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 Case No.: 2018-CP-32-03103
Appellate Case No.: 2021-000658

R-Anell Housing Group, LLC, Respondent,

v.

Homemax, LLC, Appellant.

APPELLANT'S FINAL REPLY BRIEF

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RE-INTRODUCTION OF CASE AND ISSUES

Respondent ("R-Anell") is a manufacturer of modular homes, and Appellant ("Homemax") is a retailer. This dispute concerns two homes manufactured by R-Anell—the "Christofoli House" and the "Brown House." R-Anell filed this suit against Homemax alleging a breach of contract for non-payment of the Brown House. Homemax answered and counterclaimed for both negligence and breach of contract related to the Christofoli House which was damaged by water intrusion. After the trial court granted directed verdict on Homemax's negligence claim, the jury returned a verdict for R-Anell. This appeal concerns three alleged errors: (I) the trial court erred in awarding statutory prejudgment interest under S.C. Code Ann. § 34-31-20(A); (II) the trial court erred in granting directed verdict on Homemax's claim for negligence based on the economic loss rule; and (III) the trial court erred by excluding email evidence as irrelevant.

RE-STATEMENT OF THE CASE

The general circumstances that precipitated this lawsuit are not disputed. R-Anell does not dispute that the Christofoli House suffered water damage, and Homemax does not dispute it withheld payment on the Brown House. The parties' disagreement lies in whether R-Anell is responsible for the damages to the Christofoli House, and if so, does this offset any amount Homemax might have owed on the Brown House. Although the parties might agree on the "big picture," throughout the four-day trial it was apparent they do not see eye-to-eye on the more nuanced facts or the inferences to be drawn therefrom. This competing view of the facts continues on appeal where R-Anell takes exception to Homemax's characterization of certain facts.

For example, R-Anell disputes any inference Homemax makes that the plastic wrap was intended to do more than simply protect the home during the limited time it was in transit. Complaining this inference is not supported by the record, R-Anell claims the "temporary plastic

[is] intended only for transport." (Resp. Br. p. 4). The problem for R-Anell is that the testimony of its own general manager, Phillip Hathcock, refutes R-Anell's claim that the wrap was only intended to provide protection during transport. Mr. Hathcock specifically agreed that once construction is complete the homes are "put outside at the factory yard" and the wrap is needed because "they got to be watertight while they're at R-Anell's facility [before transport] . . . in addition to being [watertight] in the shipping process **and once delivered**"—*i.e.,* after transport. (R. p. 66) (all emphasis added). Further, Mr. Hathcock testified that because R-Anell may not know how long a home might sit outside before it is assembled, the wrap is intended to function regardless of "whether they're going to sit for a day, a week or a month, **or two months**." (R. p. 69) (emphasis added). [1]

Homemax's view of the facts is supported by the Record. That R-Anell might choose to ignore conflicting testimony or view conflicting evidence differently does not leave Homemax's view unsupported.[2] The Appellate Court Rules do not require the parties to agree on the facts, their

[1] For reference, the Christofoli Home sat outside for 53 days—*i.e*., less than two months—this was 13 days at R-Anell's facility before delivery and 40 days at Homemax's facility after delivery. (R. p. 69).

[2] There are other examples that show R-Anell's complaints about Homemax's recitation of the facts are unfounded. For instance, in response to Homemax's statement of facts, R-Anell avers; "nor is it true that R-Anell forced shipment [of the Christofoli House] for 'budgetary and accounting purposes.'" (Resp. Br. p. 5). However, R-Anell's salesman for the Christofoli House (Jeremy Cosby) was asked: "Did you ever make any representation to Mr. Fautley [the owner of Homemax] to the extent that you wanted this [Christofoli] house to go ahead and be transported even though the Christofoli site was not ready to receive it?" Mr. Cosby answered: "I'm sure I did, yes. . . . Yes, we wanted the house to ship." (R. p. 99). Mr. Cosby went on to testify that "**when the house shipped made a difference in terms of R-Anell's budget**." (R. p. 100). Thus, there is no basis for R-Anell's claim that Homemax's statement of the facts in this regard is false.

