Prop. Owners' Ass'n v. Heritage Cmtys., Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), is short of complete. PPS also is patently incorrect that proximate cause and liability were not challenged by the defendants in *Magnolia North*. The opinion in *Magnolia North* provides:

Appellants maintain the trial court instructed the jury that it had granted a directed verdict to the POA on its negligence claim, and, therefore, the jury must award the POA damages on this claim. **Appellants argue the trial court improperly gave the jury the impression it had already determined the POA had established proximate cause.**

Id. at 363, 725 S.E.2d at 120. (Emphasis added). Later the Court's decision states: "Appellants argue the trial court misconstrued counsel's acknowledgment that defects existed as an admission that Appellants were 'negligent as to, **and were the proximate cause** of, all of the alleged defects.'" *Id.* at 368-369, 725 S.E.2d at 123 (bold emphasis added, underline in original). Plainly, the defendants in *Magnolia North* admitted to building defects but disputed the issue of proximate cause. That is precisely what happened here.

From opening statements onward, Professional never disputed the buildings at Fenwick were damaged as a result of construction defects. (Appx. p. 1863:21-1864:2). Considering the numerous, admitted defects in its work, Professional focused its defense on the issue of proximate cause. (Appx. pp. 1864:3-19, 1885-1886, 2003).

One after the other, PPS admitted to numerous code violations and violations of its contract for the work, which the trial court acknowledged at the directed verdict stage. (Appx. pp. 883:9-913:11, 1087:5-14). Even if PPS disputed proximate cause at the directed verdict stage, the issue was later put to rest after Dawkins proffered testimony

that water intrusion occurred at the roof-to-wall terminations where the stucco was installed without complete flashings. Dawkins' testimony is fatal to Professional, because it failed to inspect for and covered up this and other defective conditions in violation of its contract and Dawkins confirmed this defect proximately caused water intrusion. Further, King acknowledged Glick's photographs of rotted wood where water had gotten behind the reverse lap of Professional's paperbacked lath.

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

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

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

A. I believe it is.

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

A. I believe so.

(Appx. pp. 908:14-909:14). "An admission of counsel **or evidence** supporting less than all of the complaint's specifications of negligent conduct is sufficient to support a directed verdict for the POA." *Id.* at 369, 725 S.E.2d at 123. (Emphasis added). "[I]t is not necessary to prove that the defendant's negligence was the sole proximate cause of the injury." *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972). It is sufficient if the evidence establishes that the defendant's negligence is "a concurring or a contributing proximate cause." *Id.* at 606, 193 S.E.2d at 534; *see also Baggerly v. CSX Transp., Inc.*,

370 S.C. 362, 369, 635 S.E.2d 97 (2006). The Court of Appeals overlooked these points and the logic of *Magnolia North*.

4. PPS's discovery violations are not so easily ignored.

“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). Audaciously, PPS plays the victim in its Return by suggesting it is Respondents' fault that PPS committed discovery violations. That Dawkins was identified more than a year prior to trial¹ simply means PPS had more than one year to fulfill its duty to produce his complete file. If Respondents waited until trial to complain that PPS failed to produce documents, it is because PPS waited until then to use various materials it had not previously produced. The rules of discovery avoid this merry-go-round argument when properly followed.

It also is incorrect that Fenwick did not request Dawkins' file through discovery. To suggest that PPS fulfilled its obligations to produce these files by responding that they “will, upon request, be made available” is more gamesmanship. Plainly the request already was made and PPS had a duty to comply, but did not. It is nothing short of hypocritical to suggest Fenwick “ambushed” PPS with an objection to these unproduced

¹ PPS named several experts in discovery, yet did not call most of them as witnesses at trial. (Appx. pp. 737-738). Requiring timely production of files in response to discovery allows the requesting party the opportunity to determine who it should depose. Under PPS's point of view, Respondents should have deposed all of PPS's witnesses to find out the scope of their available records, rather than having PPS fulfill its discovery obligations. Discovery in South Carolina is not supposed to be a guessing game. See *In re Anonymous Mbr. of S.C. Bar*, 346 S.C. 177, 552 S.E.2d 10 (2001) (“In this respect, the discovery process is designed to “make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”)(internal citations omitted).

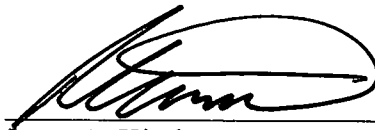
materials at trial. Tellingly, when confronted with the missing discovery at trial, PPS never made such a claim. Instead, PPS represented to the trial judge that it did not possess the requested items. (Appx. pp. 1101-1102). In fact, it was counsel for PPS who apologized to the trial court for not fully producing the requested materials. (Appx. p. 1391). PPS should withdraw its assertion that it is the one who was ambushed at trial, and this Court should take further review and find the trial court properly exercised its broad discretion under the totality of the circumstances to exclude Dawkins.

CONCLUSION

For the reasons set forth herein, inclusive of those arguments and points raised in Fenwick's Petition for a Writ of Certiorari, this Court is requested to grant the Petition and take further review of the decision of the Court of Appeals.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I, Moira W. Kerrigan, an employee of Thurmond Kirchner Timbes & Yelverton, P.A., attorneys for the Petitioners, do hereby certify that I have this date, mailed, postage prepaid, a true and correct copy of the Petitioners Reply to Return to Petition for Writ of Certiorari to the following counsel of record:

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