

RECEIVED

Feb 03 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2021-000658
Civil Action No. 2018-CP-32-03103

R-Anell Housing Group, LLCRespondent,

v.

Homemax, LLCAppellant.

INITIAL BRIEF OF RESPONDENTS

James S. Murray (SC Bar No. 73307)
Robert P. Mangum (SC Bar No. 103904)
Turner Padget Graham Laney, PA
209 Seventh Street, Third Floor
Augusta, GA 30901
jmurray@turnerpadget.com
rmangum@turnerpadget.com
706-722-7543
Counsel for Respondent R-Anell

TABLE OF CONTENTS

Table of Authorities	iii
Statement of Issues on Appeal	1
Statement of the Case	1
Statement of Facts.....	2
Arguments.....	6
I. The trial court properly found that the jury award was a liquidated sum certain and therefore properly applied statutory pre-judgment interest pursuant to S.C. Code Ann. § 34-31-20, and any argument as to the pleadings should not be considered by this Court because those arguments were neither raised nor ruled upon in the trial court	6
A. Standard of Review.....	7
B. Argument	7
1. R-Anell properly requested statutory interest, but to the extent it may not have done so, Homemax waived its pleading argument by failing to raise the issue at trial.	8
2. The contract for the Brown Home was for a sum certain	10
3. The amount claimed on the Brown Home contract was due and payable as of March 24, 2018	13
II. The trial court properly granted R-Anell’s motion for directed verdict on Homemax’s negligence counterclaim because the economic loss rule applies to bar negligence claims when the relationship between the parties is governed by a commercial contract.....	16
A. Standard of Review.....	16
B. Argument	16
III. The trial court properly excluded the email chain referencing a prior modular home, as it was not relevant to the issues presented at trial, and it would have been overly prejudicial to R-Anell to admit the email	20
A. Standard of Review.....	20

B. Argument	21
Conclusion	25

TABLE OF AUTHORITIES

State Cases

<i>Babb v. Rothrock</i> , 310 S.C. 350, 426 S.E.2d 789 (1993)	8,13
<i>Bishop Logging Co. v. John Deere Indus. Equip. Co.</i> , 317 S.C. 520, 455 S.E.2d 183 (Ct. App. 1995).....	17
<i>Butler Contracting, Inc. v. Court St., LLC</i> , 369 S.C. 121, 631 S.E.2d 252 (2006).....	7,10
<i>Calhoun v. Calhoun</i> , 339 S.C. 96, 529 S.E.2d 14 (2000)	8
<i>Dixie Bell, Inc. v. Redd</i> , 376 S.C. 361, 656 S.E.2d 765 (Ct. App. 2007)	8
<i>First State Sav. & Loan v. Phelps</i> , 299 S.C. 441, 385 S.E.2d 821 (1989).....	16
<i>Future Grp. v. Nationsbank</i> , 324 S.C. 89, 478 S.E.2d 45 (1996)	13,14,15
<i>Henson v. City of Georgetown</i> , 358 S.C. 133, 594 S.E.2d 499 (Ct. App. 2004)	16,20
<i>Historic Charleston Holdings, LLC v. Mallon</i> , 381 S.C. 417, 673 S.E.2d 448 (2009)	7
<i>Holmes v. Haynsworth, Sinkler & Boyd, P.A.</i> , 408 S.C. 620, 760 S.E.2d 399 (2014)	7
<i>I’On, L.L.C. v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000)	9,24
<i>Johnson v. Sam English Grading, Inc.</i> , 412 S.C. 433, 772 S.E.2d 544 (Ct. App. 2015)	21
<i>Kennedy v. Columbia Lumber & Mfg. Co.</i> , 299 S.C. 335, 384 S.E.2d 730 (1989)	17,19,20
<i>McKissick v. J.F. Cleckley & Co.</i> , 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996)	16
<i>Patton v. Miller</i> , 420 S.C. 471, 804 S.E.2d 252 (2017)	9
<i>QHG of Lake City, Inc. v. McCutcheon</i> , 360 S.C. 196, 600 S.E.2d 105 (Ct. App. 2004)	8, 13
<i>Quality Towing, Inc. v. City of Myrtle Beach</i> , 340 S.C. 29, 530 S.E.2d 369 (2000)	9
<i>Sapp v. Ford Motor Co.</i> , 386 S.C. 143, 687 S.E.2d 47 (2009).....	17,18,19,20
<i>State v. Brown</i> , 344 S.C. 70, 543 S.E.2d 552 (2001).....	23
<i>State v. Kromah</i> , 401 S.C. 340, 737 S.E.2d 490 (2013)	21,24
<i>State v. Lee</i> , 399 S.C. 521, 732 S.E.2d 225 (Ct. App. 2012)	24
<i>Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.</i> , 320 S.C. 4, 463 S.E.2d 85 (1995)	19
<i>Willis v. Floyd Brace Co.</i> , 279 S.C. 458, 309 S.E.2d 295 (Ct. App. 1983)	22
<i>Zinn v. CFI Sales & Mktg.</i> , 415 S.C. 93, 780 S.E.2d 611 (Ct. App. 2015)	16

Federal Cases

<i>Belfor USA Grp., Inc. v. Banks</i> , 2016 U.S. Dist. LEXIS 91483 (D.S.C. July 14, 2016).....	18,19
<i>Besley v. FCA US LLC</i> , 2016 U.S. Dist. LEXIS 2200 (D.S.C. Jan. 8, 2016).....	18
<i>Charleston Marine Containers, Inc. v. Sherwin-Williams Co.</i> , 165 F. Supp. 3d 457 (D.S.C. 2016)	23
<i>Cox House Moving, Inc. v. Ford Motor Co.</i> , 2006 U.S. Dist. LEXIS 55490 (D.S.C. Aug. 8, 2006)	18
<i>Genesis Telecomms., LLC v. Moore</i> , 2010 U.S. Dist. LEXIS 142483 (D.S.C. Oct. 18, 2010).....	23
<i>Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.</i> , 843 F.Supp. 1027 (D.S.C. 1993).....	9, 17, 19
<i>Palmetto Linen Serv. v. U.N.X., Inc.</i> , 205 F.3d 126 (4th Cir. 2000).....	17
<i>Tri-Lift NC, Inc. v. Drive Auto. Indus. of Am.</i> , 2021 U.S. Dist. LEXIS 6954 (D.S.C. Jan. 13, 2021).....	18
<i>Wildwood Indus. v. Genuine Mach. Design, Inc.</i> , 2007 U.S. Dist. LEXIS 77165 (N.D. Ind. Oct. 15, 2007)	12

