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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2011196386

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

v.

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

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

Professional Plastering & Stucco, Inc., Appellant

v.

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

Of whom APS Unlimited, Inc. is Respondent.

**APPELLANT'S FINAL REPLY BRIEF TO
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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ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO QUALIFY CHRIS DAWKINS AS AN EXPERT IN CONSTRUCTION AND ENGINEERING.

A. Dawkins satisfies the expert qualification requirements of Rule 702, SCRE.

1. Dawkins has the requisite knowledge, skill, experience, and education to qualify as an expert in engineering and construction.

Respondents argue that, based on the *voir dire* of Dawkins by Respondents' counsel, Dawkins lacks the requisite knowledge, skill and experience to qualify as an expert in engineering and construction. However, the evidence establishes that Dawkins' knowledge, skill, experience, training and education qualify him as an expert in engineering and construction, and these qualifications supported his proffer as Professional Plastering's expert. (R. p. 1064, line 24 - p. 1069, line 16); (R. p. 1087, line 12 - p. 1089, line 5). He holds a bachelor's degree in Civil Engineering from North Carolina State University and a master's degree in Civil Engineering with a construction management specialty from Georgia Tech. (R. p. 1065, lines 15-21). He is a licensed Professional Engineer in the states of Georgia and North Carolina. (R. p. 1066, lines 3-4). He has been qualified as an expert four times by Georgia courts and has never been found unqualified as an expert in these fields (R. pp. 1087-1088). Additionally, his experience in civil engineering and building construction systems spans nearly thirty years. (R. p. 1065, line 25 - p. 1066, line 1). Dawkins has evaluated and diagnosed stucco cladding issues, including water intrusion behind stucco, on fifty projects. One project involved more than 100 stucco-clad buildings. (R. p. 1068, line 18 - p. 1069, line 8). His construction and engineering experience includes the coastal areas of Georgia and South Carolina. (R. p. 1098, lines 1-6).

Respondents' arguments are not related to Dawkins' qualifications as an expert in engineering and construction. Rather, they contend he is unqualified for reasons that are beyond Rule 702's requirements. To meet the test proposed by Respondents, Dawkins would have to be a licensed architect, general contractor, and engineer who has designed multi-family buildings in Charleston, South Carolina. (See Respondents' Initial Brief pp. 9-10). Respondents' argument is akin to excluding an expert medical doctor in a personal injury case because he did not work in the same hospital where the plaintiff was treated. Respondents' own experts, Myles Glick and Robert Gallagher, would not qualify under this standard.¹ Professional Plastering's Initial Brief highlights Dawkins' construction and engineering qualifications and experience in detail, and Professional Plastering incorporates that discussion here. (Appellant's Brief pp. 12-18).

At trial, Professional Plastering established that Dawkins was being offered as an expert in the fields of engineering and construction. (R. p. 1370, lines 19-23). Dawkins has the requisite knowledge, skill and experience to qualify as an expert in engineering and construction, and the trial court's failure to qualify him as an expert was an abuse of discretion requiring reversal.

2. Dawkins' Testimony was Reliable.

Respondents also argue that Dawkins' testimony was not reliable. It is noted that Respondents did not challenge Dawkins as an expert based upon his reliability. In support of their position, Respondents state that Dawkins performed no destructive testing of his own. However, Dawkins used the same methodology as Respondents' expert Myles Glick. Although Dawkins did not actually perform the physical cutting and

¹ Myles Glick is an architect. He is not licensed as an engineer or general contractor. Robert Gallagher is a general contractor. He is not licensed as an architect or engineer.

removal of building material himself, he was on site for four days making observations at cuts performed by a licensed general contractor. (R. p. 1070, line 25 - p. 1072, line 2).

An expert may “base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions.” *Hundley ex rel. Hundley v. Rite Aid*, 339 S.C. 285, 294, 529 S.E.2d 45 (Ct. App. 2000)(economist allowed to testify to future medical costs based on information contained in Life Care Plan prepared by nurse and provided to economist prior to trial); Rule 703, SCRE (“The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.”).

