THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 201196386

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

v.

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

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

Professional Plastering & Stucco, Inc., Appellant,

v.

Maria Ariasm, Miquel Roasles, and APS Enterprises Unlimited, Inc., Third-Party Plaintiffs,

Of whom APS Unlimited, Inc. is Respondent.

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

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STATEMENT OF THE CASE

Mark F. and Nan M. Teseniar, on behalf of themselves and others similarly situated ("Teseniar"), commenced this action on January 4, 2008, alleging construction defects caused damages to the buildings comprising the Twelve Oaks at Fenwick Plantation Horizontal Property Regime ("Fenwick"). (R. p. 75). The suit began against the developers, but Teseniar later amended the Complaint to add the architect, general contractor, and various subcontractors, such as Professional Plastering & Stucco, Inc. ("Professional Plastering"). The Twelve Oaks Property Owners Association ("POA") (together with Teseniar, the "Respondents") later asserted claims alleging design and construction defects caused damages to the common areas of Fenwick. (R. p. 129). All pending actions were consolidated for trial pursuant to an Order dated October 20, 2008. (R. p. 4). The case was certified as a class action on October 20, 2008. (R. p. 50). Professional Plastering was the only defendant not to settle prior to trial.

The Honorable Kristi L. Harrington conducted the jury trial on May 9, 11, 12, and 13, 2011.[1] The jury found in favor of Respondents on the two surviving causes of action, negligence and breach of warranty of workmanlike service, awarding $7,723,225.00 in actual damages. (R. pp. 65, 1549:6-1550:22). Punitive damages were included on the verdict form and inquired about by the jury during deliberations, but none were awarded. (R. pp. 65, 1819).

After the verdict, Professional Plastering made oral Motions for New Trial Absolute, Motion for Set-Off, Motion for Judgment Notwithstanding the Verdict, and Motion for New Trial Nisi Remittitur. (R. pp. 1579:15-1581:19). Written Motions and

[1] No court was held on May 10, 2011.

related materials were later filed by Professional Plastering. (R. pp. 288, 506, 700, 703, 733). These post-trial motions were denied by an Order filed June 17, 2011. (R. p. 68). Professional Plastering then filed Motions to Alter or Amend the Judgment, which were denied in an Order filed July 19, 2011. (R. pp. 749, 69).[2] This appeal follows.

STATEMENT OF FACTS

Respondents represent the interests of the POA and, in a representative capacity, the individual homeowners of the Fenwick condominium community. (R. pp. 1027:19-25, 1047:1-15). There are 216 residential condominium units contained within 12 buildings at Fenwick. (R. pp. 1027:19-25, 1033:8-12). Respondents retained Miles Glick, an expert[3] in the fields of architecture, forensic architecture, and construction, to investigate the various problems discovered in the buildings. Glick performed destructive testing to evaluate the cause and extent of the damages. (R. pp. 806:8-808:8). Glick determined numerous deficiencies existed in the overall construction, which pervaded many different construction trades. (R. p. 808:3-8). Hence, the lawsuit originally involved numerous defendants. However, after all other trades settled with Respondents, the trial focused solely on the exterior stucco installed by Professional Plastering and damages resulting therefrom.

Professional Plastering was a subcontractor for the original construction,[4] but that

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[2] Professional Plastering filed a Cross-Claim against its subcontractor APS Enterprises, Inc. ("APS") (R. p. 210). APS moved for and was granted summary judgment as to Professional Plastering's claims. (R. p. 223, 64). Professional Plastering has appealed from that decision as well. Respondents take no position insofar as the appeal of APS's grant of summary judgment is concerned.

[3] Glick was qualified without objection. (R. p. 805:2-6).

[4] Professional Plastering later returned to Fenwick in 2003 to address various leaks that had been reported. (R. p. 868:12-16).

entity ceased doing business the same year this lawsuit was filed. (R. pp. 859:6-869:16). Professional Plastering installed roughly one-quarter million square feet of stucco at Fenwick. (R. pp. 824:15-19, 964:2-12). The product installed by Professional Plastering was the Magna Wall system.[5] Magna Wall is a proprietary stucco system that must be installed per the manufacturer's installation instructions, and Professional Plastering was certified by the manufacturer to install the system. (R. pp. 809:19-810:10). Donnie King, who owned Professional Plastering, testified his company had a duty to conform its work to the building code, the Magna Wall installation instructions, and the project's contractual requirements. (R. pp. 859:1-873:7, 876:18-880:13).

Glick testified the Magna Wall system is a water management system, as opposed to a barrier system.[6] (R. pp. 819:10-821:5). According to Glick, a water management system, like Magna Wall, should allow any water that enters to exit the wall, as it is designed, to prevent damage. (R. pp. 822:15-823:15).

With regard to the work of Professional Plastering, Glick testified to the building codes, installation instructions, and industry standards that applied to the stucco installation. (R. pp. 808:18-814:13, 822:15-824:6, 834:10-23, 1707, 1714, 1733, 1748, 1752). He found numerous deficiencies in Professional Plastering's work in violation of these applicable requirements. (R. pp. 806:8-856:23, 1412:9-1426:17, 1445:5-22). Among other things, Glick testified to flashing deficiencies and improper lapping, which allowed water to damage the underlying sheathing and studs in the wall, among other

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[5] The architectural plans called for a traditional three-coat stucco application, but a substitution allowed for the use of the Magna Wall system. Repair estimates called for a return to the traditional stucco application. (R. pp. 1212:9-1213:8).

[6] A barrier system does not allow water behind the cladding. A water management system is designed to control water that gets behind the cladding so it escapes before damaging the building. (R. pp. 819:10-821:5).

things. (R. pp. 822:15-823:15). "Now, just because water gets in a system, it still should be able to get out. And that is the purpose of the proper lapping." (R. p. 827:1-3). Glick discovered missing weep screeds, which should have been installed to allow water entering the system to drain from the wall before causing damage. (R. pp. 824:5-827:10).

Glick testified Professional Plastering failed to install sealant joints, or "j-beads," at the edges to prevent water intrusion, again violating the installation instructions and causing the water management system to fail. (R. pp. 833:24-834:23). Professional Plastering argued others were at fault for the missing caulk joints, but Glick opined it was "impossible" for anyone to install caulking because Professional Plastering did not first install a casing bead. (R. pp. 833:18-23, 846:16-23). According to Glick, Professional Plastering did not install flashing around the windows, although flashing was called for in its contract. (R. pp. 841:6-842:14). Glick also testified Professional Plastering covered up defective work of other tradesmen, exacerbating the problems. (R. pp. 843:5-844:5).

Everywhere Glick tested, he found the buildings at Fenwick were rotting. (R. pp. 840:24-841:5). In fact, Glick testified, "I didn't find any place that didn't have improper installation of the stucco system or rotted wood." (R. pp. 848:4-19, 851:2-5). At tested locations, the moisture content of the wood was frequently as high as fifty percent (50%) and reached 100% in at least one test site. (R. pp. 833:7-16, 837:9-21, 840:6-15).

Glick also opined about the scope of repairs needed to remedy the defects and resulting damages at Fenwick. (R. pp. 848:25-852:6). Glick's investigation related to all trades and their respective defects, but only the claims against Professional Plastering remained unsettled at trial. Respondents presented Robert Gallagher, who was qualified as an expert in the fields of general contracting and estimating without objection. (R. p. 928:11-24). Gallagher offered opinions about the cost associated with Glick's scope of

repairs. Gallagher first prepared a $15,748,225.00 estimate to remedy 100% of the problems, including the stucco defects. (R. pp. 929:7-937:5, 1769). Because Professional Plastering was the sole remaining defendant at trial, Gallagher also prepared a "stucco-only" estimate for the cost to repair just the stucco related damages, which he said would cost $8,761,443.00. (R. pp. 954:23-961:18, 1768). Gallagher further testified the homeowners at Fenwick would have to move out of their homes while the repairs were made due to safety concerns. (R. pp. 964:2-965:18).

In opposition to the evidence presented by Respondents, Professional Plastering offered the testimony, via deposition, of Claude McNabb and Tacy McGinty. McNabb was the Vice President of the developer of Fenwick when it was constructed. According to McNabb, Professional Plastering's stucco application was proper and passed his inspections. (R. pp. 1121:1-1150:10). McGinty, the project manager for the general contractor during the construction, testified the work performed by Professional Plastering was properly done in accordance with the contract documents. (R. p. 1266:21-1358:20).

On the other hand, Donnie King, the owner and president of Professional Plastering, testified that its stucco installation at Fenwick violated the building code and the Magna Wall manufacturer's installation instructions in numerous particulars. (R. pp. 869:9-899:11). King further testified that he never visited the Fenwick project to check the company's work, neither during original construction nor when repairs were later needed. (R. pp. 867:24-868:20).

Robert Pusheck, an expert in construction and restoration, also testified for Professional Plastering. He did not find any evidence Professional Plastering's work proximately caused damages to the Fenwick buildings. (R. pp. 1221:1-17, 1461:4-

1462:2). Pusheck also opined the cost to repair the stucco work was less than the $8,761,443.00 figure presented by Gallagher. The jury found in favor of Respondents, awarding damages correlating with Gallagher's total damages estimate.

