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. are the, ... Appellants.

Professional Plastering & Stucco, Inc., ... Third-Party Plaintiffs,

v.

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

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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 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") (ROA: ___, 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. Professional Plastering & Stucco, Inc. ("Professional Plastering") 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 "Respondents") were consolidated on October 10, 2008. (ROA: ___, Order of Consolidation). Professional Plastering was the only defendant who had not settled at the time of trial.

The consolidated cases of the Respondents against Professional Plastering were tried by jury before Judge Harrington on May 9, 11, 12, and 13, 2011. The jury returned a verdict in favor of the Respondents 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. (ROA: ___, Jury Verdict Form; May 11-13, 2011 Transcript p.756: 9-757: 18). 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. (ROA: ___, May 11-13, 2011 Transcript 786: 34-788:13). Written Motions, Memoranda, and Reply in support of these motions were filed by Professional Plastering. (ROA: ____, Professional Plastering's Memorandum in Support of Motion for New Trial Absolute, Memorandum in Support of Motion for Set-Off, Memorandum in Support of Motion for Judgment Notwithstanding the Verdict, and Memorandum in Support of Motion for New Trial Nisi Remittitur and Reply.) The motions were denied by Judge Harrington in an order filed on June 17, 2011. (ROA: ___, Order Denying Post-Trial Motions). Professional Plastering subsequently filed a Motions to Alter or Amend the Judgment (ROA: ___, Professional Plastering's Motions to Alter or Amend the Judgment) which were denied by Judge Harrington in an order filed July 19, 2011. (ROA: ____,Order denying Rule 59(e) Motion).

On April 1, 2010, Professional Plastering filed a Cross-Claim against its subcontractor APS Enterprises, Inc. (hereinafter "APS") asserting claims for negligence, breach of warranties, breach of contract, and indemnity. (ROA: ___, Professional Plastering's Answer to Plaintiff's Fourth Amended Complaint, Second Amended Third-Party Complaint, and Cross-Claims). APS filed a motion for Summary Judgment against Professional Plastering on the basis that Professional Plastering was not a licensed

stucco installer, and therefore could not maintain these claims.(ROA: ___, APS's Motion for Summary Judgment and Memorandum) Judge Harrington granted APS' Motion for Summary Judgment on May 11, 2011 (ROA: ___, Order Granting Summary Judgment). Professional Plastering subsequently filed a Motion to Alter or Amend the Judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. This motion was denied by Judge Harrington on July 19, 2011 (ROA: ___, Order Denying 59(e) Motions). Professional Plastering appeals the jury verdict and the judgment entered following the jury verdict, the denial of the Motion for New Trial Absolute, Motion for Judgment Notwithstanding the Verdict, Motion for Set-Off, Motion for New Trial Nisi Remittitur, and the denial of the Rule 59(e) Motions to Alter or Amend each of the above denials. Professional Plastering appeals the order granting APS's Motion for Summary Judgment and the order denying Professional Plastering's Rule 59(e) Motion to Alter or Amend the Judgment. The Notice of Appeal was filed and served on opposing counsel on July 20, 2011.

FACTS OF THE CASE

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, estimator and repair contractor. Mr. Glick provided a detailed analysis of the alleged defects in the stucco application that included the application of stucco before flashing was installed at roof to wall intersections, the application of stucco was too thin in some areas and too thick in others, the use of

termination devices at dissimilar materials and the base of the wall was not in accordance with the manufacturer's instruction, and 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 a proper repair 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 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 (ROA: ___, May 11-13, 2011 Transcript p. 67- 137).

In the case presented for Professional Plastering, the testimony of Mr. 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 that the stucco application was proper and passed his inspections. (ROA: ___, May 11-13, 2011 Transcript McNabb at p. 271 -300:8) Tacy McGinty, the project manager for Summit, the general contractor on the project 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.. Tacy McGinty testified the work performed by Professional Plastering was properly done in accordance with the contract documents. . (ROA: ___, May 11-13, 2011 Transcript McGinty at p. 418 -510:19).

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 (ROA: ___, Defense Exhibit 4 for id.) which was a stucco related repair estimate for all 12 buildings in the amount of $3,662,587.64. The exhibit displayed the estimate as a comparison between Mr. Gallagher's stucco-only repair and Mr. Puschek's stucco-only repair. (ROA ___, May 11-13, 2011 Transcript p. 319:1 – 415:8). Defendant Exhibit 4 was not admitted into evidence.

Mr. Christian Dawkins, P.E. 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 his forensic inspection of the buildings, the application of the building codes, whether the work of Professional Plastering met the code requirements, whether the work met the manufacturer's specification, the requirements of the contract documents and that the work of Professional Plastering was not a proximate cause of the Respondents' damages. He was only allowed to testify to his personal observations during his investigation of the buildings but could not give any opinions.

The Respondents objected to Mr. Dawkins being qualified as an expert. (ROA: ___, May 11-13, 2011 Transcript 233: 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. Motions for directed verdict were heard and denied. The requested jury charges were reviewed. The Respondents' proposed verdict form was accepted by the

court over the Appellant's objections. 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. (ROA ___; Verdict Form). No punitive damages were awarded.

APS' MOTION FOR SUMMARY JUDGMENT

Professional Plastering hired APS as a sub-subcontractor for the stucco installation during the repairs of the breezeways in 2003-2004 (ROA: ___March 20, 2012 Transcript of Hearing to Reconstruct the Record p. 17:9 – 18:24and subcontract?). APS filed a motion for Summary Judgment against Professional Plastering on the basis that Professional Plastering was not a licensed stucco installer, and therefore could not maintain an action against APS. (ROA: ___, APS' Motion for Summary Judgment). APS cited South Carolina Code Ann. Sections §§40-11-270 and 40-11-370 in support of its motion. Professional Plastering's argued that the licensing requirements under the statute only applied to general or mechanical contractors, therefore Professional Plastering was not required to hold a South Carolina license. (ROA: ___; March 20, 2012 Transcript of Hearing to Reconstruct the Record p. 17:9 – 18:24). Further, Professional Plastering was not enforcing the provisions of a contract but bringing an action for negligence. (ROA: __, Transcript of Hearing to Reconstruct the Record p. 20:17-22) Judge Harrington ruled that because Professional Plastering did not have a license, it may not maintain its claims against APS and summary judgment was granted. (ROA:___, Order Granting APS' Motion for Summary Judgment).

ARGUMENT

I. 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?

A. Standard of Review.

The qualification of an expert witness and the admissibility of his or her opinion are matters resting within the discretion of the trial judge. *Manning v. City of Columbia*, 297 S.C. 451, 453, 377 S.E.2d 335, 336-37 (1989); *Pope v. Heritage Communities, Inc.* 395 S.C. 404, 423, 717 S.E.2d 765 (Ct. App. 2011). On appeal, the trial court's ruling will not be disturbed absent an abuse of that discretion and a showing of prejudice. *Strange v. S.C. Dep't of Highways & Pub. Trans.*, 307 S.C. 161, 163, 414 S.E.2d 138, 139 (1992). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Fields v. Reg'l. Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). "A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair." *Id.* Prejudice is "a reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof." *Fields v. Haynes*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008).

As discussed below, the exclusion of Professional Plastering's only liability expert was an abuse of discretion and the ruling was manifestly arbitrary, unreasonable and unfair.

