

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

The Honorable R. Lawton McIntosh Circuit (10<sup>th</sup>) Court Judge

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Case No: 2012-207852

JERRY HOLTZCLAW, d/b/a  
GREEN THUMB LANDSCAPING  
AND IRRIGATION

Respondent

V

DENNIS WALDREP

Appellant

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INITIAL BRIEF OF APPELLANT

**RECEIVED**

MAR 19 2013

**SC Court of Appeals**

Dennis Waldrep  
209 Amethyst Way  
Seneca, SC 29672  
Proceeding Pro Se

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*MacQuish v. United States*, 844 F.2d 733, 735 (10th Cir. 1988).

## STATUTES

South Carolina Rules of Professional Conduct

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South Carolina Rules of Civil Procedure

## OTHER AUTHORITIES

South Carolina Lawyers Weekly No. 001-012-08

32 CJS Evidence Sections 695 and 851

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## STATEMENT OF ISSUES ON APPEAL

1. WAS DEFENDANT/APPELLANT'S COUNSEL INADEQUATE IN REPRESENTING DEFENDANT AT TRIAL TO REQUIRE A REVERSAL OF THE TRIAL COURT'S ORDER?
  - a. DID DEFENSE COUNSEL FAIL TO INTRODUCE KEY EVIDENCE AND/OR MAKE ADEQUATE REFERENCE TO SAID EVIDENCE TO SECURE A VERDICT ON BEHALF OF DEFENDANT?
  - b. DID DEFENSE COUNSEL FAIL TO PROPERLY INTERPRET THE INSTRUCTIONS OF THE COURT OR FOLLOW THE INSTRUCTIONS OF THE COURT RESULTING IN PREJUDICE TO THE DEFENDANT?
  - c. DID DEFENSE COUNSEL FAIL TO ADEQUATELY INTRODUCE EVIDENCE THROUGH DEFENSE WITNESSES OR ILLICIT EVIDENCE ON CROSS EXAMINATION FROM PLAINTIFF'S WITNESSES?
  - d. DID CERTAIN STATEMENTS MADE BY DEFENSE COUNSEL TO HER CLIENT ILLUSTRATE DEFENSE COUNSEL'S INABILITY OR LACK OF PREPARATION TO ADEQUATELY HANDLE THE REQUIREMENTS OF THE TRIAL?
  
2. DID THE TRIAL COURT ERR IN FAILING TO ADEQUATELY CONSIDER KEY EVIDENCE REGARDING THE POSITION OF PLAINTIFF RELATIVE TO THE PERFORMANCE OF THE PARTIES?

- a. DID THE TRIAL COURT IMPROPERLY CONSIDER CERTAIN ISSUES RELATIVE TO THE COSTS SUBMITTED BY THE PLAINTIFF AT TRIAL AND THE PERFORMANCE OF DEFENDANT RELATIVE TO THE CONTRACT/
- b. DID THE REMARKS MADE BY THE TRIAL COURT INDICATE A BIAS ON BEHALF OF THE PLAINTIFF OR A FAILURE TO ADEQUATELY CONSIDER THE POSITION OF THE DEFENDANT/
- c. DID THE TRIAL COURT FAIL TO INVESTIGATE THE WORK PERFORMED BY THE PLAINTIFF AS IT INDICATED IT WOULD DO ON THE RECORD?
- d. DID THE TRIAL COURT PROVIDE INSTRUCTIONS TO COUNSEL THAT WERE NOT FOLLOWED OR MISINTERPRETED THAT SHOULD HAVE RESULTED IN A MISTRIAL?
- e. DID REMARKS BY THE TRIAL JUDGE INDICATE THAT THE COURT HAD MADE A DECISION PRIOR TO A FULL HEARING OF THE CASE?
- f. DID THE COURT FAIL TO CONSIDER THE CONTRACT WHICH IS A CENTRAL ISSUE IN THIS CASE?
- g. DID THE TRIAL COUR ABUSE ITS DISCRETION IN FINDING IN FAVOR OF PLAITIFF IN THIS MATTER?

## STATEMENT OF THE CASE

This case is an appeal from a trial that was held in November of 2012 and resulted in a verdict in favor of the Plaintiff. A copy of the Order entered in that matter is attached hereto as "Exhibit A". It is from that verdict that the Defendant/Appellant Waldrep files this appeal requesting a reversal of that verdict. The underlying action was instituted by the Plaintiff claiming that Waldrep owed money for work that was performed at a property owned by Waldrep. The action was essentially a breach of contract matter wherein the Plaintiff claimed that Waldrep had failed to pay in full for the work that had been performed as his property. A trial was held and a verdict was granted in favor of the Plaintiff. Waldrep has filed this appeal for based on abuse of discretion by the trial court and ineffective assistance of counsel.

Although Waldrep was represented by counsel during the course of the trial it is clear as set forth in the argument section of this brief why counsel was ineffective in its representation of Waldrep and that the ineptitude of counsel was to such a degree that it tainted the trial and deleteriously impacted Waldrep by depriving him of his rights to a full and fair hearing and as such requires a reversal of the verdict of the trial court.

Additionally, Waldrep appeals from the verdict of the trial court due to reversible errors made by the court during the course of the trial that rise to the level of abuse of discretion. A review of the transcript and the "sua sponte" motion for reconsideration reveal that the trial court asked inappropriate questions, considered evidence not properly before the court, disregarded critical evidence in

favor of Waldrep, failed to adequately control or instruct counsel resulting in confusion and prejudice against Waldrep and related matters all of which indicate that the trial court did not properly find in favor of Waldrep or enable Waldrep to have a fair trial. Further the court made improper inferences in favor of plaintiff that were not supported by the evidence such as the Plaintiffs "need" for money regardless of his breach of contract and failure to comply with the provisions thereof. As a result, Waldrep is entitled to a new trial as set forth in the argument

### **ARGUMENT**

Was the representation by Waldrep's counsel insufficient to warrant a new trial? The analysis of counsel's inadequacies also serve to elucidate many of the errors that occurred at trial that substantiate Appellant's claim for abuse of discretion and as such are helpful in understanding the myriad of errors, mistakes and abuses that occurred.

