THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Circuit Case No. 2015-CP-40-7142

Appellate Case No. 2018-001668

Chad Johnson, Jillian Johnson, and Paul K. Gitzen ..... Respondents,

v.

American Residential Services, L.L.C. d/b/a ARS Rescue Rooter.....Appellant.

APPELLANT'S INITIAL BRIEF

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December 31, 2018

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T.A. Mauet & W.D. Wolfson, Trial Evidence, 417 (1997)

STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DENIED ARS' MOTION TO FIND CHAD JOHNSON NEGLIEGENT AS A MATTER OF LAW BECAUSE, AS A LICENSED CONTRACTOR AND THE BUILDER OF HIS OWN HOME, HE FAILED TO MEET A BUILDING CODE STANDARD.

II. THE COURT ERRED AS A MATTER OF LAW IN NOT CHARGING THE JURY THAT CHAD JOHNSON (A LICENSED CONTRACTOR) OWED A DUTY OF CARE TO MEET THE APPLICABLE BUILDING CODE WHEN HE CONSTRUCTED HIS HOUSE.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ALLOWING JOHNSON TO CLAIM IMPROPER DAMAGES IN THE TRIAL OF THIS CASE.

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ALLOWING JOHNSON TO PRESENT REBUTTAL TESTIMONY AND THEN ERRED AGAIN BY NOT ALLOWING ARS TO RESPOND TO THE REBUTTAL TESTIMONY FROM JOHNSON PERMITTED BY THE TRIAL COURT.

V. THE COURT ERRED AS A MATTER OF LAW IN NOT ALLOWING INTO EVIDENCE CERTAIN TESTIMONY AND MATH CALCULATIONS FROM ARS' ENGINEERING EXPERT.

VI. THE COURT ERRED AS A MATTER OF LAW IN QUALIFYING JOHNSON'S HVAC WITNESS (JOSEPH GILMORE) AS AN EXPERT AT TRIAL.

VII. THE COURT ERRED WHEN IT REFUSED A SPECIFIC REQUESTED INSTRUCTION THAT THE JURY BE INFORMED THAT AN INDIVIDUAL MENTIONED IN THE TRIAL IN A NEGATIVE LIGHT TO ARS WAS NOT AN AGENT OR REPRESENTATIVE OF ARS.

VIII. THE TRIAL ERRED AS A MATTER OF LAW WHEN IT DENIED ARS' NEW TRIAL MOTION BECAUSE THE VERDICT MAKES NO SENSE AND IS CONTRARY TO THE EVIDENCE PRESENTED AND APPLICABLE LAW.

STATEMENT OF THE CASE

Respondents (Chad Johnson, Jillian N. Johnson, and Paul Gitzen) ("Johnson") filed a lawsuit against Appellant (American Residential Services, LLC

d/b/a ARS Rescue Rooter) ("ARS") on November 30, 2015 in the Richland County Court of Common Pleas. Johnson owned property at 125 Dunwoody Place, Blythewood, South Carolina and started construction of their personal residence on that property in 2014. Johnson, a licensed general contractor, built the house, and ARS designed and installed the HVAC equipment. The lawsuit alleged inadequate design and installation of the HVAC system that damaged the hardwood floors and interior finishes. Complaint, ¶ 14. Johnson asserted causes of action for Negligence/Gross Negligence, Breach of Contract, Breach of Warranty of Workmanlike Service, Breach of Express Warranty, Breach of Implied Warranty of Fitness for a Particular Use, violation of the South Carolina Unfair Trade Practices Act, and a "Failure to Warn." Complaint. ARS denied the allegations and asserted various defenses.

Trial of the case took place in Columbia, South Carolina on January 8-11, 2018 before the Honorable DeAndrea Benjamin. At trial, Plaintiff abandoned the claims for Breach of Warranty of Workmanlike Service, Breach of Implied Warranty of Fitness for a Particular Use, and a "Failure to Warn." Judge Benjamin granted ARS' motion for direct verdict on the UTPA claim, but denied the other motions. Transcript, page 319, lines 5-24. Judge Benjamin submitted the case to the jury on the following causes of action: Negligence/Gross Negligence, Breach of Contract, and Breach of Express Warranty. Plaintiff claimed damages totaling One Hundred Sixty-Five Thousand Six Hundred Nineteen and no/100 Dollars ($165,619.00). Plaintiff's Damages Chart.