B. Qualifications of Expert.

The Court abused its discretion in failing to qualify Chris Dawkins, P.E. as an expert witness. The Judge stated: "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." (ROA: ___, May 11-13, 2011 Transcript p. 524: 21-525:7)

During voir dire, Mr. Dawkins testified that 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. (ROA: ___, May 11-13, 2011 Transcript p. 215: 15-21). He is a licensed Professional Engineer in the states of Georgia and North Carolina. (ROA: ___, May 11-13, 2011 Transcript p. 216: 3-4). He has been qualified as an expert four times by courts in the state of Georgia and has never been refused qualification. (ROA: ___, May 11-13, 2011 Transcript p. 237-238). Additionally, he has nearly thirty years of experience in civil engineering and building construction systems. (ROA: ___, May 11-13, 2011 Transcript p. 216:1). Mr. Dawkins further testified that he has been involved with more than fifty projects involving stucco cladding, one of which included more than 100 stucco-clad buildings. (ROA: ___, May 11-13, 2011 Transcript p. 218: 18-23). His involvement with these projects included diagnosing issues with the stucco cladding itself as well as water intrusion behind the stucco. (ROA: ___, May 11-13, 2011 Transcript p. 219: 6-8). He has done work in the coastal areas of Georgia and has participated in approximately thirty projects in South Carolina. (ROA: ___, May 11-13, 2011 Transcript p. 248:1-6).

Mr. Dawkins testified that he had reviewed Mr. Glick's reports, photographs, and PowerPoint presentation. He reviewed the reports of the following engineering firms: S&ME, Engle Martin, G.R. McManus, and H2L Engineers concerning their

investigations of the project. He reviewed the building plans, specifications, Magna Wall stucco system literature including the engineering reports and technical literature, and the manufacturer's installation document by General Aluminum for the windows.((ROA: ___, May 11-13, 2011 Transcript 220:15 – 222:22). In addition, Mr. Dawkins review the National Evaluation Service, Incorporated report, NER459, April 1997; NER459, July 2002; and the ICDO Evaluation Services, Incorporated report NER 4776, July 2000 (ROA: ___, May 11-13, 2011 Transcript 223: 9-24, Plaintiff's exhibits 4, 5, and 6). Plaintiff's exhibits 4, 5, and 6 provided evaluations of the Magna Wall fiber-reinforced stucco system.

The Court inquired as to Mr. Dawkins' "particular skills and understanding of South Carolina licensure and building codes." (ROA: ___, May 11-13, 2011 Transcript p. 246:3-6). In response, Mr. Dawkins testified that the International Building Code of 2000 is applicable to the project. He is familiar with the requirements of the International Building Code of 2000 as it has been adopted by the states of Georgia, and South Carolina. ((ROA: ___, May 11-13, 2011 Transcript 247:3-17). He further testified that there would be no distinction between an analysis that he would perform in Georgia and the one performed in South Carolina. ((ROA: ___, May 11-13, 2011 Transcript 247:18-25).

The Respondents provided the following as reasons why Mr. Dawkins should not be qualified: 1) Mr. Dawkins is from Georgia; 2) Mr. Dawkins has no office in South Carolina; 3) Mr. Dawkins has never designed a multi-family project; 4) Mr. Dawkins has never designed a building in Charleston or in South Carolina; 5) Mr. Dawkins has never been qualified as an expert in South Carolina; 6) Mr. Dawkins is not a licensed architect;

7) Mr. Dawkins is not a licensed general contractor; 8) Mr. Dawkins is not a licensed engineer in South Carolina 9) Mr. Dawkins performed none of his own testing, only observed testing by others[1]; 10) Mr. Dawkins investigated buildings and offered a scope of repair in violation of statute ; 11) Mr. Dawkins is not a certified construction consultant, and 12) Mr. Dawkins did not know of any local variations in the IRC[2] (ROA: ___, May 11-13, 2011 Transcript 224:18-233:18). The issues addressed by Plaintiff in their voir dire of Mr. Dawkins are not part of the qualification requirements of an expert under Rule 702 but merely factors that may affect the weight but not the admissibility of his testimony. The reasons stated are primarily that he is not from Charleston, South Carolina and not licensed in South Carolina as a professional engineer. The trial court's focus on whether Mr. Dawkins was licensed in South Carolina is demonstrated in the following exchange between defense counsel and the court in relation to the objection that Mr. Dawkins was not qualified because he did not make his own investigative cuts but observed with other engineers the cuts performed by a contractor:

"So his observation of the cuts is identical to the observation made by Mr. Glick.

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[1] It was established that his protocol for testing was the same as the Respondents' expert (ROA: ___, May 11-13, 2011 Transcript 242:13-25 to 244:19.

[2] The IRC did not apply to this project. Plaintiffs' expert Myles Gick was asked what the appropriate building code was for the project, and the following exchange occurred:

Q.	What was the appropriate building code?
A:,	It's 2000 IBC, which is the International Building Code..
Q.	And it would be IBC rather than the IRC. Is that not correct?
A.	Correct.
Q.	The IRC is the International Residential Code?
A.	That's correct.
Q.	So these would be considered commercial buildings?
A.	Correct. The IRC is for one and two- family dwellings.

(ROA:___, May 11-13, 2011 Transcript p. 583:10-22)

THE COURT: Except Mr. Glick's licensed in South Carolina; isn't he, Mr. Anderson?"

In determining a witness's qualifications as an expert, the trial court should not have a solitary focus, but rather should make an inquiry broad in scope. *Fields v. Haynes*, 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008). To be competent to testify as an expert, "a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 253, 487 S.E.2d 596, 598 (1997). Being licensed as a professional engineer in South Carolina is not something that a witness must have acquired before being found to be competent to testify as an expert in this State. *Fields v. Haynes*, *supra* ("holding that trial court abused its discretion in failing to qualify unlicensed home inspector as an expert"); *State v. Inman*, 395 S.C. 539, 563, 720 S.E.2d 31 (2011) (out-of-state expert witness's failure to comply with South Carolina licensing requirements does not preclude witness testimony). In *Baggerly v. CSX Transportation, Inc.*, 370 S.C. 362, 374-75, 635 S.E.2d 97, 103-04 (2006), the Court addressed the conflict between Rule 702 of the South Carolina Rules of Evidence qualifications for experts and the statute which includes the offering of expert technical testimony within the practice of engineering. Similar to the situation in this case, the trial court in *Baggerly* had excluded the Defendant's expert on the basis that he was not a licensed South Carolina professional engineer. In reversing the trial court's decision to exclude the expert, the Supreme Court held that it would not interpret S.C. Code Ann. § 40-22-200 to require a person offering expert testimony in the field of engineering to be

licensed as a professional engineer. *Baggerly v. CSX Transportation, Inc.*, *supra at* 374-75. The Court determined that the suggestion that only professional engineers licensed in South Carolina are permitted to give expert engineering testimony in this state "could not have reasonably been intended by the Legislature." *Id.*

The Court went on to say that the "primary purposes of Section 40-22-30 is to shield South Carolina consumers from those who are not properly credentialed pursuant to this State's standards, but who nevertheless hold themselves out to be professional engineers." *Id.* However, the services of an expert witness are "being offered to a South Carolina jury, not to the State's citizens seeking traditional professional engineering services." *Id.* The Court in *Baggerly* went on to find that if they "held that the exclusion of an out-of-state professional engineering expert is proper under the statute, the result would be to limit the truth-seeking duty of the courts of this State." *Id.* at 375. The Court "refuse[d] to endorse an interpretation of the professional engineer licensing statute which has the potential of either preventing out-of-state experts from testifying in South Carolina courts or imposing the unreasonable burden of getting licensed in this State simply to be permitted to provide forensic testimony." *Id.*

To exclude Mr. Dawkins as an expert was contrary to Rule 702 of the South Carolina Rules of Evidence (SCRE), which states that if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. Mr. Dawkins has sufficient knowledge, skill, experience, education and training to be qualified as an expert in this case.

It is clear from Mr. Dawkins's credentials that he has the requisite level of knowledge and skill and is better qualified than the jury to form an opinion on the subject matter. Any issue concerning the amount of Mr. Dawkins training and experience affects the weight, not the admissibility of his testimony. *Wilson v. Rivers*, 357 S.C. 447, 453, 593 S.E.2d 603, 605 (2004); *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 254 (1997); *Watson v. Ford Motor Co.*, 389 S.C. 434, 447 (2010); *Lee v. Suess*, 457 S.E.2d 344, 346 (1995)(finding trial court erred in failing to qualify plastic surgeon as an expert in the field of family practice because surgeon's "limited exposure to the field of family practice merely goes to the weight of his testimony and not its admissibility.") The trial court erred in refusing to qualify Mr. Dawkins as an expert in construction and engineering.