Respondents also argue that Dawkins’ testimony was unreliable because it contradicted the testimony of Professional Plastering’s president Donnie King. Again, this argument goes to the weight of Dawkins’ testimony not admissibility. It is for the jury to determine whether a contradiction exists and which witness to believe.

Significantly, King’s testimony did not conflict with Dawkins’ expert opinions. King testified about generalized construction conditions as opposed to those specifically related to the Project. King was not at the Project. (R. p. 868, lines 1-25). Dawkins, on the other hand, testified concerning what he observed specifically at this Project.

Professional Plastering’s response to Respondents’ arguments concerning Donnie King’s so-called “admissions” is set forth fully in the next section and will be addressed *infra*.

Respondents have not provided any authority to support their proposition that an expert’s opinions based upon direct observation of a project are not reliable when they conflict with the testimony of an individual who has not been to the project.

Respondents' arguments concerning the reliability of Dawkins' testimony are actually challenges to credibility and weight rather than reliability. The examples asserted in Respondents' brief do not deal with the methods or processes employed by Dawkins in making his observations and opinions, but instead deal with alleged conflicts in testimony and what weight should be given to who opened the wall to allow the experts of each party to observe the actual construction in the field. "Judging the credibility of the testimony of witnesses is a function of the jury, not the court, as is the weight to be given to such testimony." *Doe v. Asbury*, 281 S.C. 191, 194, 314 S.E.2d 849 (Ct. App. 1984). Dawkins satisfied the reliability requirement of expert testimony and should not have been excluded on this basis.

B. The Trial Court's Error in Refusing to Qualify Dawkins as an Expert was Highly Prejudicial to Professional Plastering.

Respondents cite the testimony of Donnie King in support of their argument that the error in refusing to qualify Dawkins was harmless. King's testimony does not contain "clear admissions." King was Professional Plastering's president. He was never at the Project.² (R. p. 868, lines 1-25). During King's cross-examination he was asked whether he saw stucco installation errors. King testified he "didn't see that." (R. p. 873, line 21 - p. 874, line 8).

Most of King's testimony addressed general construction conditions, not specifically related to the Project. For example:

Q. You saw the reverse weather lap in the photographs on Monday, correct?

A. I heard Mr. Glick talk about it.

² King relied upon his supervisors to handle the construction at multiple sites in several states. (R. p. 863, line 17 - p. 864, line 5)

Q. Each product you put on the structure is supposed to be layered to the outside, like shingles, so it sheds water, correct?

A. Yes, sir.

Q. And if it's not, it permits water to get behind it; correct?

A. If it's not shingled right, yes, sir.

Q. It permits water to get into the wood structure, correct?

A. Yes, sir.

(R. p. 894, line 14 - p. 895, line 1).

Further, with regard to the weep screeds, King was asked to admit that installing weep screeds would prevent wood rot. King did not agree. In fact, he testified that he disagreed with this question:

Q. And that J-bead for the system -- for a wall system to what we call weep or release water, has to have what's called a weep screed, correct?

A. Yes, sir.

Q. The weep screed is a series of holes that lets the wall breathe or allows the water to go downward and out, correct?

A. That's the theory of it, (affirmative nod).

Q. And you would agree that if water is not expelled from the system, it will cause rot behind the system, correct?

A. Uh, -- I've got a little different theory than Mr. Glick.

Q. So you agree that a properly-applied stucco system needs to be able to drain moisture that gets behind the stucco, correct?

A. They designed a weep screed to put down there

so the water can go out.

Q. And you agree that a properly-designed system needs that, correct?

A. Well, I find it difficult with all the holes in paper-backed lath and the Tyvek that the water's going to make it to the bottom of the building. I don't agree with that. Because on that particular job right there there was probably over two millions holes in that paper-backed lath and that Tyvek, if you add the numbers up for the square footage that is there.

Q. I ---

A. I think the number is something like two and half million holes in it.

Q. Do you deny previously testifying under oath that a properly-applied stucco system need to be able to drain moisture that gets behind the stucco?