The jury deliberated for nearly 8 hours over two days and returned with a mixed verdict. Transcript, page 518, line 24; page 532, line 5; page 532, line 9; page 534, line 3. It found for ARS on the Breach of Contract cause of action and determined ARS was not guilty of gross negligence. It found, however, for Johnson on the Breach of Express Warranty claim and awarded Twenty-Four Thousand Two Hundred and Thirty-Three and no/100 Dollars ($24,233.00) and for Johnson on the Negligence claim and awarded One Hundred Twenty-Four Thousand Five Hundred and no/100 Dollars ($124,500).

ARS timely filed post-trial motions on January 19, 2018, which Judge Benjamin heard on July 26, 2018. By written order filed August 16, 2018, Judge Benjamin granted ARS' post-trial motion for election of remedies, but otherwise denied ARS' post-trial motions. Johnson elected the One Hundred Twenty-Four Thousand Five Hundred and no/100 Dollars ($124,500) rendered for the negligence cause of action. ARS timely filed this appeal. Johnson did not file any appeal or cross-appeal.

STATEMENT OF FACTS

Chad Johnson was a licensed residential general contractor who decided to build his own house on property the family owned. Transcript, page 61, line 20 and page 63, lines 20-25. Johnson and his wife designed "every square inch" of the house without having a licensed architect or engineer involved. Id., page 63, lines 16-19 and page 155, lines 9-25. Neither Chad Johnson nor Jillian Johnson is an architect or engineer. Id. Similarly, neither had any experience with HVAC design or installation and did not have any expertise on that subject matter when building the house. Id., page 156, lines 1-page 157, line 7.

Johnson had never built a single family home with a crawlspace before starting this project. Id., page 159, lines 15-19. In addition, Johnson never investigated how to handle moisture or humidity in the crawlspace while building his house. Id., page 160, lines 3-12.

Johnson contracted with ARS for the design and installation of the HVAC system. Johnson's step-father worked for ARS at that time. Id., page 148, line 5-page 154, line 23. ARS started its work in September 2014 and completed the HVAC install in November 2014. Id., page 68, lines 17-25. Johnson did not complete construction of the residence until spring 2015, and the family moved into the home at the end of April 2015. Id., page 69, lines 1-5.

On July 24, 2015, Johnson called ARS because he said the crawlspace of the house "was like a tropical rain forest." Id., page 74, lines 2-7. An ARS technician arrived at the house that night and returned with others the "following Monday or

Tuesday." Id., page 74, line 23-page 76, line 17. On July 30, 2015, ARS sent Bill Weir to the home because Weir was the representative for Rheem, who manufactured the HVAC system. Id., page 81, lines 1-2 and page 84, lines 12-17. Johnson admitted that Weir told him at that time that the system operated correctly and Johnson needed to add a vapor barrier to the crawlspace. Id., page 80, lines 10-12 and page 81, lines 12-25. Before that date, Johnson had only added a dump-truck full of sand into the crawlspace. Johnson added that vapor barrier after the conversation with Weir.

Johnson also paid for a remediation company (Rumsey Construction) to come for about six weeks starting September 15, 2015 to "stabilize the environment," which effectively dried out the crawlspace. Id., page 268, lines 12-page 269, line 6; page 189, lines 7-16. Eventually, Johnson paid $15,940.00 for a new HVAC system, which he admitted was an "upgrade." Id., page 170, lines 5-7.

At trial, Plaintiff's submitted liability expert was Joseph Gilmore, who was a "certified energy rater for certifying new home construction." Id., page 190, lines 13-20. Over ARS' objection, the trial judge allowed Gilmore to offer opinions about the sizing and installation of the HVAC system. Id., page 120, line 19-page 121, line 19; page 10, lines 16-25, and page 141, line 23-page 144, line 5. While Gilmore has a degree from the University of South Carolina in electrical and computer engineering (1989), he did not have any degree in mechanical engineering. Id., page 200, lines 17-21. His certification came from Home Energy Corporation after self-study, a 7-day class, and a limited apprenticeship. Id., page 201, line 11-page 204, line 8. Gilmore worked as an engineer for various manufacturing facilities and runs a consulting company that does "new home construction analysis, testing, existing home, ... green certifications." Id., page 195, lines 13-19. Gilmore admitted that he did investigate or perform any analysis of the crawlspace and the moisture sources in the crawlspace before Johnson added the vapor barrier. Id., page 254, line 12-page 255, line 1. Gilmore opined that the original system was too large for the house (3 ton versus 2.5 ton).