C. Prejudicial Effect.

The specialized knowledge in engineering and construction that Mr. Dawkins has would certainly assist the jury in this case, and his expert testimony was critical to the defense of this action. It is clear from the proffered testimony of Mr. Dawkins that his exclusion as an expert was highly prejudicial to Professional Plastering. As demonstrated by his proffered testimony, if Mr. Dawkins were qualified as an expert, he would testify that the work of Professional Plastering was not a proximate cause of the water intrusion at the project. (ROA: ___, May 11-13, 2011 Transcript p. 748:22). In his proffered testimony, Mr. Dawkins spoke in great detail as to the sources of water intrusion at the project, none of which were caused by the work of Professional Plastering.(ROA: ___, May 11-13, 2011 Transcript p. 783:25 – 784:18). Mr. Dawkins provided the following testimony:

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

(ROA: ___, May 11-13, 2011 Transcript p. 783:22–784:22). The proffered testimony of Mr. Dawkins reveals the prejudice to Professional Plastering by excluding him as an expert. His testimony reveals that the work by others on the project, not Professional Plastering, was the cause of the water intrusion. He provided the essential link to the current condition of the building and the testimony of Taci McGinty who inspected the work performed by Professional Plastering during the construction of the project and found the work to be in compliance with the contract documents. (See the testimony of Ms. McGinty at ROA: ___, May 11-13, 2011 Transcript McGinty at p. 484:8 – 488:25).

In *Fields v. Haynes*, the Court held that the trial court abused its discretion in failing to qualify the Plaintiff's home inspector as an expert because he was not licensed in South Carolina. *Fields v. Haynes*, 376 S.C. 545, 557, 658 S.E.2d 80 (2008). The Court in *Fields*, however, found this to be harmless error because the expert's testimony would have been cumulative. *Id.* at 558. At trial, the Fields presented testimony of a repair contractor, who was qualified as an expert in residential homebuilding, and a forensic architect, who was qualified as an expert in the standard of care and in the area of forensic examination and repair of residential construction. *Id.* The Court determined that the testimony of the excluded expert would be cumulative of the testimony of the repair contractor and forensic architect. *Id.* In fact, Fields agreed that the forensic architect would testify to essentially the same topics found in the excluded expert's report. *Id.*

Unlike *Fields*, there was no cumulative evidence in this case. Because Mr. Dawkins' opinion was not allowed, no expert testimony was presented from an engineer or an architect on Professional Plastering's behalf. In *Bramlette v. Charter- Medical Columbia,* 393 S.E.2d 914, 302 S.C. 68, 74 (1990), the Court determined that the defendant was prejudiced by the exclusion of their expert witness, as the testimony of plaintiff's expert remained uncontradicted. Professional Plastering was prevented from presenting any expert testimony that would contradict the testimony of Respondent's expert Myles Glick, a forensic architect.

The exclusion of Mr. Dawkins' expert testimony was highly prejudicial to Professional Plastering. This prejudice was further exemplified by the Respondents' closing argument when it was stated that Professional Plastering had not put up any

witnesses to contest that Professional Plastering was a major cause of the problems. (ROA ___; May 11-13, 2011 Transcript p. 700:1-4). By excluding Mr. Dawkins as an expert, the defense was denied the ability to present expert testimony on the following issues: 1) whether the stucco application was in substantial accordance with the plans and specification, manufacturer's instruction, and otherwise correct; 2) whether any defects in the stucco were a proximate cause of the alleged damages; 3) whether the building code violations were a proximate cause of the alleged damages; 4) what the proximate causes of the alleged damages were; 5) rebuttal to the testimony of the Respondents' expert; and 6) what a proper scope of repair would entail for the twelve buildings at Fenwick.

The Court's error in excluding Chris Dawkins as an expert in this case was highly prejudicial to Professional Plastering and therefore warrants reversal.

D. Discovery Issue.

The Respondents argued in trial and in their Memorandum in Opposition to Professional Plastering's Post-Trial Motions that the Court could excluded Chris Dawkins for a discovery violation. (ROA: ___, May 11-13, 2011 Transcript p 249: 19-251: 11; Memorandum in Opposition to Professional Plastering's Post-Trial Motions p. 8). The alleged discovery violation was a failure on the part of Professional Plastering to produce Mr. Dawkins' file.

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, SCRCP; *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 Professional Plastering informed the Court that they had never received documents from the file of Mr. Dawkins. (ROA: ___, May 11-13, 2011 Transcript p.251: 16-21). In addition, the discovery request issued by Respondents and identified as unanswered by Respondents were answered on August 20, 2010 with an invitation to come to Defense Counsels' office and review all non-privileged documents.[3] Mr. Dawkins was initially called as the first witness at 9:00 a.m on May 12, 2011. During Mr. Dawkins qualification as a witness the failure to produce documents was raised for the first time by the Respondents. The file and all its contents were turned over to Respondents in the morning of May 12, 2011. The court postponed Mr. Dawkins' testimony and Professional Plastering proceeded with other witnesses. The court 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. The offered deposition was not taken and instead Respondents' counsel requested and was given an interview of Mr. Dawkins. Upon a review of the contents of the file, it was determined that there were some charts that paired comments to photographs Mr. Dawkins had reviewed. The comments to the photographs were notes as to whether there was visible moisture damage and things like that. It appears the photographs were from Mr. Glick and the notes relate to Mr. Glick's photographs. (ROA:

[3] 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." (ROA: ---, p. 4 Reply Memorandum in Support of Defendants Motion filed June 1, 2010.

___, May 11-13, 2011 Transcript 254: 1-9.) There was also a list of test cuts observed by Mr. Dawkins. The Respondents' attempted to use the list in cross examination of Mr. Dawkins when he testified as a non-expert witness. Respondents' question was withdrawn upon objection. Respondents' were in possession of Mr. Dawkins' entire file from the morning of May 12, 2011 until the court reconvened on May 13, 2011.

"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, 580 S.E.2d 128 (2003)).

In *Bensch*, the Court found that by not naming an expert, there was a degree of surprise since the respondents were prevented from hiring their own expert. That is clearly not the case here. The Respondents have articulated absolutely no surprise, and in fact, they were not surprised as the witness was named a year prior to the trial. There was no bad faith, and the Respondents have not alleged any. In *Jenkins v. Few*, *supra*, Few argued that the trial court erred in allowing Stokes to testify as an expert witness because he lacked the necessary qualifications and Few was not provided with notice Jenkins intended to call Stokes as an expert. The Court found that the trial court made the appropriate considerations before declining to exclude Stokes as an expert witness. The trial court determined Jenkins was calling Stokes as an expert witness although named as a fact witness. Jenkins's counsel explained he first listed Stokes as a fact witness but

reserved the right to make a later determination about calling him as an expert witness. However, after deciding to call Stokes as an expert witness, Jenkins's counsel inadvertently failed to supplement his interrogatory answer. The trial court found this mistake was not the result of bad faith. Finally, the trial court found the degree of surprise and prejudice to Few was low because Stokes testified to the same thing during his deposition and Few's counsel had the opportunity to cross-examine him during an *in camera* proffer of his testimony. Accordingly, the Court concluded that the trial court did not abuse its discretion in admitting Stokes as an expert witness.