An attorney is required by the Rules of Professional conduct to act competently and in the best interest of the client according to the Rules of Professional Conduct. In this case if she (Waldrep's counsel) was not adequately skilled or prepared to handle this trial it was improper for her to do so. The transcript in this matter clearly reveals that Waldrep's counsel failed miserably in this regard. It is submitted that counsel either lacked the sufficient skills and experience to properly represent Waldrep in a trial of this nature and/or failed to adequately prepare for the trial and as a result multiple, fatal mistakes were made. These mistakes essentially deprived Waldrep of a fair trial and prejudiced him by resulting in a verdict against him without any real evidence to substantiate the verdict or any evidence to refute the presentation made by the Plaintiff. Additionally, the trial judge allowed the trial to go off course by questioning the Plaintiff about his need for money, disregarding the breach of contract issues, seeking proper engineering advice and failing to

provide the attorneys with clear instructions as evidenced by the confusion from the in chambers conference. Interestingly, Plaintiff's counsel was proficient enough to send multiple invoices to Waldrep requesting payment for her horribly substandard performance. Waldrep is in the process of instituting a civil matter for legal malpractice against his former counsel to recover damages.

As indicated, this matter is essentially a breach of contract by a builder/contractor to a homeowner for payment for work performed. The initial contract that began this work (attached hereto as "Exhibit B") was introduced at trial as "Plaintiff's Exhibit 2" to bolster Plaintiff's case. The issue is that the Plaintiff drafted and breached the contract not the Defendant therefore the introduction of this document did not or should not have helped the Plaintiff's case but should have in fact resulted in a verdict for Waldrep. Counsel for Waldrep neglected to bring this and other items to the attention of the court and the court failed to consider these issues when rendering its verdict. For example, the fact that Waldrep fully complied with the terms and conditions of the contract and it was the Plaintiff Green Thumb that breached the agreement between the parties. Waldrep made every payment as required by the document and fully complied with the terms and conditions of the document drafted by the Plaintiff. The Plaintiff never provided any notice in writing that more funds were required (as required by the contract) It wasn't until approximately thirty days from completion of the project that the Plaintiff advised Defendant verbally that he had left his "profit" off the agreement. This of course begs the question of whether it was an innocent error or fraud in the inducement to secure the project from Defendant. These failures by Waldrep's counsel are not limited to her egregious conduct at trial but also to her failure to properly plead, counterclaim or conduct discovery on behalf of her client.

The contract drafted and provided by the Plaintiff provides, in pertinent part that “All work will be performed in a professional manner according to standard horticulture and construction standards.” This was not properly plead in Waldrep’s answer nor was it elucidated at trial. According to the experts and construction standards set forth by the manufacturer of the concrete products (Allan Block) that were used, the work was not performed in a professional manner and in accordance with construction standards. This is another breach of the contract by the Defendant. that should have resulted in damages being awarded to Waldrep rather than the Plaintiff’s specious claim for more money.

Next, the only additions that are permitted by the terms of the contract are entitled “Concealed Contingencies” This section states that the contract is subject to extra charge for concealed contingencies such as rock, debris, poor drainage situations, etc. Not readily apparent in the materials and work specified. “ This flies in the face of the claims made by the Plaintiff at trial. The Plaintiff claims (and was granted a verdict) because he essentially mispriced the Allan Blocks that was used to improperly build a retaining wall. It is impossible to know if he did this intentionally to obtain the job, was inept because it was his first job of this nature which he admitted at trial or that he believed he could hide additional costs elsewhere. Ultimately, he admitted that he made an error and then sought Waldrep to pay for his error (either intentional or negligent). This is after Waldrep had complied with every term of the contract. This improper pricing of a piece of material that was used is clearly not a “concealed contingency” as set forth in the contract and Waldrep’s counsel neglected to mention this at all and the court failed to consider this when rendering its decision.

Next, the contract clearly indicates that any change order must be signed by the owner or representative. This did not happen. The Plaintiff failed to provide any change

order, signed or otherwise to prove his claim for additional funds. What really happened in this case is that the Plaintiff underpriced the Allan Blocks that he used and to either induce Waldrep to accept the transaction or because he was inept, incompetent or untruthful. Either counsel for Waldrep failed to plead fraud in the inducement, misrepresentation or breach of contract (by failing to use a change order) or the court neglected to properly consider the evidence before it. The contract was drafted solely by the Plaintiff and he breached the document by failing to utilize change orders as stated. Then he improperly used the court system to collect money from Waldrep and benefitted from the inability of counsel to properly represent Waldrep.

In addition to failing to plead effectively and expose the either negligent or intentional plot of Plaintiff to seek more money from Waldrep counsel neglected to produce sufficient evidence to show that the work was done improperly. The work done by the Plaintiff was done in such a manner as to cause significant damages to Waldrep's property and in fact is subject of an insurance claim on Plaintiff's insurance. It is not unreasonable to presume that a contractor has the requisite knowledge to perform the tasks for which he is hired. This however was not the case in this matter. The Mfg. Allan Block sets forth on their website a reference to some basic standards regards the retaining wall that was constructed. While this website information is not technical information in terms of actual specifications or instructions for installation, it does indicate that there are definite and specific requirements that must be adhered to when building a wall of this nature. The trial Judge mentioned that he would undertake to consult the county engineer to examine the detail of these requirements relative to the standards and the work that was actually performed. Unfortunately, the county engineer was never consulted. This was yet another failure on the part of Waldrep's counsel and the court. Simply stated, following the

Judge's comment regarding the engineering, she failed to pursue this course of action in any manner. She did not contact the county engineer, she did not inquire of the court how this investigation was to be made or who should be responsible for the initiation of the action and collection of the information for presentation to the court, she did not call the county engineer as a witness to request his opinion on the matter. She simply did nothing.