ARS presented the testimony of mechanical engineer Larry Elkin. Elkin testified that no connection existed between the installation of the HVAC system at the Johnson residence and the elevated moisture they experienced in the crawlspace. Id., page 335, line 4-14. Elkin testified about the improper attempts at moisture control in the crawlspace by Johnson, who was the general contractor for the project, the concern about ventilated crawlspaces in humid South Carolina (a complaint echoed by Gilmore), and other construction deficiencies with improper flashing at the front porch, which directed rain water into the crawlspace, and missing downspout extensions. Id., page 335, line 4-page 339, line 21.

Elkin also noted that the crawlspace would be "dry" at the time of trial because of the cool weather conditions and the crawlspace would have continued to show signs of moisture after the installation of the vapor barrier until Rumsey's work to dry the crawlspace based on the engineering principle known as "absorption hysteresis." Id., page 82, lines 4-21; page 116, lines 1-23; page 370, line 16-page 374, line 8.

Elkin also noted that Johnson elected a hand-scraped finish for their flooring and the flooring he observed in May 2016 did not show evidence of cupping according to the applicable South Carolina residential construction standards. Id., page 361, line 3-362, line 13.

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DENIED ARS' MOTION TO FIND CHAD JOHNSON NEGLIEGENT AS A MATTER OF LAW BECAUSE, AS A LICENSED CONTRACTOR AND THE BUILDER OF HIS OWN HOME, HE FAILED TO MEET A BUILDING CODE STANDARD.

The trial testimony clearly established Johnson was negligent as a matter of law, and the Court erred in refusing ARS' motion to declare Johnson negligent as a matter of law. "One who undertakes and agrees to construct buildings is liable for any damage proximately resulting from the negligence or unskillful manner in

which he constructs the building." Judge Ralph King Anderson, South Carolina Requests to Charge – Civil, § 11-1. In this case, excessive crawlspace moisture was one of the most significant issues discussed at trial. Johnson admitted he had never built a single family home with a crawlspace before. Id., page 159, lines 15-19. In addition, Johnson never investigated how to handle moisture or humidity in the crawlspace while building his house. Id., page 160, lines 3-12. Johnson testified that the only thing he did when constructing the house to address any potential issues in the crawlspace was to put a dump truck load of sand in the crawlspace. Transcript, page 160, lines 13-16. Johnson testified he did so because "... for several reasons, to keep from crawling on solid clay and to make it more comfortable. And then it also will absorb as opposed to water pooling on top." Id., page 160, lines 16-19. Johnson chose 22 tons of sand for the crawlspace because the dump truck held that amount of sand. Id., page 160, lines 22-25.

Johnson's submitted expert (Gilmore) testified that a vapor barrier is a "vital component" for a crawlspace. Id., page 246, lines 3-18; page 252, lines 13-16. Gilmore also stated that the building code "require[s] that you address it. [The building code] gives you some options, but the vapor barrier is the most common one to select." Id., page 252, lines 17-21 (emphasis added). Gilmore did not offer any testimony that Johnson complied with this requirement. Gilmore also testified that the responsibility for this work to address the crawlspace belonged to the general contractor or insulation subcontractor, and was not the responsibility of ARS as the HVAC subcontractor. Id., page 252, line 22-page 253, line 9; page 261, line 1-page 262, line 11. Gilmore discussed the need for the vapor barrier: "Because there's going to be vapor [sic] escaping from the earth regardless, even if we don't have rain, just the fact that we have ground water in the vicinity, we're going to have vapor. So it does reduce the amount of vapor that can get into the air by trapping it beneath it. You know, to be honest, I think for the most part, ventilated crawlspaces need to be outlawed. When we do a crawlspace, we need to do a sealed crawlspace with dehumidification or a conditioned crawlspace where we take control of that space." Id., page 246, lines 8-18.