The Respondents were aware prior to trial that Mr. Dawkins had been retained as an expert in this case. As noted by Professional Plastering's discovery responses, Mr. Dawkins was identified as an expert witness for Professional Plastering on April 1, 2010, over a year prior to trial. (ROA: ___, Discovery Responses of Professional Plastering). Respondents also had and presented their own expert witnesses, Mr. Glick and Mr. Gallagher. Mr. Dawkins was Professional Plastering's liability expert, and the content of his testimony was critical to their case. The Respondents never contacted defense counsel to arrange a review of documents pursuant to Professional Plastering's discovery response. There was no motion to compel filed by Respondents or other follow up action pursuant to Rule 37, SCRCP. Respondents did not issue any subpoenas, or notice the deposition fo Mr. Dawkins. Respondents had more than one year in which to depose Mr. Dawkins and to discover his opinions. Professional Plastering agreed not to use the photographs taken by Mr. Dawkins in direct examination of Mr. Dawkins but made the photographs available to the Respondents (ROA: ___, May 11-13, 2011 Transcript p. 241: 15).

There was no discovery violation, and furthermore, there was no prejudice to Respondents resulting from Professional Plastering's alleged discovery violation, and therefore Mr. Dawkins should not be excluded as an expert on this basis. In addition, this matter was not timely raised to the trial court and not the basis for the trial court's ruling, and it is not preserved for review or properly before this Court.

II. DID THE TRIAL COURT ERR IN NOT ADMITTING APPELLANT'S STUCCO-ONLY ESTIMATE INTO EVIDENCE AND EXCLUDING DEFENDANT'S EXHIBIT 4 FROM JURY DELIBERATIONS

A. Standard of Review.

"To warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice." *Fields v. Haynes*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008) (citing *Fields v. Reg. Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506 (2005)).

In the present case, there was both error and prejudice from the exclusion of the evidence.

B. Trial Court's Erred by the Exclusion of the Estimate.

It was error for the Court to exclude Professional Plastering's stucco-only cost estimate when the Respondents were allowed to present a stucco-only estimate as evidence to the jury, and the trial court instructed the jury to make a stucco-only verdict. The trial court stated that the cost of repair estimate prepared by Professional Plastering's expert Robert Puschek was not going back to the jury because it was not presented in discovery. (ROA:___, May 11-13, 2011 Transcript p. 642: 2-25). Respondents' stucco-only estimate was produced on May 5, 2011, only three days prior to the start of trial. The previous repair estimate produced by Respondents was not an estimate of the

damages related only to the stucco. It was a repair estimate for the entire project. When Professional Plastering received the new $8 million stucco-only repair estimate, it was necessary for Professional Plastering's expert Robert Puschek to analyze Respondents' new estimate and to produce a comparable estimate which included only the stucco and related items. (ROA: ___, May 11-13, 2011 Transcript p. 342: 14-18).

As Professional Plastering's stucco-only estimate was prepared in response to Plaintiff's stucco-only estimate, it is appropriate rebuttal evidence and should be admissible. "When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the evidence had been incompetent or irrelevant if offered initially." *State v. McEachern*, Op. No. 4981 (Ct. App. June 6, 2012). Respondents stucco-only estimate, which was produced only on the Thursday before trial, was admitted by the trial court, so Professional Plastering's stucco-only estimate should be admitted as well in order to rebut Respondents' contention that their stucco-only estimate is reasonable.

In *Bramlette v. Charter Medical Columbia*, *supra* the appellate court found that the trial court erred in excluding the testimony of an undisclosed expert witness whose testimony would have rebutted that of plaintiff's expert. The principle enunciated in *Bramlette,* is applicable to Professional Plastering's stucco-only estimate as its exclusion allows the Respondent's expert testimony and exhibit to remain uncontradicted.

In *Fields v. Haynes*, the Court addressed an issue regarding the admission of repair costs. Similar to the argument by Respondents in this case, Fields argued that the report of the Builder's estimating expert should have been excluded because it was first provided to them on the day that the builder was to testify. *Fields v. Haynes*, 376 S.C. at

568. In response, the Builder argued that the report was based solely on a comparison of the invoices of the Plaintiffs' repair estimate which was only received by them on the Friday before trial. *Id.* In determining that the introduction of the Builder's report was not prejudicial, the Court explained that Fields "had the opportunity to cross-examine [the expert] regarding his report and conclusions, recall their experts in rebuttal, and also could have asked for a short recess or overnight continuance to prepare for cross-examination." *Id.*

Additionally, in its decision to allow the Fields' repair contractor's costs into evidence, the Court determined that the critical issue in regard to whether or not the repair costs were admitted "was the reasonableness and necessity of those costs." *Fields supra* at 567. The relevant question is not whether the Respondents believed that their repair costs were reasonable, but whether the costs were in fact reasonable. *Id.*

The admission of Professional Plastering's stucco-only estimate was necessary for a proper analysis of Respondents' estimate to determine if it was reasonable. Prior to the time of the stucco-only estimate, Professional Plastering had given Respondents an estimate with a breakdown of the costs. An analysis of Professional Plastering's stucco-only estimate was required to determine the reasonableness and necessity of Respondents' estimate.

C. Prejudicial Effect.

Allowing the Respondents' stucco-only repair estimate into evidence, while excluding the Defendant's stucco-only repair estimate was extremely prejudicial to Professional Plastering. Prejudice is "a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Haynes, supra* at

557. Here, the jury was not provided with an estimate by the Defendant to compare to the Respondents' stucco-only estimate. The only written estimate provided to the jury relating only to the stucco was Respondents' repair estimate. By having no other estimate related to the stucco besides the Respondents' stucco-only estimate, there is a reasonable probability that the jury's verdict was influenced by the lack of a comparable written estimate by Professional Plastering.

The exclusion of Professional Plastering's stucco-only estimate coupled with the trial court's endorsement, through the verdict form, of the Respondents' settlements as being non-stucco related is highly prejudicial to Professional Plastering. In essence, the trial court and the Respondents required the jury to make a determination as to the "stucco only" repairs and then deprived Professional Plastering of the ability to provide a comparative "stucco only" repair estimate. This excluded Professional Plastering's analysis of the repair costs and any comparative estimate. The numbers provided by Respondents were the only numbers in the jury room. Professional Plastering was harmed by the lack of an exhibit to which the jury could refer or use to perform an analysis of what a reasonable cost of repair for the Respondents would be. Allowing Professional Plastering's expert to only testify to the numbers on Exhibit 4 and display the exhibit 4 on the overhead was insufficient in light of the jury being able to hold and handle and study the estimate exhibit of the Respondents in the jury room.

When the trial court excluded Professional Plastering's repair estimate it provided an endorsement by the trial court of the Respondents' estimate and damages amount. Excluding the Defendant's repair estimate for the stucco, which was necessary to the

defense of the case, was highly prejudicial to Professional Plastering and warrants reversal.

III. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR SET-OFF AND MOTION FOR A NEW TRIAL NISI REMITTITUR?

A. Standard of Review.

Professional Plastering is entitled to a set-off, and the trial court erred in not granting the Motion for set-off of the settlement received by Plaintiffs from the verdict, or the Motion for a New Trial Nisi Remittitur.

"The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties." *Rutland v. South Carolina Department of Transportation*, 390 S.C. 78, 86, 700 S.E.2d 451, 455 (Ct. App. 2010) (citing *Welch v. Epstein*, 342 S.C. 279, 313, 536 S.E.2d 408, 425 (Ct. App. 2000)). "A set-off is not necessarily founded upon any statute or fixed rule of court but grows out of the inherent equitable jurisdiction of the court." *Id.* (citing *Rookard v. Atlanta & Charlotte Air Line Ry.*, 89 S.C. 371, 376, 71 S.E. 992, 995 (1911)). Therefore, a motion for set-off is addressed to the discretion of the court, and this discretion should not be arbitrarily or capriciously exercised. *Id.*

B. Error in Denying Motion for Set-Off.

At the conclusion of the trial, Professional Plastering made a motion for set-off which was denied by the trial court without a hearing. (ROA:___, May 11-13, 2011 Transcript 788:3-8). The trial court erred in denying Professional Plastering's Motion for Set-Off.