Counsel did introduce an expert but her voir dire of this expert was obviously inadequate (or she hired an unqualified expert) because the trial Judge remarked that the abilities or veracity of the expert were in question. Why didn't she supplement this testimony, call the county engineer, and bring in another expert? Again, she simply did nothing.

During the course of the trial and "in chambers" conference was held between his Honor and the lawyers. Counsel represented to Waldrep that the judge had given her an opportunity to produce additional information and Amend our Pleadings. When the trial resumed and counsel endeavored to present the information she believed she was permitted to do as a result of this in chambers conversation and was advised by the Judge that no such opportunity had been granted. Her commentary to her client regarding this obvious error underscores both her inadequacy as counsel in this case and/or her inattention or unpreparedness. She said to her client "I swear that is what he said". However, she made no objection, filed no motion, and requested no interlocutory appeal. Again, she simply did nothing. Did she fail to follow the judge's instruction, did she misunderstand, was she confused, unprepared, unskilled or was the court at fault. We will never know, but what is apparent is that Waldrep has suffered severe prejudice that warrants a new trial where his case can be properly presented.

During counsel's cross examination of the Plaintiff why didn't she question Plaintiff about his breach of contract and reasons why he failed to comply with the terms thereof? The Plaintiff had admitted he had never done a job like this and it was his "first one. Why wasn't this information collected in discovery, why wasn't a deposition of the Plaintiff performed to explore this information and prepare adequately. It seems as though the counsel for Waldrep simply went by the seat of her pants and when it didn't go her way she again did nothing. Except of course, sending Waldrep a bill.

During the trial the judge advised Defense counsel that she had the opportunity to prove their case relative to the construction of the wall. While it can be debated who had the burden of proof, it would appear that this was an opportunity to illustrate to the court not only that the Plaintiff's case was specious at best and resulting from either fraud or negligence but to prove the damages suffered by Waldrep. At this point counsel may have sought to amend her pleadings, call an additional expert, introduce manuals from the National Concrete Masonry Association (NCMA) regarding construction of the wall and/or call the construction official to illicit his opinion or at least ask for the day to review the information. Once again, none of this happened and the interests of Waldrep were again ignored by his counsel.

Another error committed by the counsel for Waldrep and the court is a procedural matter. She was provided with receipt from Plaintiff's counsel on the day of trial. Not in discovery, but on the morning of trial. Clearly, these receipts, provided and constructed in breach of the initial agreement should have been analyzed and utilized against the Plaintiff. Counsel for Waldrep failed to request that the court allow her sufficient time to conduct this analysis, have them reviewed by and expert of otherwise prepare for their use at trial. She allowed this "surprise evidence" to be dropped on her on the morning of trial without

objection and this surprise was instrumental in the verdict in favor of the Plaintiff.

Interestingly, the billed items (Receipts) presented by the Plaintiff totaled \$12,537 (2,214 Blocks) and the receipts totaled \$8,996 (1,497 Blocks). Not even this glaring error was addressed by Waldrep's counsel or the court and as a result, Waldrep is now faced with a judgment against him and a wall that was inadequately constructed and must be repaired at significant cost, If his attorney had performed even in a remotely adequate fashion and the court had properly identified the items in question the outcome of this trial would have been significantly different.

In summary, counsel for Waldrep failed to plead properly, conduct discovery in a remotely competent manner, and perform during trial with at least the basic skills. Her performance was so bad that it caused a verdict against Waldrep. This was not a trial on the merits where the truth surfaced and the verdict was entered. Rather, it was an ambush by the Plaintiff of an attorney that was either unskilled, unprepared or both. The deplorable actions or inactions of Waldrep's counsel would not be so egregious if it wasn't for the life altering nature of the judgment against him.. First, the amount of the judgment is \$52,998.98 and growing each day with interest, his attorney has billed him in excess of \$13,000. Further, the facts that the retaining wall was built to unacceptable standards means that it must be removed and reconstructed a cost which as yet is unknown. This not only threatens his home but the cumulative amount of the financial damages and costs threaten his very livelihood and ability to support himself and his family. All he is asking for is simply a fair trial, one where each side is provided ample opportunity to present a fair trial with at least mildly skilled and prepared counsel. Accordingly, Waldrep respectfully requests that this court allow him a retrial and time to conduct basic discovery to adequately present this case and receive an equitable decision.

While The general rule in civil cases is that the ineffective assistance of counsel is not a basis for appeal or retrial. *MacQuish v. United States*, 844 F.2d 733, 735 (10th Cir. 1988). If a client's chosen counsel performs below professionally acceptable standards, with adverse effects on the client's case, the client's remedy is not reversal, but rather a legal malpractice lawsuit against the deficient attorney. *Id.* at 735-36; *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 n.10 (1962). Waldrep acknowledges the conduct from discovery through reconsideration is so reprehensible it amounts to a threat against his financial stability, his family's ability to retire and even safety in his own home because of the defective retaining wall that may collapse at any time.

Did the trial court commit reversible error in failing to properly admitting and considering key evidence in this matter relative to the performance of the parties? There were several instances during the course of this trial where the trial court either allowed evidence to be admitted that should have been excluded or admitted evidence and failed to adequately consider the gravity of the evidence in favor of both parties. Each of the instances individually amount to reversible error and when taken cumulatively it becomes clear the court erred that resulted in substantial prejudice to Waldrep thereby requiring that the verdict of the trial court be overturned and a new trial be granted. *France v. Southern Equip. Co* 689 S.E. 2<sup>nd</sup> WW.Va.2010), 32 CJS Evidence Sections 695 and 851 , *Nowak v McEldowney* 2002 SD 162, 655 N.W. 2d 909.

