

RECEIVED

Jan 04 2022

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Jocelyn Newman, Circuit Court Judge

Common Pleas Court Case No. 2018-CP-32-03103
Appellate Case No. 2021-000658

R-Anell Housing Group, LLC, Respondent,

v.

Homemax, LLC, Appellant.

INITIAL BRIEF OF APPELLANT

THURMOND KIRCHNER & TIMBES, P.A.

Thomas J. Rode, SC Bar No. 77480
15 Middle Atlantic Wharf
Charleston, SC 29401
Phone: 843-937-8000
Fax: 843-937-4200
Attorneys for the Appellant

MIKE KELLY LAW GROUP, LLC

Bradley D. Hewett, SC Bar No. 77924
1523 Huger Street, Suite A
Columbia, SC 29201
Phone: 803-726-0123
Additional Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

ISSUES ON APPEAL.....1

I. Did the trial court err in awarding statutory prejudgment interest from March 24, 2018, when Respondent failed to plead prejudgment interest, where the amount sought was not a sum certain agreed to by the parties, and where there is no evidence that the amount claimed was payable on March 24, 2018, all of which are required by S.C. Code Ann. § 34-31-20?

II. Did the trial court err in finding the economic loss rule barred Appellant’s negligence claim against Respondent because Respondent had no extra-contractual duties, where our Supreme Court has exempted residential construction from the economic loss rule, and where both South Carolina’s Code of Law and Code of Regulations impose duties on manufacturers of modular homes—such as Respondent—which arise independent of any contract?

III. Did the trial court err in finding email evidence discussing problems with the waterproof plastic wrapping on one of the modular homes manufactured by Respondent was irrelevant when the issue here concerned Respondent’s alleged failure to properly waterproof a modular home before shipping, and where Respondent testified the wrapping on the subject home was installed with the same quality as the wrapping it installed on all other homes it manufactured?

STATEMENT OF THE CASE.....1

FACTUAL BACKGROUND2

The Purchasing Process2

The Christofoli House3

The Brown House4

PROCEDURAL HISTORY & TRIAL COURT RULINGS6

LAW AND ARGUMENT7

I. **The trial court erred in awarding statutory prejudgment interest from March 24, 2018, and therefore this Court should reverse the trial court’s award of statutory prejudgment interest.**7

 A. *Standard of Review regarding the trial court’s erroneous award of statutory prejudgment interest.*8

| | |
|---|----|
| B. <i>Law and Argument regarding the trial court’s erroneous award of statutory prejudgment interest.</i> | 8 |
| 1. <i>R-Anell failed to plead statutory prejudgment interest</i> | 9 |
| 2. <i>The trial court erred in awarding statutory prejudgment interest because the amount claimed was not a sum certain as required by law.</i> | 10 |
| 3. <i>The trial court erred in awarding statutory prejudgment interest because there is no evidence the amount claimed was payable as of March 24, 2018.</i> | 12 |
| | |
| II. The trial court erred in directing a verdict against Homemax’s claim for negligence based on the economic loss rule. This Court should reverse and remand so that Homemax may submit its tort claim to the jury. | 16 |
| A. <i>Standard of Review regarding the trial court’s erroneous grant of directed verdict based on the economic loss rule.</i> | 16 |
| B. <i>Law and Argument regarding the trial court’s erroneous grant of directed verdict based on the economic loss rule.</i> | 17 |
| | |
| III. The trial court erred in excluding relevant email evidence that R-Anell had problems with the waterproof wrapping it put on houses. | 20 |
| A. <i>Standard of Review regarding the erroneous exclusion of evidence.</i> | 20 |
| B. <i>Law and Analysis regarding the erroneous exclusion of evidence.</i> | 20 |
| | |
| CONCLUSION | 24 |

TABLE OF AUTHORITIES

Cases

Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993) 15

Beckman Concrete Contractors, Inc. v. United Fire and Cas. Co., 360 S.C. 127,
600 S.E.2d 76 (Ct. App. 2004)..... 11

Burke v. Republic Parking Sys., 421 S.C. 553, 808 S.E.2d 626 (Ct. App. 2017)..... 20

Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 631 S.E.2d 252 (2006) 10

Dixie Bell, Inc. v. Redd, 376 S.C. 361, 656 S.E.2d 765 (Ct. App. 2007) 8, 10, 11, 12

Hinkle v. Nat'l Cas. Ins. Co., 354 S.C. 92, 579 S.E.2d 616 (2003) 17

Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs., 357 S.C. 327,
592 S.E.2d 335 (Ct. App. 2004)..... 11

Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 673 S.E.2d 448 (2009) 8

Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003) 17

Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 384 S.E.2d 730 (1989) 17, 18

Law v. S.C. Dep't of Corr., 368 S.C. 424, 629 S.E.2d 642 (2006) 17

Lewis v. Congress of Racial Equality, 275 S.C. 556, 274 S.E.2d 287 (1981) 11

McMillan v. S.C. Dep't of Agric., 364 S.C. 60, 611 S.E.2d 323 (Ct. App. 2005)..... 8

McMillan v. S.C. Dep't of Agric., 380 S.C. 212, 670 S.E.2d 368 (2008) 9

S. Welding Works, Inc. v. K & S Constr. Co., 286 S.C. 158,
332 S.E.2d 102 (Ct. App. 1985)..... 13, 15

Smith-Hunter Constr. Co. v. Hopson, 365 S.C. 125, 616 S.E.2d 419 (2005)..... 15

State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) 20

State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001)..... 20

State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004) 21

State v. White, 425 S.C. 304, 821 S.E.2d 523 (Ct. App. 2018) 20

Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003) 8, 13, 16

Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.,
320 S.C. 49, 463 S.E.2d 85 (1995) 17, 18

Toole v. Salter, 249 S.C. 354, 154 S.E.2d 434 (1967)..... 23

Town of Bennettsville v. Bledsoe, 226 S.C. 214, 84 S.E.2d 554 (1954) 8

Wakefield v. Spoon, 100 S.C. 100, 84 S.E. 418 (1915)..... 13

Statutes

S.C. Code Ann. § 15-3-630..... 19
S.C. Code Ann. § 15-3-640..... 19
S.C. Code Ann. § 23-43-10..... 18
S.C. Code Ann. § 23-43-150..... 19
S.C. Code Ann. § 23-43-40..... 18
S.C. Code Ann. § 34-31-20..... passim

