

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Henry W. Brown
Special Referee

Appellate Case Number 2019-000513

Brown Contractors, LLC, under S.C. Residential Builders License No. 20378,
.....Appellant/Respondent,

v.

Andrew Joseph McMarlin a/k/a Andrew Joseph McMarlin and Amy Salzhauer,
.....Respondents/Appellants.

And

Andrew McMarlin and Amy Salzhauer,Respondents/Appellants,

v.

James Brown, IV and Brown-Meihaus Construction Co., LLC,Third-Party Defendants.

PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv
CERTIFICATION OF COUNSEL1
QUESTIONS PRESENTED FOR REVIEW1
STATEMENT OF THE CASE1
SUMMARY OF GROUNDS FOR CERTIORARI2
STANDARD OF REVIEW3
ARGUMENTS3

I. The Special Referee and the Court of Appeals Erred in Failing to Properly Apply the Law and Hold Jay Brown Personally Liable for the Damages Awarded to Petitioners.

CONCLUSION11

TABLE OF AUTHORITIES

Cases

<i>16 Jade Street, LLC V. r. Design Constr. Co.</i> , 405 S.C. 384, 747 S.E.2d 770 (2013)	6
<i>BPS, Inc., v. Worthy</i> , 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005).....	5
<i>Plantation A.D., LLC v. Gerald Builders of Conway, Inc.</i> , 386 S.C. 198, 687 S.E.2d 714 (Ct. App. 2009).....	5
<i>Ritter & Assocs., Inc. v. Buchanan Volkswagen, Inc.</i> , 405 S.C. 643, 649, 748 S.E.2d 801, 804 (Ct. App. 2013)	3
<i>Rowe v. Hyatt</i> , 468 S.E.2d 649, 650 (S.C. 1996)	4
<i>Steinke v. Beach Bungee, Inc.</i> , 105 F.3d 192 (4th. Cir. 1997)	4

Rules

<i>S. C. Code Ann.</i> 33-44-303	5,6
<i>S.C. Code Ann.</i> 33-6-220(b).....	5
Section § 40-59-410.....	7
Section § 40-59-400.....	7,10

CERTIFICATION OF COUNSEL

The undersigned hereby certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals on May 19, 2022.

QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals err in misapplying the law of personal liability of the sole member of a Limited Liability Corporation.
- II. Did the Court of Appeals err in holding that the McMarlins failed to offer evidence of tortious conduct on the part of Jay Brown.

STATEMENT OF THE CASE

This action was instituted by Jay Brown, and his company Brown Contractors, LLC (collectively “Brown”, Appellants/Respondents), with the wrongful filing of a mechanics lien against the property of Amy and Andy McMarlin, Respondents/Appellants (R. pp. 656-659). Brown asserted claims for foreclosure of a mechanic’s lien and breach of contract, alleging an entitlement to payment for work he performed on the McMarlin’s home on Sullivans Island, SC (the “Home”). Brown claimed a total of \$206,428.59.

The McMarlins answered (Amended Answer, R. pp. 33-47), denying any liability to Brown, alleging that the lien was defective because Brown was not properly licensed and counterclaimed for overpayment and for the costs associated with the completion of the Home and for the repairs to defectively performed work. Ultimately, the McMarlins claimed damages totaling \$727,361.56.

The parties submitted the claim to a Special Referee by Order dated June 21, 2016 (R. pp. 1-2). The matter was tried before the Special Referee from November 7 to 10, 2017 and December

13, 2017 and the Special Referee issued an Order dated May 1, 2018 (R. pp. 3-19). In that Order, he found that Brown was not properly licensed and that his ostensible “qualifier,” Vuong Nuguyn, was not an employee of Brown Construction, LLC or in responsible charge of construction. Therefore, the Special Referee found the mechanic’s lien to be invalid and he denied Brown’s claim. He found in favor of the McMarlins as to their counterclaim and awarded damages totaling \$346,693.00.

The parties subsequently filed motions pursuant to Rule 59, filed May 11, 2018 (R. pp. 71-96, pp. 97-103). The McMarlins also filed an affidavit of attorneys’ fees (R. pp. 104-110). On February 25, 2019, the Special Referee denied the parties Rule 59 motions and awarded the McMarlins attorneys’ fees totaling \$133,161.00 by Order filed February 25, 2019 (R. pp. 22-25).