In this case, Johnson did nothing to "take control" of his crawlspace. Johnson did not add the "vital component" (vapor barrier) for the crawlspace until after Johnson thought the crawlspace resembled a "tropical rain forest" and after the advice from the Rheem representative, Bill Weir. As ARS' engineering expert (Larry Elkin) testified, the Johnson homes showed signs of damage from elevated moisture in the crawlspace that did not have any connection with the installation of the HVAC system by ARS. Id., page 335, line 4-page 377, line 19. Even Gilmore testified that ventilated crawlspaces should be "outlawed" in South Carolina and a sealed or conditioned crawlspace should be required. Id., page 246, lines 14-18.

"[A] violation of a building code violates a legal duty for which a builder can be held liable in tort for proximately caused losses." Kennedy v. Columbia Lumber and Manufacturing Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989). In our case, Johnson's own expert clearly testified that the building code required Johnson to address the crawlspace, which Johnson never did until the problems existed. Under the Kennedy decision, ARS was entitled to ruling from the trial court that Johnson was negligent as a matter of law. Accordingly, the trial court erred by denying ARS' motion on this issue and not finding Johnson negligent as a matter of law. Transcript, page 383, lines 13-22; page 395, lines 7-12. Of note, the jury did not assign any percentage of negligence to Johnson despite this testimony.

II. THE COURT ERRED AS A MATTER OF LAW IN NOT CHARGING THE JURY THAT CHAD JOHNSON (A LICENSED CONTRACTOR) OWED A DUTY OF CARE TO MEET THE APPLICABLE BUILDING CODE WHEN HE CONSTRUCTED HIS HOUSE.

Similarly, the trial court erred in not charging the law that a builder has a duty to meet the building code and that a violation of that duty is negligence as a matter of law. Transcript, page 437, line 23-page 441, line 17. "The trial court must charge the current and correct law applicable to issues raised in the pleadings and supported by the evidence." Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). In our case, the failure by the trial court to charge the jury that

Johnson had a duty of care to comply with the building code constituted an error of law and prejudiced ARS. Again, the jury did not assign any fault to Johnson despite the undisputed testimony from his expert (Gilmore) and ARS' engineering expert (Elkin) about the construction deficiencies committed by Johnson as the general contractor that contributed to the elevated crawlspace moisture issues.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ALLOWING JOHNSON TO CLAIM IMPROPER DAMAGES IN THE TRIAL OF THIS CASE.

The trial court erred in allowing Johnson to claim as part of the damages in this lawsuit the costs of what Johnson paid for the new HVAC system ($15,940.00) versus the amount paid to ARS for the original system ($9,200.00). Id., page 10, lines 11-25; page 141, line 23-142, line 3. The trial court denied ARS' motion to strike that claim (and to substitute the damage claim with what Johnson paid ARS) because the trial court determined the issued to be "a question of fact." Id., page 142, line 25-page 143, line 9.

Johnson testified that the new system was an "upgrade" from the original system. Transcript, page 170, lines 5-7. Clearly, Johnson was not entitled to the additional costs of upgrading the HVAC system. An award of damages that included the costs of the upgraded system constituted an impermissible betterment. St. Joseph Hospital v. Carbetta Constr. Co., 316 N.E.2d 51 (Ill. App. Ct. 1974) (holding the hospital was not entitled to recover extra costs and labor expenses for installing more expensive paneling than it had originally paid for). "Generally, an owner of personal property injured by another's tortious conduct can recover the difference between the market value immediately before and the market value immediately after the injury." F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 633 (4th ed. 2011). "If the property is made more valuable by repair than it was prior to injury, the owner may not recover the full cost of repair." Id. 634 n. 11 (citing Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 484, 623 S.E.2d 373, 377-78 (2005). In this case, given that the jury's award cannot be mathematically

matched with the damages submitted to the jury for consideration, ARS was prejudiced with the trial court's decision to allow this element of damage to be considered by the jury.

In addition, the costs submitted by Johnson's repair contractor Rumsey and the mold remediator (Savannah Analytics) to draft estimates and protocols along with the time Gilmore spent drafting a report used in this litigation were improper elements of damages pursuant to Vaughn v. City of Anderson, 300 S.C. 55, 386 S.E.2d 297 (Ct. App 1989). That case decided that "[p]ayment of expert witness fees is an element of the cost of proving the claim and not of the damage." Id. The costs associated with the written reports from these witnesses were not needed to address the Johnsons' concerns and, as such, those reports used for litigation should have not been submitted to the jury as elements of Johnson's claimed damages.