Other Authorities

24 CFR § 3280..... 18
24 CFR § 3281.12..... 19
S.C. Code Regs. Ann. § 6-626..... 19
S.C. Code Regs. Ann. § 8-600..... 18
S.C. Code Regs. Ann. § 8-620..... 19

Rules

Rule 208, SCACR..... 7
Rule 401, SCRE..... 20, 22, 24
Rule 402, SCRE..... 20

ISSUES ON APPEAL

- I. Did the trial court err in awarding statutory prejudgment interest from March 24, 2018, when Respondent failed to plead prejudgment interest, where the amount sought was not a sum certain agreed to by the parties, and where there is no evidence that the amount claimed was payable on March 24, 2018, all of which are required by S.C. Code Ann. § 34-31-20?
- II. Did the trial court err in finding the economic loss rule barred Appellant’s negligence claim against Respondent because Respondent had no extra-contractual duties, where our Supreme Court has exempted residential construction from the economic loss rule, and where both South Carolina’s Code of Law and Code of Regulations impose duties on manufacturers of modular homes—such as Respondent—which arise independent of any contract?
- III. Did the trial court err in finding email evidence discussing problems with the waterproof plastic wrapping on one of the modular homes manufactured by Respondent was irrelevant when the issue here concerned Respondent’s alleged failure to properly waterproof a modular home before shipping, and where Respondent testified the wrapping on the subject home was installed with the same quality as the wrapping it installed on all other homes it manufactured?

STATEMENT OF THE CASE

The appellant, Homemax, LLC (“Homemax” or “Appellant”) is in the business of selling modular homes in South Carolina. (R. __). The respondent, R-Anell Housing Group, LLC (“R-Anell” or “Respondent”) is a foreign entity in the business of manufacturing modular homes for sale in South Carolina. (R. __). Homemax served as a dealer of modular homes manufactured by R-Anell pursuant to a “Dealer Agreement.” (Dealer Agreement) (R. __). This lawsuit concerns two separate transactions for two separate modular homes manufactured by R-Anell and sold to Homemax—the “Christofoli House” and the “Brown House.” (R. __) (Complaint) (counterclaim). R-Anell, the plaintiff below, brought a claim for breach of contract against Homemax regarding payment for the Brown House. (R. __). Homemax asserted counterclaims for negligence and breach of contract stemming from the Christofoli House transaction. (R. __).¹ The trial court directed a verdict against Homemax’s negligence claim, and after the jury returned a verdict in

¹ Homemax also asserted a claim for Unjust Enrichment/Quantum Meruit, but voluntarily dismissed this claim at trial. (Trans. p. 366) (R. __).

favor of R-Anell, the trial court awarded R-Anell statutory prejudgment interest. This appeal followed.

FACTUAL BACKGROUND

The Purchasing Process

Although Homemax and R-Anell had a relationship going back to 2014, the parties entered into a written dealership agreement on January 1, 2017. (R. __) (Ex. D-1). However, this agreement did not layout the specific details of how individual transactions were to be conducted. Rather, the evidence presented at trial regarding the parties' course of dealing demonstrated that if a Homemax customer was interested in an R-Anell home, the customer would select their desired model, options, and trims, then Homemax would request a quote from R-Anell. *See e.g.*, (R. __). (Ex P-3). If approved, Homemax would submit a purchase order to R-Anell for the specific floor plan model. (R. __). Homemax would pay for the homes through a line of credit that Homemax had with a third-party lender—this source of funding being known in the industry as “floor plan financing.” (Trans p. 72) (R. __). After receiving a purchase order R-Anell would confirm the payment source before it would begin manufacturing the home. (R. __). Manufacturing usually began four to six months after R-Anell received the purchase order. (Trans. p. 175) (R. __).

The modular homes were manufactured in two halves which would be joined together once delivered to the final homesite. Therefore, to avoid exposure of the interior components to the elements before the modules were joined together, the final stage of production required R-Anell to wrap the house in a water-tight plastic. (Trans. p. 106) (R. __). R-Anell was responsible for delivering the home to its final destination and would hire contractors to unwrap and erect the two halves of the house on the foundation. (Trans. p. 99) (R. __). The floorplan funding source would

typically remit payment directly to R-Anell within 14 days after the house was shipped. (Trans. p. 187) (R. __).

The Christofoli House

In December of 2016, Homemax ordered a modular home from R-Anell for Mr. and Mrs. Christofoli. (R. __) (Christofoli Order Def. #2). Production of the “Christofoli House” was completed before the site preparations were completed at the final homesite. As a result, on May 5, 2017, R-Anell moved the Christofoli House to an outside storage lot where it remained for twelve days. (R. __). It was significant to R-Anell, for budgetary and accounting reasons, that the Christofoli House ship as soon as possible. (Trans. P. 179). Therefore, even though the Christofoli homesite was not ready, on May 17, 2017, R-Anell shipped the Christofoli House to Homemax’s retail location, where it remained (outside) until June 26, 2017, when it was finally delivered to the Christofoli’s homesite. (R. __). Once at the final homesite, contractors hired by R-Anell unwrapped the house to discover one of the modules (Unit A) had suffered significant damage because of water intrusion. R-Anell instructed its contractors to remove all the water damaged components, and initially began efforts to repair the home. (Trans. p. 230) (R. __). However, on September 21, 2017, R-Anell informed Homemax that it would not be undertaking any further repair efforts, and that it would be Homemax’s responsibility to complete the remediations. (Ex. D-14) (R. __). Homemax ultimately lost the deal with the Christofolis, incurring damages of \$203,301.96 caused by the damage to the home. (R. __).²

² This included costs of remediating the water damage to the house, paying interest to its floor plan source for the house, paying utilities for the house, paying legal fees to defend litigation ultimately brought against it by the Christofolis, and \$94,000.00 paid by Homemax to the Christofolis to settle the lawsuit.