A. No, they require you to put a weep screed there at the bottom.

(R. p. 888, line 1-p. 889, line 15)(emphasis added).

Also, King did not admit that Professional Plastering's work concealed the absence of kickout flashing, as Respondents suggest. He testified that when he saw the slides of plaintiff's expert, Myles Glick, it appeared there was no kickout flashing at the location where the stucco was applied. (R. p. 881, lines 9-11). However, he went on to testify that he did not know whether kickout flashing was called for on this job. (R. p. 882, lines 17-18). In fact, Tacy McGinty, the project manager for Summit, the general contractor, confirmed that the architect did not require the installation of kickout flashing. (R. p. 1306, lines 13-19). Summit and the subcontractors relied upon the architectural drawings which did not show kickout flashing, and therefore, kickout flashing was not installed. (R. p. 1307, lines 8-25). If anything, King's testimony shows his obligation to

follow the instructions of the general contractor. King testified, "my business is a customer service business. And when my customers ask me to do special things for them that they want on their job, that's what I do." (R. p. 891, lines 21-24).

Respondents contend that King admitted that Professional Plastering should have installed casing beads, but they were not installed as required. When King was asked if a casing bead was required at the window, King responded, "not very many times." (R. p. 887, lines 1-3). He said that "some people do away with a casing bead with that type of window." (R. p. 886, lines 22-23). Dawkins' testimony would have expanded upon this testimony. He determined that Professional Plastering's scope of work included the instruction to "install j-mold at all edges of the stucco not finished into a wall or jamb. . . . If I come to a jam (sic) i.e. as in the jam (sic) of a window . . . Professional Plastering is not required to put a J mold at that location." (R. p. 1574, line 19 - p. 1575, line 6).

With regard to the failure to remove the excess paper between the laths, King testified that he "heard Mr. Glick say that." (R. p. 897, line 19). What follows is a generalized discussion concerning the subject. No specific reference to the Project is made. Other testimony of King included his disagreement that cracking in the stucco was caused by variations in the thickness of the stucco. (R. p. 893, lines 10-18); (R. p. 894, lines 11-13). When asked about the type of fasteners used, King testified that they did use corrosive resistant fasteners as required. (R. p. 895, lines 18-22); (R. p. 896, line 6).

Donnie King's testimony does not provide party admissions supporting the exclusion of Dawkins' expert testimony. Although King admits that the stucco application was not in strict compliance with the NER Report, he never agreed that the

stucco application was the proximate cause of any damages at the Project. Dawkins' expert testimony would have helped the jury understand Professional Plastering's explanation why none of the work by Professional Plastering proximately caused the damage alleged by Respondents.

The reliability of the opinions of Dawkins is not undermined by the testimony of King. The trial court erred in refusing to qualify Dawkins as an expert. Further, Professional Plastering was highly prejudiced by the Court's refusal to qualify Dawkins as an expert.

1. Dawkins' Proffered Opinions are not Cumulative.

Respondents argue that Dawkins' opinions are cumulative to the evidence in the record. However, the evidence in the record shows that Respondents are wrong. No testimony was presented by a construction engineer on Professional Plastering's behalf after Dawkins' opinions were barred. The failure to qualify Dawkins as an expert left a large gap in Professional Plastering's case, which was not filled by the testimony of others. No witness testified that Professional Plastering's work was not a proximate cause of the damages claimed by Respondents. This point was highlighted by Respondents' closing argument, when counsel stated that Professional Plastering had not put up any witnesses to contest that Professional Plastering was not a major cause of the problems. (R. p. 1496, lines 1-4). Dawkins' expert testimony would have refuted this argument.

In his proffer, Dawkins testified that based on their scope of work, Professional Plastering was not required to put a J mold at the window jamb. (R. p. 1574, line 25 - p. 1575, line 7). Dawkins also testified that kickout flashing was not in Professional

Plastering's scope of work, and was taken out of the scope of work of Johnson Roofing.