ARGUMENT AND CITATION OF AUTHORITY

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISQUALIFYING CHRIS DAWKINS AS AN EXPERT BECAUSE HE FAILED TO QUALIFY AS AN EXPERT UNDER RULE 702, SCRE

Professional Plastering offered Chris Dawkins ("Dawkins") as an expert in the areas of engineering and construction. (R. p. 1074:8-13). The trial court found Dawkins was not qualified, citing a number of reasons. (R. pp. 1074:20-1105:9, 1372:21-1374:10). Professional Plastering has failed to identify any reversible error in the trial court's decision.

A. The Applicable Standard of Review

"The qualification of an expert witness and the admissibility of his or her opinion are matters within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion and a showing of prejudice." *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 423, 717 S.E.2d 765, 775 (Ct. App. 2001). *See also Manning v. City of Columbia*, 297 S.C. 451, 377 S.E.2d 335 (1989); *McDill v. Mark's Auto Sales, Inc.*, 367 S.C. 486, 626 S.E.2d 52 (Ct. App. 2006). "An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support." *Nelson v. Taylor*, 347 S.C. 210, 214, 553 S.E.2d 488, 490 (Ct. App. 2001) (*citing Lee v. Suess,* 318 S.C. 283, 457 S.E.2d 344 (1995)). To demonstrate prejudice, there must be "a reasonable probability the jury's verdict was influenced by the

challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg,* 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

It is also true "the trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, SCRE whether the evidence is scientific or non-scientific." *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009). While executing the gatekeeping role in determining admissibility, the trial court must assess the foundational requirements of qualifications and reliability and further find that the testimony will assist the trier of fact. *Id.* at 275, 676 S.E.2d at 689.

> [t]he familiar tenet of evidence law that a continuing challenge to evidence goes to "weight, not admissibility"[7] has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability. Nonscientific expert testimony must satisfy Rule 702 both in terms of expert qualifications and reliability of the subject matter.

Id. at 273, 676 S.E.2d at 688.

B. Dawkins Failed to Satisfy the Expert Qualification Requirements of Rule 702, SCRE

"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. Regardless of "whether an expert's testimony is scientific or nonscientific, the trial court has a gatekeeping role with respect

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[7] Professional Plastering never argued at trial that Dawkins' shortcomings went to the weight of his testimony, not its admissibility. This argument first appeared in the *Reply* brief filed in support of its post-trial motions. (R. p. 733). A party cannot use a Rule 59(e) motion (much less a Reply supporting that motion) to present an issue to the court for the first time. *Fields v. Reg'l Med. Ctr.*, 363 S.C. at 27, 609 S.E.2d at 510.

to all evidence sought to be admitted under Rule 702." *Pope*, 395 S.C. at 424, 717 S.E.2d at 775 (*citing State v. White*, 382 S.C. at 274, 676 S.E.2d at 689). As a gatekeeper,

> [t]he trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.
>
> Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability. Thus, only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate.

Watson v. Ford Motor Co., 389 S.C. 434, 446-447, 699 S.E.2d 169, 175 (2010) (internal citations omitted). Applying the foregoing analysis to the instant case, Dawkins' proffered testimony failed to meet the requirements for admissibility under Rule 702.

1. Dawkins Lacked the Requisite Knowledge, Skill and Experience to Qualify as an Expert in Engineering and Construction

Whether an individual qualifies as an expert is dependent upon the particular witness's reference to the subject in question. *Watson*, 389 S.C. at 447, 699 S.E.2d at 175. During *voir dire*, Respondents' counsel exposed the following shortcomings with regard to Dawkins' experience as it related to Fenwick and the construction defects and damages discovered therein:

- He never designed a project such as the one at issue – a twelve building, multi-family condominium project;

- He performed no actual testing of his own at the Fenwick complex at issue in this litigation;
- He never designed any kind of building in Charleston, South Carolina;
- He never designed any kind of building in Coastal South Carolina or anywhere else in South Carolina;
- He had never been qualified as an expert on any subject matter by any court of law in South Carolina;
- He has never held a license as a professional engineer in the state of South Carolina and has no knowledge of South Carolina licensure requirements;
- He was not a licensed architect in any state;
- He was not a licensed general contractor in any state; and
- He had no certifications whatsoever to support his title of "Construction Consultant," which he admits is a title he gave to himself.

(R. pp. 1075:4-1078:3). Considering Dawkins' lack of experience and scant investigation into the construction issues actually involved in this case, Respondents objected to his qualification as an expert, citing the litany of concerns articulated above. (R. pp. 1083:19-21, 1090:2-12, 1370:24-1371:2).

On appeal, Professional Plastering couches the issue as though the trial court refused to qualify Dawkins **solely** because he was not licensed in South Carolina. Framing its argument in this manner, Professional Plastering oversimplifies the issue, ignores the balance of the record, and completely distorts the trial court's actual ruling. Respondents relied on numerous grounds when objecting to Dawkins' qualification as an expert. Respondents never relied solely on the fact that Dawkins was not licensed in South Carolina. (R. pp. 1370:24-1371:2). Likewise, the trial court specifically acknowledged *Baggerly v. CSX Transportation, Inc.*, 370 S.C. 362, 374-375, 635 S.E.2d 97, 103-104 (2006), and noted:

> The request was whether or not Mr. Dawkins would be qualified as an expert at this time based upon my review the voir dire – *in camera voir dire* as well as the background of the case. I am declining to grant your request to have Mr. Dawkins qualified as expert in the areas of engineering and construction. **I am not relying solely on the fact that he is not licensed in South Carolina. I am taking all of the information as a whole, in its entirety, in order to make my decision.**

(R. pp. 1095:14-24, 1372:21-1373:7) (emphasis added). The trial court's disqualification of Dawkins was a proper exercise of its wide discretion. The decision followed lengthy examination of Dawkins by both parties and ample arguments on the issue. Further, due to the necessity of calling certain witnesses out of order, the trial record was essentially complete by the time the trial court made a final determination. Under these circumstances, the trial court completed a "broad inquiry" as envisioned by *Fields v. Haynes Waters Builders, Inc.*, 376 S.C. 545, 558, 658 S.E.2d 80, 87 (2008), and therefore, should be affirmed.

2. Dawkins' Testimony was Unreliable

For Dawkins' expert opinions to be admissible, the trial court had to find not only that he possessed the requisite knowledge, skill, experience, training or education, but also the substance of his testimony was reliable. *Watson*, 389 S.C. at 447, 699 S.E.2d at 176. Based on Professional Plastering's Brief, Dawkins presumably would have testified none of the damages at Fenwick were proximately caused by Professional Plastering's work. (App. Br.). This testimony was properly excluded because it is unreliable. Respondents incorporate the points above about Dawkins' lack of knowledge, skill, and experience necessary to qualify as an expert in the first place. Further, the record reveals Dawkins performed no destructive testing of his own. (R. pp. 1075:20-1076:9). This evidence from the trial is sufficient to support a determination that Dawkins' testimony

about the proximate cause of any damage at the Fenwick complex was unreliable. Moreover, Donnie King's numerous admissions at trial further undercut the reliability of Dawkins' opinion that Professional Plastering correctly performed the work. Accordingly, the trial court properly applied Rule 702, SCRE, and did not err in disqualifying Dawkins as an expert.

C. Any Error by the Trial Court in Refusing to Qualify Dawkins as an Expert was Harmless

Even assuming, *arguendo*, the trial court erred in failing to qualify Dawkins as an expert, Professional Plastering must establish resulting prejudice to warrant reversal. *See Owners Ins. Co. v. Clayton,* 364 S.C. 555, 563, 614 S.E.2d 611, 615 (2005) ("Error without prejudice does not warrant reversal."); *Fields,* v. *Reg. 'l Med. Ctr.,* 363 S.C. at 26, 609 S.E.2d at 509 ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."). Because any alleged error by the trial court was harmless in light of the record before this Court, the decision of the trial court must be affirmed.

According to the record, had Dawkins been qualified as an expert, he generally would have opined: (1) the work performed by Professional Plastering at the subject project was in accordance with construction documents; and (2) others were responsible for the damages at Fenwick. Respondents address these in turn.

1. Proffered Opinions About Professional Plastering's Compliance with the Contract Documents Are Both Cumulative and Contradictory to the Admissions in the Record

In Professional Plastering's opening statement, it argued that other trades were to blame for the problems at Fenwick. Professional Plastering claimed it was a small

player, merely doing what it was told to do. (Supp. ROA. pp. 1:1-2:19. Counsel told the jury to "follow the water." (Supp. ROA. pp. 3:22-4:1). Professional Plastering theorized its work was not the proximate cause of the damages. (Supp. ROA. p. 5:3-11).