Statutes

S.C. Code Ann. § 34-31-20..... *passim*
S.C. Code Ann. § 36-2-202..... 11,14
S.C. Code Ann. § 36-2-207..... 11,12,14
S.C. Code Ann. § 36-2-310..... 14
S.C. Code Ann. § 36-2-509..... 25

Other Authorities

Rule 8, SCRCP..... 9
Rule 402, SCRE..... 21
Rule 403, SCRE..... 24
Rule 406, SCRE..... 23

STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court properly grant R-Anell’s request for statutory pre-judgment interest pursuant to S.C. Code Ann. § 34-31-20 where the trial court found the evidence presented at trial showed a liquidated amount of \$142,292.80 was due on the contract as of March 24, 2018, and the only arguments made in opposition to the application of statutory pre-judgment interest by Homemax at trial were that this amount due was neither a liquidated amount nor an account stated?
- II. Did the trial court properly grant R-Anell’s motion for directed verdict on Homemax’s negligence counterclaim on the basis of the economic loss rule, where the mandate of the appellate courts in this State is that, except for narrow exceptions, the economic loss rule applies to bar negligence claims?
- III. Did the trial court properly exclude from evidence an email that is irrelevant to the ultimate issues in this case and is in fact pertinent only to an entirely different modular home that is unrelated to either of the homes at issue in the matter before the trial court?

STATEMENT OF THE CASE

Trial commenced on Respondent R-Anell (“R-Anell”)’s claim for breach of contract and Appellant Homemax (“Homemax”)’s counterclaims for breach of contract, unjust enrichment, and negligence on June 7, 2021. (Compl.; Def. Answer and Counterclaim.; *see generally* Trial Transcript). In relevant part to this appeal, at the conclusion of R-Anell’s case-in-chief at trial, Homemax moved for directed verdict on R-Anell’s request for an award of statutory pre-judgment interest pursuant to S.C. Code Ann. § 34-31-20(A). (Trial Transcript, p. 268-273 (hereafter, “Tr.”)). The Circuit Court denied this motion. (*Id.*, p. 273). At the conclusion of Homemax’s case-in-chief, in relevant part, R-Anell moved for a directed verdict against

Homemax's counterclaim for negligence.¹ The trial court granted R-Anell's directed verdict motion as to Homemax's negligence claim. (*Id.*, p. 365-380). The jury returned a verdict in favor of R-Anell's breach of contract claim in the amount of \$142,292.80. (*See Verdict*). R-Anell then moved the trial court to apply the statutory pre-judgment interest rate of 8.75% to the jury's verdict on the breach of contract claim. (*Id.*, p. 478-481). The trial court granted this motion. (*Id.*, p. 480-481); *see also* June 11 Order.

STATEMENT OF FACTS

Respondent R-Anell will state the operative facts briefly, then provide rebuttal to specific statements from Appellant Homemax. Typically, R-Anell and Homemax would enter into a contract in the following manner: Homemax would meet with an end-consumer. (Tr., p. 57-58). If the end-consumer desired to purchase a home, then Homemax would submit a request for the desired home to R-Anell. (*Id.*). Then R-Anell would issue a quote, which Homemax would sign and return if it agreed to the terms. (*Id.*). Homemax would then sell the home to the end-consumer, with whom it had a separate sales contract. (*See Id.*, p. 280; 321-322).

R-Anell would inform Homemax when the ordered homes were ready to go into production. (Tr., p. 62). If Homemax was not ready to accept delivery on the projected completion date, then R-Anell expected Homemax to inform it so at that time. (*Id.*). Two to four weeks prior to completion of the manufacturing process, R-Anell would again follow up to confirm shipment and the method of payment. (*Id.*, p. 66). After R-Anell completed production, it would turn over the modular homes to a third-party shipping company. (*Id.*, p. 70-71). R-Anell expected modular homes to ship within three-to-five days of production. (*Id.*, p. 68).

¹ Homemax orally agreed to dismiss its unjust enrichment claim at trial, and R-Anell's other directed verdict motions were denied. (*Id.*, p. 365-66; 391; 396-397).

Upon receipt of shipment, Homemax was required to sign a delivery inspection form. (*See* Pl. Ex. 14; Tr., p. 327-328). Delivery could be made either at Homemax's commercial lot, or the final home site. (Tr., p. 68-69). R-Anell typically does not have contractual duties after delivery, but it did offer minimal trim services to Homemax due to Homemax's inexperience in the modular home industry. (*See Id.*, p. 58-59).

Here, Homemax ordered a home for the Christofoli family (hereafter, the "Christofoli Home") in late 2016. (Tr., p. 283). R-Anell and Homemax agree that there was a binding contract between them on the Christofoli Home. (*Id.*, p. 103; 106). R-Anell completed the Christofoli Home on May 4, 2017, but Homemax delayed the delivery date. (*Id.*, p. 210-11). It was shipped on May 17, 2017. (Pl. Ex. 12). An employee of Homemax signed the delivery inspection form on the date of delivery certifying there were no damages to the Christofoli Home upon inspection. (Pl. Ex. 14). The Christofoli Home sat on Homemax's lot for 40 days. (Tr., p. 285).

After 40 days, the Christofoli Home was shipped to the final destination. (*See* Tr., p. 362). Upon unwrapping it, Homemax determined the home was water damaged in "Unit A." (*Id.*, p. 288; Homemax Brief., p. 3). R-Anell and Homemax worked together for some months attempting to remediate the damages to the Christofoli Home. (Tr., p. 227-228; 236-237; 291).

During the time while Homemax and R-Anell were working together to remediate the water damage to the Christofoli Home, which R-Anell undertook gratuitously despite no responsibility to do so, Homemax contracted with the Brown family, and it ordered a home from R-Anell in May 2017 (hereafter, the "Brown Home"). (*See* Pl. Ex. 3; Tr., p. 159-160; Tr., p. 321-322). Homemax delayed delivery of that house for approximately 3 months. (Tr., p. 328). Homemax finally authorized delivery of the Brown Home on March 24, 2018. (*See* Pl. Ex. 4).