"A non-settling defendant is entitled to credit for the amount paid by another defendant who settles." *Rutland v. South Carolina Department of Transportation*, 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010) (citing *Smalls v. S.C. Dept. of Educ.*, 339 S.C. 208, 219, 528 S.E.2d 682, 688 (Ct. App. 2000); *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967). "The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him." *Smalls v. South Carolina Dept. of Educ.*, *supra* at 219 (quoting *Hawkins v. Pathology Assocs. Of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998)); *Welch v. Epstein*, 342 S.C. 279, 313 (Ct. App. 2000) ("there can be only one satisfaction for an injury or wrong"). The court's jurisdiction "to set-off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties." *Id.* "Before 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*, Opinion No. 4959 (Ct.App. filed on March 28, 2012) (citing *Hawkins*, 330 S.C. at 118, 498 S.E.2d at 406-07 (Ct. App. 1998)). "When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." *Id.*; *Ellis v. Oliver*, 335 S.C. 106, 112-13, 515 S.E.2d 268, 271-72(Ct. App. 1999) (when a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to set-off arises as an operation of law.) In *Smith*, the appellate court determined that the prior settlement by the defendants was for the same injury, and "[t]herefore, the right to setoff arises as an operation of law, and the circuit court must award a setoff." *Id.*

Additionally, in *Ellis*, the appellant argued that the trial court erred in applying the set-off because she did not present to the jury the medical expenses attributable to the settling defendant's negligence, and therefore, the jury's verdict was not taking into account her settlement with the other defendant. *Ellis*, *supra* at 113. However, the Court determined that the application of the settlement credit was mandated and gave 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.*

The trial court erred when it required the jury to find damages that would be in over and above the settlement already received by the Respondents as set forth on the verdict form. The trial court's actions were without precedence or warning to Professional Plastering. There was no indication from the trial court that it would nullify the right to setoff in the guise of a jury to determination. The jury should have tasked with determining what, if any damages, the Respondents suffered and then the set-off should have been performed by the Court.

Even accepting the method used by the Court in requiring the jury to award damages over and above the amount Respondents had received in settlement, which Professional Plastering does not accept, Professional Plastering is entitled to a set off.

Professional Plastering is entitled to a set-off of the entire settlement received by Respondents. The buildings at Twelve Oaks have a highly integrated wall system, and in looking at the damages, it is impossible to isolate the damages and separate them by building trade or subcontractor. Any attempt to do so is exercising a non-existent discretion for determining the equities involved. *Ellis, supra at 113.* As an example of

such an attempt the settlement received from all of the subcontractors, suppliers and building trades that were involved in building envelope is $7,975,000.00. [4]

The allegations in the Complaint against all of the construction defendants were exactly the same, as were the alleged damages. [5] Professional Plastering is entitled to a set-off of all monies paid by the settling defendants.

Alternatively, Professional Plastering is entitled to a set-off by the amounts Respondents have already received pursuant to settlement. In particular, this includes the settlements paid by APS and Chartis. APS was Professional Plastering's subcontractor on the project during the 2003-2004 repairs to the breezeways, and Chartis

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[4] The following settlement amounts have been received by the Respondents in this action:

Summit Contractors	$5,000,000.00
Fugelberg Koch Architects	$ 500,000.00
Los Campos	$ 100,000.00
APS	$ 100,000.00
Chartis an insurer of Professional Plastering	$ 100,000..00
North Florida Framing and Marquez	$ 400,000.00
H2L	$ 350,000.00
Johnson Roofing	$ 175,000.00
Neo	$ 65,000.00
All South Vinyl	$ 75,000.00
AM Jacobs	$ 35,000.00
Development Compliance & Inspection	$ 100,000.00
Best Masonry, Successor in Interest to Magna Wall	$637,500.00
Nava Guzman	$ 137,500.00
General Aluminum	$ 12,500.00
KMAC	$ 87,500.00
Fenwick HOA/Ferguson et al.	$ 100,000.00

(Court approved Settlement Agreements).

[5] The Complaint stated as a direct and proximate result of the Defendants' negligence, gross negligence, carelessness, willfulness and wantonness, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages including, but not limited to, the expense associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair, and restore the buildings and units to make them safe and habitable. These deficiencies as set forth above have caused damage to the wall sheathing, structural framing, and other building components including but not limited to the stucco and siding. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded into the subject buildings and units causing and resulting in damage to walls, rot, deterioration and other damages to the finish and structural elements.

(ROA:___, Plaintiffs' Fourth Amended Complaint).

is one of Professional Plastering's insurance carriers. Professional Plastering should receive a set-off by the total amount paid in settlement by APS and Chartis as their work and payment was for the exact same damages alleged against Professional Plastering.

Professional Plastering's damages should also be set-off against the full amount of the settlement received from Fugelberg Koch Architects. Attached to the Respondents' Fourth Amended Complaint is the Affidavit of Myles Glick. As outlined in Mr. Glick's affidavit, the architect Fugleberg Koch is directly responsible for the damages associated with the stucco system.[6] Mr. Glick testified that the architect "bore responsibility and was accountable" for the stucco issues. (ROA:___, May 11-13, 2011 Transcript p. 170: 2-10).

Professional Plastering is also entitled to a set-off by the full amount of the settlement paid by H2L. As set forth in Respondents' Fourth Amended Complaint, H2L investigated water intrusion at breezeways and worked with the defendants Summit and Fugelberg Koch Architects to develop a breezeway repair. (ROA:___, Plaintiffs' Fourth Amended Complaint p. 17). H2L recommended a remediation of the "hard coat stucco wall system" to allow drainage of the system which was accomplished, partially, in the breezeway areas of the buildings only. However, no attention was paid to the overall

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[6] In his Affidavit, Mr. Glick states that:

> the construction of the buildings at issue with a Magna-Wall system installed as a barrier system, and consequently causing the problems above stated was not in accordance with the Contract documents, was not in accordance with the design concept, and any such certification to the Owner to the contrary contained in the architect certified pay applications, was incorrect. That in his opinion Fugelberg Koch was negligent in failing to exercise its duties to ensure that the actual construction of the buildings at issue met the design concept it had designed, in failing to ensure that such construction was in accordance with the contract documents, and in certifying to the Owner that in fact such construction was in conformity with the Construction documents, when it was not. That as a result of this negligence, an improper building envelope was installed on the subject buildings, requiring extensive demolition and repair.

(ROA:___, Affidavit of Myles Glick dated April 20, 2009)

stucco system of the buildings, having the identical design and construction deficiencies. (ROA:___, Plaintiffs' Fourth Amended Complaint p. 17)

Professional Plastering is also entitled to a set-off from the settlements received from Los Campos, North Florida Framing, and Johnson Roofing. Los Campos was tasked with applying sealant at the project as well as the final layer of the stucco system, the elastomeric paint. (ROA:___, May 11-13, 2011 Transcript p. 452: 20- 453: 7). The contract between Summit and Los Campos provides that Los Campos "is to furnish and install all required caulking, with the specified type of caulking at all areas of the project. These caulked areas to include, but not limited to, windows, doors, exterior siding, exterior trim, interior trim, exterior door sills, between exterior trim, tubs and masonry and fascia boards." (ROA:___, Subcontract of Los Campos). Additionally, the subcontract states that "the exterior waterproofing of all stucco is the responsibility of the subcontractor [Los Campos]. 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." (ROA:___, Subcontract of Los Campos).

North Florida Framing was responsible for the reverse laps in building wrap and flashing at the windows and the other reverse laps in the weather barrier. The contract between North Florida Framing and Summit provides that North Florida Framing "shall furnish and install all of the different types of fasteners, flashing, clips, caulks, rods, epoxies, etc. as required for the entire project." (ROA:___, Subcontract of North Florida Framing). Additionally, the subcontract required North Florida Framing "to provide all required caulk and 'Z' flashing (termite shield) at the perimeter of the building per plans and specifications and at the top of all windows as required by the Contractor."