As another example, R-Anell disputes Homemax's description that it was "months" before R-Anell realized it had not been paid on the Brown House. Claiming this period was only three weeks, R-Anell complains Homemax's view of the facts is not supported by the record. (Resp. Br. p. 6). But again, R-Anell is wrong, ignoring that its own witness, Mr. Cosby, testified "Q: And I

import, or the inferences to be drawn therefrom. Regardless, R-Anell does little to explain how its alternative interpretation of the facts is of consequence to this appeal. To the contrary, that the evidence offered at trial supports varied interpretations serves to bolster Homemax's arguments that reversal is required—particularly regarding the erroneous application of prejudgment interest and improper grant of directed verdict.

LAW AND ARGUMENT IN REPLY

I. THE TRIAL COURT ERRED IN AWARDING STATUTORY PREJUDGMENT INTEREST.

As set out in Homemax's initial brief, the trial court erred in awarding prejudgment interest under S.C. Code Ann. § 34-31-20(A) for three reasons: (A) because R-Anell failed to plead prejudgment interest; (B) because the amount claimed is not a sum certain determinable by a formula previously agreed to by the parties; and (C) because the amount claimed was not due on March 24, 2018—the date from which the trial court began assessing prejudgment interest.

A. R-Anell failed to plead statutory prejudgment interest.

As a threshold matter, Homemax pointed out that R-Anell failed to plead statutory prejudgment interest. In response, R-Anell offers three summary assertions: (1) that the law does not require a party to plead prejudgment interest; (2) that R-Anell did plead prejudgment interest; and (3) this issue is not preserved. None of these arguments are compelling.

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think you didn't even realize the Brown House hadn't been paid for **until months after** it had shipped, [is that] right? . . . A: "That's correct." (R. pp. 100-01). Just because R-Anell might disagree with, or choose to ignore, the competing testimony offered by its own witnesses does not mean Homemax (or this Court) is required to do the same.

1. *R-Anell's claim that it was not required to plead prejudgment interest is contrary to well-established law and is based on an incomplete quotation that R-Anell offers from Calhoun v. Calhoun which serves as a manifest misrepresentation of the law.*

To incorrectly claim the law does not require a litigant to plead prejudgment interest when the amount pled is purportedly for a sum certain, R-Anell offers **a partial** quotation from *Calhoun v. Calhoun.* (Resp. Br. p. 8). The complete quotation from *Calhoun,* reads: "While prejudgment interest must be pled in order to be recovered, except in cases involving an agreement to pay a sum certain, this Court has recognized that a claimant is entitled to interest from the date of the rendition of the verdict, or post-judgment interest, as a matter of course." *Calhoun v. Calhoun*, 339 S.C. 96, 102, 529 S.E.2d 14, 18 (2000).

By deleting the second half of the quoted sentence, R-Anell also deletes the context. It completely ignores that, unlike this case which concerns ***pre***judgment interest under subsection §34-31-20***(A)***, the *Calhoun* decision actually addresses ***post-***judgment interest under subsection §34-31-20***(B)***. The question in *Calhoun,* was whether the plaintiff could collect ***post-***judgment interest if she failed to allege it in her complaint. *Id.* Although the Court recognized the failure to plead ***pre***judgment interest would preclude that particular form of relief, the *Calhoun* Court declined to impose the same pleading requirement on ***post-***judgment interest. *See Calhoun*, 339 S.C. at 102, 529 S.E.2d at 18 (holding that unlike claims of prejudgment interest, because "[the] petitioner was entitled to ***post-***judgment interest as a matter of law, the fact that . . . she failed to seek it in her [] pleadings is irrelevant.")(emphasis added). The statement quoted by R-Anell, (albeit incomplete) was offered by the *Calhoun* Court within this limited context of distinguishing between prejudgment and post-judgment interest.

Thus, when the complete quotation offered by R-Anell is considered in context, it is abundantly clear that *Calhoun* supports the well-settled requirement that a party must plead pre-

judgment interest—precisely the opposite of what R-Anell cites it for. There can be no doubt that *Calhoun* does not change this well-settled requirement because the Supreme Court has specifically cited *Calhoun* for this exact premise. *See Tilley v. Pacesetter Corp.*, 355 S.C. 361, 375, 585 S.E.2d 292, 299 (2003) (citing *Calhoun* for the premise that "[t]his Court requires parties to plead for pre-judgment interest in order for it to be recovered."); *Durlach v. Durlach*, 359 S.C. 64, 75, 596 S.E.2d 908, 914 (2004) (citing *Calhoun* for the premise that "[p]arties must plead for pre-judgment interest in order for it to be recovered.").