This appeal follows and the parties’ filed notices of appeal dated March 27, 2019 and March 29, 2019. Both parties filed Initial Briefs and Designations of Matter on June 24, 2019.

The Court of Appeals issued its Opinion, #2022-UP-175, on April 20, 2022 and both Appellant/Respondent and Respondent/Appellant filed separate Petitions for Rehearing on May 5, 2022. By Order from the Court of Appeals dated May 19, 2022, the petitions for rehearing were denied.

SUMMARY OF GROUNDS FOR CERTIORARI

Both the Special Referee and the Court of Appeals erred in their application of the law of personal liability of a member of a limited liability corporation and failed to impose personal liability on Jay Brown for the damages sustained by the McMarlins which was irrefutably proven by a preponderance of the evidence.

STANDARD OF REVIEW

“When reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law, and the appellate court will not disturb the special referee's findings of fact as long as they are reasonably supported by the evidence.” *Ritter & Assocs., Inc. v. Buchanan Volkswagen, Inc.*, 405 S.C. 643, 649, 748 S.E.2d 801, 804 (Ct. App. 2013) (internal quotation marks omitted).

ARGUMENT

I. The Special Referee and the Court of Appeals Erred in Failing to Properly Apply the Law and Hold Jay Brown Personally Liable for the Damages Awarded to Petitioners.

This case raises a critical issue in the construction context regarding the personal liability, or lack thereof, of a single member, construction LLC. The issue is the extent to which that single member, who personally has “responsible charge of construction”, and who personally manages all of the affairs of the LLC, including the selection and retention of subcontractors, and also actively managing projects in the field, can be found personally liable from the defects flowing from those construction activities.

In this case the testimony was that Jay Brown was the single member who personally ran the operations of Brown Constructors, LLC. As reflected below, Mr. Brown personally hired and fired all subcontractors who performed work at the McMarlin Home, actively managed the day-to-day construction operations at the McMarlin Home, and was even personally paid a project management fee by the McMarlins (in addition to the cost plus compensation paid to Brown Constructors, LLC).

Further, it is undisputed that Jay Brown misrepresented the qualifications of his qualifier, Nugyen, on the application with the LLR, and personally signed the statement of account and other

relevant documents that supported his defective mechanics lien against the McMarlins (for which they were awarded the sum of \$133,161.00 in attorney's fees).

A. Error of Law

The rulings of the Special Referee and the Court of Appeals are predicated on a mistaken application of the law. Both rulings ignore clear evidence of tortious conduct on the part of Jay Brown and conclude that personal liability was not proven, without asserting what legal standard applies. The reason for that is the lack of clear South Carolina law on this issue, which compels the Supreme Court to rule in this case.

In his Order, at page 16, the Special Referee found that the evidence was insufficient to establish Jay Brown's personal liability:

Jay Brown clearly acted on behalf of Brown Contractors, LLC. However, Jay Brown could be personally liable if negligent conduct as to the portion of the residence addressed in the Brown Atlantic report is shown by Mr. Brown personally. As to the specific items of damage found herein, there is not sufficient evidence of Jay Brown's personal negligence to impose liability on Mr. Brown.

In making that ruling, the Special Referee failed to cite to any authority of what sort of evidence is required to impose liability and failed to consider the evidence that was offered in the case which establishes Jay Brown's tortious conduct by a preponderance of the evidence.

It is clear that one may not be personally liable for the torts of another merely by his or her status as a shareholder or officer of an LLC; but it is also clear when the member has participated in or directed the tortious act, personal liability will attach. *See Steinke v. Beach Bungee, Inc.*, 105 F.3d 192 (4th. Cir. 1997) (holding personal liability attached to corporate members who personally contributed unsafe conditions resulting in Plaintiff's death), *citing Rowe v. Hyatt*, 468 S.E.2d 649, 650 (S.C. 1996) ("An officer, director or controlling person in a corporation is not merely as a result of his or her status as such, personally liable for the

torts of the corporation. To incur liability, the officer, director, or controlling person must ordinarily be shown to have in some way participated in or directed the tortious act"). *BPS, Inc., v. Worthy*, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005) (Summary judgment reversed as to corporate officer's individual liability where evidence presented to support liability based on his own conduct); *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 687 S.E.2d 714 (Ct. App. 2009)(Officer who made misrepresentations regarding proposals of the LLC was not shielded from liability by his status as a corporate officer).