Pusheck, Professional Plastering's expert in both construction[8] and restoration, acknowledged external wall damage existed underneath the stucco. However, when asked if he agreed the damage was caused, "at least in some part, by the improper application of stucco at Fenwick...," Pusheck responded, "No." (R. pp. 1221:1-17, 1461:4-1462:2). This opinion, from a qualified expert, is the same opinion Dawkins sought to convey, *to wit*, the damages were not proximately caused by Professional Plastering's work. For Dawkins to reiterate this point is cumulative. *Fields v. Haynes*, 376 S.C. at 558, 658 S.E.2d at 87; *State v. Pipkin*, 359 S.C. 322, 327-28, 597, S.E.2d 831, 834 (Ct. App. 2004); Rule 61, SCRCP.

Professional Plastering also presented the deposition testimony of Tacy McGinty. McGinty was employed by Summit Contractors, a one-time defendant in the case and the general contractor that hired Professional Plastering to install the stucco exterior. (R. pp. 1267:3-1269:2). McGinty, whose experience and background in construction were communicated to the jury, testified Professional Plastering's work was inspected during the course of the project and accepted during the submission process for payment requests. She did not recall any deficiencies in the work. (R. pp. 1269:6-1283:24, 1332:8-1358:19). This testimony plainly suggests Professional Plastering correctly performed the work. In this vein, Dawkins would have offered the same evidence the jury heard from McGinty, rendering it cumulative. Curiously, however, McGinty's

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[8] This is one of the same fields of expertise in which Professional Plastering sought to qualify Dawkins, highlighting the duplicitous nature of their proffered qualifications.

testimony and Dawkins' presumed testimony cannot be reconciled with Donnie King's clear admissions to numerous defects in the work.

King admitted Professional Plastering had a duty to ensure its work conformed to all applicable building codes, and he also admitted its work failed to meet code in several respects. (R. pp. 869:9-873:7, 876:18-880:13). Dawkins would have attributed various deficiencies in the stucco to the building substrate in an effort to shield Professional Plastering. (R. pp. 1571:3-1573:12). But, King admitted Professional Plastering had a duty to inspect the building substrate prior to installing the stucco to ensure the underlying work was proper. (R. pp. 880:8-881:5). King also admitted Professional Plastering's work concealed underlying defects, such as the absence of kickout flashing. (R. pp. 881:6-882:23). Dawkins suggested Professional Plastering would have no notice of missing flashing or other underlying defects discussed frequently at trial. (R. pp. 1563:10-1564:13). King, on the other hand, testified he could visually recognize the presence of kickout flashing on a building given his lifetime of experience. (R. pp. 903:16-904:5).

The admissions from King did not stop there:

- He admitted Professional Plastering should have installed casing beads, but that they were not installed as required;
- He admitted Professional Plastering should have installed weep screeds to prevent wood rot by allowing the stucco system to drain water that entered the wall, but weep screeds were missing;
- He admitted Professional Plastering should have installed j-molds in appropriate locations but failed to do so;
- He admitted it was a violation of the manufacturer's installation instructions for stucco to be in contact with the roofing shingles, a condition that was shown to exist in photographs from the site;

- He conceded it was improper for Professional Plastering not to have removed excess paper between the laths, preventing the lapped stucco layers from integrating as required, which is a building code violation; and

- He admitted various aspects of Professional Plastering's work failed to comply with the NER report, which constitutes a building code violation.

- He admitted that Professional Plastering warranted and guaranteed its work would be free from all faults and defects.

(R. pp. 889:10-898:20, 915:25-917:16). In fact, King conceded one or more aspects of Professional Plastering's work violated the applicable building code. (R. pp. 898:13-899:11, 1492:20-25). King then confessed:

> Q: The only question for the jury is **how many violations and how much**, correct?
>
> A: **Yes sir**.

(R. p. 899:12-14) (emphasis added).

Considering these admissions, it strains credibility to suggest the verdict would have been any different had Dawkins been allowed to take the stand and essentially disagree with the admissions of the party who hired him to testify. King's admissions also undermine any supposed reliability of Dawkins' opinion that Professional Plastering correctly performed the stucco installation. Accordingly, any error in refusing to qualify Dawkins was harmless. *Cf. Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967) (where the verdict of any fair jury would have been the same even if no error had been committed, the error is harmless and not prejudicial).

2. Proffered Opinions That Others Contributed to the Damages at Fenwick are Cumulative to the Evidence in the Record

Respondents conceded throughout the trial that **numerous** trades were at fault in causing the estimated $15,748,225.00 in damages at Fenwick. (R. pp. 798:2-25, 1769).

In opening statements, Respondents said, "We had many other issues and many defendants. They had roofing problems, framing problems, windows, and mechanical problems, and happily we've been able to resolve those problems with these other defendants. And that's why [the other defendants are] not here right now." (R. p. 798:10-19). Glick testified: "There were a lot of construction deficiencies in many categories. Russell Meese was there to investigate the roof. Mr. Lenny Greene was a mechanical engineer looking at mechanical problems. And Mr. Tom Carlson, with CalLite (sic) Construction, who's assisting me with the crews, to cut these holes...." (R. p. 808:3-8). Professional Plastering questioned Glick extensively about the problems he found in the work of other tradesmen. (R. pp. 999:3-1026:8). Glick admitted others were responsible for some of the problems and pointed out that those trades were accountable to Respondents for their mistakes. (R. pp. 1025:1-1026:6).

Jeffrey Jessup testified the POA got involved in the suit to protect its interest in damaged common elements. (R. p. 1034:5-21). Jessup admitted to problems with many aspects of the work, not just the defective stucco. (R. pp. 1042:15-1043:18). For example, there were building deficiencies in the areas of the complex where HardiPlank (as opposed to stucco) was used on the exterior. (R. pp. 999:24-1000:10). Interestingly, the rot was more severe under Professional Plastering's stucco than was observed beneath the HardiPlank, an observation Professional Plastering's expert made as well. (R. pp. 1001:1-4, 1213:12-19).

Respondents **never** argued Professional Plastering was the sole cause of all of the problems. In fact, the entire trial was conducted so as to repeatedly inform the jury of numerous other defendants who had already reached a settlement (to the tune of

$8,025,000.00) with Respondents for their part of the more than $15 Million in damages at Fenwick. Respondents' clear theme at trial was to seek damages from Professional Plastering for the difference between the $15,748,225.00 repair estimate Gallagher presented and the $8,025,000.00 Respondents received in settlement funds from all other parties. Professional Plastering consented to this presentation of the case, never once objecting during opening statements, the testimony at trial, and Respondent's summation, all of which followed this theme. To the extent Dawkins intended to tell the jury other tradesmen caused damages at Fenwick, Respondents repeatedly accomplished this task for him. Additional testimony by Dawkins that others were at fault would have been cumulative to the undisputed evidence presented at trial. *Fields v. Haynes*, 376 S.C. at 558, 658 S.E.2d at 87; Rule 61, SCRCP.

3. Any Prejudice Claimed by Professional Plastering was Preventable Because it Designated Multiple Experts in Discovery

Any prejudice Professional Plastering claims as a result of Dawkins' disqualification was preventable had it elected to call additional experts designated for trial. Professional Plastering's Expert Witness Designation identifies Wade Anderson, a professional engineer licensed in the State of South Carolina, as a proposed expert witness. The designation also identifies Professional Plastering's owner, Donnie King, as an expert to testify "within the scope of his expertise." (R. p. 713, 723). Despite identifying these "experts," Professional Plastering chose not to elicit opinions from either of them at trial. Consequently, Professional Plastering caused any prejudice it claims to have suffered at trial.

The gravamen of Professional Plastering's argument relating to Dawkins' disqualification boils down to its belief that the jury was forced to accept Glick's

testimony because his opinions were not challenged by a competing expert. This theory ignores the trial court's instructions regarding experts. The trial court advised, "That does not mean that you must accept the [expert's] opinion. It is simply evidence for you to use in any way that you see fit." (R. p. 805:7-21). Before the jury began deliberations, the trial court also instructed, "An expert witness' testimony is to be given no greater weight than that of any witness simply because that witness is an expert. Further, you are not required to accept an expert's opinion even though it is not contradicted." (R. pp. 1506:13-1507:21). Even if one presumes Glick's testimony was "uncontradicted," such does not render his testimony "undisputed." *See Black v. Hodge*, 306 S.C. 196, 410 S.E.2d 595 (Ct. App. 1991) (addressing this very issue and plainly stating that a jury need not believe uncontradicted testimony).

Here, Professional Plastering certainly disputed Respondents' evidence at trial. (R. pp. 1221:1-17, 1461:4-1462:2). The jury was free to decide what testimony to accept. Considering King's numerous admissions to code violations in Professional Plastering's work, there is abundant evidence in the record to support the verdict. No reasonable jury would have reached a different verdict, even if Dawkins had testified. Accordingly, the trial court should be affirmed.