R-Anell's claim that *Calhoun* holds that a litigant is not required to plead statutory prejudgment interest under Section 34-31-20 (A) is a blatant misrepresentation of the law, and R-Anell has acknowledged it did not plead this statutory interest. Therefore, this Court should reverse the trial court's award of prejudgment interest. *See Tilley*, at, 375, 585 S.E.2d at 299 ("If no request for prejudgment interest is made in the pleadings, it cannot be recovered on appeal").

2. *At trial R-Anell acknowledged the 7% interest it plead in the complaint is not statutory prejudgment interest, therefore R-Anell cannot now claim it plead this relief.*

Section 34-31-20(A) establishes the statutory prejudgment interest rate at 8.75%. In its complaint R-Anell did not seek this statutory prejudgment interest amount but instead sought contractual interest at the rate of 7%. *See* (R. p. 13). At trial, Homemax moved for directed verdict on R-Anell's pleaded claim for contractual prejudgment interest. (R. p. 147) (arguing "they have not provided any testimony in the case in chief that they were owed interest pursuant to a written agreement or verbal agreement or any evidence at all there was any type of agreement between the parties for interest[.]"). In discussion of the issue R-Anell acknowledged that "the statutory prejudgment interest [rate] is 8.75 percent [whereas the] Seven percent is [R-Anell's] standard that they charge" on unpaid invoices. (R. pp. 151-52).

Having admitted that the 7% interest alleged in the complaint is **not** statutory interest under Section 34-31-20(A), it follows that R-Anell did not plead this statutory prejudgment interest. On appeal, R-Anell does not argue that it actually pled statutory prejudgment interest. Instead, it suggests this omission should be overlooked because the pleadings are to be liberally construed. (Resp. Br. p. 9). While it is generally true that Rule 8 provides pleadings are to be "construed as to do substantial justice to the parties," this does not eliminate the law's requirement that statutory pre-judgment interest be specifically pled. *See* Rule 8, SCRCP. Moreover, there is no need to "construe" the pleadings when R-Anell has acknowledged the contractual interest it sought in the complaint (*i.e*., 7%) is not statutory prejudgment interest under Section 34-31-20(A). Thus, R-Anell's claim that the pleadings should be construed to have pled something (*i.e*., 8.75% statutory prejudgment interest) it has acknowledged is distinct from what it actually pled (*i.e.,* 7% non-statutory prejudgment interest) must fail.[3]

3. *R-Anell's allusion to issue preservation is misplaced.*

Finally, R-Anell contends this point is not preserved. However, to find this unpreserved would be an overly technical interpretation of the rules of issue preservation because Homemax is not required to use some magic or specific language to raise this point. *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("[A] party is not required to use the exact name of a legal doctrine in order to preserve the issue."). The notion that the only interest

[3] R-Anell suggests its pleadings were sufficient by reference to the prayer for relief contained at the conclusion of its Complaint which seeks "the amounts stated above with updated interest." (R. p. 14). However, this Court has offered persuasive unpublished authority to indicate that such a vague pleading should be considered insufficient. *See Sundown Operating Co. v. Intedge Indus.,* No. 2007-UP-091, 2007 S.C. App. Unpub. LEXIS 132, at *7 (Ct. App. Feb. 23, 2007) ("Sundown makes only a general request for 'interest as provided by law.' This request is too general and vague to meet the strict requirement that a demand for prejudgment interest must be specifically pled.").

R-Anell pled was for 7% (and therefore not statutory prejudgment interest) was inherent from the context of the argument and the fact that it arose on directed verdict. As such, the argument was "specific to the issue of the claim by R-Anell for any interest that is owed on this case," which as set forth in the complaint was limited to the 7% contractual interest, not statutory interest. *See* (R. p. 147) ("They have rested their case, they have not provided any testimony in the case-in-chief that they were owed interest pursuant to a written agreement or verbal agreement or any evidence at all there was any type of agreement between the parties for interest to be paid . . ."); *accord* (R. p. 153) (in limiting its motion for directed verdict to the issue of interest, stating "The only claim we have here is for a breach of contract, that is what was plead."). Stated differently, the fact that Homemax moved for directed verdict on the issue of prejudgment interest necessarily means the "prejudgment interest" pled by R-Anell was not statutory prejudgment interest. *Accord* (R. p. 152, lines 7-11) (R-Anell acknowledging that statutory prejudgment interest is a matter for the court not the jury).