(R. p. 1575, line 20 - p. 1576, line 15). This testimony was consistent with King's

testimony that he did not think kickout flashing was required on the Project. When asked about the proximate cause of the damages at the Project, Dawkins testified:

There was water intrusion at the roof-to-wall terminations. The proximate cause was lack of kickout flashings. I mean they should have been there. At the windows, water was entering the head area of the windows because of the improper paper installation, compounded by the improper head flashing installation done by North Florida Framing. Then that situation was compounded even worse by lack of a sill flashing by North Florida framing at the sill of the window because there was no sill flashing installed, based on the evidence and what I could see from anybody's photos plus my own site visit.

There was water intrusion at the balcony-to-wall termination at the breezeways, which was also an integration of - a waterproofing/integration issue.

(R. p. 1576, line 25 - p. 1577, line 18).

Dawkins further testified that he did not find any water intrusion which would have been proximately caused by the work done by Professional Plastering. (R. p. 1577, lines 19-22). With regard to the weep screeds, Dawkins testified, "They had screeds. What is shown in many of the photos is correct, they had holes in them. I did find what he [Glick] found or showed in his report of some that didn't. But there was no water intrusion or damage caused by that condition." (R. p. 1578, lines 3-11).

Dawkins was the only witness to testify that the work of Professional Plastering was not a proximate cause of the damages. Dawkins' expert testimony explained the actual proximate causes of the damages, and he identified which subcontractor was responsible for the work in his opinion. This testimony provided the link between the observations by Tacy McGinty and Claude McNabb of what occurred during construction and the reported condition of the project today.

The testimony of Chris Dawkins was not cumulative, and Professional Plastering was highly prejudiced by his exclusion.

2. The Prejudice to Professional Plastering was not Preventable Despite Multiple Expert Designations.

Respondents suggest that any prejudice to Professional Plastering was preventable because Professional Plastering had designated other experts. However, the other experts designated by Professional Plastering did not have the same qualifications as Dawkins and did not spend four days on site examining the conditions that were present in the field. Donnie King, although designated as an expert, is not an engineer like Dawkins and he was not on site. His testimony was different from Dawkins' testimony.

Respondents contend Professional Plastering's designation of Wade Anderson as an expert makes Dawkins' exclusion harmless at best. Although Professional Plastering designated Wade Anderson as an expert in April 2010, more than a year prior to trial, he did not possess the knowledge and experience that Dawkins acquired during his investigation. Professional Plastering had decided that Dawkins was the expert whose testimony they would rely on in the trial of this matter. Dawkins visited the Project and performed observations of the destructive test cuts, not Wade Anderson. Dawkins reviewed Glick's report and photographs. Dawkins was present and prepared to provide expert testimony at trial, not Wade Anderson.

Professional Plastering did not have another expert to fill Dawkins' place and was highly prejudiced by the trial court's refusal to qualify Dawkins as an expert.

The trial court's refusal to qualify Dawkins as an expert was highly prejudicial to Professional Plastering and warrants reversal.

C. Dawkins' Testimony was not properly excluded based on Professional Plastering's Alleged Discovery Violations.

Respondents contend as an additional sustaining ground that Dawkins' testimony was properly excluded based on an alleged discovery violation by Professional Plastering. Dawkins should not be excluded as an expert on this basis for the following reasons: 1) There was no bad faith discovery violation; 2) there was no prejudice to Respondents resulting from Professional Plastering's alleged discovery violation; and 3) any perceived prejudice was cured by the 24 hour delay provided by the court in which the "notes" of Dawkins were reviewed by Respondents and their expert witness and a deposition of Dawkins was offered by Professional Plastering but the offer was not accepted. Further, an interview with Dawkins was provided to Respondents upon their request. The photographs of Dawkins were provided for the review and use of the Respondents, and Professional Plastering did not use the photographs at any point in its examination. Professional Plastering's Initial Brief discusses in detail the reasons why Dawkins could not have been excluded based upon an alleged discovery violation, and that argument is incorporated in the response set forth below. (App. Brief pp. 20-24).