The Brown House

On September 1, 2017, R-Anell submitted a quote for a house to Homemax's customers Mr. and Mrs. Brown. The quoted price was \$142,660 but was "subject to verification." (R. __). (Ex. P-3). However, due largely to the ongoing dispute over the problems with the Christofoli House, on February 27, 2018, R-Anell sent a letter notifying Homemax that it was terminating its relationship with Homemax and stating it would not "sell or build any additional retail sold homes for Homemax from the date of [February 23, 2018]." (R. __). (Ex. D-3). At the time R-Anell sent this letter, it had not yet delivered the Brown House. Despite some initial confusion about the status of the Brown House, subsequent to sending this letter, R-Anell clarified it did not intend to abandon the Brown House. (Trans. p. 190) (R. __).

As the Brown House neared completion R-Anell's transportation coordinator Melissa Allen took over the transaction to verify payment terms and coordinate delivery. (Trans. p. 203-04) (R. __). R-Anell's internal documents, when provided to Ms. Allen, showed the Brown House transaction was to be "COD" (*i.e.*, "cash on delivery"). (Trans. p. 211-13) (R. __). However, Ms. Allen testified that she knew Homemax had never purchased a home COD, but always utilized a floor plan financier. (Trans. p. 206) (R. __). Therefore, it came as no surprise, when in a phone call between Ms. Allen and David Fautley (owner of Homemax) several days before the Brown House was planned to ship, Mr. Fautley advised that he had not agreed to COD for the Brown House, but instead that it would floor planned. (Trans. 206) (R. __). After this call, Ms. Allen confirmed that the purchase was "pending" with one of Homemax's floor plan financiers. (Trans. p. 207) (R. __).

Ordinarily, R-Anell would not ship a home until Ms. Allen confirmed that the floor plan financing had been approved. (Trans. p. 192) (R. __). In this case when Ms. Allen went to check

the floor plan status, she confused the Brown House with a recent prior purchase from Homemax that had a similar serial number. (Trans. p. 193) (R. __). Under the mistaken belief that the floor plan had been approved on the Brown House, R-Anell shipped the Brown House to Homemax. (Trans. p. 192). Because shipment would not occur prior to floor plan approval, since the Brown House was shipped, all parties believed the floor plan was approved, and R-Anell did not expect or request payment on delivery. *See* (Trans. p. 133) (In explaining why no money was collected on delivery Phillip Hathcock, general manager of R-Anell, testified it was because a “floor plan [financier] was supposed to pay for it **not COD.**”) (emphasis added); *see also* (Trans. p. 198) (R. __) (explaining why funds were not demanded on delivery Albert Gurner testified that R-Anell was of the expectation that the house was to be paid by a floor plan financier and that as a result “**we weren’t looking for a COD check at that point.**”) (emphasis added); (Trans p. 206-07) (R. __) (Melissa Allen testified that she spoke with Mr. Fautley—the owner of Homemax—and both she and Mr. Fautley were of the understanding the Brown House would be financed through a floor plan financier and not COD); *see also* (Trans. p. 320-21) (R. __). (David Fautley testified about the expectation that floor plan financing would pay).

Several months passed before it was discovered that the floor plan financier had not paid for the Brown House. (Trans. p. 179-80) (R. __). Only then did R-Anell seek payment from Homemax on the invoice for the Brown House—although this invoice amount was different than the amount shown on the quote it submitted to Homemax for the Brown House. *See* (Ex. P-4) and (Ex. P-3) (R. __); (R. __). However, by this time, Homemax had incurred substantial damage and costs stemming from the debacle with the Christofoli House—this exceeding the amount demanded by R-Anell for the Brown House—and therefore, Homemax declined to pay. This suit followed.

PROCEDURAL HISTORY & TRIAL COURT RULINGS

R-Anell commenced this action for breach of contract regarding the Brown House. (Complaint) (R. __). Meanwhile, Homemax asserted counterclaims for negligence and breach of contract related to the Christofoli House. (Answer & CC) (R. __). Homemax asserted its damages stemming from the Christofoli transaction fully offset any amounts it owed to R-Anell for the Brown House. (Answer & CC) (R. __).

The matter was tried before a jury in Lexington County between June 7 and 10 of 2021. *See* (Trans) (R. __). During the trial, Homemax attempted to introduce email correspondence between R-Anell and its delivery company dated May 17, 2017—the same day the Christofoli home was delivered—in which the delivery company was complaining the house it carried for R-Anell the day before “had all kinds of problems with [the] plastic” wrapping and as a result the drivers needed additional tape to address these problems. (Ex. D-12) (R. __). Notwithstanding that Homemax’s claim focused on R-Anell’s failure to properly wrap the house, the trial court excluded this evidence on the basis that it was not relevant. (Trans. pp. 135-37) (R. __).

At the close of Homemax’s case in chief, the trial court directed a verdict against Homemax on its claim for negligence, reasoning this claim was barred by the economic loss rule. (Trans pp. 365 – 97) (R. __). To support this, the trial court held that R-Anell had no duties beyond those set forth by contract and therefore, Homemax could not go forward on a cause of action in tort but was limited only to an action sounding in contract. (Trans. p. 377-80) (R. __). Therefore, the jury was never able to consider Homemax’s tort claim.

The jury found in favor of R-Anell on its claim for breach of contract related to the Brown House, and against Homemax on its claim for breach of contract related to the Christofoli House. (Trans. p. 477) (R. __). Over Homemax’s objection the trial court awarded R-Anell prejudgment

interest from March 24, 2018. (Trans. pp. 478-79); (Trans. pp. 268-76) (R. __). Homemax timely appealed. (NOA) (R. __).

LAW AND ARGUMENT³

This appeal presents three instances of reversible error. First, this Court should reverse the trial court's award of prejudgment interest because it is inconsistent with established law and unsupported by the evidence. Additionally, or in the alternative, this Court should reverse and remand for a new trial because the trial court erred in finding Homemax could only proceed on a contract theory and directing a verdict against Homemax's tort claim. Finally, this Court should reverse and remand because the trial court abused its discretion in finding that email evidence regarding problems with the Christofoli House and R-Anell's plastic wrapping was not relevant to this matter.