After the Brown Home was delivered, Homemax refused to pay for it. (Tr., p. 333-334). An invoice issued for the delivery date, which R-Anell submitted to Homemax at or prior to delivery, shows the cost of the Brown Home was \$142,292.80. (*See* Pl. Ex. 4; *See* Tr., p. 205-206). Homemax's president, David Fautley, testified that at the time of ordering the home, he intended to pay for it, but he later decided that he would not pay for it, claiming it was due to the money Homemax spent on remediation for the Christofoli Home. (Tr., p. 333-334). The subject lawsuit followed.

R-Anell disputes several statements in Homemax's Statement of Facts, as set forth below. R-Anell disputes that the description of the purchasing and ordering conduct between R-Anell and Homemax was a "course of dealing," which is a legal conclusion unsupported by Homemax's citations. (*See* Homemax Brief, p. 2 (hereinafter, "Homemax Br.")).

Homemax incorrectly suggested that it was assumed that every modular home for Appellant was financed through a floor plan. (Homemax Br., p. 2). Rather, the testimony was that R-Anell called for each sale to determine how the dealer intended to pay. (Tr.,p. 79-80; 204). R-Anell also submitted due-upon-receipt invoices with all modular homes, regardless of payment method. (*Id.*, p. 205-206; *see* Pl. Ex. 4; *see* Pl. Ex. 12).

Few of the statements Homemax made in its brief regarding the wrapping and transport are supported by the record. R-Anell applied a temporary plastic intended only for transport. (Tr., p. 139). To be clear, R-Anell was not responsible for delivering the modular homes to their "final destination," and the testimony and evidence is that R-Anell handed off the modular units to a third-party carrier. (*See Id.*, p. 117). The testimony also demonstrated that sometimes modular homes were delivered to the end-consumer's lot, while other times the modular homes were delivered to the Homemax's lot. (*Id.*, p. 68-69). In addition, while R-Anell hired contractors to

do minimal trim services for some houses, which is not at issue here, the testimony was that this was not standard and only done for inexperienced dealers like Homemax. (*See Id.*, p. 58-59).

It was not R-Anell's fault that the modular units for the Christofoli Home were not able to ship in a timely manner, nor is it true that R-Anell forced shipment for "budgetary and accounting purposes." (*See Homemax Br.*, p. 3). Homemax's deliveries were chronically late shipping due to Homemax's own delays. (*See Tr.*, p. 168-169; 201-202). It was not a favor to R-Anell for Homemax to accept delivery at its commercial lot; this was expected if the end-consumer's lot was not ready once the modular home was complete. (*See Id.*).

There is no reasonable calculation of damages that would result in Homemax having suffered \$203,301.96 in damages. (*See Homemax Br.*, p. 3). Even at trial, counsel for the Homemax admitted that Homemax could only recover \$110,000, and that included a \$30,000 claim for lost profits for which there was essentially no evidence presented. (*Tr.*, p. 316-317).

Contrary to the statement in Homemax's brief, there was no possibility that R-Anell might have intended "to abandon the Brown Home" after R-Anell terminated the volume dealer relationship with Homemax. (*Homemax Br.*, p. 4). The testimony at trial established that R-Anell had already completed the Brown Home at the time it terminated the volume dealer agreement. (*See Tr.*, p. 84; 190-191). The only reason it did not ship earlier was because, yet again, Homemax delayed delivery. (*See Id.*, p. 201-202).

On the matter of whether the Brown Home was to be COD ("cash-on-delivery") or floor-plan financed, Homemax omits the testimony that someone from Homemax had to have asked for the home to be paid COD at some point prior to production, then later changed it to floor plan. (*Tr.*, p. 205-206). That testimony indicates Homemax was a cause of the confusion regarding payment. (*See Id.*). And while Homemax claims in its brief that "all parties believed

the floor plan was approved,” Homemax’s president knew at the time it was not approved, and it was never going to be approved. (Homemax Br., p. 5; Tr., p. 325-326; 334).

R-Anell disputes that it was “months” before it sought payment from Homemax on the Brown Home. (*See* Homemax Br., p. 5). The evidence is that payment was due on delivery, whether by COD or floor-plan. As the date on the invoice and the testimony both indicate, the invoice was generated and the price was transmitted to Appellant on or before the date of delivery. (Pl. Ex. 4; Tr., p. 205-206). Mr. Fautley testified R-Anell got paid “up front” on floor-planned units, and COD payments were to be demanded at delivery. (Tr., p. 196-197; 287). The testimony was that R-Anell understood something had gone wrong regarding payment and followed up with Homemax approximately three weeks after delivery. (*Id.*, p. 85-86).

Homemax misstates the testimony and evidence regarding payment for the Brown Home, and the amount spent by Homemax on the Christofoli Home in the months following the delivery of the Brown Home. (*See* Homemax Br., p. 5-6). As of March 24, 2018, though Homemax claims it spent an amount “exceeding the amount demanded” by R-Anell for the Brown Home in its brief, Homemax only spent approximately \$9,000 on remediation of the Christofoli Home water damage by that time. (*See* Pl. Ex. 24; *See* Tr., p. 351-358). The remaining expenses were costs that it would have incurred regardless of the water damage issue. (*See* Tr., p. 399-402; *See* Pl. Ex. 24). By comparison, R-Anell had spent a little more than \$44,000. (Tr., p. 152; *See* Pl. Ex. 26). Homemax did not suffer the bulk of its supposed “damages” until it settled the Christofoli lawsuit in 2019. (*See* Pl. Ex. 24). Homemax later sold the Christofoli Home and lot for \$280,000. (*See* Pl. Ex. 24).

ARGUMENTS

I. The trial court properly found that the jury award was a liquidated sum certain and

therefore properly applied statutory pre-judgment interest pursuant to S.C. Code Ann. § 34-31-20, and any argument as to the pleadings should not be considered by this Court because those arguments were neither raised nor ruled upon in the trial court.

A. Standard of Review

As to the statutory interest issue, “[t]he award of prejudgment interest will not be disturbed on appeal unless the trial court committed an abuse of discretion.” *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 435, 673 S.E.2d 448, 457-58 (2009) (citing *Jacobs v. Am. Mut. Fire Ins. Co.*, 287 S.C. 541, 544, 340 S.E.2d 142, 143 (1986)). “An abuse of discretion occurs when the circuit court’s rulings ‘either lack evidentiary support or are controlled by an error of law.’” *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 635, 760 S.E.2d 399, 407 (2014) (citing *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012)).