"The sanction of excluding a witness should never be lightly invoked." *Bensch v. Davidson*, 354 S.C. 173, 182, 580 S.E.2d 128 (2003). "Before so ruling, the trial court should ascertain the type of witness involved, the content of the evidence, the explanation for the failure to name the witness in answer to the interrogatory, the importance of the witness' testimony, and the degree of surprise to the other party." *Id.* (citing *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d (1974)); *Jumper v. Hawkins*, 348 S.C. 142, 152, 558 S.E.2d 911 (2001).

The *Bensch* and *Reed* cases cited by Respondents do not deal with the exclusion of an expert for lack of notice of the contents of the expert's file but deal with the exclusion of an expert for failing to identify the expert in response to discovery. See *Reed v. Clark*, 277 S.C. 310, 315, 286 S.E.2d 384 (1982); *Bensch v. Davidson*, 354 S.C. at 181-182. There is a significant distinction between those cases and the present.

Bensch concerns the exclusion of an expert witness after the party had previously stated in their answers to interrogatories that they did not intend to use any expert witnesses. *Bensch v. Davidson*, 354 S.C. at 181-182. In determining whether to exclude the expert in *Bensch*, the Court considered the factors set forth in *Laney v. Hefley*. The Court determined that the expert's proposed testimony was irrelevant and the content of the testimony was already provided by another witness. *Id.* at 182. The Court further considered the degree of surprise to the opposing party and found that by not identifying the witness as an expert the opposing party was prevented from hiring their own expert. *Id.* at 183. That was not the case here, as Respondents hired multiple experts.

In *Laney*, which involved a motor vehicle accident, the Supreme Court determined that the trial court did not abuse its discretion in refusing to exclude a witness who had not previously been identified in discovery. *Laney v. Hefley*, 262 S.C. 54, 60, 202 S.E.2d 12 (1974). In reaching its decision, the Court found that "[t]he fact that the opposing party has independent knowledge of the existence of such witness prior to trial is a major consideration." *Id.* Through other depositions, defendant had knowledge of the presence of the witness in the home at the time of the accident. *Id.* The Court determined, "While the defendant was given no information as to what, if anything, she knew about the accident, we do not think the defendant was warranted in assuming that

she knew none of the details surrounding the accident, or that she was not [in possession] of any information of probative value as to how the accident occurred, even though she did not see it.” *Id.* at 61. *Laney* also refers to *Buckler v. Sinclair Refining Company*, 68 Ill. App. 2d 283, 216 N.E.2d 14, in which the testimony of an undisclosed doctor, who defendant was aware treated the plaintiff, was not excluded. *Id.* “If there was prejudice or surprise it was, at least in part, due to failure of the defendant to inquire more fully into the nature and significance of the examination.” *Id.* (citing *Buckler v. Sinclair Refining Company*, 68 Ill. App. 2d 283, 216 N.E.2d 14 (1966)).

In this case, Dawkins was identified as an expert more than a year prior to trial. In the thirteen months before trial when Respondents knew Dawkins was Professional Plastering’s expert witness, no deposition was taken, no acceptance of the invitation to review Professional Plastering’s files was made, no motion to compel production of documents was filed, and no subpoenas were issued. Respondents did nothing. (App. Brief p. 23). Their allegations of discovery abuse are meritless.

The subject of the alleged discovery violation in this matter is the contents of Dawkins’ file. Contained in Dawkins’ file were the following items:

- Notations regarding Glick’s photographs
- Notations of test cuts observed
- Photographs

(R. p. 1104, lines 1-9). Respondents are unable to show any prejudice as a result of not having notice of the contents of Dawkins’ file. Furthermore, Dawkins’ file was made available again to Respondents’ attorneys on May 12, 2011. That same day, Respondents’ expert Myles Glick was able to analyze Dawkins’ file and discuss the

contents with Respondents' counsel. (R. p. 1104, lines 6-9); (R. p. 1106, lines 16-19). The trial court afforded Respondents' counsel an opportunity to depose Dawkins that evening. (R. p. 1371, lines 11-18). The trial court did not make a decision on whether to qualify Dawkins as an expert until the next morning. Furthermore, Dawkins did not testify to or rely upon the photographs or notes which had not been produced. (R. p. 1373, lines 9-18). There is no evidence in the record that Respondents suffered any prejudice from their strategic decision to ignore Dawkins' file until trial. In fact, counsel for Respondents attempted to use the notes when cross-examining Dawkins' fact witness testimony. (R. p. 1408, line 23 - p. 1409, line 7).