I. **The trial court erred in awarding statutory prejudgment interest from March 24, 2018, and therefore, this Court should reverse the trial court's award of statutory prejudgment interest.**

The trial court's award of prejudgment interest is inconsistent with established law and unsupported by the evidence. Not only did R-Anell fail to plead statutory prejudgment interest, to allow the trial court's ruling to stand would alter the law to permit statutory prejudgment interest anytime the plaintiff creates an invoice for the amount claimed. The question does not, and should not, turn on whether the plaintiff reduces the amount claimed to an invoice. Instead, the law inquires whether the amount claimed is capable of being reduced to a sum certain based upon the terms of the parties' *agreement*. Moreover, prejudgment interest is only assessable from the time

³ Pursuant to Rule 208(b)(1)(D), SCACR the standard of review is addressed separately for each issue on appeal.

the amount was payable. Here, there is no evidence the amount was payable on March 24, 2018—the date on which the trial court commenced the accrual of interest.

A. Standard of Review regarding the trial court’s erroneous award of statutory prejudgment interest.

This Court should reverse where the trial court’s award of prejudgment interest amounts to an abuse of discretion, which occurs when the award “conflicts with . . . established law [or] is not reasonably supported by the evidence.” *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 435-36, 673 S.E.2d 448, 458 (2009). Here the trial court abused its discretion in awarding prejudgment interest from March 24, 2018, because such an award is inconsistent with the law and not reasonably supported by the evidence.

B. Law and Argument regarding the trial court’s erroneous award of statutory prejudgment interest.

“In all cases of accounts stated and, in all cases, wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum.” S.C. Code Ann. § 34-31-20(A). “If pre-judgment interest is pled for in the complaint, it is allowed on obligations to pay money from the time the payment is demandable, either by agreement of the parties or by operation of law, if the sum is certain or capable of being reduced to certainty.” *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 375, 585 S.E.2d 292, 299 (2003) (citation and internal quotations omitted). However, “our Supreme Court held pre-judgment interest should not be included in the judgment [when] it was not pled in the complaint or prayer.” *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 367, 656 S.E.2d 765, 768 (Ct. App. 2007) (citing *Town of Bennettsville v. Bledsoe*, 226 S.C. 214, 219, 84 S.E.2d 554, 556 (1954)); see also *McMillan v. S.C. Dep’t of Agric.*, 364 S.C. 60, 74, 611 S.E.2d 323, 330 (Ct. App. 2005) (“Pre-judgment interest must be specifically pled in order to be recovered.”) (reversed

on other grounds by *McMillan v. S.C. Dep't of Agric.*, 380 S.C. 212, 214, 670 S.E.2d 368, 369 (2008)).

Here, the trial court erred in awarding statutory prejudgment interest of 8.75% pursuant to S.C. Code Ann. § 34-31-20(A) from March 24, 2018, for three reasons: (1) because R-Anell failed to plead prejudgment interest; (2) because there is no evidence that the amount claimed is for a sum certain based upon calculations previously agreed to by the parties; and (3) because there is no evidence that the amount claimed was payable on March 24, 2018.⁴ Any one of these reasons, standing alone, warrants reversal.

1. *R-Anell failed to plead statutory prejudgment interest.*

As a threshold matter, R-Anell failed to plead a request for statutory prejudgment interest in its complaint. Rather, R-Anell's complaint alleges that contractual interest had accrued at the rate of 7% (not the statutory rate). (Complaint) (R. ___). R-Anell's complaint is otherwise devoid of a claim for prejudgment interest pursuant to § 34-31-20(A). *Accord* (Trans p. 272) (R-Anell conceding the 7% interest, as referenced in the complaint, "actually, **that is not the statutory prejudgment interest.**") (R. ___) (emphasis added). At the close of R-Anell's case, Homemax moved for directed verdict on R-Anell's claim for interest. (Trans. pp. 268-75) (R. ___). To this the trial court found, and R-Anell conceded that the interest it prayed for in the complaint (*i.e.*, 7%) "is not a contract term [and] it doesn't derive from anywhere else." (Trans. p. 273) (R. ___). Consequently, the trial court determined it was "not appropriate" for R-Anell's claim for prejudgment interest to go before the jury but would be considered, if at all, by the court at the

⁴ There were 1,174 days between March 24, 2018, and June 10, 2021. Although not specifically set out in the Order, the trial court's calculation of interest "from March 24, 2018, to the date of judgment" is apparently calculated as daily interest on the verdict amount multiplied by these 1,174 days: *i.e.*, $((\$142,292.80 * 0.0875)/365) * 1,174 = \$40,046.65$.

conclusion of the case. (Trans. pp. 273-74) (R. ___); *see also* (Trans. p. 475-76) (R. ___) (wherein the court declined a question from the jury asking whether it could add interest).

While ordinarily the question of statutory prejudgment interest under Section 34-31-20(A) is a matter to be determined by the court, the trial court erred in awarding such interest in this case because R-Anell never plead it. *See Dixie Bell*, 376 S.C. at 367, 656 S.E.2d at 768 (“our Supreme Court held pre-judgment interest should not be included in the judgment because it was not pled in the complaint or prayer.”). The only interest R-Anell plead was contractual in nature for which it ultimately conceded was not supported by the evidence. (Trans p. 272) (R. ___). (R-Anell conceding the 7% interest, as referenced in the complaint, “actually, **that is not the statutory prejudgment interest.**”); *accord* (Complaint) (R. ___). Having failed to plead statutory interest under Section 34-31-20(A) the trial court committed reversible error in awarding such interest.

2. *The trial court erred in awarding statutory prejudgment interest because the amount claimed was not a sum certain as required by law.*

Second, and notwithstanding that R-Anell did not plead statutory prejudgment interest, there is no evidence that the amount claimed was for a sum certain based upon calculations previously agreed to by the parties. “[O]ur Supreme Court [has] explicated the sum certain requirement for prejudgment interest” by stating that “prejudgment interest is allowed on a claim of liquidated damages; *i.e.*, the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties.” *Dixie Bell*, 376 S.C. at 370, 656 S.E.2d at 769 (*citing Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006)).