(ROA:___, Subcontract of North Florida Framing). This section of the subcontract refers to flashing at the head of the windows and treatment at the base of the wall.

Johnson Roofing was the roofer for the project, and according to the contract between Johnson Roofing and Summit, Johnson Roofing was "to provide and install water diverters per the drawings."[7] (ROA:___, Subcontract of Johnson Roofing). The subcontract further provided that Johnson Roofing "shall install all products in accordance with manufacturer's recommendations." (ROA:___, Subcontract of Johnson Roofing). The result of these two sections is that if kickout flashings were required than Johnson Roofing was required to install the "kickout flashings" at the wall to roof intersections as described by Mr. Glick in his testimony. The scope of work performed by these subcontractors encompassed and impacted the work performed by Professional Plastering, and Professional Plastering is entitled to a set-off of the amounts paid by these subcontractors related to the stucco.

Magna Wall, the manufacturer of the stucco, settled the claims the Respondents made against it which were based, almost completely on the fact that the Magna Wall, as the manufacturer of the stucco, should have properly inspected the work of Professional Plastering [8]

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[7] See testimony from Tacy McGinty that kickout flashing was not included on the drawings or required by the architect. (ROA ___, May 11-13, 2011 Transcript p. 458:13 – 460:8)

[8] Plaintiffs' Fourth Amended Complaint provides that Magna Wall was negligent

a. In failing to warn all potential users, consumers, sellers and installer of potentials for defect in its products and in the installation instructions;
b. In failing to design, manufacture, market, sell and distribute a product free from potential defects when put to its intended reasonable and foreseeable uses;
c. In failing to adequately and competently supervise and/or train the applicators, vendors, subcontractor or specialty contractors that sold, used and installed its products; and
d. In failing to provide adequate installation instructions;
e. In failing to warn;

Additionally, Professional Plastering is entitled to a set-off from the settlement paid by Summit. As the general contractor, Summit was responsible for supervising as well as approving the installation of the stucco at the project. The Settlement and Release Agreement between Respondents and Summit provides that:

> "the settlement was to forever settle all past or present claims made or capable of being made in the lawsuit against Releasees and all future claims no matter when arising (resulting in past, present, and future damages) or any other claims now existing or arising in the future against Releasees: (a) relating to any and all construction deficiencies or Code violations, whether known or unknown, from original construction and subsequent repairs as well as any resulting damages."

(ROA:___, Settlement Agreement between Summit and Respondents dated November 9, 2010 at p.4). It is evident by the settlement agreement between Summit and Respondents that the settlement paid by Summit was to include damages related to the stucco system. Therefore, Professional Plastering should be entitled to a set-off of the settlement proceeds paid by Summit.

The trial court's error in failing to grant Professional Plastering's Motion for Set-off is highly prejudicial and warrants reversal. In addition, the trial court could have resolved the matter by granting Professional Plastering's Motion for New Trial Nisi Remittitur for the reasons stated above.

IV. 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?

A. Standard of Review.

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f. In failing to properly inspect the improper application of the stucco and notify the contractor and/or owner of the application deficiencies; and

g. Other deficiencies or failures will be proved at trial.

(ROA:___, Plaintiffs' Fourth Amended Complaint at p.39-40).

The trial court committed reversible error in submitting to the jury the special verdict form, which included the amount that had previously been paid in settlement to the Respondents.

"A special verdict question may be so defective in its formulation that its submission results in a prejudicial effect which constitutes reversible error." *SCDOT v. First Carolina*, 372 S.C. 295, 303, 641 S.E.2d 903 (2007). In evaluating the prejudicial effect of a defective special verdict question or special interrogatory, the court must consider the question or interrogatory along with the instructions given to the jury. *Fortune v. Gibson,* 304 S.C. 279, 282, 403 S.E.2d 674, 675 (Ct. App. 1991) (finding that special interrogatories and instructions must be considered together).

B. Error in Verdict Form and Court's Instructions.

Where there are no questions of fact concerning the settlement agreement for the jury's determination, evidence thereof should be excluded from consideration of the jury, and credit (set off) shall be applied by the court. *Powers v. Temple*, 250 S.C. 149, 155, 156 S.E.2d 759 (1967). In analyzing the rule set forth in *Powers*, the Court in *McCombs v. Stephens*, 252 S.C. 442, 166 S.E.2d 814 (1969) stated, "The foregoing rule has as its purpose the elimination of possible prejudice to the litigants and certainly in the allowance of proper credit to the defendant. We think, as a general rule, that this can best be assured by leaving to the jury the assessment of the damages and to the court the duty of allowing credit for any amount received by plaintiff under a covenant not to sue. Ordinarily, submission of the issue to the jury will constitute reversible error." *McCombs v. Stephens*, 252 S.C. 442, 445 (1969).

The trial court committed reversible error in submitting to the jury the special verdict form, which included the amount that had previously been paid in settlement to the Respondents. The verdict form used in this case required the jury, in determining its damage award, to only award damages which were in addition to money already received by the Respondents in settlement, improperly attempting to remove the Defendant's right to set-off and allowing the jury to consider the amount of settlement received by the Respondents in their determination of damages without any evidentiary basis. (ROA:___, Verdict Form). The Court instructed the jury, "The verdict form indicates that Respondents 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." (ROA: ___, May 11-13, 2011 Transcript 732:2-7). The form and charge regarding the verdict form were a comment on the facts, unduly suggestive and misleading. As counsel for the plaintiff stated "Were the jury to find us a verdict and were some items like this not included or a very, very clear instruction from the Court, this has to be an additional new money . . . So either this type of form - - and we think this is fine and not prejudicial. It's exactly what's been stated - - needs to be submitted. Or a very clear and concise instruction to the effect that if you find a new award, it must be new and additional money over and above what was collected in settlements." (ROA: ___, May 11-13, 2011 Transcript 625:11- 626:1.) The trial court then ruled as follows: "With that understanding and that clarification of the verdict form that you have submitted - - the second one with on the claim of negligence and negligence per se in it, it does make it clear to the jury what we have tried, particularly the facts of this case. . . ." (ROA: ___, May 11-13, 2011 Transcript 628:7-13).

Generally a "trial [court] should not intimate to the jury any opinion on the facts of a case, whether intentionally or unintentionally." *Sierra v. Skelton*, 307 S.C. 217, 225, 414 S.E.2d 169, 174 (Ct. App. 1992). In a case tried before a jury, the jury is the judge of the facts in the case. *Day v. Kilgore*, 314 S.C. 365, 444 S.E. 2d 515 (1994).

The error in the verdict form was not cured but exacerbated by the trial court's charge, as the trial court repeated the language of the defective verdict form in her instructions to the jury. It was error in the Court's instruction to require the jury, in their verdict, find over and above the amount received by Respondents in settlement. The amount of damages to which the Plaintiff is entitled is a question of fact for the jury and unrelated to any prior settlement *McCombs v. Stephens*, 252 S.C. 442, 445 (1969).

C. Prejudicial Effect.

By including the amount that Respondents have received in settlement on the verdict form, the court improperly provided approval to the Respondents' cost of repair estimate and endorsed Respondents' position that the settlement proceeds were not stucco related and not adequate compensation for the damages alleged. The Court's actions in including the settlement amount on the verdict form were erroneous and had a highly prejudicial effect on Professional Plastering.

It should have been a question for the jury to determine whether the cost of repair was less than the amount stated by Respondents. Over the objection of Professional Plastering, the Court struck the words "if any" from the verdict form, as it related to actual damages. (ROA:___, May 11-13, 2011 Transcript p. 741: 14-20). The jury instruction and special verdict form required the jury to find over and above the eight million dollars Respondents had received in settlement. This took away from the

province of the jury, any consideration of the question of whether the Respondents had been fully compensated for their damages.