As stated previously in Professional Plastering's Initial Brief, several steps could have been taken by Respondents: they could have deposed Dawkins, sent him a subpoena, contacted Professional Plastering's counsel to review the contents of his file, or filed a motion to compel. None of these steps were taken by Respondents, as they would rather create another red herring to distract the Court from the substantive issue. (App. Brief p. 23).

Dawkins should not have been excluded as an expert on this basis and a new trial is required.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN EXCLUDING PROFESSIONAL PLASTERING'S STUCCO-ONLY ESTIMATE.

The trial court's exclusion of Professional Plastering's stucco-only estimate was an abuse of discretion resulting in prejudice to Professional Plastering. In support of their argument that any error by the Court in excluding the stucco-only estimate was harmless, Respondents cite *Clark v. Cantrell*, 332 S.C. 433, 504 S.E.2d 605 (Ct. App. 1998) (*aff'd*

339 S.C. 369, 529 S.E.2d 528 (2000). The facts of *Clark* are distinguishable from those in the present case.

The issue in *Clark* involved the defendant's attempt to admit a diagram prepared by her expert after the court's denial of her request to admit a video animation of the scene of the collision. In denying the defendant's request to admit the diagram, the Court determined that the diagram did not indicate the relative speeds of the vehicles and by admission of the expert the diagram did not accurately portray the testimony concerning the positions of the vehicles prior to the collision. *Clark*, 332 S.C. 433, 450 (Ct. App. 1998). Unlike *Clark*, there was no issue of the accuracy of the excluded estimate in the present case. Respondents did not object to the content or accuracy of the exhibit. Their only objection alleged a late production of the estimate prepared in rebuttal to Respondents' estimate. Further, *Clark* did not involve a competing diagram that was being rebutted. Professional Plastering's stucco-only estimate was prepared to rebut Respondents' estimate. The exhibit showed the repair costs estimates. The cost figures included in the exhibit were previously provided to Respondents. As Respondents admit in their Brief, Respondents already had an estimate from Pusheck with the breakdown of costs. (Respondents' Initial Brief p. 25). The only thing different in this estimate was it showed what percentage of Procon's and CRW's estimates were fees, and it placed the two estimates side by side so that it was easy for the jury to compare the two estimates. There was no prejudice to Respondents. Professional Plastering's Initial Brief is relied upon for further argument on this issue.

Respondents argue that the stucco-only estimate was an impermissible pitting of witnesses. The impermissible pitting of witnesses is the act of examining a witness in

such a manner as to force the witness to attack the veracity of another witness. *State v. Kelsey*, 321 S.C. 50, 69, 502 S.E. 2d 63 (1998). The stucco-only estimate prepared by Pusheck did not attack Gallagher's veracity but rather compared the methods used by Gallagher to those used by Pusheck to calculate the cost of repair; therefore, the stucco-only estimate did not constitute pitting of witnesses.

Professional Plastering was prejudiced by the trial court's exclusion of the stucco-only estimate. The cost of repair was a contested issue between Professional Plastering and Respondents, and exclusion of the estimate left the jury with only Respondents' estimate in the jury room to consider. The trial court erred in excluding Professional Plastering's stucco-only estimate and should be reversed.

III. THE TRIAL COURT ERRED IN DENYING PROFESSIONAL PLASTERING'S MOTIONS FOR SET-OFF AND A NEW TRIAL *NISI REMITTITUR*.

A. The Record does not Support the Trial Court's Decision to Deny Professional Plastering's Motion for Set-Off.

Respondents argue that Professional Plastering consented to the issue of set-off being dealt with by the jury by not objecting to the theme of Respondents' case. This is not accurate. Professional Plastering has explained on appeal why and how the trial court erred in its decision to include the settlement amount on the verdict form, and in denying Professional Plastering's motion for set-off. Professional Plastering properly objected when Respondents presented their proposed verdict form. (R. p. 1471, lines 2-24). Prior to that point, the issues of set-off or the verdict form had not been addressed. Further, there was no prior indication that the trial court would fail to perform the post-verdict assessment and evaluation necessary when application is made for set-off. The record

shows that there was no indication that the court would allow the set-off issue to be addressed by the jury. This was a question of law, not a finding of fact for the jury.