D. As an Additional Sustaining Ground, Dawkins' Testimony was Properly Excluded Due to Professional Plastering's Discovery Violations

During *voir dire* of Dawkins, it was discovered he maintained a file of his work, at least some of which he said had been provided to counsel for Professional Plastering. (R. pp. 1082:25-1083:18). Respondents had previously served written discovery requests, the scope of which required Professional Plastering to produce copies of any such files kept by Dawkins. (R. pp. 1090:14-22, 1100:21-1101:11). However, the only

item ever produced by Professional Plastering was a copy of Dawkins' *curriculum vitae.* (R. pp. 1090:14-22, 1100:21-1101:11, 1104:14-1105:3). Respondents were never provided with any of Dawkins' actual work, including his field notes from whatever investigations he undertook. This was not an isolated occurrence during the trial.[9]

There is a continuing duty on the part of a party from whom information is sought through discovery to supplement its responses to discovery with documents or information. *Bensch v. Davidson*, 354 SC 173, 182, 580 S.E.2d 128, 133 (2003). A party's disclosure of information before trial is designed to avoid surprise and to promote decisions on the merits after a full and fair hearing. *Id.* (*citing Reed v. Clark*, 277 S.C. 310, 286 S.E.2d 384 (1982)). "When it appears a violation of [discovery] has occurred, it lies within the discretion of a trial court to decide what sanction, if any, should be imposed." *Bensch,* 354 SC at 182, 580 S.E.2d at 133.

In its Brief, Professional Plastering offers inconsistent and contradictory explanations for why the materials were never provided to Respondents. In one breath, Professional Plastering blames Respondents because, "Respondents never contacted defense counsel **to arrange a review of documents" possessed** by them. (App. Br.) (emphasis added). Inexplicably, Professional Plastering then also claims in its Brief, just as it did at trial, that "Counsel for Professional Plastering informed the Court that they had **never received documents** from the file of Mr. Dawkins." (App. Br.) (R. pp. 1101:16-20, 1102:6-11). These assertions cannot coexist, and Professional Plastering has yet to explain how Respondents could have made arrangements with its counsel to review documents its counsel never received.

Viewing the record as a whole, Professional Plastering proffered an expert who

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[9] An additional discovery violation is discussed in Section II of this Brief.

lacked material qualifications, performed no destructive testing, had never designed any structure in South Carolina, was unlicensed in South Carolina, would have offered cumulative testimony, and failed to produce material documents relating to his opinions until the third day of trial. The trial court was well within its broad discretion to exclude Dawkins as an expert in the case under these circumstances.

II. THERE WAS NO REVERSIBLE ERROR IN THE TRIAL COURT'S EXCLUSION OF PROFESSIONAL PLASTERING'S "STUCCO-ONLY" ESTIMATE WHERE THE DOCUMENT WAS CUMULATIVE TO THE TESTIMONY AT TRIAL, WAS NOT PRODUCED IN DISCOVERY, AND WAS NOT A "STUCCO-ONLY" ESTIMATE

Professional Plastering offered into evidence a purported "stucco only" repair estimate prepared by Pusheck. (R. p. 1664). Just before Pusheck testified, Professional Plastering handed Respondents' counsel a "thumb-drive" containing material documents prepared by Pusheck that were not produced in discovery. Respondents objected, seeking to prevent Pusheck from testifying about his unproduced findings. When Respondents called this additional discovery violation to the trial court's attention, Professional Plastering explained: "The only thing I can say, Your Honor, is it was our understanding that this material had been produced. If it hasn't been, then –[.]" The discussion was cut short by the trial court's immediate demand to see all counsel in chambers. (R. pp. 1151:18-1153:4). Following the chambers conference, Respondents were permitted to *voir dire* Pusheck about the materials in his file. (R. pp. 1153:18-1167:19). Thereafter, Respondents renewed their objection to the newly presented estimate. (R. pp. 1167:15-1168:4).

Importantly, Respondents objected only to the admissibility of **the document**. Thus, Pusheck went on to testify at length about the **substance** of his expert opinions about the cost of repair from Professional Plastering's point of view. (R. pp. 1169:1-

1210:25). Pusheck's testimony included a thorough explanation of the basis for his purported "stucco-only" estimate. (R. pp. 1192:14-1194:15, 1199:21-1210:25). Further, Pusheck's stucco-only estimate was displayed on the court's overhead projection system for the jury's view during his testimony. When Professional Plastering sought once more to admit the document, Respondents renewed their objection. Following a bench conference,[10] the trial court sustained the objection and excluded the document from evidence.

A. The Applicable Standards of Review

Rulings on the admission or exclusion of evidence lie within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the appealing party." *Fields v. Reg'l Med. Ctr.,* 363 S.C. at 25, 609 S.E.2d at 509. *See also Pike v. S.C. Dept. of Transp.,* 343 S.C. 224, 234, 540 S.E.2d 87, 92 (2000); *Gooding v. St. Francis Xavier Hosp.,* 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997); *Hanahan v. Simpson,* 326 S.C. 140, 156, 485 S.E.2d 903, 911 (1997); *Timmons v. S.C. Tricentennial Commn.,* 254 S.C. 378, 405, 175 S.E.2d 805, 819 (1970); *Powers v. Temple,* 250 S.C. at 160, 156 S.E.2d at 764; *Means v. Gates,* 348 S.C. 161, 166, 558 S.E.2d 921, 923 (Ct. App. 2001). A trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters will be interfered with by the Court of Appeals only if an abuse of discretion has occurred. *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987); *Clark v. Ross*, 284 S.C. 543, 328 S.E.2d 91 (Ct. App. 1985). The burden is upon the appealing party to demonstrate the

[10] It does not appear that the precise arguments raised by the parties during this bench conference nor all of the grounds for the trial court's decision were ever completely placed on the record. *See York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) (arguments raised during an off the record bench conference which are not made a part of the record are not preserved for review). (R. p. 1210:20-25).

abuse of discretion. *Clark*, 284 S.C. at 570, 328 S.E.2d at 107. In addition to demonstrating an abuse of discretion, the appealing party must also demonstrate prejudice resulting therefrom in order to establish an error of law. *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989).

B. The Exclusion of Professional Plastering's Purported "Stucco-Only" Document was a Proper Exercise of the Court's Discretion on Matters of Evidence and Discovery Violations

A discovery sanction should be aimed at the specific misconduct of the party sanctioned. *Balloon Plantation v. Head Balloons*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990). Furthermore, whatever sanction is imposed should serve to protect the rights of discovery provided by the Rules of Civil Procedure. *Downey*, 294 S.C. at 45, 362 S.E.2d at 318. *See also Kershaw Co. Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990). The trial court allowed Pusheck to testify completely about his "stucco-only" estimate, and the jury was allowed to see the actual document during Pusheck's testimony as a demonstrative exhibit. Because Professional Plastering did not produce the document until immediately prior to calling Pusheck as a witness, the trial court had discretion exclude the document while allowing Pusheck to testify fully to its subject matter. This is especially true where the document was published to the jury during Pusheck's testimony. The trial court's ruling had the effect of a carefully tailored sanction against the failure to produce the document, protecting the Respondents' rights to receive requested discovery. *Balloon Plantation,* 303 S.C. at 154, 399 S.E.2d at 440; *Downey*, 294 S.C. at 45, 362 S.E.2d at 318.[11]

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[11] Professional Plastering suggests it was treated unfairly because Respondents were allowed to admit a "stucco-only" estimate produced prior to trial. This argument is unavailing. Professional Plastering's only objections to Respondents' "stucco-only"

Additional grounds support the exclusion of Pusheck's "stucco-only" estimate. Professional Plastering mischaracterizes the document as a "stucco-only" comparison—it is nothing of the sort. Rather, the document itemizes repair costs associated with several items that are unrelated to stucco, such as windows and doors. (R. pp. 1163:8-21, 1664). Further, the document categorizes certain costs as "betterments," such that the document effectively "argues" points for the defense. (R. p. 1162:2-10). While Professional Plastering may have desired an "apples to apples" comparison, that is not what its exhibit represented.[12] In addition to addressing trades that were not "stucco-only," the document had the effect of pitting the party's experts against one another. *See State v. Kelsey*, 331 SC 50, 502 S.E.2d 63 (1998) (improper "pitting" constitutes reversible error). Because Professional Plastering's exhibit was not truly a "stucco-only" estimate, it was not proper rebuttal evidence, regardless Professional Plastering's urging on appeal. *Compare State v. McEachern*, Op. No. 4981 (Ct. App. 2012) (holding when a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof).

C. Any Error in Excluding the "Stucco-Only" Estimate was Harmless

Perhaps the best reason Professional Plastering's argument fails is that any

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estimate were for lack of foundation and that the damages were speculative. These very same objections were made to Respondents' total repair estimate, produced long before trial. (R. pp. 955:6-17, 992:12-993:5). As evidenced by Pusheck's preparation of his own "stucco-only" estimate prior to trial, Professional Plastering cannot (and did not) complain it was somehow prejudiced by the production date of Respondents' stucco-only estimate. The same is not true of Respondents, who were utterly surprised at trial by Pusheck's new document. Professional Plastering's argument is a red hearing that has no merit.