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ALLOWING JOHNSON TO PRESENT REBUTTAL TESTIMONY AND THEN ERRED AGAIN BY NOT ALLOWING ARS TO RESPOND TO THE REBUTTAL TESTIMONY FROM JOHNSON PERMITTED BY THE TRIAL COURT.

After the parties presented their cases-in-chief, the trial court erred in allowing Johnson to present reply/rebuttal testimony from Johnson about the alleged current conditions of the allegedly damaged hardwood floors. Transcript, page 387, lines 2-page 388, line 8 and page 396, line 3-page 426, line 3. First, the trial court allowed Johnson to present several photographs he took after the second day of trial of the several toe kick registers in his house. The court also allowed Johnson to comment about several photographs already in evidence about the cupping of the hardwood floors in the house. Johnson discussed the toe kicks issue in his case-in-chief. Id., page 76, lines 18-23; page 83, lines 8-24; exhibit 8. Johnson discussed his photographs of the hardwood floors in the case-in-chief. Id., page 130, line 22-page 134, line 13. Further, any discussion by Johnson about the significance of the toe kick registers was improper because Johnson admitted he did not have any expertise regarding HVAC matters. Id., page 64, lines 18-20. So, the court

allowed Johnson in part to discuss evidence and testimony already discussed in Johnson's case-in-chief, which made the testimony and evidence improper for reply/rebuttal testimony.

ARS was clearly prejudiced by the allowed testimony because it introduced testimony that the cupping of the hardwood floors different from what ARS' expert observed. This error was not harmless to ARS. "Reply testimony should be limited to rebuttal of matters raised by the defense, rather than to complete the plaintiff's case-in-chief." State v. Prather, 422 S.C. 96, 810 S.E.2d 419 (Ct. App. 2017). In that criminal case, the appellate court concluded the trial court erred in allowing reply testimony that was "general testimony" about the circumstances of the crime.

"Rebuttal evidence is not an opportunity to repeat previous testimony just to have the last word." T.A. Mauet & W.D. Wolfson, Trial Evidence, 417 (1997). "The plaintiff should not be allowed to 'sandbag' by intentionally withholding evidence from his case-in-chief in the hope that the defendant, not aware of the evidence, will step into the trap and present evidence that the plaintiff later can rebut dramatically." Id. Clearly, the testimony from Johnson about the hardwood floors should have been presented in Johnson's case-in-chief because that subject matter was not an issue raised by ARS for the first time in its presentation of evidence. Further, the discussion of toe kick registers responded to Johnson's direct testimony.

The Court further erred in not allowing ARS to present reply/rebuttal testimony from engineer Larry Elkin in response to the reply/rebuttal testimony o Johnson allowed by the Court. After the court did not allow Elkin to offer a rebuttal to Johnson's testimony, ARS proferred Elkins' testimony. Transcript, page 521, line 23-page 525, line 17. Elkin testified that the photographs of the toe kicks provided by Johnson during the third day of the trial had no significance from a building envelope or engineering perspective. Id., page 521, line 24-page 523, line 21. Elkin also testified that Johnson's comments about the cupping of the hardwood floors and how Johnson presented that evidence to the jury in his rebuttal violated the South Carolina Residential Construction Standards published by the Residential

Builders Commission at the South Carolina Department of Labor Licensing and Registration. Id., page 523, line 22-page 525, line 11. The failure of the trial court that allowed Johnson to testify about incorrect standards without response from ARS clearly prejudiced ARS. Furthermore, the trial court, once it allowed Johnson to testify on rebuttal, should have allowed Elkin's testimony that testimony from Johnson during reply/rebuttal was not correct according to the South Carolina Residential Construction Standards and that the Standards did not support Johnson's testimony based on the use of a 4' metal level across several planks of hardwood flooring. The trial court's decision not to allow Elkin's testimony was fundamentally unfair and prejudiced ARS because it allowed the jury to consider the claimed cupping of the hardwood floors based on erroneous and incorrect methodology and standards.

V. THE COURT ERRED AS A MATTER OF LAW IN NOT ALLOWING INTO EVIDENCE CERTAIN TESTIMONY AND MATH CALCULATIONS FROM ARS' ENGINEERING EXPERT.