In this case, the trial court conflates the existence of an invoice with creating a *per se* entitlement to prejudgment interest. *See e.g.*, (Trans. pp. 480-81) (R. ___). The test is not whether there is an invoice for the amount claimed, but whether the amount due is capable of being made

certain “by mathematical calculation previously agreed to by the parties.” *Id.* Had the legislature intended to make prejudgment interest dependent upon the plaintiff merely generating an invoice it could have drafted Section 34-31-20 to say as much. But it did not. *Accord e.g., Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 333-42, 592 S.E.2d 335, 339-43 (Ct. App. 2004) (recognizing that the intent of a statute is to be gleaned from the language employed by the legislature and applying the principle of *inclusio unus est exclusio alterius*—the inclusion of one is the exclusion of another).

While an invoice *could be* evidence that the claim is for a sum-certain, an invoice alone is not determinative. Instead, the question is whether the prior *agreement* of the parties establishes the amount to be for a sum certain or “liquidated” amount. *See Dixie Bell*, 376 S.C. at 370, 656 S.E.2d at 770 (recognizing that a liquidated sum is “an amount contractually stipulated to” while an unliquidated sum “cannot be determined by a fixed formula.”); *citing Lewis v. Congress of Racial Equality*, 275 S.C. 556, 274 S.E.2d 287 (1981) and *Beckman Concrete Contractors, Inc. v. United Fire and Cas. Co.*, 360 S.C. 127, 131-132, 600 S.E.2d 76, 78-79 (Ct. App. 2004) (italics added for comparison) (internal modifications omitted).

In this case the only evidence presented at trial of an agreement between the parties regarding the Brown House was a September 2017 “quote” purportedly accepted by Homemax in the amount \$142,660.80. (Plaintiff’s Ex. 3) (R. __). However, the terms of this quote specifically state: “Price [is] subject to verification.” (*Id.*) (R. __). The process of “verification” is not defined in the quote and there is no evidence that this verification process—whatever it might be—is a formula by which the agreed upon price could be mathematically calculated to a certain sum. *Contra Dixie Bell*, 376 S.C. at 370, 656 S.E.2d at 769 (holding that a sum certain must be mathematically calculable based upon a formula agreed to by the parties).

The fact that there was no sum certain amount here is further demonstrated by the fact that the price reflected on the quote is different than the amount reflected in the invoice for the Brown House. *Compare* (Plaintiff's Ex. 3) (R. __) (the "quote" for the Brown House reflecting an amount of \$142,660.80) *with* (Plaintiff's Ex. 4) (R. __) (the invoice for the Brown House reflecting an amount of \$142,292.80). If the amount at issue here were truly for a sum-certain, as required by statute, then the discrepancy between the amount of the quote and the amount of the invoice would be attributable to some mathematical formula agreed to by the parties. However, that is not the case. Instead, R-Anell's witness conceded at trial it could not explain the difference. (Trans. p. 78; 130); (R. __). If R-Anell cannot explain why the price on the invoice is different than that reflected in the quote, then it cannot logically follow that there was an agreement between the parties by which the price could be reduced to a sum certain. *See Dixie Bell*, 376 S.C. at 370, 656 S.E.2d at 769 (holding it must be that the "sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties.").⁵

Therefore, because R-Anell failed to present evidence that the amount was for a sum certain, the trial court's award of prejudgment interest was an error and should be reversed. But there is more.

3. *The trial court erred in awarding statutory prejudgment interest because there is no evidence the amount claimed was payable as of March 24, 2018.*

Notwithstanding the reasons articulated *supra*, even assuming for the sake of argument that the amount R-Anell claimed was for a sum certain, the trial court nonetheless erred in awarding

⁵ The terms of the invoice itself lend further support to the conclusion that the amount sought was not for a sum certain. For example, the invoice document specifically states: "This invoice price may be subject, if earned to Manufacturer's Volume Rebate Programs." (Ex. P-4) (R. __).

statutory prejudgment interest from March 24, 2018, because there is no evidence the amount was payable on March 24, 2018.

Statutory prejudgment interest may only be applied from the time the payment was due. *See Tilley*, 355 S.C. at 375, 585 S.E.2d at 299 (“If pre-judgment interest is pled” it is permitted only “**from the time the payment is demandable**, either by agreement of the parties or by operation of law.”) (emphasis added). A claim for prejudgment interest is properly denied where there is no evidence of any specified time for when the account is due or where there is no evidence the parties “agreed to a contract price” before the plaintiff performed. *See S. Welding Works, Inc. v. K & S Constr. Co.*, 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985) (providing that statutory prejudgment interest requires “(1) that the account is actually stated; and (2) that the parties either expressly or impliedly agreed that it is a true statement and is due to be paid then or at some other specified time”); (citing *Wakefield v. Spoon*, 100 S.C. 100, 84 S.E. 418 (1915)).

The trial court’s grant of interest from March 24, 2018, was error because the evidence does not establish the amount (assuming arguendo it was a sum certain) was due on this date. *Contra* S.C. Code Ann. § 34-31-20(A) (requiring the amount claimed be both for sum certain, “and due”); *see also S. Welding Works*, 286 S.C. at 164, 332 S.E.2d at 106 (holding the amount must be “due to be paid then or at some other specified time.”). Presumably, R-Anell contends the amount was due on March 24, 2018, because the invoice for the Brown House bears this date with the designation COD (*i.e.*, “cash on delivery”). However, the evidence is undisputed that at the time R-Anell shipped the Brown House, neither it nor Homemax intended or agreed that COD was an agreed upon term of the transaction. In fact, the opposite is true.