Evidence was presented by Professional Plastering's expert Rob Puschek that Respondents actual damages totaled only $4.9 million. (ROA:___, May 11-13, 2011 Transcript p. 343: 11). Even if the jury were to accept Mr. Puschek's $4.9 million proposal as the correct analysis of damages in this case, the jury was prevented from taking this evidence into consideration in their award because they were required by the verdict form and instructions by the Court to award damages in addition to the settlement.

The issue of total damages should have been a question for the jury, and the set-off performed by the Court. The verdict form and instructions from the Court have nullified Professional Plastering's right to set-off and precluded a defendant from being protected from a plaintiff's double recovery.

The erroneous inclusion of the settlement amount on the verdict form coupled with the Court's charge concerning the verdict form were highly prejudicial to Professional Plastering and warrant a reversal.

V. DID THE TRIAL COURT ERR IN ITS INSTRUCTIONS TO THE JURY?

A. Standard of Review.

"A trial court must charge the current and correct law." *Wells v. Halyard*, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000). "To entitle an Appellant to reversal, the trial court's instructions must be not only erroneous, but also prejudicial." *Burroughs v. Worsham*, 352 S.C. 382, 392, 574 S.E.2d 215 (Ct. App. 2002)(citing *Arkwright Mills v. Clearwater Mfg. Co.*, 217 S.C. 530, 61 S.E.2d 165 (1950)). The errors in the instructions

given to the jury were highly prejudicial to Professional Plastering and as such warrant a reversal.

B. Breach of Implied Warranty of Workmanlike Service

The Court erred in its instructions given to the jury on the implied warranty of workmanlike service. During the trial, Appellant moved for a directed verdict on the claim for breach of warranty of workmanlike service on the basis that the warranty only applied to residential construction and this was a commercial project. (ROA:___, May 11-13, 2011 Transcript p. 201:6-19); (ROA:___, May 11-13, 2011 Transcript p. 609:16 - 610:4). However, the motion was denied by the Court. (ROA:___, May 11-13, 2011 Transcript p. 210:25 - 211:4); (May 11-13, 2011 Transcript p. 612:15-16).

It was error for the jury to be charged on the warranty of workmanlike service, as it is inapplicable to the present case. The warranty of workmanlike service applies only to residential construction. *Kennedy v. Columbia Lumber*, 299 S.C. 335, 384 S.E.2d 730 (1989); *Sapp v. Ford Motor Company*, 386 S.C. 143, 150, 687 S.E.2d 47 (2009) ("Courts have recognized that the transaction between a builder and a buyer for the sale of a home largely involves inherently unequal bargaining power between the parties. For these reasons, we created this narrow exception to the economic loss rule to apply solely in the residential home context.") The Court in *Sapp* explained "[a]t the time of our decision in *Kennedy*, we had no intention of the exception extending beyond residential real estate construction and into commercial real estate construction. Such a progression was in error and we now correct that expansion." *Sapp*, 386 S.C. at 150. The project at issue was originally constructed as an apartment complex, which is a commercial project. Respondents' expert acknowledged that the project was a commercial undertaking and

buildings were commercial buildings. (ROA: ___, May 11-13, 2011 Transcript 583:19-21). Therefore, under the law set forth in *Sapp* and *Kennedy,* the warranty of workmanlike service should not apply to the present action and to give this instruction to the jury was in error and requires a new trial.

C. Cost to Repair to Existing Code.

In the instructions to the jury regarding damages, the Court charged the jury that the "cost of repair may include the expense necessary to perform the repairs to the existing building codes." (ROA:___, May 11-13, 2011 Transcript p. 726:23-25). There was no evidence presented that this was necessitated. Additionally, there is no law in South Carolina which provides this.

Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position that he was in prior to the damages received insofar as this is monetarily possible. *See Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. *Id.* . The basic measure of actual damages is the amount needed to compensate the plaintiff for the losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position he would have been in if there has been no wrongful injury. *Id.* (citing *Rogers v. Florence Printing Co.*, 233 S.C. 567,578, 106 S.E.2d 258, 264 (1958); *Hutchinson v. Town of Summerville*, 66 S.C. 442, 448 45 S.E. 8, 10 (1903)).

This charge was incorrect and requires reversal since it does not reflect an accurate measure of how damages can be awarded. The charge did not place the

Respondents in a same or similar position but instead placed the Respondents in a better position. The jury was charged to award the Respondents betterments, and that is not a recognized measure of damages in South Carolina. This was error and requires reversal.

D. Depreciation.

Included in the instruction on damages, the jury was also charged that "items or elements of the damage that may be shown by the plaintiff are such things as the cost of repairs, depreciation, and incidental damages and consequential damages." (ROA:___, May 11-13, 2011 Transcript p. 727: 6-10). Instructing the jury that the damages could include depreciation was error. The Respondents presented no evidence of depreciation. The jury cannot and should not have been allowed to consider any depreciation since there was no evidence presented of any such alleged element of damages. Jury instructions should be confined to the issues made by the pleadings and supported by the evidence. *Baker v. Weaver*, 279 S.C. 479, 482, 309 S.E.2d 770, 771 (Ct. App. 1983). Therefore, the errors in the Court's instruction regarding damages requires a new trial.

E. Negligence

The trial court committed reversible error in failing to instruct the jury on Professional Plastering's requested instructions regarding negligence.[9] Professional Plastering requested the following instructions be given to the jury on negligence which the Court failed to include in its charge:

> NEGLIGENCE AS A MATTER OF LAW- PROXIMATE CAUSE
> Even if an expert's uncontradicted testimony establishes the defendant's negligence as a matter of law. This alone does not establish liability. Negligence is actionable only if it is a proximate cause of the injury. It is for the jury to decide whether any alleged negligence on the part of the defendant proximately caused the Plaintiffs damages.

[9] The Court's instruction on Negligence is contained at p.712:23-715:24 of the May 11-13, 2011 Transcript.

> *Warren Sauers v. Poulin Brothers*, 328 S.C.601, 493 S.E.2d 503, 506 (1997) citing *Hanselmann v. McCardle,* 275 S.C. 46, 267 S.E.2d 531 (1980); *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996).

(ROA:___, Court's Exhibit 7, Professional Plastering's Proposed Jury Instructions).

The trial court committed reversible error in failing to include Professional Plastering's requested instructions on negligence. It was important for the jury to understand that even though expert testimony, which is uncontradicted, may demonstrate negligence on the part of the defendant, the jury must still decide whether that negligence was a proximate cause of the injury.*See Sauers v. Poulin Bros.*, 328 S.C. 601, 607, 493 S.E.2d 503 (1997). In *Poulin*, the general contractor's expert testified in an action against the stucco subcontractor that the application of the stucco system violated industry standards as well as the building code causing water intrusion into the home. *Poulin*, 328 S.C. at 605. However, the stucco subcontractor did not present any expert testimony to refute these allegations. The only testimony offered was that of the subcontractor's owner, who testified only about how the stucco was applied to the home. *Id.* The Court determined that "even if the expert's uncontradicted testimony establishes [subcontractor's] negligence as a matter of law, it did not establish [subcontractor's] liability as a matter of law. Negligence is actionable only if it is a proximate cause of the injury." *Id.*

Omitting the requested charge aggravated the error committed in not allowing Professional Plastering's expert to testify as an expert. In *Bramlette v. Charter Medical Columbia*, 302 S.C. 68, 74, 393 S.E.2d 914 (1990), the appellate court found that the trial court erred in excluding the testimony of an undisclosed expert witness whose testimony would have rebutted that of plaintiff's expert. The Court further determined that plaintiff

was prejudiced by the exclusion of the expert, as the testimony of plaintiff's expert remained uncontradicted. Id. The failure to give the charge was highly prejudicial to Professional Plastering and requires reversal and a new trial.