“[B]efore entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury,” *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188 (Ct. App. 2012). “When the settlement is for the same injury, the nonsettling defendant’s right to a setoff arises by operation of law.” *Id.* (citing *Ellis v. Oliver*, 335 S.C. 106, 112, 515 S.E.2d 268, 271-72 (Ct. App. 1999)).

S.C. Code Ann. § 15-38-50 provides:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

- (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
- (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15-38-50.

“Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors.” *Vortex Sports v. Ware*, 378 S.C. 197, 210, 662 S.E.2d 444 (Ct. App. 2008)(citing *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999). “This court has previously recognized a strict application of the statute may lead to unintended results; however, this is a matter for the legislature to

correct if our interpretation is contrary to its intent.” *Id.* “Our supreme court made clear that a statutory set-off is a mandate, not an allowance that the benefitting party must establish.” *Ellis v. Oliver*, 335 S.C. 106, 111 (Ct. App. 1999).

Respondents argue that set-off is not required as a matter of law when there are questions of fact concerning the settlement agreement for the jury’s determination. This is incorrect as the interpretation of a settlement agreement, like any contract interpretation issue, is a question of law for the court. There were no questions of fact regarding the settlement agreements for the jury’s determination. As stated in *Vortex Sports v. Ware*, 378 S.C. 197, 210 (Ct. App. 2008)(internal cites omitted), “The plaintiff contended because the measure of damages was different for the two causes of action; then two different injuries occurred. This court noted that plaintiff’s ‘claims against Richland Memorial and Dr. Oliver arose out of the same factual scenario’ and found the plaintiff ‘confuse[d] the concept of damages with the meaning of the word injury as used in the statute.’ Injury, as used in the statute, is broad enough to include all damages.” *Vortex Sports v. Ware*, 378 S.C. 197, 210 (Ct. App. 2008). Any interpretation obligation was part of the court’s analytical responsibility to decide whether the equitable relief of set-off was appropriate. This decision is ordinarily reserved by the judge for a post-trial determination of the set-off. There are no fact questions regarding the settlement agreements for the jury’s determination. Further, as noted in Professional Plastering’s brief, the settlements had been approved by the Court prior to the trial.

An application to the Court is the only proper method for applying set-off. Respondents argue that they have not received a double recovery, and therefore a set-off is not warranted. However, this argument is without merit. The double recovery is

readily apparent in the list of settlements provided in Professional Plastering's Motion for Set-off. (R. p. 508). This issue was addressed by the Court in *Ellis v. Oliver*. The plaintiff argued that at trial she did not present any evidence of medical expenses attributable to Richland Memorial (the settling party) which were the exact amount of the settlement; and therefore the jury's verdict did not take into consideration her Richland Memorial bills or settlement with Richland Memorial. *Ellis v. Oliver*, 335 S.C. 106, 111, 113 (Ct. App. 1999). The Court determined, "Application of the settlement credit was statutorily mandated in this case. Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." *Id.*

Respondents' assertion that the jury was not required to award damages to Respondents if they found in their favor is incorrect and contrary to Respondents' position in trial. Professional Plastering requested an additional jury charge that the jury was not required to award damages in excess of the settlements already received. (R. p. 1533, line 22 - p. 1534, line 21). In response to Professional Plastering's request, counsel for Respondents stated that "... if we are asking for something here that it is a curative instruction, that if you do find for the plaintiff that you must award something." (R. p. 1536, lines 3-7). Although the trial court's instructions to the jury contained the language concerning "damages, if any," Respondents objected to "if any" being included on the verdict form. (R. p. 1529, line 24 - p. 1530, line 8); (R. p. 1533, line 19 - p. 1537, line 20). Despite Professional Plastering's objection to the change, the trial court then struck the words "if any" from the verdict form, requiring the jury to award damages to Respondents in an amount above the \$8,025,000 already received if the decision favored