There is no dispute where COD is a term of the sale, R-Anell demands payment be remitted directly to the delivery driver at or prior to the driver delivering the home to Homemax. *See* (Trans

p. 185-86) (R. __); (Trans p. 187) (R. __) (Albert Gurner testified on behalf of R-Anell that when the terms of the sale are “COD” it would mean “the driver is supposed to get the funds before he unhooks the house”); (Tans p. 196-97) (R. __). (Mr. Gurner testified that COD means “the transport driver should pick up the check at the time that they are delivering the house to the site.”). However, that did not occur here because the undisputed evidence was that neither R-Anell nor Homemax agreed or believed the purchase to be on COD terms. To the contrary, all parties believed the payment would be through floor plan financing not COD. *See* (Trans. p. 133) (In explaining why no money was collected on delivery, Phillip Hathcock, general manager of R-Anell, testified it was because a “floor plan [financier] was supposed to pay for it **not COD.**”) (emphasis added); *see also* (Trans. p. 198) (R. __) (explaining why funds were not demanded on delivery Albert Gurner testified that R-Anell was of the expectation that the house was to be paid by a floor plan financier and that as a result “**we weren’t looking for a COD check at that point.**”) (emphasis added); (Trans p. 206-07) (R. __) (Melissa Allen testified that she spoke with Mr. Fautley—the owner of Homemax—and both she and Mr. Fautley were of the understanding the Brown House would be financed through a floor plan financier and not COD).⁶

The evidence as presented by R-Anell leaves only one logical inference—the designation of COD on the invoice was incorrect. (*Id.*) (R. __). Prior to the shipment of the Brown House both R-Anell and Homemax were of the mutual understanding that payment would be through a floor plan financier. (*Id.*) (R. __). Mr. Gurner testified the only reason the Brown House was delivered by R-Anell on March 24, 2018, was because R-Anell was under the mistaken belief that the floor plan financing had been approved. (Trans. p. 198-99) (R. __) (explaining this as a “terrible

⁶ In testifying for R-Anell, both Jeremy Crosby (Trans p. 181) (R. __) and Melissa Allen (Trans p. 206) (R. __) conceded that Homemax had never purchased a home from R-Anell on COD terms before.

oversight by Ms. Allen.”). This is significant because the law requires that “the parties either expressly or impliedly agreed that [the amount] is due to be paid then or at some other specified time.” *S. Welding Works*, 286 S.C. at 164, 332 S.E.2d at 106. In this case the evidence makes plain that was no agreement between the parties that the amount was payable on March 24, 2018. It is axiomatic that R-Anell’s mistaken belief that the floor plan financing had been approved cannot take the place of the mutual agreement required by law.

Furthermore, the evidence presented by R-Anell is that “it didn’t even realize the Brown House hadn’t been paid for until months after it shipped.” (Trans. p. 179-80) (R. ___). Thus, there can be no inference that R-Anell demanded payment on March 24, 2018, if itself was unaware the floor plan financier had not issued payment until several months later. *See Smith-Hunter Constr. Co. v. Hopson*, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005) (recognizing that interest is payable from the time payment is demandable) (citing *Babb v. Rothrock*, 310 S.C. 350, 426 S.E.2d 789 (1993)).

Finally, it bears mention that the terms of the invoice itself are inconsistent with the conclusion that payment was due on March 24, 2018. For example, the invoice states that payment should be remitted to R-Anell at its office in Cherryville, North Carolina. (Ex. 4) (R. ___). Such delivery of payment by mail is inconsistent with the sale being COD which R-Anell testified would require payment be remitted immediately to the driver on delivery. Moreover, the face of the invoice states “This invoice is Due Upon Receipt **unless** the customer has special terms.” (Ex. D-4) (R. ___) (emphasis added). In this case, those special terms were R-Anell’s and Homemax’s understanding that the sale was to be financed through a floorplan financier. *Compare* (Ex. P-12) (R. ___) (the invoice for the Christofoli House—which was undisputedly floor plan financed—bears the same designation of “Due Upon Receipt unless [there are] special terms”). These facts

serving to further demonstrate that there was no agreement between the parties that payment was due on March 24, 2018. *Contra Tilley*, 355 S.C. at 375, 585 S.E.2d at 299 (“If pre-judgment interest is pled” it is permitted only “**from the time the payment is demandable**, either by agreement of the parties or by operation of law.”) (emphasis added).

In sum, there is no evidence to support the trial court’s assumption that the parties agreed payment was due on March 24, 2018—this being an indispensable requirement to an award of statutory prejudgment interest. Therefore, the trial court’s award of prejudgment interest from this date is reversible error.

II. The trial court erred in directing a verdict against Homemax’s claim for negligence based on the economic loss rule. This Court should reverse and remand so that Homemax may submit its tort claim to the jury.

The trial court committed reversible error in directing a verdict against Homemax’s negligence claim based on the economic loss rule. It was an error of law for the trial court to base its directed verdict on the incorrect conclusion that R-Anell had no duties other than those arising by contract. Not only has the Supreme Court exempted residential construction from the economic loss rule, but South Carolina’s Code of Laws and Code of Regulations impose legal duties on R-Anell as a manufacturer of modular homes to the same extent as a contractor, engineer, architect, or other construction or design professional. Therefore, an action in tort may be pursued against R-Anell.

A. Standard of Review regarding the trial court’s erroneous grant of directed verdict based on the economic loss rule.

“In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference, or its inference is in doubt.” *Law v. S.C. Dep’t of Corr.*, 368 S.C. 424, 434, 629

S.E.2d 642, 648 (2006); *citing Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). “The appellate court will reverse the trial court's ruling on a JNOV motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law.” *Id.* at 434-35, 629 S.E.2d at 648; *citing Hinkle v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

B. Law and Argument regarding the trial court's erroneous grant of directed verdict based on the economic loss rule.

Traditionally, the economic loss rule marks the distinction between actions which lie in tort and actions which lie in contract. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54, 463 S.E.2d 85, 88 (1995) (recognizing that “the economic loss rule maintains the dividing line between tort and contract”) (internal quotations omitted). While some states use the economic loss rule to prohibit all recovery of purely economic damages in tort, that is not the case in South Carolina. *Id.* at 54, 463 S.E.2d at 88. Instead, South Carolina “has long recognized tort action [is permitted even] when the damages are purely economic.” *Id.* (“Purely ‘economic loss’ may be recoverable under a variety of tort theories.”).