B. Argument

Homemax set forth three grounds for its contention that the trial court improperly applied pre-judgment interest under S.C. Code Ann. § 34-31-20(A): (1) that the prejudgment interest was not pleaded; (2) that the amount requested at trial was not a sum certain as required by law; and (3) that there was no evidence the amount claimed was payable as of March 24, 2018. (*See generally* Homemax Br., p. 7-16). None of these arguments has merit. The trial court did not abuse its discretion in awarding statutory prejudgment interest to R-Anell.

“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). Prejudgment interest may be awarded by the court “when a monetary obligation is a sum certain, or is capable of being reduced to certainty, accruing from the time payment may be demanded either by the agreement of the parties or the operation of law.” *Historic Charleston Holdings,*

381 S.C. at 435, 673 S.E.2d at 457 (citing *Butler Contr., Inc. v. Court St., LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006)). “The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest.” *Babb v. Rothrock*, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993). “The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.” *QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 205, 600 S.E.2d 105, 109 (Ct. App. 2004) (citing *Babb*, 310 S.C. at 353, 426 S.E.2d at 791.).

1. R-Anell properly requested statutory interest, but to the extent it may not have done so, Homemax waived its pleading argument by failing to raise the issue at trial.

Contrary to Homemax’s contention that R-Anell has failed to adequately plead its request for pre-judgment interest, R-Anell did plead its request for interest in its Complaint. (*See* Homemax Br., p. 9-10). R-Anell was not required to do so, however, as it pleaded a sum certain contract. Furthermore, even if R-Anell failed to meet the pleading burden, Homemax raises this argument for the first time on appeal, and this Court should refuse to consider it.

As an initial matter, the Supreme Court has held that “while pre-judgment interest must be pled in order to be recovered, *except in* cases involving an agreement to pay a sum certain...” *Calhoun v. Calhoun*, 339 S.C. 96, 102, 529 S.E.2d 14, 18 (2000) (emphasis added); *see also* *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 367, 656 S.E.2d 765, 768 (Ct. App. 2007) (explaining *Calhoun* as “finding pre-judgment interest must be pled absent an agreement to pay a sum certain.”). This case involves a sum certain, as R-Anell addresses in the section below, so R-Anell need not have pleaded prejudgment interest at all. For now, it suffices to say this was pleaded as a sum certain of \$142,292.80 in R-Anell’s Complaint, and this was the exact award

rendered by the jury prior to the application of interest. (*See* Compl., ¶ 9; *see also* Verdict).

Further, even if R-Anell was required to plead prejudgment interest, it did so by requesting prejudgment interest on its actual damages in both its pleadings and its prayer for relief. (*See* Complaint, ¶ 16 and Wherefore Clause (“Plaintiff is entitled to an award for actual damages, with interest thereon, for Defendant’s breach of contract.”)).² The South Carolina Rules of Civil Procedure require only notice pleading, and Homemax cannot reasonably say that it had no notice that R-Anell intended to pursue prejudgment interest on the Brown Home contract in this matter. *See Patton v. Miller*, 420 S.C. 471, 492, 804 S.E.2d 252, 263 (2017) (stating that “[t]oday, however, we operate under the far more flexible notice pleading provisions of the Rules of Civil Procedure); *see also Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000) (citing Rule 8(f), SCRCP for the proposition that “[p]leadings are to be liberally construed ‘to do substantial justice to all parties.’”). Homemax cited no case law holding that a plaintiff must invoke the statute in its pleadings to request prejudgment interest at trial.

Even if Homemax was correct on the law, and even if Homemax was correct that R-Anell had not sufficiently pleaded prejudgment interest, Homemax’s argument was not preserved for appeal. To preserve an issue for appeal, “the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Counsel for Homemax had two opportunities to address the statutory prejudgment

² Homemax claims counsel for R-Anell “conceded” that the interest pleaded in the Complaint was not statutory prejudgment interest. (Homemax Br., p. 9). This a complete misrepresentation of the trial transcript. (*See* Tr., p. 272-273) (stating that R-Anell is entitled to 8.75% interest by operation of law, but whether there was a contract for 7% interest could be an issue for the jury.).

interest argument at trial: Once on Homemax’s directed verdict that was denied, and the other at the conclusion of trial. (Tr., p. 268-273; 478-481). In both instances, Homemax argued only that the contract between Homemax and R-Anell was not a “sum certain” or an “account stated.” (*Id.*). Homemax never argued the pleading issue, and so this argument is unpreserved and inappropriate for consideration on appeal.

For the foregoing reasons, Homemax has no argument that R-Anell failed to properly plead the statutory interest it requested, and the court granted pursuant to S.C. Code Ann. § 34-31-20(A).

2. The contract for the Brown Home was for a sum certain.

Homemax next maintains the Brown Home contract was not for a sum certain. (Homemax Br., p. 11-12). Homemax’s argument appears to be that because R-Anell drafted the invoice it submitted for delivery of the Brown Home in March 2018, and because the price on the invoice was slightly lower than the original quoted price for the Brown Home in September 2017, the contract cannot be for a sum certain. (*Id.*). This argument fails to consider the leading decision in this State on liquidated sums and sums certain, and the law under the Uniform Commercial Code, as adopted by this State, that underlies the contract for the Brown Home.³

A claim is for a liquidated sum certain, if the damages claimed are “certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties. *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006) (internal citations omitted). In *Butler*, the Supreme Court further explained that “the fact that the amount due is disputed by the opposing party does not render the claim unliquidated for

³ The court charged the jury, upon consent of the parties, that the UCC governs this contract. (*See, e.g.*, Tr., p. 407; 464-465).

the purposes of an award of prejudgment interest,” and “[t]he proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.” *Id.* at 133, 259. “[I]t is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable.” *Id.* at 134, 259.

The March 24, 2018 invoice controls the terms of agreement. Terms in a confirmatory memorandum are the final expression of the terms between the parties. S.C. Code Ann. § 36-2-202. Terms in a written confirmation between merchants are part of the contract unless: “(2)(a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.” S.C. Code Ann. § 36-2-207(1)-(2). A term “materially alters” the contract if it results “in surprise or hardship if incorporated without express awareness by the other party.” S.C. Code Ann. § 36-2-207, Cmt. 4. “If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to.” S.C. Code Ann. § 36-2-207, Cmt. 6.