The contract between the Parties was not properly admitted or considered. Specifically, the contract between the Parties attached hereto as "Exhibit B" outlines the obligations set forth the respective parties and while Waldrep performed all the duties as set forth in the contract the Plaintiff failed to abide by the terms and conditions. Instead the Plaintiff submitted a "scope of work document" that indicated that Waldrep owed the

Plaintiff an additional \$52,998.98. The admission of this document and lack of consideration of the initial contract was improper. The contract in Exhibit B outlined precisely the manner in which additional costs should be addressed and the way a work order or change order are to be handled. The contract states very plainly that “a change order must be signed by the owner or representative (to be determined in writing by the owner) which will state the additional costs” (on page two of the contract written by the Plaintiff). During the deposition of Mr. Waldrep he was presented with a “scope of work” (which was prepared 90 days after the work was completed) document that contained information relative to additional work that was purportedly done at his property and that he allegedly owed the Plaintiff an additional \$52,998.98. During trial this document and the initial contract were introduced. It is well settled that any ambiguities or conflicts in a contract are construed against the party that drafted the document. These two documents taken together are clearly at odds with each other. The Contract, signed by Waldrep details with specificity the manner in which additional work and changes are to be addressed and states that a work or change order, which the “scope of work “ document obviously purports to be regardless of the nomenclature used by the Plaintiff fails to comply with these prerequisites. There is no signature by Waldrep and not indication that he agreed to the additional work or the additional cost now being requested by the Plaintiff. The first time that Waldrep became aware of this scope of work document was three (3) months from the completion of the job. There are direct conflicts between the contract signed by the parties and the scope of work order used by the Plaintiff at trial to claim additional funds owed. The breach in this case was not by Waldrep but by the Plaintiff. He failed to abide by the terms and conditions of his own contract and the Court erred in allowing him to not only introduce this documents but by according it the weight that it did in awarding

him a verdict in the amount claimed by the scope of work document. The controlling document in this case should have been the contract signed by the parties. The scope of work document was not signed by the owner or representative as required by the contract. Waldrep discussed with Plaintiff at the completion of each phase of the work as it was finished and Plaintiff never, not once, notified Waldrep of additional charges. The document introduced at trial by Plaintiff without signature does not comply with the terms and conditions set out in the contract drafted by the Plaintiff, and is in direct conflict with the contract. The scope of work order is not signed or in any way approved by the owner or a representative. It appears to have been unilaterally prepared by the Plaintiff and presented to Waldrep as a bill.

The mere existence of this scope of work document raises several questions. First, why didn't Plaintiff notify or other present to Waldrep a change order in accordance with the contract? At that point Waldrep had complied with all the terms and conditions of the contract and no reason to assume that he would not continue to do so. Would Waldrep have agreed to have the work performed or performed by this contractor if the estimate for work had been higher by \$52,998.98 or 80% above what had been paid already. Obviously, this proposal would have been rejected. This begs the questions as to whether the Plaintiff was simply negligent in preparing the original estimate and bill or if he fraudulently induced Waldrep to enter into the agreement by providing an artificially low number and once the work had begun he could undertake a way to collect other funds he desired. One instance that leads us to believe that fraud may have been at work is the price charged for removing wood from the Waldrep property. The Plaintiff charged Waldrep \$2,000 for cutting and stacking a cord of wood. As the court may be aware a cord of wood is a stack 4 feet by 4 feet by 8 feet in length. Two thousand dollars for this service is so clearly

excessive that is begs the question that makes one wonder if this is how the Plaintiff planned on recouping his money from his artificially low bid designed to induce Waldrep to enter into the agreement. Additionally, a quantum meruit theory fails on behalf of the Plaintiff in this case as well. The wall that was constructed by the Plaintiff (who was an unlicensed contractor) and admitted that he had never performed this work before was improperly constructed and has resulted in one leak in Plaintiff's property and must be removed and replaced resulting in substantial damages to Waldrep.

Clearly, the original contract controls in this case and the "scope of work" document is at best an attempt by Plaintiff to collect additional funds and at worst a continuation of the fraud perpetuated on Waldrep. In either instance, the trial court erred in considering this document and according it any weight or veracity and awarding the Plaintiff additional funds.

Did remarks or actions by the trial court indicate a bias on behalf of the Plaintiff or a disregard or oversight of Waldrep's procedural rights? During the course of trial the judge made certain remarks that are cause for consternation and give rise to the question that the procedural rights of Waldrep may have been overlooked or abridged in some manner warranting a reversal of the trial court's order. Specifically, Waldrep introduced through the course of trial and during the motion for reconsiderations information that outlined the inadequacies of the work performed by the Plaintiff and the damages that he has suffered as his residence. Additionally, it should have been clear to the court that the Plaintiff did not comply with the terms and conditions set forth in Plaintiff's own contract by producing a manufactured "scope of work" document and delivering to Waldrep receipts on the day of trial which show differing amounts for the number of blocks used and the number of blocks

for which Waldrep was billed. This discrepancy alone is indicative of the mistakes made by the Plaintiff.

Additionally, the court made several troubling remarks which are cause for concern and reversal of the order entered by the court. First, the trial judge remarked that the objections of Waldrep were a result of “buyer’s remorse” Page 471 Lines 12-17. This remark is troubling for several reasons. Initially, it is challenging to determine what the judge meant by calling the actions of a litigant trying to protect his rights “buyer’s remorse” especially when he complied fully with the terms and conditions of the contract he signed and appears to have been fraudulently induced to enter into the agreement . This is especially true in light of the fact that the trial court appears to have entered an order based on documents that did not comply with the contract, were not signed by Waldrep or even delivered to him in a timely manner. This remark also suggests that the court had already decided against Waldrep and in favor of the Plaintiff before all the evidence and arguments had been heard. Does this not abridge the litigant’s rights and essentially deny him a full and fair hearing?