[12] Pusheck had already prepared and submitted a "line-by-line breakdown" to compare to Gallagher's $15 Million repair estimate, which would have included the stucco repairs. (R. pp. 1154:8-1155:6; 1813).

alleged error was harmless. Professional Plastering cannot show prejudice resulting from the exclusion of the document embodying Pusheck's "stucco-only" estimate. *See Owners Ins. Co. v. Clayton,* 364 S.C. at 563, 614 S.E.2d at 615 ("Error without prejudice does not warrant reversal."); *Fields v. Reg'l Med Ctr.,* 363 S.C. at 26, 609 S.E.2d at 509 (noting an appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof).

As mentioned, the exclusion of the exhibit in no way precluded Pusheck from testifying at length about his opinions as the cost to repair the stucco and resulting damages. Therefore, it is patently incorrect for Professional Plastering to suggest that it was denied the ability to present its "stucco-only" estimate. This is especially true where Pusheck's "stucco-only" estimate was displayed to the jury and discussed in detail. In addition to Pusheck's testimony, counsel for Professional Plastering republished the exhibit during closing arguments. (R. pp. 1487:20-1491:5). In the Court of Appeals' decision from the case of *Clark v. Cantrell*, 332 S.C. 433, 504 S.E.2d 605 (Ct. App. 1998) (aff'd by *Clark v. Cantrell*, 339, S.C. 369, 529 S.E.2d 528 (2000)), this Court found no error in the exclusion of a diagram prepared by an expert where the information in the diagram had already been provided to the jury, rendering the diagram cumulative. *Id.* at 450, 504 S.E.2d at 614. Footnote 9 of this Court's analysis in *Clark v. Cantrell* is directly on point with the facts of this case, stating: "The trial court allowed Cantrell's expert to use the diagram as a demonstrative exhibit, but did not allow the jury to use the diagram during deliberations." *Id.* Citing Rule 61, SCRCP, the exclusion of the diagram was harmless. The same result applies here.

In addition, prior to offering its "stucco-only" estimate, Professional Plastering

admittedly provided Respondents with "an estimate with a breakdown of the costs" associated with the various repairs at Fenwick. Professional Plastering could have offered this breakdown into evidence, but chose not to do so. (App. Br. p. 27).

Finally, Professional Plastering's primary argument revolves around the alleged prejudice Professional Plastering suffered due to "the lack of an exhibit to which the jury could refer or use to perform an analysis of what a reasonable cost of repair ... would be." (App. Br.). The jurors viewed the very exhibit in question during Pusheck's testimony and were allowed to take notes during the course of the trial. (R. pp. 1487:20-1491:5). Professional Plastering fully explained Pusheck's methodologies. (R. pp. 1174:22-1194:15, 1199:21-1216:21, 1253:13-1257:10). It also fully cross-examined Respondents' repair expert about his own estimate. (R. pp. 965:25-991:13). Unquestionably, the jury had ample opportunity to hear and weigh the positions of each party's experts on the issue of damages as well as each party's counsel during summation. Under these circumstances, it is mere conjecture to suggest the inability of the jurors to hold Professional Plastering's "stucco-only" exhibit in their hands during deliberations somehow prejudicially affected the outcome of the trial. Accordingly, the trial court should be affirmed. *Fields v. Haynes*, 376 S.C. at 558, 658 S.E.2d at 87; *Clark v. Cantrell*, 332 S.C. at 450, 504 S.E.2d at 614; Rule 61, SCRCP.

III. THE TRIAL COURT COMMITTED NO ERROR IN DENYING PROFESSIONAL PLASTERING'S MOTIONS FOR SET-OFF AND A NEW TRIAL WHERE THE ENTIRE TRIAL WAS DEVELOPED AROUND RESPONDENTS' REQUEST FOR DAMAGES IN ADDITION TO THE SETTLEMENT AMOUNTS ALREADY PAID BY OTHERS, WHICH THE JURY AWARDED UPON CLEAR INSTRUCTIONS AND WITH COMPLETE KNOWLEDGE OF THE PRIOR SETTLEMENTS

The trial court correctly denied Professional Plastering's Motion for Set-Off and Motion for a New Trial Remittitur. The evidence firmly demonstrates the damages

awarded were intended by the jury to be in addition to the total settlement previously received from the settling defendants.

A. The Record Supports the Trial Court's Decision to Deny Professional Plastering's Motion for Set Off

"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." *Rutland v. S.C. Dep't of Transp.*, 390 S.C. 78, 85-86, 700 S.E.2d 451, 454-55 (Ct. App. 2011) (*citing Welch v. Epstein,* 342 S.C. 279, 313, 536 S.E.2d 408, 425 (Ct. App. 2000)). As noted by Professional Plastering, the purpose of a set-off "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 him." *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 219, 528 S.E.2d 682, 688 (Ct. App. 2000). However, a set-off is not required in all circumstances. "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*, 390 S.C. at 86, 700 S.E.2d at 456 (emphasis added). "Therefore, such motions [for set off] are addressed to the discretion of the court—a discretion which should not be arbitrarily or capriciously exercised." *Welch,* 342 S.C. at 313, 536 S.E.2d at 426. A trial court's reallocation of prior settlements "must yield to fairness and justice." *Id.*

Respondents conducted the trial, from start to finish, according to one simple theme: (i) inform the jury of the **total** amount of damages suffered; (ii) inform the jury of how much was received in settlements from other defendants for their own respective fault; and (iii) ask the jury to find Professional Plastering **responsible for the difference** between those two figures. Professional Plastering never objected to Respondents' factual development of this theme at trial.

During opening statements, Respondents told the jury about the nature of the case and, specifically, that the overall repairs to the project would cost in excess of $15,000,000.00. (R. pp. 798:10-799:8). Without objection, Respondents further explained the settling defendants had already paid approximately $8 Million of the total $15 Million cost of repair, leaving Professional Plastering responsible for the difference. "That's what we are here about." (R. p. 799:1-24). This theme permeated the trial, without objection.

Gallagher's two damages estimates were entered into evidence. (R. pp. 1768, 1769). First, Gallagher presented his **total cost** to repair **all** of the various deficiencies and resulting damages. His total figure came to $15,748,225.56, accounting for the alleged negligence of all defendants. (R. pp. 929:2-930:8, 932:13-954:22, 1769). After all other defendants settled, Gallagher prepared for trial his "stucco-only" estimate, representing the estimated costs to correct the defects and resulting damages caused by Professional Plastering. (R. pp. 954:23-955:17). Gallagher's "stucco-only" estimate found Professional Plastering responsible for $8,716,443.00 in repair costs to remedy the defective stucco and resulting damages. (R. pp. 955:24-965:20).

Jeffrey Jessup testified in his capacity as a Fenwick homeowner and the POA board president. (R. p. 1027:7-25). Jessup told the jury about the $15.7 Million in repair costs that Respondents were facing due to all of the construction defects. (R. pp. 1035:18-1036-16). Jessup then testified, still without objection, about the $8,025,000.00 in settlements Respondents had already received from others before the trial proceeded against Professional Plastering. (R. pp. 1036:17-1037:14). Jessup's testimony was followed by Respondent and class representative Mark Teseniar. Teseniar asked the jury

to find Professional Plastering responsible for its share of the damages due to the defective stucco application, per Respondents' theme. (R. pp. 1046:1-1048:18). Again, there was no objection to this method of trial.

During summation, Respondents quite candidly reminded the jury:

> Let me talk to you about the damages. We have an estimate in evidence, Plaintiff's Exhibit Number 15, the ProCon estimate, $15.7 Million. This is an older estimate. It applied to everybody who was in the case. You have frankly been told repeatedly this week that the plaintiffs have been paid $8 Million dollars.
>
> In opening, Mr. Leath asked you for the difference. **He said he would like for you to award us $15.7 Million less the eight million that we've been paid. That's $7.7 Million.** Just to make sure everybody was correct about the numbers, Mr. Gallagher also produced what's been admitted into evidence as Plaintiff's Exhibit No. 14. It itemized the stucco-related-only damages in this case. It totals $8.7 Million, **a million dollars more than what we have remaining on the original estimate.**
>
> **We're not asking for that extra million. We're still only asking for what haven't been paid of the total job, even though the total stucco damages are documented by Mr. Gallagher at $8.7 Million.**

(R. pp. 1494A:7-1494B:7) (emphasis added). There is no confusion in what was asked of the jury. Respondents further explained:

> Now, if you'll recall, the analysis done by Mr. Gallagher was that the stucco itself, just that portion of it, repair would cost $8.7 Million. But we're not asking for that. We're asking for less than that, and Mr. Lucey explained that.
>
> **And why is that? Because it wouldn't be fair and wouldn't be appropriate for us to ask you for more than the total repair on these buildings, which is $15,778,000.00 as you'll see in Mr. Gallagher's estimate. And, yes, some of the other folks have paid some of Professional Plastering's part.**

(R. p. 1496:10-22) (emphasis added). Respondents boiled it down even further, asking the jury to award the difference between Gallagher's total repair estimate and the monies received in settlement—in other words, Respondents requested the precise amount of

$7,723,225.00. "I'll say it again, $7,723,225.00." (R. p. 1499:2-8). Again, there was no objection. The verdict clearly demonstrates the jury understood and accepted Respondent's theme of the case: (i) $15,748,225.00 in total damages, less (ii) $8,025,000.00 in settlements received, equals (iii) $7,723,225.00, the exact amount requested, and the exact amount awarded. (R. p. 65). There simply is no basis for a set-off where the evidence overwhelmingly demonstrates the damages found by the jury are in **addition to** the settlements previously received.