The Court's instructions to the jury were inadequate and did not apprise the jury of the law applicable to this action, which is highly prejudicial to Professional Plastering. By failing to include these requested charges in the instructions to the jury, the Court committed reversible error and reversal is warranted.

VI. DID THE TRIAL COURT ERR IN NOT GRANTING APPELLLANT'S MOTION FOR DIRECTED VERDICT ON RESPONDENTS' CLAIM OF BREACH OF WARRANTY OF WORKMANLIKE SERVICE AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT?

The Court erred in its denial of Professional Plastering's motion for directed verdict on the breach of warranty of workmanlike service cause of action. At the close of all evidence , Professional Plastering moved for a directed verdict on the claim for breach of warranty of workmanlike service on the basis that the warranty only applied to residential construction and the project was a commercial project. (ROA:___, May 11-13, 2011 Transcript p. 201:6-19); (ROA:___, May 11-13, 2011 Transcript p. 609:16 - 610:4). The motion was denied by the Court. (ROA:___, May 11-13, 2011 Transcript p. 210:25 - 211:4); (May 11-13, 2011 Transcript p. 612:15-16).

The implied warranty of workmanlike service was addressed by the Court in *Kennedy v. Columbia Lumber.* According to *Kennedy,* "A builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner." *Kennedy v. Columbia Lumber*, 299 S.C. 335, 384 S.E.2d 730, 736 (1989); *Smith v. Breedlove,* 317 S.C. 415, 422 (2008). The Court in

Kennedy was specifically addressing theories of liability in new, residential housing. *Kennedy,* 299 S.C. 335 at 341. The Court in *Kennedy* stated:

> "In summation we hold that . . .B. An implied warranty of service attaches to a builder's construction of new **residential** housing. A home buyer purchasing from a party not the builder may ordinarily sue the builder on this warranty despite the lack of contractual privity." [*emphasis added*].

Looking at the history of the implied warranty of workmanlike service in *Rutledge v. Dodenhoff,* 254 S.C. 407, 175 S.E.2d 792 (1970), a purchaser of a home may hold the builder-vendor liable on the theory of breach of an implied warranty of workmanship. *Rutledge v. Dodenhoff,* 254 S.C. 407, 413, 175 S.E.2d 792 (1970). "The rationale of the decisions which hold the builder-vendor of a new house liable on the basis of an implied warranty is that the seller and buyer are not on an equal footing in such a transaction." *Id.* at 413-414; *Smith v. Breedlove*, 317 S.C. 415, 422 (2008) ("The rationale behind this implied warranty is based on the relative bargaining positions of the parties.") "[T]he primary purpose of the transaction is to provide the purchaser with a habitable dwelling and the transfer of the land is secondary." *Id.*

The Court in *Sapp v. Ford Motor Company*, 386 S.C. 143, 687 S.E.2d 47 (2009) clarified that the holding in *Kennedy* is applicable only in the residential context. The Court in *Sapp v. Ford Motor, supra* at 148 stated the following:

"Courts have recognized that the transaction between a builder and a buyer for the sale of a home largely involves inherently unequal bargaining power between the parties. For these reasons, we created this narrow exception to the economic loss rule to apply solely in the residential home context". The Court went on to explain "At the time of our decision in *Kennedy*, we had no intention of the exception extending beyond residential real estate construction and into commercial real estate construction. Such a progression

was in error and we now correct that expansion." *Sapp*, *supra* at 150. As the application of the warranty of workmanlike service arises out of *Kennedy*, it is applicable solely to residential real estate.

The project at issue was originally constructed as an apartment complex by a large commercial developer working with a large commercial builder. The relationship of the owner and builder was one of equal bargaining power. Respondents' expert, Myles Glick stated in cross-examination that the project was considered commercial and governed by the commercial code (2000 IBC). *See* footnote 2 above.

Therefore, the warranty of workmanlike service should not apply to the present action. The trial court erred in failing to grant Professional Plastering's directed verdict motion on the breach of warranty of workmanlike service cause of action. In addition, the trial court erred in not granting Professional Plastering's Motion for Judgment Notwithstanding the verdict for the same reasons.

VII. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT APS' MOTION FOR SUMMARY JUDGMENT?

A. Standard of Review.

In reviewing the grant of a summary judgment motion, the appellate court applies "the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319 (2001) (quoting *Baughman v. America Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537 (1991)).

B. Court's error in granting summary judgment.

The trial court erred in its ruling that Professional Plastering could not maintain cross-claims against APS on the basis that Professional Plastering did not hold a valid contractor's license for stucco installation. (ROA:___, Order Granting APS' Motion for Summary Judgment).

Professional Plastering served as a stucco subcontractor for the general contractor Summit at the project. Professional Plastering, in turn, subsequently contracted with APS to perform stucco repair work at the project's breezeways. At the hearing on the motion for summary judgment, counsel for APS argued that because Professional Plastering was not a licensee, they could not hire unlicensed subcontractors. (ROA:___, Transcript of Hearing to Reconstruct the Record p. 16: 17-21). However, the fact that Professional Plastering is not licensed in South Carolina does not bar it from asserting claims against APS.

Chapter 11 of Title 40, South Carolina Code of Laws, the "Definitions" section of this statute, "contractor" is defined as "a general or mechanical contractor regulated under this chapter." S.C. Code Ann. § 40-11-20(4) (2011). S.C. Code Ann. § 40-11-20(9) defines "general contractor" as "an entity which performs or supervises or offers to perform or supervise general construction." "General construction" is 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." S.C. Code Ann. § 40-11-20(8).

The statute further defines a "licensed contractor" as "an entity that is licensed by the South Carolina Contractor's Licensing Board to engage in general or mechanical contracting within the State." S.C. Code Ann. § 40-11-20 (13). An "unlicensed

contractor" is defined as "an entity performing or overseeing general or mechanical construction without a license." S.C. Code Ann. § 40-11-20 (24). Professional Plastering did not act as either a general or mechanical contractor, and therefore was not required under the statute to hold a license.

S.C. Code Ann. § 40-11-270(C) provides:

> 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.

S.C. Code Ann. § 40-11-270(C). Summit, acting as general contractor, was the license holder for the Twelve Oaks project. There is no dispute between the parties that Summit was a licensed general contractor. (ROA:___, Transcript of Hearing to Reconstruct the Record p. 15:23-25). As such, any subcontractors on the project, including Professional Plastering and APS, performed work at the project as "unlicensed subcontractors" as permitted under S.C. Code Ann. § 40-11-270(C).

APS was a subcontractor that provided labor for work performed on the stucco in the breezeways. Tacy McGinty, the Rule 30(b)(6), SCRCP representative of Summit, admitted that Summit had agreed to provide material and supervision for work done at the breezeway, and to accept responsibility for obtaining engineering approval for the work. (ROA:___, Deposition of Tacy McGinty, taken on April 12, 2011, 29:17 – 30:11).

S.C. Code Ann. § 40-11-370(C) provides that "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. ..." S.C. Code Ann. § 40-11-370(C) (Emphasis added). However, Professional Plastering was not required to have a license

under this chapter. Professional Plastering lawfully operated as an unlicensed subcontractor under the license of Summit as provided for in S.C. Code Ann. § 40-11-270(C), and is therefore not barred from maintaining an action at law or in equity against APS pursuant to S.C. Code Ann. § 40-11-370(C). APS has failed to make a showing under the statute that Professional Plastering was required to hold a license, as it was never established that Professional Plastering was a contractor which fell under the definition set forth in the statute. The Court erred in making that determination, and in doing so prejudiced Professional Plastering by dismissing their claims against APS.

The Court erred in granting APS's Motion for Summary Judgment, which was highly prejudicial to Professional Plastering. For the reasons stated above, the trial court should be reversed on this ground.

CONCLUSION

For the reasons set forth above, Appellant Professional Plastering & Stucco, Inc. respectfully requests that the Court to reverse the decisions of Judge Harrington, and grant a new trial.

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