Another statement made by the trial judge that is cause for alarm surrounds the damages claimed by the Plaintiff. The judge remarked that the Plaintiff “may not get all that he has claimed. This statement can be interpreted to mean that the judge had already decided to award the Plaintiff payment from Waldrep based on fraudulent, unsigned, and improperly constructed documents. This is another error because it essentially denies Waldrep the opportunity to a full and fair hearing. As this case was heard without a jury, the judge is the finder of fact and appears to have made a decision before all the facts were presented and considered.

Next, the trial judge held an in chambers conference that obviously caused confusion and resulted in incorrect action by Defense counsel. Without this opportunity as promised, there was essentially not opportunity for Waldrep to refute the erroneous information that had been presented to the court. Therefore the court relied on this erroneous information in making an award in favor of the Plaintiff again depriving Waldrep of a full and fair hearing. This exchange also suggests another problem that occurred during the course of this trial. As previously indicated, the in chambers conference between the lawyers and the judge left Counsel for the Defendant Waldrep with the impression following this conference that the judge had set out the opportunity for Waldrep to produce evidence to enable the court to consider all the evidence available to make a decision. When counsel endeavored to comply with this directive the trial judge advised that he did not say that. Clearly, there was confusion somewhere in this exchange and this confusion deprived Waldrep of the opportunity to produce necessary evidence and fully make his case to refute the erroneous materials entered by the Plaintiff and prove his damages. At a minimum the judge should have clarified the exchange and perhaps entered a mistrial because the obvious confusion was to such an extent that it again deprived Waldrep of a full and fair hearing on such an extreme problem existing at his residence and essentially enabled the Plaintiff to succeed either in his fraud or negligent behavior.

Moreover, the trial judge indicated that it he would cause the county engineer to investigate the work performed at the Waldrep residence and rely on the results of this investigation in making his decision (Page 471 Lines 2- 6). This would have resulted in a clear answer for the court and a verdict in favor of Waldrep. Unfortunately, no such investigation occurred. The county engineer never reviewed the work that was performed or the expert's information that clearly revealed that the work performed was substandard.

Indeed the Plaintiff himself stated that this was his first job and last job of this type and it is clear that he either did not know what he was doing or made fraudulent or material misrepresentations all of which severely prejudiced Waldrep.

It is important to note that the work done in this case was by an unlicensed contractor and not only improper from a billing, contractual and billing perspective but has already caused significant damage to Waldrep's property. Waldrep has already been required to make a claim on the Plaintiff's insurance for water damage that occurred at his property and the Plaintiff's Liability Paid due to neglect on his part.

A complete review of this case reveals a rather obvious course of events all of which have led to the deprivation of Waldrep's rights and severely prejudiced his interests and prevented him from collecting damages for which he is clearly entitled. The most obvious and simple analysis of this case is as follows. The Plaintiff promoted himself and his business to Waldrep and produced a contract with specific terms and conditions and prices all of which Waldrep complied. It is unclear what happened behind the scenes but it is reasonable to speculate that one or two issues occurred. First, it is probable that the Plaintiff produced a low number and professional looking contract to fraudulently induce Waldrep to accept the contract by this unlicensed, first timer or the alternative is that the Plaintiff was so unskilled not only at constructing the wall which has already resulted in a damage claim on Plaintiff's insurance but equally unskilled at estimating and pricing a job. The discrepancy appears to be the amount paid for the Allen blocks that were used and the number of said blocks that were used. It seems unlikely that any person, especially a contractor could not ascertain the price of a block. The price quoted is roughly half the price that was ultimately claimed at trial. The number of blocks used ranges from a claim of 2,124 that was Billed to only 1,497 that actually had receipts. Also, the judge never

gave Waldrep credit for the 627 block for which he had already paid. Are we to believe that the Plaintiff cannot count or is the more likely scenario that he managed to persuade Waldrep to do business with him and when he found it to be insufficiently profitable he elected to use the court system to further his unscrupulous behavior?

The list of errors at trial is extensive and all deprive Waldrep of a full and fair hearing and result in the abatement of his rights to seek to be made whole. The trial court made remarks that can clearly be interpreted in favor of the Plaintiff prior to the conclusion of the proceedings which in and of themselves should result in a reversal and new trial. The confusion regarding conference in chambers and the refusal to allow Waldrep to introduce additional evidence or amend his pleadings amounts to reversible error and perhaps even a cause for a mistrial. The reliance on an unsigned, manufactured document (Scope of Work) as a contract between the parties should be construed against the Plaintiff and not against Waldrep and is again an erroneous decision by the trial court.

Procedurally, the production of receipts and delivery of those receipts to a litigant the day of trial and the failure to allow that litigant time to analyze and responds severely prejudices the rights of Waldrep and warrants a new trial. While counsel for Waldrep has obviously proved her inadequacy at multiple instances throughout the course of this matter the trial court made several errors that warrant the reversal of the order and a new trial being granted.

This was not an instance of a contractor performing work and the recipient of that work failing to pay for it. Quite the contrary. This was an instance of an unlicensed business, fraudulently inducing an unsuspecting homeowner into hiring him to build a retaining wall at his property. There was a contract signed and the homeowner complied. Then when the wall proved improperly constructed the contractor constructed documents

with invented numbers that do not match in an effort to essentially extort more money from this homeowner. The wrong number of blocks was set forth in these receipts. It took three months for this contractor to produce a bill. Why such a long time? Did it take that long to fabricate a reason to charge Waldrep extra? From charging \$2,000 for cutting and stacking wood to the wrong number of blocks, to reliance on unsigned, documents this case is alarming from start to finish. The contractor breached his own contract and appears to have used the court to benefit from his apparently fraudulent actions. Unfortunately, the homeowner hired the wrong attorney and received insufficient legal advice. However, in conjunction with this bad legal advice the court made several errors that warrant reversal of the trial court's order. Waldrep is still suffering damages at his residence and now has been deprived of his substantive and procedural rights at the trial level. He begs this appellate court to reverse the decisions of the trial court and enter a judgment on his counterclaim in his favor.