The simplest and only logical interpretation of the verdict reveals the jury accepted Gallagher's $15,748,225.00 total damages assessment, as requested in closing arguments. A set-off for the prior settlements was then applied by the jury on the verdict form, to the penny.[13] It is illogical to suggest Respondents have somehow recovered twice for the same damages under these conditions. The evidence presented, the arguments of counsel in summation, the instructions to the jury, and the clear language of the verdict form all were consistent with the conduct of the trial and resulting verdict. (R. pp. 1472:2-1473:5, 1474:18-1475:21). Professional Plastering has already received the set-off it seeks. To apply yet another set-off would be to ignore the jury's clear verdict and the overwhelming evidence in the record.

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[13] Professional Plastering's reliance on cases that require a set-off as a matter of law is misplaced. (App. Br. p. 30). As stated in *Powers v. Temple*, "[w]here there are **no** questions of fact concerning settlement agreement[s] for the jury's determination, evidence thereof should be excluded from the consideration of the jury, and [set-off] shall be applied by the court. 250 S.C. 149, 155, 156, S.E.2d 759 (1967) (emphasis added). Thus, only where there are no questions of fact as to settlement agreements, will the right of set-off arise as an operation of law. *Id.* Stated differently, the right to set-off does not arise as an operation of law where, in cases such as here, questions of fact exist as to the exact injury the settlement funds were paid to compensate.

Although the above discussion is dispositive of the issue raised on appeal, certain of Professional Plastering's contentions demand a response. First, and contrary to Professional Plastering's baseless assertion, the trial court did not "require" the jury to award damages in excess of the settlement amount already received by Respondents (App. Br. p. 31). The trial court instructed, "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 [Respondents] would be in addition to those damages already received." (R. pp. 1527:4-1528:14) (emphasis added). The trial court further twice instructed that if the jury found in favor of Respondents on either cause of action, "you would then state the amount of damage, **if any**, sustained by the plaintiff." (R. pp. 1520:5-8, 1528:8-14) (emphasis added). The instructions did not stop there. "**If** you answer this issue in any amount, you should award such damages as you find from the preponderance of the evidence is a fair compensation for **any** damage that plaintiff has sustained as a proximate result of the negligence of the defendant." (R. p. 1521:6-11) (emphasis added). For sake of argument, the jury could have found in favor of Professional Plastering. The evidence obviously convinced the jury otherwise. However, nothing from the trial, jury instructions, or verdict form "required" the jury to award damages of any particular amount or even at all.

Assuming, *arguendo,* Professional Plastering was entitled to any set-off other than that which was provided for on the Verdict Form, it has already received one. Gallagher testified the cost to repair damage related to the stucco deficiencies would cost $8,761,443.92. Because the verdict was only $7,723,225.00, Professional Plastering has effectively received a set-off of $1,038,218.92. This is just what Respondents explained

in closing, informing the jury they were not seeking the full amount of the "stucco-only" damages because it would not be fair to Professional Plastering for Respondents to recover more than was necessary to cover total cost of repair, and other settling defendants had already paid for part of Professional Plastering's share of the "stucco-only" costs. (R. p. 1496:10-22). Fairness and justice lie therein.

Finally, Professional Plastering argues outside the trial record in its Brief by presenting a list of settlement details specific to other defendants who settled prior to trial. (App. Br. pp. 32-36). The details of this information were never presented as evidence during the trial of the case and should not be considered now. *See Cobb v. Benjamin*, 325 S.C. 573, 581, 482 S.E.2d 589, 593 (Ct. App. 1997) (noting materials not included at the trial will not be considered on review).

B. The Record Supports the Trial Court's Decision to Deny Professional Plastering's Motion for New Trial Remittitur

As an initial observation, Professional Plastering has abandoned this argument. Professional Plastering references its Motion for New Trial Remittitur in the title of the third issue presented on appeal, but gives no analysis to this particular motion in its Brief. Instead, Professional Plastering's Brief focuses only on the motion for set-off. Only a single sentence, without any authority or analysis, is contained in Professional Plastering's Brief relative to the Motion for New Trial Remittitur. (App. Br. p. 36). *See Hollis v. Stonington Development, LLC*, 394 S.C. 383, 406-07, 714 S.E.2d 904, 916 (Ct. App. 2011) (noting argument is abandoned where the appellant fails to cite any case law and only conclusory statements are made). *See also* Rule 208(b)(1)(D), SCACR (requiring discussion and citations of authority for each issue on appeal). Regardless, there was no error in denying Professional Plastering's motion.

The grant or denial of a motion for new trial *nisi remittitur* rests within the discretion of the trial judge, whose decision will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Proctor v. D.H.E.C.*, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006). Compelling reasons must be given to justify invading the jury's province by granting a new trial *nisi remittitur*. *Id.* (*citing Pelican Bldg. Ctrs. v. Dutton,* 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993)). The consideration for a motion for a new trial *nisi remittitur* requires the trial judge to consider the adequacy of the verdict **in light of the evidence presented**. *Id.* (emphasis added).

The record plainly supports the jury's verdict. The damages awarded represent the exact difference between the $15,748,225.00 in total damages suffered by Respondents (as supported by the testimony and Plaintiffs' Exhibit No. 15) and the $8,025,000.00 in settlements received from other parties. There was evidence that the verdict is $1,038,218.92 **less than** the amount cost to correct Professional Plastering's defective work and damages it caused. The jury's determination of damages "is entitled to substantial deference." *Proctor*, 368 S.C. at 321, 628 S.E.2d at 519 (*citing Harrison v. Bevilacqua,* 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003). Professional Plastering's disappointment with the jury's acceptance of Respondents' repair estimates does not render the verdict excessive.

Based upon the foregoing, the trial court did not abuse its discretion in denying Professional Plastering's Motion for Set-Off and Motion for a New Trial Remittitur, and this Court should affirm the decision of the trial court.

IV. THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR BY INCLUDING THE SETTLEMENT AMOUNT RECEIVED BY RESPONDENTS ON THE VERDICT FORM AND IN ITS RELATED JURY CHARGE, BECAUSE THE VERDICT FORM AND THE CHARGE CONFORM TO THE EVIDENCE AT TRIAL

"The determination of whether a special verdict should be submitted to the jury is within the sound discretion of the trial judge, and an appellate court will only reverse upon a finding of an abuse of that discretion. An abuse of discretion occurs when a ruling is based on an error of law or a factual conclusion without evidentiary support." *SC DOT v. First Carolina Corporation of SC*, 372 S.C. 295, 300, 641 S.E.2d 903, 907 (2007) (internal citations omitted).

Respondents incorporate the discussion and analysis above in Section III inasmuch as it also supports the inclusion of the settlement amounts on the verdict form and the instructions given to the jury relating thereto. As discussed above, Professional Plastering consented to Respondents' theme of the case, having never objected to the jury being repeatedly informed of the prior settlements. Having consented to this method of trial, Professional Plastering cannot complain at this late stage. *Cf. State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000) (holding an issue conceded in the trial court cannot be argued on appeal); *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998) (same). Professional Plastering never objected as the jury was repeatedly reminded of the prior settlements. It also never objected when the jury was asked during the testimony and in closing to award damages for the difference between the total damages figure and the prior settlements. The verdict form and instructions conform to this evidence and method of trial. Professional Plastering cannot complain of this result, after the fact.

Viewed differently, Professional Plastering has suffered no prejudice, because Respondents effectively conceded Professional Plastering's request for set-off and conducted the trial in a manner ensuring the set-off was applied by the jury if damages were awarded at all. Both the verdict form and the trial court's instructions were consistent with one another and conform to the evidence at trial. Thus, the verdict form was neither confusing nor misleading. *See State v. Covert*, 368 S.C. 188, 214, 628 S.E.2d 482 (Ct. App. 2006) (the prejudicial effect of a defective verdict form is cured where the trial court provides clear and cogent jury instructions). Such was the case in *SC DOT v. First Carolina Corp.*, where the Supreme Court held, "Reading the verdict form in conjunction with the jury instructions, we find that any possible confusion or misapprehension caused by the verdict form was remedied by the instructions from the court." *Id.* at 304, 641 S.E.2d at 908. This case demands a similar finding.