The Court erred in not allowing the math calculations performed by ARS' expert Larry Elkin to be placed into evidence. Transcript, page 342, line 18-349, line 23. The trial court, without explanation, refused to allow the calculations performed by Elkin in front of the jury to be submitted to them for consideration as evidence. Such ruling prejudiced ARS because it prevented the jury from having into evidence during deliberation testimony that was relevant to the issues raised in the lawsuit, and no prejudicial effect warranted the exclusion of this evidence. See Davis v. Taylor, 340 S.C. 150, 530 S.E.2d 385 (Ct. App. 2000). The evidence presented was "relevant," and no reason existed to exclude the evidence.

VI. THE COURT ERRED AS A MATTER OF LAW IN QUALIFYING JOHNSON'S HVAC WITNESS (JOSEPH GILMORE) AS AN EXPERT AT TRIAL.

The trial court erred in allowing Joseph Gilmore to testify as an expert witness and to offer expert testimony when he did not have the requisite

qualifications to opine about mechanical engineering and building envelope issues. See Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010). "[T]he trial court serves as a gatekeeper and must decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010). "[E]xpert testimony is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge." Id. at 445, 699 S.E.2d at 175. "All expert testimony must meet the requirements of Rule 702, regardless of whether it is scientific, technical, or otherwise." Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012).

In deciding whether to admit expert testimony, the court must first determine whether the subject matter requires expert testimony to assist the trier of fact. Watson, 389 S.C. at 446, 699 S.E.2d at 175. Next, the court must determine whether the purported expert "has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." Id. (emphasis added). "Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable." Id. "Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability." Id.

The South Carolina Rules of Evidence provide that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE. This mirrors the federal rule.1 However, the advisory committee notes on the Federal Rules of Evidence provide that while Rule 704 may have abolished the old common law ultimate issue rule, such a change "*does not* lower the bars so as to admit all opinions." Fed. R. Evid. 704 advisory committee notes (emphasis added). Expert opinion must "assist the trier of fact." Rule 702, SCRE; see also Fed. R. Evid. 702.

1 "[Rule 704] is identical to the federal rule as it existed prior to the 1984 amendment which added subsection (b) to the rule to prohibit expert testimony on the ultimate issue of whether a criminal defendant is insane." Rule 704 (notes), SCRE.

Therefore, the rules "afford ample assurances against the admission of opinions which would merely tell the jury [or finder of fact] what result to reach." Fed. R. Evid. 704 advisory committee notes. See, e.g., Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003) (holding that an affidavit consisting primarily of legal arguments and conclusions was inadmissible); O'Quinn v. Beach Assoc., 272 S.C. 95, 249 S.E.2d 734 (1978) (holding an expert was properly excluded from testifying to establish a conclusion of law).

Even if the evidence passes muster under Rules 702 and 704, the court must also determine whether its probative value is outweighed by its prejudicial effect. Rule 403, SCRE; *see also* Jamison v. Ford Motor Co., 373 S.C. 248, 644 S.E.2d 755 (Ct. App. 2007) (excluding relevant evidence upon a showing that its admission would be more prejudicial than probative). Only after the evidence meets the standards for admissibility under the rules governing expert testimony *and* Rule 403 may the fact finder consider it. Id.

In this case, Gilmore lacked the requisite knowledge and skill necessary to qualify as an expert in the engineering topics related to building envelope issues. Gilmore testified that he did not have a degree in mechanical engineering. Transcript, page 200, lines 17-21. Further, Gilmore admitted that he did not possess any university or school degree associated with HVAC design, Id., page 201, lines 7-10. Gilmore also failed the professional engineering exam the one time he took it. Id., page 200, lines 4-9. Of significance to this litigation, Gilmore also did not perform any investigation about the conditions in the crawlspace and did not offer any opinions about the conditions in the crawlspace. Id., page 254, 12-16; page 259, lines 1-7. The significance about Gilmore's lack of knowledge of crawlspace moisture issues is evidenced by Elkin's testimony that the laws of physics prove that the HVAC system at the Johnson residence could not put moisture in the crawlspace. Id., page 362, line 14-page 363, line 19.

In South Carolina, before an expert is qualified to testify, it must be shown that the putative expert has "acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." Watson, *supra* (emphasis added).