All it would have taken to make this case correct would have been a visit to the property by the county engineer. This is an action that the trial judge indicated would occur. It did not and not Waldrep sits in the untenable position of having a dangerous situation at his home and a faulty court order entered against him and is desperately seeking recourse. The Wall is in Failure Mode and not only is dangerous once it starts to actually fall down and at 80 lbs. per block could hurt someone if the block hits them, and it will cause the value of my home to be affected as well. Further examination of the trial transcript reveals multiple inaccuracies and inconsistencies that deleteriously impact the rights of Waldrep and result in an adverse and improper. Beginning on page 426 of the trial transcript the court begins to inquire of the Plaintiff if he made any money on this job and how he was supporting himself during the course of the job. This exchange continues

for approximately a page and one half but the more interesting aspect of this exchange is why. If this case is stemming from a breach of contract and the negligent construction of the wall what do the finances of the contractor have to do with responsibility for the breach and whether the contractor was negligent. The judge continues with an inquiry regarding building permits and then exclaims that “if they worked without permits, that’s not going to affect my decision whatsoever” (Page 428 lines 9-10). This entire exchange seems extraordinarily confusing. Initially, it appeared that the judge was endeavoring to determine the skill level and familiarity with the Plaintiff with the job he had undertaken perhaps to assess skill or credibility. Then following the building permit comment it almost appears that the judge is trying to ascertain whether or not the Plaintiff needs money. The issue of whether the Plaintiff was able to support himself or needed money is irrelevant in both a breach of contract action and/or an action for negligent construction of a wall. The inability of the Plaintiff to adequately quote and price a job and perform the work certainly speaks to his competence, skill and ability but this does not seem to be the goal of the inquiry of the judge. Rather, the judge appears to be trying to understand if the Plaintiff needs money and inadequately priced the job to find a way to award him money. Does the fact that the Plaintiff is inept in this regard the fault of the Defendant Waldrep and should he be forced to pay for the Plaintiff’s inadequacies? This is most certainly abuse of discretion and reversible error.

Similarly, beginning on page 468 of the trial transcript, the judge again delves into the profit margin of the Plaintiff. It is baffling as to why the judge is undertaking the job of calculating the bill and profit margin of the Plaintiff. This is a breach of contract case and the Plaintiff presented the Defendant with a contract that he drafted and an estimate that he prepared. If he performed these tasks in addition to the actual construction work

inadequately then he is both negligent and liable. Whys the judge is apparently trying to justify the additional charges by the Plaintiff that were produced in breach of the initial contract is not only irrelevant but has tainted the trial and verdict and prejudiced the rights of the defendant.

Then on page 469 of the transcript the judge comments between lines 3 and 14 that; “I thought it was a badly constructed wall, the lower retaining wall. It appears that my law clerks math is correct, and that’s very debatable, there’s a 10.2 inch allowance for variance for settlement for the length of this wall, which is eight-five to ninety feet, by all testimony. Now, as such I don’t think it’s a badly constructed wall.” This is based on information the court apparently pulled from the Allen website. The unfortunate aspect of this is that the Allen website is simply a website diagram , it is not an engineering requirement or a building code. The experts in the case testified that the wall was incorrectly constructed and had the judge taken the opportunity to send the county engineer with a transit it would have become immediately clear within minutes that this was the case. The County Engineer (that the judge indicated would review the matter) would certainly have known the National Code of the NCMA. Additionally, the Defendant’s response clearly indicates that the maximum variance is 3 inches, in the SUA Sponte on Exhibit B form the NCMA. A law clerk’s math based on a sales diagram on a company website is hardly an acceptable method to ascertain the adequacy of something as important as a retaining wall. This analysis as conducted by the trial court is another example of abuse of discretion and reversible error.

Interestingly, the court continues on page 469 at line 10 that “I understand Mr. Waldrep’s dismay at the billing, When I heard it, I was taken quite aback and I’m not going to allow you to get the entire amount of the bill. That is entirely too high. Entirely too

high.’ Is this the court’s ideas of a scientific or negligence analysis. Either the contract was breached or it wasn’t or the wall was constructed improperly or it wasn’t. While I appreciate the sensibilities of the judge being offended at the exorbitant price claimed by the Plaintiff this is hardly an appropriate legal analysis and another example of reversible error.

The court continues on that same page at line 15 by saying to defense counsel “I’m going to give her the opportunity, and copy Mr. Hood to respond solely to the document that was presented from the Allen website to show my calculations were wrong”. First, there was not introduction of a document; this was simply an internet diagram that was interpreted and rudimentary calculations performed by a law clerk with unknown engineering experience. Meanwhile the engineers in this case were seemingly dismissed by the judge and the issue appears to be decided in this rudimentary and certainly inadequate fashion. The wall is constructed improperly but the court seemed determined not to ascertain that fact which is again an abuse of discretion and committed reversible error.