To the extent that R-Anell suggests statutory prejudgment interest was tried by consent, this implication must also fail. *See Norwest Props., LLC v. Strebler*, 424 S.C. 617, 626, 819 S.E.2d 154, 159 (Ct. App. 2018) ("when there is no consent to try an unpleaded issue, as manifested by a trial objection to evidence only relevant to the unpleaded issue, a court may not amend without a formal motion."); (*citing* 3 James Wm. Moore et al., Moore's Federal Practice §15.18[3] (3d ed. 2018); *see also McMillan v. S.C. Dep't of Agric.*, 364 S.C. 60, 75, 611 S.E.2d 323, 331 (Ct. App. 2005) (finding, in a matter where pre-judgment interest was not pled, the defendant's objection to pre-judgment interest prevented the conclusion that issue was tried by consent, even where the plaintiff made a motion to amend the pleadings to conform to the evidence) (reversed on other grounds by *McMillan v. S.C. Dep't of Agric.*, 380 S.C. 212, 670 S.E.2d 368 (2008)). Thus, the

discussion of prejudgment interest was within the context, and on the premise, that 7% contractual interest is the only interest R-Anell sought in its complaint. Therefore, R-Anell's preservation argument is not compelling.

B. ***This case did not involve a "sum certain" as required by law***.

Regardless of whether R-Anell properly pled prejudgment interest, it was nonetheless improperly awarded because this case was not for a "sum certain" as required by law. "[P]rejudgment 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)). Prejudgment interest is not proper where the sum cannot be determined by a fixed formula." *Id.* at 370, 656 S.E.2d at 769 (*citing Lewis v. Congress of Racial Equality*, 275 S.C. 556, 274 S.E.2d 287 (1981)). Homemax argues this is not a sum certain as defined by the law because the amount is determined by an invoice (unilaterally created by R-Anell) rather than by a formula agreed to by the parties.

In responding to Homemax's arguments, R-Anell initially asserts that Homemax "fails to consider the leading decision in this State on liquidated sums and sums certain." (Resp. Br. p. 10). Strangely however, R-Anell fails to identify what this "leading decision" is. (*Id.*). Assuming this "leading decision" is *Butler Contracting, Inc. v. Court Street, LLC*, (because it is the only South Carolina opinion cited in this section of R-Anell's brief), this case actually supports Homemax's position.[4]

[4] Although Homemax cited *Butler* in its initial brief, it accepts R-Anell's invitation to discuss it further because it supports Homemax's position that this case does not satisfy the "sum certain" requirement.

In *Butler,* after completing a construction project, the plaintiff (Subcontractor), sued the defendant (Contractor) seeking $177,001.00, which was the unpaid balance on a $713,364.00 contract. *Id.* Importantly, as the *Butler* Court explained; "Contractor did not dispute the [contract amount], or the amount still owed to Subcontractor. Contractor, however, filed a counterclaim seeking an offset for $94,878 in damages allegedly caused by delays attributable to Subcontractor." *Id.* at 134, 631 S.E.2d at 259. At a bench trial, the circuit court determined Contractor was entitled to $25,000.00 as an offset (not the $94,878.00 sought in the counterclaim) and a verdict of $152,001.00 was entered in favor of Subcontractor (*i.e.* $177,001.00 less $25,000.00 = $152,001.00). *Id.* The issue on appeal concerned the trial court's decision to deny prejudgment interest because the counterclaim constituted a "good faith dispute [over] the amount due." *Id.* In reversing the denial of prejudgment interest the Supreme Court explained the "assertion of a counterclaim seeking an offset [against a sum certain] does not prevent an award of prejudgment interest." *Id.* at 134-35, 631 S.E.2d at 259. Importantly, the *Butler* Court determined the amount owed to the plaintiff Subcontractor was a sum certain <u>because the contract amount was undisputed</u>, and therefore was "capable of being reduced to a certainty based on contractual provisions regarding the amount of the original contract. . . and [deducting] payments made by Contractor." *Id.* at 134, 631 S.E.2d at 259.

In sum, *Butler* holds that a counterclaim pled as an offset to a sum certain will not preclude prejudgment interest. However, *Butler* does nothing to abrogate the requirement that (setoff notwithstanding) the underlying amount must still be a sum certain capable of calculation based on an agreed upon mathematical formula. In *Butler,* that formula was the undisputed contract price, less the undisputed partial payments which equaled a sum certain of $177,001.00. *See id.* (*supra*).