Homemax claims the “trial court conflates the existence of an invoice with creating a *per se* entitlement to prejudgment interest.” (Homemax Br., p. 10). But the invoice here did not merely “exist.” The testimony at trial indicated that the March 24, 2018 invoice was sent to Homemax at or prior to delivery of the Brown Home units. (Tr., p. 205-206). Homemax’s pleadings admit that it received the invoice. Def. Answer and Counterclaims, ¶ 9 (“Defendant admits only that Plaintiff has submitted an invoice to Defendant for the Home.”). The invoice set forth a price of \$142,292.80. (Pl. Ex. 4). As Homemax notes, the September 2017 quote for the Brown Home states that the price is subject to verification. (Pl. Ex. 3). The March 24, 2018

invoice is the verification of the price quotation. (*See* Pl. Ex. 4). Homemax's complaint on appeal that there was no "mathematical formula" for calculation of the price misses the mark, as there was no need for a mathematical formula: R-Anell confirmed the price by sending the confirmatory invoice, which it is entitled to do under the UCC. S.C. Code Ann. § 36-2-202; S.C. Code Ann. § 36-2-207.

The only question, then, is whether the adjusted price term is violative of any of the three criteria listed above in Section 2-207 such that it cannot become part of the contract between the parties. If it does not violate any of the three, then it becomes the written expression of the agreement between the parties. There was no evidence submitted at trial that the contract for the Brown Home was specifically limited to the terms of the original offer. In fact, the price was explicitly subject to later verification. (*See* Pl. Ex. 3 ("Quote: Price subject to verification.")). There was no evidence at trial of notification of objection given by Homemax to R-Anell after receipt of the invoice, whether due to price or otherwise. David Fautley, president for Homemax, admitted at trial that he accepted delivery of Brown Home modular units, never objected to delivery, never later rejected delivery, and that R-Anell had consistently demanded the principal amount of \$142,292.80 since delivery. (Tr., p. 325-326; 334). These unconvertible facts resolve at least concerns of Section 2-207(2)(a) and (2)(c).

The remaining question is whether a \$368 (approximately 0.2%) downward adjustment from the quotation price to the verified price in the March 24, 2018 invoice materially altered the contract such that it resulted "in surprise or hardship" to Homemax. *See* S.C. Code Ann. 36-2-207, Cmt. 4. The appellate courts of South Carolina have not addressed a UCC case in which a downward price adjustment in a final confirmatory memorandum was at-issue, but one other court has held that a downward adjustment in price is not a material alteration resulting in

surprise or hardship to the buyer. *Wildwood Indus. v. Genuine Mach. Design, Inc.*, 2007 U.S. Dist. LEXIS 77165, at *21 (N.D. Ind. Oct. 15, 2007) (stating “[t]he price of the machines reflected in the Purchase Order was approximately two percent less than the price reflected in the Machinery Quotation. These alterations did not affect the terms of the agreement to such a degree that the Purchase Order would be interpreted to reject the initial offer.”). It is hard to imagine that a buyer could successfully plead surprise or hardship under any circumstances when they receive a 0.2% discount on a product for which they contracted to purchase. The verified price in the invoice is therefore is not a material alteration to the contract.

Under the UCC, then, the March 24, 2018 invoice is a final expression of the agreement between the parties as to price. (*See* Pl. Ex. 4). That Homemax fails to cite a single UCC provision in its brief despite both parties arguing extensively upon it at trial on this point is telling. The invoice price of \$142,292.80 is a sum certain as of March 24, 2018, as it fixes the “measure of recovery... at the time the claim arose.” *QHG of Lake City*, 360 S.C. at 205, 600 S.E.2d at 109 (Ct. App. 2004) (citations omitted). The trial court correctly pointed out that this is exactly the liquidated sum that the jury rendered its verdict upon. (Tr., p. 480-481.).

Therefore, Homemax’s argument that the contract price was not a sum certain, and the application of statutory prejudgment interest was an error of law by the trial court, is unavailing.

3. The amount claimed on the Brown Home was due and payable as of March 24, 2018.

Homemax argues that there is no evidence the contract price of \$142,292.80 was demandable as of the date of delivery on March 24, 2018 despite the first term of the invoice stating it is “Due Upon Receipt” because they had unwritten and unexplained “special terms” under the contract. (Homemax Br., p. 12-16; *See also* Pl. Ex. 4). This is incorrect.

“Prejudgment interest is allowed on obligations to pay money from the time when

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.” *Future Grp. v. Nationsbank*, 324 S.C. 89, 101, 478 S.E.2d 45, 51 (1996), overruled on other grounds, *Paradis v. Charleston Cty. Sch. Dist.*, Op. No. 28030, 2021 S.C. LEXIS 56, *12, 2021 WL 1992245 (citing *Babb v. Rothrock*, 310 S.C. 350, 426 S.E.2d 789 (1993)). The default under the UCC is that payment “payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery” unless otherwise agreed. S.C. Code Ann. § 36-2-310(a). As explained above, a written confirmatory memorandum is the final expression of the agreement between the parties, and between merchants, any additional terms in the final confirmatory memorandum are contract terms except under specified conditions. S.C. Code Ann. § 36-2-202; S.C. Code Ann. § 36-2-207. Parole evidence of “course of performance, course of dealing, or usage of trade” may only be admitted to supplement or explain, but not to contradict, the terms of a contract. S.C. Code Ann. § 36-2-202.

Homemax’s argument can be summarized as follows: The March 24, 2018 invoice says it is due upon receipt, but Homemax had special terms under the contract because it typically financed its transactions with R-Anell, which therefore means the contract price was not demandable at the time of delivery. (*See generally* Homemax Br., p. 12-16). Homemax asserts this is confirmed by the fact that because of confusion over whether the transaction was COD or floor plan financed, R-Anell did not immediately realize it had not been paid. (*Id.*, p. 15).

There are a number of problems with this argument. First, the UCC default rule is that when goods are shipped, payment is due at the time and place of delivery. S.C. Code Ann. § 36-2-310(a). Given that the goods here were both shipped and delivered on March 24, 2018, the default statutory due date of payment is March 24, 2018. (*See* Pl. Ex. 4; Pl. Ex. 6). This is when

payment is demandable “by operation of law.” *See Future Grp.*, 324 S.C. at 101, 478 S.E.2d at 51. In addition, the parties “by agreement” established payment was due on March 24, 2018 by the supplemental and uncontradicted terms of the March 24, 2018, invoice which is “Due Upon Receipt.” (*See* Pl. Ex. 4); *see also Future Grp.*, 324 S.C. at 101, 478 S.E.2d at 51.