On page 470 the judge continues by saying that “If you show that those tolerances are incorrect, then I will have somebody go out and measure those walls and the loser is going to pay for it. Okay, I’ll have an engineer go out there and do it and then report back to me what the measurements are..... And if I find that there is a badly build wall I’m not going to let you get paid that’s just not fair. I know your young, I know you need the money, but that not my issue.” Here the court seems to completely ignore the issue of the contract the breach by the Plaintiff and the either fraudulent or negligent manner in which the job was quoted and more concerned with the fact that he is young and needs the money. Mr. Waldrep signed a contract and performed under that contract. The Plaintiff then tried

to extort more money from Waldrep and after all of this the sole issue that the court appears to consider is the quality of the wall. This is the first error and the second is that the court never follows through. The Defendant provided documented evidence from the NCMA that the wall was improperly constructed and the court never sends an engineer and instead relies on a website diagram and the calculations of a law clerk to decide a complex engineering issue that involves the safety of a man's home. On page 356 Mr. Jordan indicates that the tolerances are an inch and a quarter which appear to conflict with the calculations provided by the law clerk but this testimony is given little weight. Later on that page at line 12 the court makes the statement appears to me as an outsider looking in, that the ball was dropped, you just dropped the ball in the process and all of a sudden you got this bill and you're like "oh, my goodness. I didn't realize I was getting that big of a bill" While this is partially correct the basic premise is flawed and should result in a reversal of the trial court findings. Yes, Waldrep never expected a bill because he had signed a contract and performed all duties required of him under that contract, and paid Holzclaw (the Plaintiff) every time he submitted a bill except the final specious one for \$52,000. Plaintiff failed to secure change order as were required by the contract that the Plaintiff drafted so the Defendant had no reason to assume or be on notice that a large bill was looming in the distance. This becomes even more specious when you consider the nature of the bill. At one point 1,500 blocks and another 2,400 blocks without ever clarifying how many were actually used. He charged the Defendant for 2124 blocks and only produced receipts at trial for 1,497 but the judge did not reduce or alter the judgment to reflect that discrepancy. Additionally the Judge says on Page 469 lines 11-13 that he is not going to allow the Plaintiff to get the entire amount of the Bill because it is Entirely "too High "but the full amount was awarded to the Plaintiff. Additionally, the additionally

funds were because the Plaintiff had priced the blocks improperly. In the initial contract they were priced at \$8 and later he was asking \$16. This is not small error and again either the product of fraud or the product of negligence, neither of which are the fault or responsibility of the Defendant. Now, the Defendant is stuck with an improperly constructed wall that must be torn down and reconstructed to proper specifications. There has been a claim on the insurance (National Grange, Claim # MPF58561) of the Plaintiff paying for water damage resulting from his shoddy work and now this issue has surfaced.

The trial court entered an order Interestingly in that order the court acknowledges that all change order must be in writing according to the original contract but makes a finding contrary to that factual statement. In part B of the Order the Court states in error that the Plaintiff failed to include his profit margins. This is simply not the case. The fact of the matter is that the Plaintiff is intentionally or mistakenly mispriced the blocks used for the retaining wall. There was never a discussion about the so-called profit margin. This is a fabrication by either the Plaintiff or an attempt by the court to pay a Plaintiff that the court had previously acknowledged "needed the money".

In section "C" of the order whether the Defendant said the work "looked good" is irrelevant. The work either conformed to engineering specification or it did not and in this case it did not. So not only is Plaintiff not entitled to recover to his mispricing debacle he is responsible for the damages incurred by the Defendant for the cost of replacing the wall with one that conforms to the code and engineering requirements.

The rationale of the trial court in Section D of the order is another example of abuse of discretion and reversible error. Here the court states that it is unconvinced of the assertion of Defendant that the wall did not conform to the Allen standards and that Allen Block only "recommends" the use of an engineer. This seems completely in opposite to

the previous assertion of the court that they had examined the Allen website and based upon calculations by the judge's law clerk that the wall was to standard. These two positions do not reconcile. Allen block either has standards or they do not.

Section "H" of the court's order is also baffling. It indicates that Mr. Jordan testified for Defendant and was on the Job for a good portion of the time and also provided an Estimate to "correct" the Plaintiff's work (\$55,721) and testified that the maximum settlement over the length of the Wall was 1.25 inches and the Judge said it is contrary to the Allan Block specifications which was the Diagram 14 that was entered into evidence on the final day by Plaintiff, but the NCMA information says 3 inches max. over the length of the Wall. The Judge says Jordan is not Credible because his testimony directly contradicts the Mfg. Own web-site specifications which he is referring to the Diagram 14. The Judge also finds Jordan non-credible because he had "financial incentives for his conclusions.

Section "I" is equally at odds with the courts findings. It states that the Defendant was told (assuming verbally) that profit had not been billed 30 days before completion of the job. This flies in the face of the contract. This would be analogous to buying a car and receiving a call from the dealership a month later indicating that the engine had not been included in the price. If this was an error by the Plaintiff then it is the Plaintiff who should bear the responsibility for the error.

Similarly, section "J" indicates that the wall is out of variance by 8.125 inches. Manufacturers tolerances are 1.25 inches maximum over a ten foot reference and for horizontal control by 3" max over the length of wall. Clearly, 8.125 (the calculation done by the law clerk is well outside those tolerances). Under our Defendants Response Sua Sponte "in Exhibit B the NMCA clearly states 3 inches Max not 1% as the court is referring to the Diagram 14 which we have proved incorrect but not recognized by the

Court. Throughout this trial the court mentions fairness and discusses multiple ancillary issues. The basic facts are that the Defendant contracted for work to be performed and signed a contract and complied with the terms and conditions of that contract. Then it became apparent that there were errors in calculation or estimation and that the Plaintiff attempted to fix them with a breach of contract and oral representations about profit, number of Allan Blocks, costs etc. Fundamental fairness suggests that this was an arm's length transaction and the Plaintiff clearly made mistakes and now seeks to have the Defendant pay for them in addition to paying for work that was done improperly and indeed poses a danger to Defendants home. It would be grossly unfair to allow the Plaintiff to submit a fraudulent or incorrect estimate, sign the contract, attempt to fix the contract in an ex post facto manner without a writing of any kind and without any notice to Defendant. There is not mention of how long Plaintiff knew there was an error which leads one to believe that this may have in fact been intentional to allow Plaintiff to now benefit from his actions would be a gross miscarriage of justice.