Here, and unlike *Butler,* Homemax's argument is not based on the fact that it asserted a counterclaim. Instead, Homemax argues this matter is not for a sum certain because there was no agreed upon mathematical formula by which the alleged sum ($142,292.80) could be calculated. To the contrary, this amount is derived solely, and exclusively from the March 24, invoice unilaterally created by R-Anell. Applying the *Butler* reasoning to this case it follows that the question is whether R-Anell and Homemax agreed upon a mathematical formula that would lead to the singular conclusion that the amount owed was $142,292.80 (before the application of any setoff for a counterclaim). Here, there is no evidence that at the time the Brown House was delivered (*i.e.*, the time R-Anell claims the payment was due) that there was an agreed upon formula that could be used to calculate this amount. The initial quoted price from R-Anell was $142,660.00, yet now it claims a different amount (*i.e.,* $142,292.80) as the "sum certain."[5]

If this case were truly for a sum certain R-Anell could point to some provision of the contract which explains the difference between the quoted amount and the invoice amount. But it cannot. (R. p. 41) (R-Anell testifying it did not "know what might have caused that difference"). This is the fatal flaw in R-Anell's claim that this is a sum certain.

In the hopes of explaining this problem away, R-Anell claims the absence of an agreed upon formula does not matter because this requirement should be usurped by Section 36-2-207 of South Carolina's Uniform Commercial Code (the "UCC"). Specifically, R-Anell claims there is no need for this formula because the March 24 invoice operated as a "confirmatory memorandum" that unilaterally and irrefutably established a sum certain contract amount. *See* (Resp. Br. p. 12)

[5] Homemax recognizes these two amounts are close, and that the amount R-Anell claims in the invoice is slightly less than the amount referenced in the quote. However, the point is that if the contract were for a sum certain there would be no difference, small as it may be. The law requires a sum certain, not a sum *almost* certain.

(asserting there was no need for a mathematical formula). However, this argument is a perversion of the UCC's confirmatory memoranda provision—which concerns contract *formation,* not damages. *See* S.C. Code Ann. §36-2-207(1) ("[A] written confirmation which is sent within a reasonable time operates as an **acceptance** even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.") (emphasis added). If prejudgment interest were apples, Section 36-2-207 is broccoli.

Our Supreme Court has explained that because Section 36-2-207 arises to address the "battle of the forms" in which the parties exchange pre-printed boiler-plate forms that may not mirror one another on terms, this section "simply does not warrant application . . . in the case ofa non-form agreement, [or when] there is no pattern of exchange of pre-printed forms." *Columbia Hyundai, Inc. v. Carll Hyundai, Inc.*, 326 S.C. 78, 82, 484 S.E.2d 468, 470 (1997) (confirming Section 36-2-207 does not eviscerate the law of contracts which requires a meeting of the minds); *see Weisz Graphics Div. of Fred B. Johnson Co. v. Peck Indus.*, 304 S.C. 101, 106, 403 S.E.2d 146, 149 (Ct. App. 1991) (explaining this section in context of the battle of the forms and confirming it only applied where the terms of the acceptance might differ from the terms of the offer by virtue of using form documents).

Here, there was no pre-contract exchange of boiler-plate forms. As such, the March 24 invoice is simply not germane to contract formation. As R-Anell itself argued, if a contract was formed on the Brown House, the September 2017 quote submitted by R-Anell was the offer, and Homemax's signing and returning this quote was the acceptance. *See* (R. p. 235) (arguing for directed verdict that there is no way to deny a contract because "we have heard in this case that there is a signed quote from Homemax that gets returned to R-Anell . . ."); (R. pp. 41-44). Thus,

the March 24 invoice, which was sent out the day of shipment (after the construction was completed) was not part of the exchange of boilerplate pre-contract documents and therefore is simply not a confirmatory memorandum. (R. p. 44) (R-Anell testifying the invoice was sent out the day of shipment). Similarly, a confirmatory writing cannot function to modify a contract once made.

In its brief, R-Anell argues that under Subsection 36-2-207(2) the March 24 invoice (as a purported confirmatory writing) functioned to establish the undisputable sum certain contract amount. However, because the amount R-Anell demands in its invoice is different than the amount of the quote, it follows that the March 24 invoice could only establish a sum certain contract amount if it functioned as a modification to the previously made contract. This is a problem for R-Anell because Subsection 36-2-207**(3)** makes plain that a confirmatory writing cannot function as a modification, providing: "Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act." S.C. Code Ann. § 36-2-207(3).