Homemax can only be correct if it can point to some evidence of “special terms” under the invoice. (*See* Pl. Ex. 4). No evidence of written special terms was offered at trial. Homemax must argue that some evidence of “course of performance, course of dealing, or usage of trade” created “special terms” that rebut the presumption that payment was due on March 24, 2018.

For this, Homemax offers the aforementioned evidence that R-Anell did not realize the Brown Home had not been paid for immediately because Homemax usually financed its homes, and that the invoice states it is to be paid by mail. (Homemax Br., p. 15). On both points, Homemax apparently conflates demand—ed with demand—able. *See Future Grp.*, 324 S.C. at 101, 478 S.E.2d at 51. The standard is that payment must be demandable by a certain date to accrue prejudgment statutory interest, not that it must be demanded on that date. *See Id.*

Addressing the latter point first, nowhere on the invoice does it say it *must* be paid by mail. (*See* Pl. Ex. 4). The invoice simply says to remit payment to R-Anell Housing Group, LLC, and lists an address for the company. This argument would not be availing for Homemax in any event, because while payment might not arrive at R-Anell if mailed on the date of delivery, it does not mean that the payment is not demandable as of that day.

As to the former point, the testimony at trial showed R-Anell expected floor plan financing to be approved by Homemax’s financiers on or before the date of shipment, and that R-Anell would get paid “up front.” (Tr., p. 287). It is not clear why Homemax argues that the purported course of dealing between the parties that sales would be floor plan financed therefore

means it was not demandable on the date of delivery. (*See Homemax Br.*, p. 15). The record is devoid of evidence that payment was demandable on any date later than March 24, 2018, the date set by agreement and operation of law. (*See Pl. Ex. 4*). The reason payment was not immediately demanded in this instance was the confusion created by Homemax. (Tr., p. 205-206). This confusion is irrelevant because payment was demandable on March 24, 2018.

Since payment for the Brown Home was demandable as of March 24, 2018, the trial court correctly applied statutory prejudgment interest pursuant to S.C. Code Ann. § 34-31-20(A).

II. The trial court properly granted R-Anell’s motion for directed verdict on Homemax’s negligence counterclaim because the economic loss rule applies to bar negligence claims when the relationship between the parties is governed by a commercial contract.

A. Standard of Review

As to the directed verdict on Homemax’s negligence counterclaim, an appellate court “must review the evidence and all reasonable inferences therefrom in the light most favorable to the party opposing the granted motion.” *First State Sav. & Loan v. Phelps*, 299 S.C. 441, 446, 385 S.E.2d 821, 824 (1989). The appellate court must “determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor.” *Id.* at 446, 824 (citing *Bultman v. Barber*, 277 S.C. 5, 281 S.E. (2d) 791, 792 (1981)). “The appellate court will reverse the trial court’s ruling on a directed verdict motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law.” *Zinn v. CFI Sales & Mktg.*, 415 S.C. 93, 108, 780 S.E.2d 611, 619 (Ct. App. 2015) (citing *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006)) (punctuation in original omitted for clarity). “An appellant seeking reversal must show error and prejudice.” *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 350, 479 S.E.2d 67, 78 (Ct. App. 1996). There is no prejudice on a directed verdict where another cause of action “subsumed” the issues

relevant to the matter on which the verdict was directed. *See Henson v. City of Georgetown*, 358 S.C. 133, 140, 594 S.E.2d 499, 502 (Ct. App. 2004).

B. Argument

Homemax argues it was error for the trial court to grant a directed verdict in favor of R-Anell on Homemax's negligence counterclaim. (Homemax Br., p. 17-19). Homemax's argument must fail, as the Court correctly applied the economic loss rule to bar Homemax's negligence counterclaim. Even if the directed verdict was not proper, this was harmless error, as the only evidence offered in support of Homemax's negligence claim is the same evidence the jury rejected in rendering a verdict in favor of R-Anell and against Homemax. (*See Verdict*).

“South Carolina’s economic loss rule provides that where a buyer’s expectations in a sale are frustrated because the product does not work properly, the buyer’s remedies are limited to those prescribed by the law of contract.” *Palmetto Linen Serv. v. U.N.X., Inc.*, 205 F.3d 126, 128 (4th Cir. 2000) (citing *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 345, 384 S.E.2d 730, 736 (1989)). This is consistent with a majority of jurisdictions, which do not allow recover in tort on commercial contracts. *See Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 317 S.C. 520, 529, 455 S.E.2d 183, 188 (Ct. App. 1995) (compiling citations from other jurisdictions). “[T]he Uniform Commercial Code, provides the exclusive rights and remedies under the economic loss doctrine to sophisticated parties in a commercial transaction when the product injures only itself and not other property belonging to the plaintiff.” *Id.* at 530, 189 (citing *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F.Supp. 1027 (D.S.C. 1993)). If commercial plaintiffs are permitted to bring negligence claims against parties with whom they contracted, then “the Uniform Commercial Code would be totally eviscerated, and the action of the General Assembly of South Carolina in enacting it would be rendered nugatory.” *Myrtle*

Beach Pipeline, 843 F. Supp. at 1054.