Generally, “the economic loss rule simply states that there is no tort liability for a product defect if the damage suffered is only to the product itself.” *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989) (stating the traditional application would provide “tort liability only lies where the damage done is to other property or is personal injury”). *Id.* However, where the “product” is a residential home, the Supreme Court has held the economic loss rule will not exclude tort liability simply because the damage is limited to the home—*i.e.*, the “product itself”—despite such damage being traditionally a purely economic loss. *Kennedy*, at 347, 384 S.E.2d at 737-38. In the context of a residential home, the “framework [the Supreme Court] adopt[ed] focuses on activity, not consequence.” *Id.* at 345, 384 S.E.2d at 737.

In this way, the name economic “loss” rule is somewhat of a misnomer. Despite what the title of the rule may suggest, its application depends not on the resulting consequence or damage but on the source of the duty from which the damage arose. This is true even outside the context of a residential construction where the Supreme Court has been clear that “[t]he question thus, is not whether the damages are physical or economic. Rather, **the question of whether the plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty plaintiff claims the defendant owed.**” *See Griffin*, 320 S.C. at 54, 463 S.E.2d at 88. Where the duty arises exclusively by virtue of a contract, an action will not typically lie in tort. *Id.* However, where the duty would arise independent of the contract, this will support an action in tort. *Id.* at 55 and 88. In the context of a residential home, the builder will be liable to the buyer of the home in tort, regardless of the existence or terms of a contract, where the builder has (among other things) deviated from industry standards. *See Kennedy*, at 347, 384 S.E.2d at 737. (indicating that although these duties may also arise under contract or warranty the law will also impose these duties).

In this case the trial court directed a verdict on Homemax’s claim for negligence because the trial court determined as a matter of law that the “duties arise solely out of the contract between the parties and certainly one part of that contract may be wrapping the [modular home components].” (Trans p. 379) (R. __). This was error.

In 1984 the Legislature enacted the South Carolina Modular Building Construction Act (the “Act”). *See* S.C. Code Ann. §§ 23-43-10 *et. seq.* The Act empowers the State Building Code Council to promulgate regulations which it has done at Article 6 of Title 8 of the South Carolina Code of Regulations. *See* S.C. Code Ann. § 23-43-40; S.C. Code Regs. Ann. §§ 8-600 *et. seq.* (Modular Building Construction); *see also* 24 CFR § 3280 (federal regulations applicable to

manufactured home construction and safety standards); 24 CFR § 3281.12 (federal regulations providing certain exceptions for modular homes). By law, no business may sell (whether wholesale or retail) modular building units in South Carolina without being licensed by the Council. S.C. Code Ann. § 23-43-150; *see also* S.C. Code Regs. Ann. § 8-620(1) (setting forth the licensing requirements for a manufacturer of modular buildings).

In addition to the licensure requirements, South Carolina's regulations provide that all manufacturers of modular homes, like R-Anell, are subject to the tort liability as contemplated by Section 15-3-630 of the South Carolina Code. *See* S.C. Code Ann. § 15-3-630; S.C. Code of Regs. Ann. § 6-626(1) ("All manufactures . . . to the extent of their work, shall be subject to the provisions of Section 15-3-630.") Section 15-3-630 contemplates tort actions against architects, engineers, and contractors upon completion of applicable portions of a construction project. Among the types of actions specifically contemplated by this statute are "action[s] to recover damages for economic or monetary loss" as well as actions against "manufacturers of components." S.C. Code Ann. §§ 15-3-640(4) & (9). Further still, R-Anell itself conceded it was subject to these extra-contractual duties. *See* (Trans. p. 364-65) (R. ___) (R-Anell's witness Mr. Hathcock conceded, with regards to the Christofoli House, that "this home was subject to the National Manufactured Housing Construction and Safety Standards Act").

In sum, R-Anell was subject to the duties which arise outside of, and independent from, any contract. That R-Anell may also have such duties by contract does not change the analysis. As a result, the trial court erred in finding Homemax's tort claim for negligence was barred by the economic loss rule. Therefore, this Court should reverse and remand the matter for a new trial.

III. The trial court erred in excluding relevant email evidence that R-Anell had problems with the waterproof wrapping it put on houses.

The trial court excluded this email evidence on the basis that it was not relevant. (Trans. p 137 (ruling “it is not relevant to the ultimate issue in this case.”) (R. ___). That was error.

A. Standard of Review regarding the erroneous exclusion of evidence.

The admission of evidence is within the discretion of the trial court, however, the exclusion of relevant evidence is an abuse of discretion. *State v. White*, 425 S.C. 304, 311, 821 S.E.2d 523, 527 (Ct. App. 2018) (“Therefore, we find the trial court abused its discretion in excluding the [evidence] because it was relevant[.]”); *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (“An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.”); *see also Burke v. Republic Parking Sys.*, 421 S.C. 553, 561, 808 S.E.2d 626, 630 (Ct. App. 2017)(recognizing that generally there is “a reasonable probability the jury’s verdict was influenced by the excluded evidence [when] the jury was not permitted to hear and consider all relevant evidence relating to” the issues before it.).

B. Law and Analysis regarding the erroneous exclusion of evidence.

Generally, “all relevant evidence is admissible.” *Pagan*, 369 S.C. at 210, 631 S.E.2d at 266; *citing* Rule 402, SCRE and *State v. Saltz*, 346 S.C. 114, 551 S.E.2d 240 (2001). Relevancy is generally accepted to be a low bar. Relevant evidence is defined as “evidence having **any** tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE (emphasis added). “Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved.” *State v. Sweat*, 362 S.C. 117, 126-27, 606 S.E.2d

508, 513 (Ct. App. 2004). Evidence need only be “logically relevant” and not a necessary element of the case. *Id.*

The email evidence in question is a thread of four emails between R-Anell and the delivery company that delivered the Christofoli House and that were exchanged on the very day the Christofoli House was delivered. (Def. Ex. 12) (R. __). The thread begins with a complaint that one of the Christofoli modules, particularly “THE A side is loaded down with parts [and] the driver said this house weight [sic] too big and heavy to be delivering parts” and asks if it is possible to move some parts to the other unit. (R. __). The second half of the email thread recounts an effort on the part of the driver, who would be delivering the Christofoli House, to get additional rolls of tape to use for the purpose of repairing problems with the plastic wrapping during transit. (R. __). The reason the driver needed these additional roles of tape was because he had used all his tape the day before. The email explains; “yesterday they had all kinds of problems with [the] plastic” wrapping on the house they delivered.” (R. __). In response, R-Anell thanks the delivery company for fixing the problems with the plastic wrap the day before and recognizes that “Unfortunately [trouble with the plastic] happens from time to time” and confirming the driver was provided two rolls of tape for the Christofoli delivery. (R. __).