Here, the writings do not agree—*i.e.,* the September 2017 "quote" in the amount $142,660.80 is different than the March 24 invoice for $142,292.80. Because subsection (3) provides the contract is limited to "those terms on which the writings agree," even if the March 24, invoice was deemed a confirmatory writing, it would not establish a sum certain contract price to support the imposition of statutory prejudgment interest. Thus, just as it did by abridging the language from *Calhoun* (see above), by ignoring subsection 36-2-207(3), R-Anell has misapprehended, or misrepresented, the law regarding confirmatory writings.

Ultimately, the issue comes back to that set out in Homemax's initial brief. The law requires an agreed upon formula for determining the amount owed. The law does not permit a party to create a sum certain simply by unilaterally generating an invoice, and this Court should reject R-Anell's request to find otherwise.

C. *There is no evidence the amount claimed was payable as of March 24, 2018*.

Homemax also argued the trial court erred in awarding prejudgment interest from March 24, 2018, because there is no evidence the amount (even if was a sum certain) was due on that date. *See* S.C. Code Ann. § 34-31-20(A) (requiring the amount claimed be both for sum certain, "**and due**") (emphasis added); *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") (emphasis added). In response, R-Anell again relies on a misapplication of the UCC as if the UCC somehow allows R-Anell (and the trial court) to simply ignore the facts and evidence. It does not.

R-Anell claims that the payment was due on Mach 24, 2018, because the invoice bears this date and says it is due on receipt. Notwithstanding that there is no evidence of when the invoice was actually received, R-Anell again misses the bigger picture. The invoice is not the agreement. R-Anell seems to rely on some creative interpretations of the UCC to claim that in any commercial transaction an invoice generated by the seller trumps any previously agreed to terms of the transaction. It simply does not.

For instance, R-Anell claims that payment was due because the "default rule" under the UCC is that "when goods are shipped, payment is due at the time and place of delivery." *See* (Resp. Br. p. 14) *citing* (S.C. Code Ann. § 36-2-310 (a)). However, and consistent with its habit of creative

editing, R-Anell ignores the first three words of Section 36-2-310 which make clear this default rule only applies "**Unless otherwise agreed**." S.C. Code Ann. § 36-2-310 (emphasis added). Conveniently, R-Anell also ignores the testimony of their own witnesses which confirm that R-Anell was not expecting payment on delivery because they had agreed otherwise—*i.e.*, agreed payment would be made at a later date through floorplan financing. *See* (R. p. 79) (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* (R. p. 117) (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); (R. pp. 125-26) (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]

Thus, the fact that Homemax did not pay for the Brown House on delivery was not, nor could it be, the act of breach. The breach (assuming there was a breach) occurred when the floor plan financing was not received. Because R-Anell's "claim" for payment could not arise until this purported breach occurred, prejudgment interest (even if proper) could not begin to accrue until the payment from the floorplan financier was due. *See Church v. McGee*, 391 S.C. 334, 348, 705 S.E.2d 481, 488 (Ct. App. 2011) ("To answer this question [of whether and when to award pre-judgment interest] this court must first determine **when the claim arose**, and then decide if the measure of recovery was fixed by conditions existing at that time.") (emphasis added).

[6] In testifying for R-Anell, both Jeremy Crosby (R. p. 102) and Melissa Allen (R. p. 125) conceded that Homemax had never purchased a home from R-Anell on COD terms before.

Here R-Anell presented no evidence of when payment from the floorplan financier was specifically required, but it suffices it was not on March 24, 2018, but some date after that. *See* (*Infra).* Thus, application of interest from this date was error. The UCC does not change that.

II. THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST HOMEMAX'S CLAIM FOR NEGLIGENCE BASED ON THE ECONOMIC LOSS RULE.

The South Carolina Supreme Court has carved out an exception to the economic loss rule where the product at issue is a residential home. *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989). Here, the damages alleged were to a residential home. Notwithstanding, R-Anell claims *Kennedy* should not apply here because the Christofoli House was not Homemax's "single largest investment." (Resp. Br. p. 20). However, R-Anell is confused, the holding of *Kennedy* is not limited to only those residential structures that constitute a plaintiff's single largest investment—if it were a plaintiff that owned multiple homes could only purse a construction defect claim on their most expensive home. That is not the law. As is common in its brief, R-Anell's "single largest investment" quote is offered with limited context.