The Supreme Court clarified in *Sapp* that the exception created by *Kennedy* “does not preclude a *homebuyer* from recovering in tort against the developer or builder,” reasoning that “[a] home is typically an individual’s single largest investment and is a completely different type of manufactured good than any other type of product that a consumer will buy...[m]oreover, courts have recognized that the transaction between a builder and a buyer for the sale of a home largely involves inherently unequal bargaining power between the parties.” *Sapp v. Ford Motor Co.*, 386 S.C. 143, 148, 687 S.E.2d 47, 49 (2009) (emphasis added). The matter has not been addressed at the appellate level in South Carolina, but federal courts interpreting South Carolina law have found that a general reference to violation of statutes or industry standard is insufficient to state a tort claim where a commercial contract exists between the parties. *See, e.g., Belfor USA Grp., Inc. v. Banks*, 2016 U.S. Dist. LEXIS 91483, at *19 (D.S.C. July 14, 2016) (holding “vague references to ‘common building practices’ and broad statements of work not being up to ‘code’ are insufficient to state a tort claim); *Cox House Moving, Inc. v. Ford Motor Co.*, 2006 U.S. Dist. LEXIS 55490, at *22 (D.S.C. Aug. 8, 2006) (finding “No South Carolina court has found that the violation of an industry standard can give rise to a special duty”); *accord Tri-Lift NC, Inc. v. Drive Auto. Indus. of Am.*, 2021 U.S. Dist. LEXIS 6954, at *8-9 (D.S.C. Jan. 13, 2021). There is no appellate authority “under South Carolina law to allow an alleged violation of either statutory law or a regulatory standard to serve as an exception to the economic loss rule.” *Besley v. FCA US LLC*, 2016 U.S. Dist. LEXIS 2200, at *14 (D.S.C. Jan. 8, 2016).

The economic loss rule applies to bar Homemax’s negligence counterclaim. This is an instance of a commercial transaction that is governed by the Uniform Commercial Code. (*See, e.g., Tr.*, p. 464-465). The expectations of the parties were set entirely by contract, and any

alleged damages flow, if at all, directly from a failure to perform the contract on the Christofoli Home. (*See Id.*). The damages sought by Homemax on its negligence claim reveal this to be true: Homemax claimed only to have suffered damages in not being able to close on their contract with the Christofoli family and in efforts to repair and remediate the Christofoli Home. Def. Answer and Counterclaims, ¶ 32. To permit Homemax to recover in tort for damages flowing from its contract with R-Anell would “eviscerate” the UCC as adopted by the Legislature and render its provisions “nugatory.” *See Myrtle Beach Pipeline*, 843 F. Supp. at 1054.

Homemax cites *Tommy L. Griffin* as follows: “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.” *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54, 463 S.E.2d 85, 88 (1995); Homemax Br., p. 18. Homemax neglects to include that the Supreme Court also held that in order to show its damages flow from tort rather than contract, a plaintiff must demonstrate that the parties had a “special relationship” such that tort liability is justified. *See Tommy L. Griffin*, 320 S.C. at 55, 463 S.E.2d at 88 (stating “In most instances, a negligence action will not lie when the parties are in privity of contract. When, however, there is a special relationship between the alleged tortfeasor and the injured party not arising [i]n contract, the breach of that duty of care will support a tort action.”).

Homemax has not demonstrated in its brief that R-Anell had a special relationship with Homemax, nor has it offered a single specific extra-contractual duty to which R-Anell was obligated other than vaguely asserting R-Anell is subject to state and federal building codes and regulations. *See Homemax Br.*, p. 18-19. Homemax’s failure to identify this special relationship or duty is fatal to its argument. *See, e.g., Belfor*, 2016 U.S. Dist. LEXIS 91483, at *19 (holding “vague references to ‘common building practices’ and broad statements of work not being up to

‘code’ are insufficient to state a tort claim”).

Homemax also argues it is entitled to claim the residential home buyer exception under *Kennedy*. See generally, *Kennedy*, 299 S.C. at 345, 384 S.E.2d at 736. To permit Homemax to recover in tort pursuant to the *Kennedy* exception would be an enormous expansion of that exception, as neither of the rationales explained in *Sapp* apply to Homemax. *Sapp*, 386 S.C. at 148, 687 S.E.2d at 49. Homemax is admittedly a volume dealer of homes, and so this is not its “single largest investment,” and as a commercial entity, it does not face the “inherently unequal bargaining power” that an individual consumer might face. *Id.* The Supreme Court already once overturned unwarranted expansions of the *Kennedy* exception in *Sapp*, and a reversal of the directed verdict on this point would be just that. See *Id.* at 150, 51.

Even if Homemax were entirely correct on its argument, it cannot show that the directed verdict against its negligence claim was prejudicial at trial. This is because Homemax’s breach of contract counterclaim, which was predicated on entirely the same facts as the negligence counterclaim, went to the jury. (*See Verdict*). In rendering a defense verdict in favor of R-Anell on Homemax’s breach of contract counterclaim, the jury necessarily considered all of Homemax’s evidence regarding the manufacturing and shipping process, and the jury necessarily rejected every construction of the facts put forth by Homemax. (*See Id.*). Because the breach of contract and negligence counterclaims rely on the same operative facts that were already presented at trial, Homemax can make no showing of prejudice. See *Henson v. City of Georgetown*, 358 S.C. 133, 140, 594 S.E.2d 499, 502 (Ct. App. 2004).

Therefore, the economic loss rule operates to bar Homemax’s negligence counterclaim, and the trial court committed no error of law in granting R-Anell’s motion for directed verdict. To the extent R-Anell was not entitled to directed verdict, Homemax has not and cannot show

prejudice that would justify remand for a new trial, since its negligence claim is predicated entirely on the same operative facts as its breach of contract claim.

III. The trial court properly excluded the email chain referencing a prior modular home, as it was not relevant to the issues presented at trial, and it would have been overly prejudicial to R-Anell to admit the email.

A. Standard of Review

As to the evidentiary issue, the admissibility of evidence is within the discretion of the trial court. *Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 448, 772 S.E.2d 544, 551 (Ct. App. 2015) (citing *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000)). “The court’s ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law.” *Id.* at 448, 388. “An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support.” *Id.* at 448, 388 (citing *Menne v. Keowee Key Prop. Owners’ Ass’n, Inc.*, 368 S.C. 557, 568, 629 S.E.2d 690, 696 (Ct. App. 2006)). The trial court’s “ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 494-95 (2013) (citing *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)).

B. Argument

Homemax has essentially two grounds for asserting the excluded email chain was relevant: first, that the portion of the email referencing the Christofoli Home being too heavy for shipment was relevant to the issues at trial, and second, that the email discussing prior issues with other homes on another day was relevant to the issues at trial. (Homemax Br., p. 20-24). The excluded email chain is not cited herein because the email chain that Homemax sought to offer as an exhibit apparently was not preserved in the trial court record, and R-Anell objects to

its designation in the record, or consideration on appeal, based on the apparent lack of preservation of the exhibit. (*See Tr.*, pp. 5-9 (list of exhibits admitted at trial)). Even if Homemax is permitted to argue on this point, it cannot prevail. “Evidence which is not relevant is not admissible.” Rule 402, S.C.R.E. The trial court did not abuse its discretion in excluding the irrelevant email chain.