V. THE TRIAL COURT'S JURY CHARGES ON BREACH OF IMPLIED WARRANTY OF WORKMANLIKE SERVICE, COST TO REPAIR TO EXISTING CODE, DEPRECIATION AND NEGLIGENCE WERE NOT ERRONEOUS OR, IN THE ALTERNATIVE, WERE HARMLESS

The trial court is required to charge only the current and correct law of South Carolina. *Clark v. Cantrell,* 339 S.C. at 389, 529 S.E.2d at 539. In reviewing jury charges for error, this court must consider the trial court's jury charge as a whole in light of the evidence and issues presented at trial. *Welch,* 342 S.C. at 311, 536 S.E.2d at 425. A jury charge that is substantially correct and covers the law does not require reversal. *Id.* at 496, 514 S.E.2d at 574. "To warrant reversal on appeal, the trial court's instructions must be not only erroneous, but must also be prejudicial." *Fields v. Haynes,* 376 S.C. at 560, 658 S.E.2d at 88 (internal citations omitted). Jury instructions should be considered as a whole and, if as a whole, they are free from error, any isolated portions which may

be misleading do not constitute reversible error. *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000); *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497-98, 514 S.E.2d 570, 575 (1999).

The trial court's charges, when read as a whole, were correct and adequately covered the current law in South Carolina. The charges were neither erroneous nor prejudicial, and an isolated error, if one occurred, was harmless.

A. The Trial Court did Not Err in its Instruction to the Jury as to Breach of Implied Warranty of Workmanlike Service

The trial court charged the jury as to Respondents' claim for breach of the implied warranty of workmanlike service. (R. pp. 1518:11-1519:6). Taken as a whole, this charge was proper in light of the evidence presented at trial and, further, was a correct statement of the law in South Carolina.

As an initial observation, Professional Plastering does not argue the charge was an incorrect statement of the elements necessary to set forth a claim for breach of the implied warranty of workmanlike service. Rather, Professional Plastering simply argues the cause of action does not apply to the Fenwick condominiums and, therefore, should not have been submitted to the jury in the first place. Thus, Professional Plastering has abandoned any argument that the **substance** of the charge was incorrect. The only question is whether the implied warranty applies in this setting. It does.

Just recently, this Court affirmed the grant of a directed verdict **in favor of the plaintiffs** on their claim for breach of the implied warranty of workmanlike service in *Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 357, 725 S.E.2d 112, 117 (Ct. App. 2012). *Magnolia North* concerned a condominium project in Horry County, South Carolina, consisting of at least 21

buildings, each containing 12, 13, or 15 condominium units, along with a complete infrastructure and four pools. *Id.* at 356, 725 S.E.2d at 117. As here, the contractor admitted to the existence of defects. Professional Plastering's suggestion that the cause of action does not apply to a condominium such as Fenwick is fatally flawed and cannot be reconciled with the analysis and result in *Magnolia North*. Fenwick is smaller in scale and scope than the *Magnolia North* project, where the cause of action was embraced by the trial court affirmed on appeal. Here, the facts are no different. Donnie King admitted Professional Plastering's code violations. The only distinction is that the trial court in the instant case allowed the jury to decide whether Professional Plastering was liable, rather than directing a verdict in the plaintiffs' favor as occurred in *Magnolia North*.

Respondents also incorporate the arguments below in Section VI of this Brief as they relate to their claim for breach of implied warranty of workmanlike service. In sum, there was nothing misleading about the trial court's charges to the jury and the charges were the correct statement of the law.

B. The Trial Court did Not Err in its Instruction to the Jury as to the Cost to Repair to Existing Code in its Charge on Damages for Breach of Implied Warranty of Workmanlike Service

There were two causes of action presented to the jury, one for negligence and one for breach of the implied warranty of workmanlike service. The trial court's charge regarding recoverable damages for negligence made **no reference** to the existing code or costs related thereto. (R. pp. 1521:6-1522:1). Reference to the damages to perform repairs to the existing building code is found only within the charge on damages for breach of the implied warranty. (R. p. 1522:2-25). Although the jury found in favor of Respondents on both claims, the verdict form does not distinguish between the damages

awarded for the negligence claim as opposed to the claim for breach of warranty. (R. p. 65). Accordingly, it is impossible to determine from this record whether the jury actually awarded (or even considered) any damages for the cost to meet the current code. *Harkins v. Greenville County*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (Appellant has the requirement to develop a record sufficient for review on appeal). *Cf. Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 198, 684 S.E.2d 541, 547 (2008) (affirming damages award because it was impossible to tell from the record what portion of the award was attributable to the issue on appeal). Professional Plastering's entire argument hinges on its bare presumption that the jury awarded damages for the cost to repair to the existing code. It is just as possible that the claim for negligence supports the jury's award of damages in its entirety, which charge made no mention of the building code. Therefore, Professional Plastering cannot demonstrate any prejudice resulting from the charge, even if it was error.

In any event, there is no error because the charge was correct. The cost of repair may include the expense necessary to perform the repairs to existing building codes. *See Peluso v. Singer General Precision, Inc., Link Division*, 47 Ill.App.3d 842 (1977). Contrary to Professional Plastering's contention, Respondents assert there is simply no betterment whatsoever to them in adhering to the existing law and code requirements when they repair the defects and resulting damages caused by Professional Plastering's failure to discharge its duties when it installed the stucco at Fenwick.

C. The Trial Court Did Not Err in Passively Referencing Depreciation in its Charge on Damages for Breach of Implied Warranty of Workmanlike Service

Like the charge above, the only mention of damages for depreciation is found in the charge for breach of the implied warranty of workmanlike service. Respondents incorporate the argument above, showing that the negligence cause of action, which has no such reference, is sufficient, standing alone, to support the entire verdict.

Moreover, there is but a single reference, using just one word, to recovery of "depreciation." (R. p. 1523:8). This isolated reference is insufficient to serve as a basis to reverse the judgment on appeal. In the same vein, Professional Plastering cannot demonstrate any prejudice resulting from this passing reference. The jury awarded Respondents the exact dollar figure of its actual damages as calculated from Gallagher's total cost of **repair**, less settlements previously received. There was no value for depreciation in Gallagher's repair estimate. (R. p. 1769).

D. The Trial Court did not Err in its Instruction on Negligence

The trial court gave complete and proper instructions to the jury on the applicable law of negligence. (R. pp. 1508:23-1517:9). Taken as whole, the charge adequately covers the current law of South Carolina. The requested charge desired by Professional Plastering is materially the same as the instructions given. (App. Br. p. 43). The trial court charged the jury that even if the testimony of an expert is uncontradicted, the jury was not required to accept his opinion. (R. pp. 1506:13-1507:21). The trial court also correctly charged the jury as to proximate cause and Respondents' burden to establish such by the preponderance of the evidence. (R. pp. 1510:1-1511:24). These instructions required Respondents to prove proximate cause as a condition of liability. Even if the

charges are not word-for-word as requested by Professional Plastering, they are nevertheless a correct statement of the applicable law. Professional Plastering's argument on appeal presupposes the jury ignored or somehow failed to follow the trial court's correct instructions. This is mere conjecture and cannot sustain the argument advanced by Professional Plastering.

This Court's reasoning in *Magnolia North* is applicable here. The jury in *Magnolia North* received the following charge, in pertinent part, on negligence:

> Now I charge you that as a matter of law, I have determined that the defendants were negligent and breached the implied warranty of workmanlike services in the construction of these condominiums and as a result of [sic] you must award the plaintiff property owners['] association damages proximately caused by the negligent construction.

Magnolia North, 397 S.C. at 363, 725 S.E.2d at 120. On appeal, the defense in *Magnolia North* argued the instruction impermissibly suggested the court had already determined the plaintiff had established the element of proximate cause as well. This Court disagreed. "The trial court's statement sufficiently qualified the requirement to award damages by describing the damages as those proximately caused by the negligent construction." *Id.* (*citing Stevens v. Allen,* 342 S.C. 47, 51, 536 S.E.2d 663, 665 (2000) (setting forth the prerequisites to an award of damages on a negligence claim). Because the challenged jury instruction accurately reflected all elements required to be established for a damages award on the plaintiff's negligence claim in *Magnolia North*, the trial court did not err in its charge. *Magnolia North*, 397 S.C. at 364, 725 S.E.2d at 120-21. *See also Stewart v. Richland Mem'l Hosp.,* 350 S.C. 589, 595, 567 S.E.2d 510, 513 (Ct. App. 2002) (stating a jury charge that is substantially correct does not require reversal).

The same is true here. The trial court properly charged the jury as to Respondents' burden to prove proximate cause, which essentially is a reiteration of the charge requested by Professional Plastering.

VI. THE TRIAL COURT PROPERLY DENIED PROFESSIONAL PLASTERING'S MOTION FOR DIRECTED VERDICT ON RESPONDENTS' CLAIM OF BREACH OF WARRANTY OF WORKMANLIKE SERVICE AND ITS MOTION FOR JNOV

When ruling on motions for directed verdict and judgment notwithstanding the verdict ("JNOV"), the trial court is required to view the evidence, and the inferences reasonably drawn therefrom, in the light most favorable to the party opposing the motions and to deny the motions when either the evidence yields more than one inference or its inference is in doubt. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). In essence, the court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his or her favor. *Proctor*, 368 S.C. at 293, 628 S.E.2d at 503. The appellate court may reverse a trial court's ruling on a directed verdict or JNOV motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. *McMillan v. Oconee Memorial Hosp.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006).