For certain, *Kennedy* marked a distinct change in the law applicable to negligence claims regarding residential homes. While this decision was based on many public policy considerations, the notion that a residence may be the buyer's "single largest investment" is not specifically among them. The "single largest investment" language first appeared as dicta in *Sapp v. Ford Motor Co.*, 386 S.C. 143, 148, 687 S.E.2d 47, 49 (2009) where, ten years after *Kennedy*, the Court summarized some of the public policy considerations that supported its decision not to extend the *Kennedy* exception beyond residential property. *See Id.* at 150, 687 S.E.2d 47 at 51 (holding "the exception announced in *Kennedy* is a very narrow one, applicable only in the residential real estate

construction context")[7]. Thus, while this "single largest investment" concept may be a reason not to expand *Kennedy* beyond the residential construction context, it is certainly not a reason to limit *Kennedy's* application within the residential construction context.[8]

Finally, R-Anell makes a summary suggestion that the trial court's grant of summary judgment was harmless because R-Anell's purported negligence and purported breach of contract were based on the same conduct. Although R-Anell makes passing citation to *Henson v. City of Georgetown*, 358 S.C. 133, 140, 594 S.E.2d 499, 502 (Ct. App. 2004), it offers no explanation of how this decision applies here. In *Henson,* this Court found the trial court properly directed a verdict on a plaintiff's claim for attractive nuisance. The *Henson* Court went on to offer, albeit in dicta, that even if this was error, it was harmless. *Id.* Importantly however, in *Henson,* the jury was specifically asked to answer a series of interrogatories in support of their verdict, and the answers

[7] Because the exception to economic loss rule adopted by *Kennedy* is limited to the residential construction context, R-Anell's contention that it would "eviscerate" the UCC to allow a tort action in this case is simply colorful rhetoric disguising a total lack of substance. Similarly, although R-Anell cites to various US District Court rulings, none offer any compelling analogy here. *See* (Resp. Br. p. 18). For example, R-Anell quotes *Besley v. FCA US LLC*, Civil Action No. 1:15-cv-01511-JMC, 2016 U.S. Dist. LEXIS 2200, at *3 (D.S.C. Jan. 8, 2016)—a case concerning a car, not a residential home—for the claim that "authority simply does not exist 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." *Id.* While this observation is true where the product at issue is a car, *Kennedy* confirms this observation is entirely false in the context of a residential home—as is the case here. This just serves to illustrate another example of R-Anell resting its arguments on legal support that is offered out of context.

[8] R-Anell seems to look at this issue backward—asserting because it had contract duties, it therefore had no tort duties. This reasoning is backward because contract duties are not necessarily mutually exclusive of tort duties, nor *vice versa*. The fact that it may have the same duty under **both** tort and contract does not invoke the economic loss rule. Instead, the economic loss rule would only apply where the duty is exclusively a contract duty. *See Sapp,* 386 S.C. at 149, 687 S.E.2d at 50 (quoting *Kennedy,* 299 S.C. at 347, 384 S.E.2d at 737 for the proposition that "[t]he 'economic loss rule' will still apply where duties are created solely by contract."); *see also* (App. Br. pp. 17-19).

to these interrogatories necessarily would have precluded a verdict on the plaintiff's attractive nuisance claim—specifically the jury found the plaintiff's fault for his own injuries exceeded the defendant's fault. *See Henson v. Int'l Paper Co.*, 374 S.C. 375, 385, 650 S.E.2d 74, 79 (2007) (affirming, as modified the Court of Appeal's decision in *Henson v. City of Georgetown*).

Unlike *Henson,* the jury in this case was not asked any special interrogatories but instead asked to render a general verdict on the prompt "as to Homemax's claim for breach of contract we find in favor of _____." (R. p. 308). As a result, it is not known why the jury found in favor of R-Anell, and this ruling does not necessarily preclude a verdict on a negligence theory that the jury was never allowed to consider. Thus, it does not follow that the failure to submit Homemax's negligence claim to the jury was harmless. *See Id.* (finding harmless error where the verdict necessarily precluded recovery on the claim on which directed verdict was granted). Therefore, R-Anell's arguments in support of the trial court's grant of directed verdict are not compelling, and this Court should reverse.

III. THE TRIAL COURT ERRED IN EXCLUDING RELEVANT EMAIL EVIDENCE.

Finally, Homemax argues the trial court erred by excluding certain email evidence on the basis that it was not relevant. (R. pp. 81-2) (ruling "it is not relevant to the ultimate issue in this case."). In response, R-Anell first summarily claims (without explanation or legal authority) that this issue is not preserved because the email is "not preserved in the trial court record." (Resp. Br. p. 21).