On the first point, Homemax raises three reasons a portion of the email chain was relevant, none of which were presented at trial and thus are likely waived. (Homemax Br., p. 21-22; *See Tr.*, p. 115-118; 135-137). First, Homemax argues that an email regarding the Christofoli Home (Order Number 40876) was relevant because it said the home was overloaded with parts. Homemax draws three potential inferences: that Unit A was heavy because it already had water damage, that it could have been damaged in transit, and that moving parts from Unit A to Unit B could have damaged the plastic on Unit A. (Homemax Br., p. 21-22).

These are creative suggested inferences, but not reasonable ones. The jury’s construction of the evidence must be reasonable, or its verdict may be overturned. *See Willis v. Floyd Brace Co.*, 279 S.C. 458, 460, 309 S.E.2d 295, 297 (Ct. App. 1983). The first suggestion, that the increased weight was due to water damage, would be an unreasonable conclusion since the plain language of the email stated that the weight was due to the parts in Unit A. (*See Homemax Br.*, p. 21-22). The second suggestion, that the email could suggest damage in transit, does nothing of the sort, as it addresses the condition of the modular home *prior to* transit. (*See Homemax Br.*, p. 22). The third suggestion, that the email suggests that plastic wrap could have been damaged while moving parts from Unit A to Unit B, is directly contradicted by the evidence in the record. (*See Id.*). Phillip Hathcock of R-Anell testified that the wrap is only applied to the roof and the open-ended sides of the modular units and is specifically designed so that one can open the doors

to the house and walk in and out, without damaging it. (*See Tr.*, p. 138-139;152). Thus, none of the three are reasonable inferences, and there was no abuse of discretion.

On the second point, Homemax argues another part of same chain discussing a prior issue with another home on a previous day was relevant. (*Homemax Br.*, p. 22-24). Though it has no bearing on the Christofoli Home, Homemax apparently argues that this email was relevant to establish a pattern of conduct or habit of improperly wrapping houses by R-Anell. (*Id.*). This email does not meet the standard to admit it as pattern of conduct or habit evidence.

As the Supreme Court has stated, Federal Rule of Evidence 406 is identical to South Carolina's Rule 406, SCRE. *State v. Brown*, 344 S.C. 70, 74, 543 S.E.2d 552, 554 (2001). The Supreme Court acknowledged that the federal courts have had a difficult time determining the admissibility of habit evidence. *Id.* However, such evidence is only admissible "when the examples offered to establish such pattern of conduct or habit are numerous enough to base an inference of systematic conduct and to establish one's regular response to a repeated specific situation." *Charleston Marine Containers, Inc. v. Sherwin-Williams Co.*, 165 F. Supp. 3d 457, 467 (D.S.C. 2016) (citing *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 511 (4th Cir. 1977)).

Habit evidence must be "specific, particularized conduct capable of almost identical repetition." *Brown*, 344 S.C. at 74, 543 S.E.2d at 554 (internal citations omitted). At least more than two, and potentially more than five, instances of repeated conduct are necessary to demonstrate admissible habit or pattern evidence. *See Genesis Telecomms., LLC v. Moore*, 2010 U.S. Dist. LEXIS 142483, at *9 (D.S.C. Oct. 18, 2010) (citations omitted). Here, Homemax seeks to admit habit evidence regarding wrapping on prior homes, but it fails to meet these requirements of numerosity or specificity. (*See Homemax Br.*, 22-24). Homemax can only offer one example, where the plastic was corrected without issue, for the proposition that R-Anell has

a propensity for improperly wrapping its houses. (*See Id.*). At the very least, the trial court committed no reversible error in excluding the email.

Even if Homemax could show the email chain was minimally relevant, as an additional sustaining ground, the email chain could have been excluded as unfairly prejudicial or for being likely to mislead the jury. Respondents may argue additional sustaining grounds that are not necessarily presented at trial. *I'On, L.L.C.*, 338 S.C. at 420-421, 526 S.E.2d at 723-724 (2000). “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE. “A trial court has particularly wide discretion in ruling on Rule 403 objections.” *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012).

The email chain is irrelevant, but even if it had minimal relevance, the minimal relevance would be substantially outweighed by the prejudice to R-Anell. The entire chain was entitled “40876” – the order number for the Christofoli Home. (*See Homemax Br.*, p. 21; *See Tr.*, p. 143). Thus, at a glance, it appears that the wrapping problems were related to order 40876. This is misleading because closer inspection reveals the wrapping issue was for another modular (of course, this Court cannot inspect it, because the email chain is not preserved in record). Given the “wide discretion” afforded trial courts, the trial court was within its discretion to exclude the email chain. *See Lee*, 399 S.C. at 527, 732 S.E.2d at 228.

Even if there was error in sustaining R-Anell’s objection, Homemax can show no “probable prejudice.” *See Kromah*, 401 S.C. at 349, 737 S.E.2d at 494-495. This is because the law and facts presented at trial established that Homemax assumed the risk of loss. Under the UCC, the risk of loss on a good shifts from seller to buyer: “(1) Where the contract requires or

authorizes the seller to ship the goods by carrier (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 36-2-505); but (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.” S.C. Code Ann. § 36-2-509.

At the latest, then, the risk of loss shifted at the time the Christofoli Home was tendered to Homemax at its lot. *See Id.* Homemax admitted to acceptance of delivery at its commercial sales lot without issue when an employee signed a delivery inspection form certifying that Unit A was undamaged. (*See Pl. Ex. 14*). The only logical conclusion is that Homemax bore the risk of loss when the damage to the Christofoli Home occurred. Thus, even if the trial court abused its discretion by sustaining counsel for R-Anell’s objection to the admissibility of these emails, such error did not result in “probable prejudice” to Homemax.

CONCLUSION

For the reasons stated herein, this Court should affirm the trial court on all three grounds raised by Homemax on appeal.

February 3, 2022

Respectfully submitted,

/s/ Robert P. Mangum
James S. Murray (SC Bar No. 73307)
Robert P. Mangum (SC Bar No. 103904)
Turner Padget Graham Laney, PA
209 Seventh Street, Third Floor
Augusta, GA 30901
jmurray@turnerpadget.com
rmangum@turnerpadget.com
706-722-7543
Counsel for Respondent R-Anell