Respondents. (R. p. 1537, lines 14-20). The verdict form was the trial court's final written instruction to the jury, which accompanied them to the jury room. It stated in part,

"The Plaintiffs have received a total of \$8,025,000 in settlements in this matter from other parties. Therefore, any damages that you award Plaintiffs would be in addition to those damages already received.
4. If you found in favor of Plaintiffs on either cause of action, please state the amount of damages sustained by the plaintiff."

(R. p. 65-66).

Respondents also argue that the settlement amounts should not be considered by the Court because they were not included in the trial record. The settlements were presented at the appropriate time, when Professional Plastering made their post-verdict motion for set-off. (R. pp. 506-699). The settlement amounts were set forth in the motion, and the settlement agreements were attached as exhibits. Prior to that time, the issue of set-off was not before the court.

Respondents argue that Professional Plastering suffered no prejudice from the settlement amount being included on the verdict form. This is not true. Professional Plastering was highly prejudiced. The Court, by including the settlement amount on the verdict form, endorsed the settlements and Respondents' argument that the settlement was insufficient compensation. There was no provision for taking evidence on the issue of common damages as would have been done in a proper judicial review under a motion for set-off. Professional Plastering was highly prejudiced by the trial court's decision to not review the verdict and settlement for dual payment of common damages as required.

The trial court erred in denying Professional Plastering's motion for set-off, by including the settlement amount on the verdict form, and in its instructions to the jury, therefore the trial court should be reversed.

B. The Record Does Not Support the Trial Court's Decision to Deny Professional Plastering's Motion for New Trial *Nisi Remittitur*.

Professional Plastering's Initial Brief addresses this issue, and Professional Plastering relies on the argument set forth in its initial brief in support of this issue.

The trial court abused its discretion in denying Professional Plastering's motion for new trial *nisi remittitur*, and therefore should be reversed on this ground.

IV. THE TRIAL COURT'S JURY CHARGES ON BREACH OF IMPLIED WARRANTY OF WORKMANLIKE SERVICE, COST TO REPAIR TO EXISTING CODE, DEPRECIATION, AND NEGLIGENCE WERE ERRONEOUS.

Professional Plastering's Initial Brief addresses this issue in detail, and Professional Plastering relies on the argument set forth in its initial brief in support of this issue.

The trial court's jury charges on breach of implied warranty of workmanlike service, cost to repair to existing code, depreciation and negligence were erroneous, and therefore the trial court should be reversed on this issue.

V. THE TRIAL COURT ERRED IN DENYING PROFESSIONAL PLASTERING'S MOTION FOR DIRECTED VERDICT ON RESPONDENTS' CLAIM FOR BREACH OF WARRANTY OF WORKMANLIKE SERVICE AND ITS MOTION FOR JNOV.

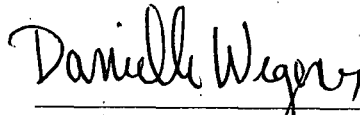
Respondents cite the case of *Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) for the position that the warranty of workmanlike service claim applies in this case. However,

Magnolia North does not contain an analysis of this issue. Professional Plastering relies on its previous argument on the issue set forth in its Initial Brief.

CONCLUSION

For the reasons set forth above and those set forth in Professional Plastering's Initial Brief which are incorporated herein by reference, Professional Plastering respectfully requests the decision of the trial court be reversed for a new trial.

Respectfully submitted,



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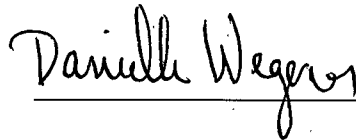
February 8, 2013

Charleston, South Carolina

CERTIFICATE OF COUNSEL

I certify that this Final Reply Brief of Appellant to 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. complies with Rule 211(b).

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