The email thread is relevant for a variety of reasons. First, it outlines that Christofoli unit A—the unit that ultimately suffered damage—was manufactured in such a way that it was unsafe for delivery by being too heavy and/or overloaded with parts. (R. __) (email subject line “40876”); *see also* (Trans. p. 143) (R. __) (testimony reflecting unit 40876A was the Christofoli unit that suffered water damage). While the email evidences a request to move some parts from unit A to unit B, there is no response to this inquiry. (R. __). This email correspondence creates several relevant inferences. For example, the unexpected weight of unit A could be the result of it having

taken on water damage while in R-Anell's storage facility prior to delivery to Homemax. *Accord* Rule 401, SCRE (relevant evidence is "evidence having **any** tendency to make the existence of any fact that is of consequence . . . more probable or less probable") (emphasis added).

Further, this evidence equally gives rise to the inference that damage to Christofoli unit A could have been the result of being transported while in an overloaded state. Finally, this email also gives rise to the inference that if parts were moved from unit A to unit B to correct the overloading problem, that damage to the plastic wrapping could have occurred when these parts were being offloaded from unit A. Any of these inferences demonstrate the relevancy of this email to the facts of this case. *Id. (supra)*.

Secondly, the portion of the email thread discussing problems with the wrapping on the house delivered the previous day is also relevant. Here, R-Anell has conceded that in order to protect the homes from water damage, it has a duty to properly wrap the homes before they are shipped. (Trans p. 109) (R. __) (suggesting this duty arose independent of contract). Moreover, when it comes to the wrapping, R-Anell testified that the Christofoli House was wrapped the same as all the other houses it manufactured and shipped. (Trans. p. 103) (R. __) (Phillip Hathcock testified that the Christofoli House was "wrapped . . . just like [] all the other ones that we sent out there."); (Trans p. 112) (R. __). (Phillip Hathcock conceded "again, I mean, we wrap them all the same way."); (Trans. p. 106) (R. __). (R-Anell conceded it had a duty and obligation to "properly wrap" the houses).

Because R-Anell has equated the propriety of the wrapping on the Christofoli House with the quality of its wrapping on all other houses, it cannot reasonably be said that the quality of the wrapping on the house delivered the day before is not logically or rationally connected to the quality of the wrap on the Christofoli house. *See generally, Toole v. Salter*, 249 S.C. 354, 361, 154

S.E.2d 434, 437 (1967) (“[i]n determining a dispute concerning the relevancy of . . . evidence, the question to be resolved is as to whether there is a logical or rational connection between the fact which is sought to be presented and a matter of fact which has been made an issue in the case.”).

To put it simply, by testifying that its wrapping on the Christofoli House was of the same quality as all other houses, R-Anell directly made the quality of the wrapping on other houses—including the one delivered the day before—relevant, and the email in question speaks directly to this point. The email offers direct evidence that “trouble with the plastic [wrapping]” is not uncommon, but rather something that “[u]nfortunately happens from time to time.” (Ex. 12) (R. __). Further, this email which is dated the same day that the Christofoli House was shipped provides circumstantial evidence that R-Anell was on notice that homes shipped during this time frame were experiencing problems with the plastic wrapping and it took no additional action to ensure the Christofoli House was not experiencing the same or similar problems. (*Id.*) (R. __).

Moreover, R-Anell testified that the wrapping for the Christofoli House is affixed to the house with mechanical fasteners not tape. (Trans. p. 108) (R. __). Yet, despite having knowledge of “trouble with the plastic [wrap]” from the day previous, this email correspondence demonstrates that R-Anell provided tape, rather than mechanical fasteners, to the transportation team to address these problems. (Ex. 12) (R. __). This, despite R-Anell knowing the Christofoli House would be sitting outside for a period of time because the homesite was not ready. (Trans. pp. 112-13) (R. __). This serves as, yet another, logical connection rendering the email relevant to the instant case.

Finally, this email creates the inference that rather than fulfilling its duty to ensure the house was properly wrapped, R-Anell simply passed the buck to the delivery company. This email, as well as the inferences it creates, makes it more likely that R-Anell failed to properly wrap the Christofoli House and makes it more likely than not that the damage to the Christofoli House

occurred while it was sitting at R-Anell's facility before it was ever shipped to Homemax. *See* Rule 401, SCRE ("Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). However, the jury was never given the opportunity to consider this relevant evidence.

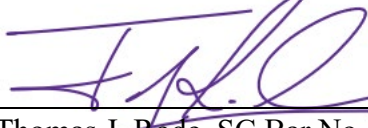
Therefore, the trial court abused its discretion in finding this evidence was not relevant, and this Court should reverse and remand for a new trial.

CONCLUSION

For the reasons stated above this Court should reverse the trial court's award of prejudgment interest, and additionally, or in the alternative, reverse and remand the matter for a new trial.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.



Thomas J. Rode, SC Bar No. 77480
15 Middle Atlantic Wharf
Charleston, SC 29401
Phone: 843-937-8000
Fax: 843-937-4200
Attorneys for the Appellant

MIKE KELLY LAW GROUP, LLC

Bradley D. Hewett S.C. Bar No. 77924
1523 Huger Street, Suite A
Columbia, SC 29201
Phone: 803-726-0123
Additional Counsel for Appellant