"The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject." Id. at 447, 699 S.E.2d at 176. In Watson, the South Carolina Supreme Court held that two putative "expert" witnesses were *not* qualified to testify as to two subject matters. Id. That case revolved around the highway crash of a Ford Explorer that allegedly resulted from the vehicle's sudden, unintended acceleration. Id. at 441, 699 S.E.2d at 172. The first witness, Williams, was offered by the plaintiff as an expert on "cruise control diagnosis." Id. at 447, 699 S.E.2d at 176. Uncontroverted testimony would show that Williams was employed in the automotive industry for more than twenty years. *Id.* His lengthy experience included work as a "trainer, consultant, software developer, and writer." Id. Further, his current position had him "conducting seminars to train automotive technicians who focus on the brake systems in vehicles." Id.

Despite Williams' extensive experience in the automotive industry, the court held that he was *not qualified* to offer expert testimony on cruise control diagnosis. Id. at 448, 699 S.E.2d at 176. Specifically, the court found that "Williams had no knowledge, skill, experience, training or education specifically related to cruise control systems." Id. (emphasis added). Further, the court reasoned that while Williams could have been "qualified as an expert in other aspects of automobile components," he lacked "qualifications specific to cruise control systems." Id. (emphasis added). Similarly, the plaintiff in Watson offered a second witness, Dr. Anderson, to testify as an expert on theories of alternative design and electromagnetic interference ("EMI") regarding the Ford Explorer's cruise control systems. Id. at 449, 699 S.E.2d at 177. Dr. Anderson's experience included a career spent "working with massive generators" and their electrical systems and their voltages. Id. at 450, 699 S.E.2d at 177. However, similar to their treatment of Williams, the court rejected Dr. Anderson's qualifications because he "failed to meet Rule 702's fundamental requirement that the witness be qualified in the particular area of expertise." Id. (emphasis added). The court noted that while Dr. Anderson's experience may have included EMI issues within electrical systems, the systems in

question, those of cruise controls, were "entirely different." *Id.* Therefore, the court held that Dr. Anderson was not qualified to testify as an expert on either alternative design or EMI. Id.

The situation in Watson is directly analogous to the case at bar. Like Williams and Dr. Anderson, neither of whom were qualified to testify as experts concerning a particular area of expertise (cruise control systems), Gilmore was not qualified to testify as an expert concerning mechanical engineering elements of a HVAC system and the crawlspace moisture conditions at the Johnson residence. While Gilmore may have been allowed to offer testimony about an HVAC system's energy rating or green certification, those issues were not at issue in this litigation. Pointedly, in Watson, the first putative expert, Williams, had extensive experience in the automotive industry specifically with brake systems. Watson at 447, 699 S.E.2d at 176. In fact, uncontroverted evidence demonstrated that Williams, a one-time vehicular software developer, was even an instructor who trained other "automotive technicians who focus on the brake systems in vehicles." Id. However, the court reasoned that while Williams may well have been an expert on brake systems, he lacked the "knowledge, skill, experience, training or education specifically related to cruise control systems." Id. (emphasis added). Therefore, he could not qualify as an expert on cruise control systems. Id. Accordingly, Gilmore lacked the requisite knowledge, skill, experience, and education to be qualified as an expert in mechanical engineering and building envelope, and the trial court should have excluded Gilmore from testifying as such.

VII. THE COURT ERRED WHEN IT REFUSED A SPECIFIC REQUESTED INSTRUCTION THAT THE JURY BE INFORMED THAT AN INDIVIDUAL MENTIONED IN THE TRIAL IN A NEGATIVE LIGHT TO ARS WAS NOT AN AGENT OR REPRESENTATIVE OF ARS.

During the trial, Johnson's attorneys attempted to make an engineer hired by ARS' insurance carrier (Benjamin Joyner) an "ARS representative" for purposes of the claim that ARS "did nothing" after Mike Weir visited the home on July 30, 2015. Transcript, page 90, line 7-page 105, line 4. The trial court sustained the objection

but respectfully erred when it refused ARS' request that the jury be instructed that Benjamin Joyner was not an agent or representative of ARS. One of Johnson's themes at trial was that ARS did not help or assist Johnson after July 31, 2015. "Great care should be exercised in the 'delicate, difficult, and important matter' of instructing the jury to disregard incompetent evidence." State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986) (citing 75 Am.Jur.2d, Trial, section 748). In this case, the trial court's failure to instruct the jury that Joyner was not a representative or agent of ARS prejudiced ARS. Johnson's attorneys argued at closing that ARS "ignored" Johnson's complaints, and the trial court's failure to correct the incorrect statement about Joyner left a clear impression on the jury that Joyner was an agent or representative of ARS, which was not the case and which prejudiced ARS because the jury could only incorrectly conclude that Joyner was ARS' agent or representative.