In this case there were a litany of mistake and error made as set forth in the following list:

2. Plaintiff's failure to comply with the terms and conditions of the contract;
3. Lack of any notice to the Defendant of missing Profit calculation or other charges;
4. No change orders in writing as in original Contract;
5. Inappropriate inquiries by the judge;
6. Failure of the court to consider Proper Standards (NCMA National Code) and engage in proper calculations;
7. Failure of Defendant's attorney to properly conduct discovery or the trial;
8. Negligence or potential fraud by the Plaintiff;

9. Failure of the Trial Court to rely on Experts; One a Civil Engineer (Structural is his Specialty) and the other an Installer of Retaining Walls. Both Experts Chandler (Engineer) and Jordan (Independent Contractor has installed numerous Retaining Walls using different Manufactures' of Blocks) were found non-credible by the Judge.
10. Reliance by the trial court on the calculation of a law clerk to decide a complex Engineering Case;
11. Failure by the Judge to send out County Engineer as mentioned on page 471 Lines 2-6 if Defendant could prove the 1% was wrong which we did and no Engineer was ever sent out to inspect Property.
12. Consideration of issues by the trial court without any grounds to do so such as the financial needs of the Plaintiff.

The Appellant submits that there was insufficient evidence submitted at trial to prove that the Defendant owed the Plaintiff anything. The receipts did not match (1,497 Blocks Paid Receipts and 2,124 Blocks Billed to Defendant), the changes did not comply with the contract that was prepared by the Plaintiff and the sole considerations seems to be that the Plaintiff prices this indeterminate number of Blocks improperly and now seeks to recover almost twice the money he originally quoted the Defendant. There was nothing to put the defendant on notice that the calculations were incorrect or that "profits" were allegedly left out. He simply made an error or used a low bid to induce the Defendant and then sought the Court's help to collect more money by claiming he "needed" it. This line of questioning by the judge lacked any probative value whatsoever unless it was designed to illustrate the ineptitude of the Plaintiff which seems hard to believe because on the following page the judge states that even if the Plaintiff failed to secure required permits

that would not prevent the court from finding in his favor. It seems clear that the trial court understood that the Plaintiff either did not know what he was doing or was acting intentionally to secure additional money from Defendant but did not seem to care that this was an error by the trial court and should be overturned.

Neither the sufficiency nor the manifest weight of the evidence introduced by the Plaintiff at trial would convince the average person that Plaintiff was entitled to more money. The facts are that he approached the Defendant and they entered into a contract and the Defendant performed all his duties under that contract. Then at least 30 days before the completion of the job the Plaintiff informed the Defendant verbally that he left his profits out and the Defendant would have to pay more. Then 90 days after the completion of the Job the Plaintiff delivers the SCOPE OF WORK which was his Final Bill which Defendant then saw for the first time. This is either fraud or negligence, neither one which are sufficient to make the Defendant pay. Additionally, the contract drafted by the Plaintiff and signed by the parties specifically indicated how changes and modifications were to be addresses. The Plaintiff failed to do this. Meaning, that he failed to comply with his own contract. He simply dumped a pile of receipts on which the numbers did not match on the Defendant the morning of trial and asked to get paid more. The Defendant was given no time to analyze the information or prepare a response despite the fact that it was in clear breach of the contract between the parties. The weight of the evidence is so obviously against the Plaintiff that he may in fact need the money but it is not Defendants job to pay it to him. The trial court should be reversed.

Additionally, a review of the actions of the trial court judge amount to an abuse of discretion. First he engages in a discourse with the Plaintiff regarding his need for the money and essentially performed the calculations for the Plaintiff despite the fact that the

contract was clear and controlled the transaction. Next, the Judge disregarding the testimony of the expert regarding the sufficiency of the construction undertaken by the Plaintiff and elected instead to use a diagram from the Allan Block website that has not certifications or other proofs indicating that this diagram was the standard to which governed the job performed by the Plaintiff and then to add insult to injury had his law clerk, a person for whom we have no idea of their engineering skills or understanding perform the calculations. This is the calculations on which the court relied to find in favor of the Plaintiff. Clearly and obviously an abuse of discretion and reversible error..

Defendant spoke to the Technical Department with Allan Block and was told that an installer of Allan Block must rely on the National Code of the NCMA for installing Walls and not a single Diagram that the Plaintiff entered just before the Trial ended and that single Diagram seems to be the Verdict that was in favor of the Defendant, even though the Plaintiff as instructed by the Judge provided the information from NMCA that Specifically states the Maximum Settlement is 3 inches no matter the Length of a Wall and this information was not noted in favor of Defendant. This information was entered to Court as Defendant's Response to Court's SUA Sponte Request and Argument.

Considering all of the errors and missteps that took place during this trial it is impossible to call these errors (individually or taken in their totality) harmless error. The errors during this trial were severe and result in substantial prejudice to the Defendant and warrant the reversal of the judgment of the trial court. In this case the appellate court should disturb the trial court's decision because of manifest abuse of discretion.

## CONCLUSION

Based on the reasons set forth above the Appellant respectfully requests that this court grant the appellants request and take the following action:

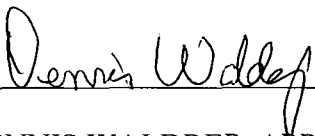
Reverse the Order of the Trial court as against the Defendant Dennis Waldrep; or in the alternative;

Vacate the Order of the Trial court and grant a new trial in this matter; or in the alternative;

Vacate the Order of the trial Court and staying any proceedings until completion of the malpractice action against Defendant's trial counsel is concluded.

Any other relief as the Court deems just and equitable.

Respectfully submitted,

  
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DENNIS WALDREP, APPELLANT/DEFENDANT IN UNDERLYING ACTION