As a threshold matter, this Court has already dismissed R-Anell's claim that this email is not in the record. On February 14, 2022, R-Anell filed a motion with this Court to strike this email from the record on appeal. Homemax replied to R-Anell's motion by pointing out several pages of discussion on this email in the trial transcript, as well as providing certified copies of this

exhibit—which was marked for identification at trial and maintained by the Lexington County Clerk of Court. *See* Rule 606(a), SCACR ("the clerk of court for the county shall retain possession of all exhibits admitted into evidence **or marked for identification** during a hearing or trial before the circuit or family court") (emphasis added). On March 23, 2022, this Court issued an Order denying R-Anell's motion to strike this email from the Record. Thus, R-Anell's claim that this email is not part of the Record is simply wrong.

As to the merits of this issue, R-Anell argues against the relevance of this email by disputing the inferences Homemax claims arise from it. For example, R-Anell disputes the inference that the wrapping could have been damaged when moving the excess parts from Unit A to B because the doors on the house can be opened without damaging the wrapping. (Resp. Br. pp. 22-23). However, R-Anell's contention only holds water if it assumed the "parts" referenced in this email could be removed through the door. R-Anell cites nothing to support this assumption.

Perhaps acknowledging that the e-mail is relevant, R-Anell's primary assertion, as an alternative sustaining ground, is that this evidence should be excluded under Rule 403, SCRE, because its "minimal relevance would be substantially outweighed by the prejudice to R-Anell." (Resp. Br. p. 24). The prejudice R-Anell claims is the possibility of confusion that the wrapping problems referenced in the email relate to another house, not the Christofoli House. (Resp. Br. p. 24). However, this risk is nearly non-existent. Even R-Anell acknowledged this apparent confusion only exists "at a glance," and that a "closer inspection" of the email makes clear the wrapping problems mentioned related to a different house—one that was sent the day before the Christofoli House. (Resp. Br. p. 24). Certainly, a jury could keep this straight.

Finally, R-Anell closes its argument by claiming that there was no prejudice from the exclusion of this email because "the law and facts . . . established that Homemax assumed the risk

of loss." (Resp. Br. p. 24). Citing the UCC for the principle that the risk of loss shifted to Homemax upon delivery, R-Anell asserts the "only logical conclusion is that Homemax bore the risk of loss when the damage to the Christofoli House occurred." Accordingly, R-Anell infers the exclusion of the email evidence made no difference. (Resp. Br. p. 25). *Contra 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.).

However, R-Anell's reasoning is fatally circular—assuming as a premise the very thing in dispute. R-Anell's assumption that the risk of loss was on Homemax when the damage occurred presumes to know when the damage occurred and could only be true if it is assumed that the damage occurred *after* the Christofoli House was delivered to Homemax. However, the question of when the damage occurred was one of the primary disputed issues in this case. *See* (R. p. 250) (the trial court denying R-Anell's Motion for Summary Judgment and stating, "But no one can say whether it was damaged before it left R-Anell, in transit, [or] once it arrived at Homemax."). It is precisely this point (which R-Anell takes for granted) that the email is relevant to. *See* (App. Br. pp. 19-24). Thus, exclusion of the email cannot be harmless and this Court should reverse. *See* Rule 401, SCRE (defining relevant evidence as "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.")(emphasis added); *State v. Sweat*, 362 S.C. 117, 126-27, 606 S.E.2d 508, 513 (Ct. App. 2004) ("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.").

CONCLUSION

For the reasons stated above, together with those set forth in Homemax's initial brief, 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,

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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

Appellate Case No. 2021-000658

R-Anell Housing Group, LLC, Respondent,

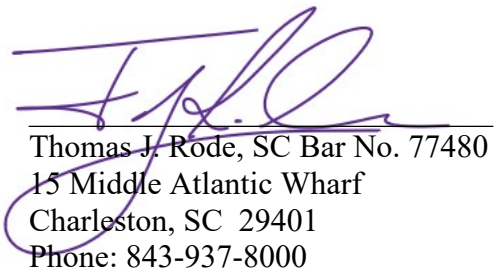
v.

Homemax, LLC, Appellant.

Certification of Counsel

The undersigned certifies that the enclosed complies with Rule 211, SCACR.

Respectfully submitted,



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