Relying on *Kennedy v. Columbia Lumber*, 299 S.C. 335, 384 S.E.2d, 730, 736 (1989) and *Sapp v. Ford Motor Co.*, 386 S.C. 143, 150, 687 S.E.2d 47 (2009), Professional Plastering avers the trial court erred in denying its Motions for Directed Verdict and JNOV as to Respondents' claim of breach of warranty of workmanlike service, contending the warranty does not apply to commercial construction. Professional Plastering's argument is fatally flawed and must fail.

A. The "Two-Issue" Rule Bars Consideration of this Issue

The special verdict form provided for two separate causes of action: (i) the negligence claim, and (ii) the claim for breach of implied warranty that is the subject of this issue on appeal. But, the verdict form provided a single line for the assessment of damages resulting from either cause of action, or both, as the case may be. The jury awarded damages of $7,723,225.00. It is impossible to determine whether those damages were attributed by the jury, in whole or in part, to any particular cause of action. Thus, the entire award is supportable by the negligence claim.

Professional Plastering argues the breach of implied warranty does not apply to the Fenwick community, but has never argued the negligence claim was inappropriate. Professional Plastering's **only** challenge to Respondents' negligence claim relates to the failure, in Professional Plastering's mind, of Respondents to prove proximate cause. (Professional Plastering's Mot. for JNOV). To be certain, neither Professional Plastering's motions for directed verdict during the trial, nor its post-trial motions, allege Respondents' negligence claim was barred as a matter of law in the same vein as Professional Plastering challenged the implied warranty claim.[14] Because the negligence claim stands independently of the claim for breach of implied warranty, and because there was no assignment of damages between these separate causes of action, the verdict must stand. Even if the cause of action for breach of implied warranty is removed from consideration, the damages remain wholly supported by the negligence claim, which was

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[14] The only argument raised by Professional Plastering via directed verdict in reference to the negligence claim was that there had been a "failure of proof," *i.e.*, a lack of evidence. That argument is measured by the "any evidence" standard at the directed verdict stage of the trial, and was properly rejected by the trial court. (R. p. 1460:4-10). *See McMillan*, 367 S.C. at 564, 626 S.E.2d at 886 (applying the "any evidence" standard of review).

decided in favor of Respondents. For that reason, the two issue rule applies, barring review of any assigned error in connection the independent claim for breach of implied warranty. *See Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 328-29, 730 S.E.2d 282, 284-85 (2012) (noting two-issue rule prevents review where master-in-equity awarded damages for three causes of action, but only two were appealed); *Cole v. Raut*, 378 S.C. 398, 407, 663 S.E.2d 30, 34 (2008) (upholding verdict under the two-issue rule where the jury's general verdict was supported by a proper negligence charge, even if charge for assumption of the risk was erroneous).

B. The Implied Warranty of Workmanlike Service Applies to the Work in Question and the Record Contains Abundant Evidence that Professional Plastering Breached the Warranty

The implied warranty of workmanlike service is applicable to Fenwick because the buildings at issue are **residential**. In reviewing a case involving a twelve-story condominium tower in Myrtle Beach, the Court of Appeals stated that, "[t]his is an action for damages for alleged defects in the construction of a **residential** building." *Carolina Winds Owners Association, Inc. v. Joe Hardin Builders, Inc.*, 297 S.C. 74, 75, 374 S.E.2d 897, 898 (Ct. App. 1998) (*overruled by Kennedy*, 299 S.C. at 341, 384 S.E.2d at 734) (emphasis added). Indeed, an apartment or condominium building is simply a multi-family residence (as opposed to a house, which is a single-family residence). When faced with whether the conversion of apartments to condominiums violated zoning ordinances, this Court has held the conversion of apartments to condominiums is a change of ownership rather than a change in use. In so ruling, the Court stated, "[a]fter conversion, the property would still be used for **residential purposes** as it was before."

Baker v. Town of Sullivan's Island, 279 S.C. 581, 585, 310 S.E.2d 433, 434 (Ct. App. 1983) (emphasis added).

In discussing the *Kennedy* exception in *Sapp,* the Supreme Court stated,

> ... the economic loss rule does not preclude a homebuyer from recovering in tort against the developer or builder where the builder violates an applicable building code, deviates from industry standards, or constructs a house that he knows or should know will pose a serious risk of physical harm. Such an exception was and still remains necessary to protect **homeowners.**

Sapp, 386 S.C. at 147-148, 687 S.E.2d at 49 (emphasis added). Such an exception remains necessary to protect the two hundred sixteen (216) homeowners at Fenwick. And there is more.

Sapp is a traditional products liability action,[15] arising from a defective cruise control switch in Ford F-150 trucks, which are without question a "product" manufactured by Ford. *Sapp*, 386 S.C. at 145-46, 687 S.E.2d at 48. Here, the issue concerned Professional Plastering's provision of services, not a product. Our Supreme Court has stated:

> In determining whether certain types of vendors or professionals offer services or products within the meaning of the strict liability statute, this Court has focused on the character of the underlying transaction, the law regarding similar transactions in other jurisdictions, and the policy arguments in favor of imposing strict liability in a given situation. ... In our view, a general contractor building a home performs a service and does not sell a product. **Professors Prosser and Keeton have recognized that "[t]he transaction of the building contractor has generally been regarded as a transaction involving the rendition of a service," and that for these reasons, strict liability is generally inapplicable to a general contractor.** W. Keeton et al., Prosser and Keeton on the Law of Torts § 104A (5th ed. 1984). **The professors note that this is true "even though the result**

[15] The issue in *Sapp* is the application of the economic loss rule, which "is a creation of the modern law of products liability." *Sapp*, 386 S.C. at 147, 687 S.E.2d at 49.

of the [contractor's] service is to supply a structure or building to the owner." *Id.*

Fields v. Haynes, 376 at 565, 658 S.E.2d at 91. Because *Sapp* involves a products liability action against the seller of a product, and this case involves an action against a contractor providing services, *Sapp* has no application to the case at bar. In fact, the Court in *Fields v. Haynes* observed that a contractor's implied warranties offer protection to the homeowner in the absence of strict liability, which does not apply to the rendition of services. *Id.* at 566, 658 S.E.2d at 91. Further, there are resulting damages at Fenwick to both individual homeowners and, separately, the common elements of the community. (R. p. 1034:5-21). Damage to a single, and singularly owned, "product," as in *Sapp*, is factually and logically distinguishable from the present case.

Moreover, *Magnolia North* confirms that a claim for breach of the implied warranty of workmanlike services is valid, even in the context of a condominium project. "At the close of all evidence, the trial court granted the POA's motions for a directed verdict as to liability on the causes of action for negligence and **breach of the warranty of workmanlike services**. The jury returned a verdict in favor of the POA for $6.5 million in actual damages and $2 million in punitive damages." *Magnolia North*, 397 S.C. at 357, 725 S.E.2d at 117 (emphasis added). The result in *Magnolia North*, is fatal to Professional Plastering's contention that the claim does not apply.

Alternatively, even if this Court were to find these twelve buildings containing 216 residences should be considered commercial structures, the implied warranty of workmanlike service nonetheless applies to Professional Plastering's work. First, Donnie King plainly admitted Professional Plastering warranted and guaranteed its work would be free from all faults and defects. (R. pp. 915:25-917:16). Further, "It seems to be well

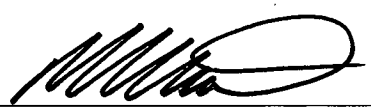
settled that where a person holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes shall be of proper workmanship ... ." *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951). Notably, *Hill* involved what was unquestionably a commercial structure—a walk-in freezer facility. Nonetheless, the Supreme Court held an implied warranty attached to the work. Here, the record shows Professional Plastering was specially certified by Magna Wall as qualified to perform stucco plastering work, specifically for Magna Wall applications. (R. pp. 809:16-810:10). McGinty testified the subcontractors who constructed the Fenwick community were all "skilled in the tasks assigned to them." (R. pp. 1298:24-1299:7). As such, Professional Plastering impliedly warranted that its work would be of proper workmanship, and Respondents' claim for breach of this implied warranty was proper.

CONCLUSION

For the reasons articulated herein and as further set forth in the materials contained in the Record on Appeal, Respondents respectfully request that This Honorable Court affirm the judgment below.

Respectfully submitted,

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.



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March 15, 2013
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 201196386

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

v.

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

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

Professional Plastering & Stucco, Inc., Appellant,

v.

Maria Ariasm, Miquel Roasles, and APS Enterprises Unlimited, Inc., Third-Party Plaintiffs,

Of whom APS Unlimited, Inc. is Respondent.

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that the Final Brief of the Respondents complies with Rule 211(b), SCACR.

****Signature Page of Counsel to Follow****

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Sworn to and subscribed before me
This 15th day of March, 2013.

Notary Public for South Carolina
My Commission Expires 11/16/2020.