VIII. THE TRIAL ERRED AS A MATTER OF LAW WHEN IT DENIED ARS' NEW TRIAL MOTION BECAUSE THE VERDICT MAKES NO SENSE AND IS CONTRARY TO THE EVIDENCE PRESENTED AND APPLICABLE LAW.

The verdict was contrary to the evidence presented and the applicable law and against the weight and preponderance of the evidence. Further, the jury's verdict was such as to indicate that the jury disregarded the appropriate charge and instructions of the Court as to the law to be applied, and the jury's verdict was contrary to the applicable law under the facts as presented in this case as noted in ARS' motion for judgment notwithstanding the verdict. In this case, Johnson submitted an itemized list claiming One Hundred Sixty-Five Thousand Six Hundred Nineteen and no/100 Dollars ($165,619.00) as damages plus punitive damages. The jury found for Johnson on the Breach of Express Warranty claim and awarded Twenty-Four Thousand Two Hundred and Thirty-Three and no/100 Dollars ($24,233.00) and for Johnson on the Negligence claim and awarded One Hundred Twenty-Four Thousand Five Hundred and no/100 Dollars ($124,500). This allocation cannot be mathematically or logically reconciled. The differences in

the case between the damages claimed for breach of warranty and negligence were slight. Further, the large disparity between the jury awards for those causes of action clearly demonstrates confusion by the jury and/or their disregard of the applicable law. Moreover, Johnson did not present any evidence at trial that differentiated the factual claims for the three causes of action it submitted to the jury. Johnson based the breach of contract action (which the jury ruled for ARS) on the identical facts as Johnson argued supported the breach of express warranty and the negligence claims.

In addition, the testimony established that Plaintiffs installed a vapor barrier after the fact, purchased and installed an upgraded HVAC system, had the crawlspace dried for 24 days by machines, and installed diverters to their gutters, which explained why they no longer had crawlspace moisture issues. The uncontradicted testimony from ARS' engineering expert was that the original HVAC system did not cause any moisture problems in the crawlspace. Thus, the jury clearly disregarded the applicable science in reaching its verdict.

South Carolina clearly holds that "when a verdict is so confused that the jury's intent is unclear, the safest and best course is to order a new trial." Johnson v. Parker, 279 S.C. 132, 303 S.E.2d 95 (1983). Further, "[trial] courts have authority to grant a new trial upon the judge's finding that justice has not prevailed." Todd v. Owen Indus. Prods., Inc., 315 S.C. 34, 431 S.E.2d 596 (Ct. App. 1993). "Any question affecting the verdict should be raised by a motion for a new trial." Ulmers v. Willingham, 238 S.C. 503, 120 S.E.2d 859 (1961). Thus, the trial court erred in this case as a matter of law when it denied ARS' motion for a new trial and motion for a new trial pursuant to the Thirteenth Juror Doctrine.

CONCLUSION

For these reasons, ARS respectfully requests the trial verdict be reversed and the case remanded for a new trial pursuant to this Court's rulings.

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December 31, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Circuit Case No. 2015-CP-40-7142

Appellate Case No. 2018-001668

Chad Johnson, Jillian Johnson, and Paul K. Gitzen..... Respondents,

v.

American Residential Services, L.L.C. d/b/a ARS Rescue Rooter..... Appellant.

PROOF OF SERVICE

On December 31, 2018, I mailed a copy of **Appellant's Initial Brief, and Appellant's Designation of Matter** to:

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December 31, 2018

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Re: **Chad Johnson v. American Residential**
Appellate Docket No.: 2018-001668
TP File No.: 1464.7397

Dear Ms. Kitchings:

We enclose the original and a copy of Appellant's Initial Brief, Appellant's Designation of Matter to be Included in the Record on Appeal, and proof of service. Please file the original and return a filed copy to our runner. If you have any questions or need additional information, please call me at your convenience. With kind regards,

TURNER PADGET

R. Heathcote Bartlett

for David S. Cobb

DSC/hah
enclosures
cc: Richard C. Detwiler (with enclosures)
George Albert Taylor (with enclosures)