The South Carolina Limited Liability Company statute "Liability of Members and Managers" *S. C. Code Ann.* 33-44-303 contains a limitation on the protection afforded to members. This statute reads as follows:

- (a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company **solely by reason of being or acting as a member or manager.**

The comment to the statute includes the following:

A member or manager, as an agent of the company, is not liable for the debts, obligations, and liabilities of the company simply because of the agency. A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity.

In *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 687 S.E.2d 714 (Ct. App. 2009), the court found where an officer of a corporation participated in the commission of conversion and fraud, specifically in making representations regarding proposals of the LLC, he was not shielded from liability merely by his status as an officer or shareholder of a corporation by *S.C. Code Ann.* 33-6-220(b). Specifically, Gerald concealed

his knowledge of foreclosure proceedings on certain property when negotiating with *Plantation, A.D.*, for development of the property.

In *16 Jade Street vs R Design*, 398 S.C. 338, 728 S.E.2d 448 (2012) (withdrawn and superceded by *16 Jade Street vs R Design*, 405 S.C. 284, 747 S.E.2d 770 (2013), 747 S.E.2d 770 (2012)), this Court delved into the critical issue of tort liability for a member of a closely held LLC. With Justice Hearn writing the opinion, in the first *16 Jade Street* case, this Court recognized that, absent clear legislative intent, the statute did not insulate members of an LLC from their personal conduct that gave rise to tort liability. This Court concluded, correctly, that 33-44-303 does not insulate a member of an LLC from “personal responsibility for his actions.”

While the first *16 Jade Street* case was withdrawn and superceded by an opinion that does not address the issue, a ruling by this Court in this case is critical to address the issue of personal liability of LLC members squarely, so that the public, members of LLCs, the courts and members of the Bar have definitive guidance about when a member of an LLC can be found liable for their tortious conduct, or not.

If 33-44-304 does not insulate a member from personal liability for their own tortious conduct, then the burden of proof required to sue a member personally is a preponderance of the evidence. *Pike v. South Carolina DOT*, 343 S.C. 224, 540 S.E.2d 87 (2000). The evidence of Jay Brown’s personally tortious conduct in this case, clearly met that standard.

B. The Evidence Supports Personal Liability

In this case, the Special Referee found that the construction at the McMarlin Home had been defectively performed or left incomplete. He held that the McMarlins had been damaged in the amount of \$346,693, for the cost of necessary repairs. The Special Referee also awarded the McMarlins attorney’s fees in the amount of \$133,161.00 as the result of a defectively, if not

fraudulently, filed mechanics lien. (Order, R. pp. 3-19) The Court of Appeals affirmed both of those holdings. Yet both the Special Referee and the Court of Appeals held that the McMarlins had failed to offer sufficient evidence of Jay Brown’s culpability for those damages, ignoring the evidence of the wrongful conduct of Brown Constructors, LLC was performed directly by Jay Brown personally.

1. Jay Brown Personally Misrepresented facts on the Application for Certificate of Authority and Filed the Defective Mechanic’s Lien Leading to the Recovery of Attorneys Fees.

Brown is unlicensed. To enable Brown Constructors, LLC to pull a permit and be paid for its work, it had to work under a qualifier. The statutory regulations for use of a qualifying license are clear. The qualifier (here, Brown subcontractors, Vuong Ngyuen or “Ngyuen”) has to either be 1) an owner or member of the contracting firm; or 2) an employee in responsible charge of construction. Section § 40-59-410, authorizes an individual residential home builder or specialty contractor to practice through a firm¹ offering those residential building services. However, to become “properly licensed” in this way requires that the following conditions be met:

(1) one or more of the corporate officers in the case of a corporation, or one or more of the *principal owners in the case of a firm, or one or more employees are designated as the resident licensee in responsible charge* of each principal or branch office for the building services regulated by the commission and are licensed under the provisions of this chapter;

(2) the firm has obtained an executed surety bond approved by the commission in the sum of fifteen thousand dollars initially and as subsequently provided by regulation; **and**

(3) the firm has been issued a residential business certificate of authorization by the commission. Nothing in this section may be construed to mean that a license or registration to practice residential home building, residential specialty contracting, or home inspecting may be held by a firm.

¹ “Firm” means a business entity functioning as a sole proprietorship, partnership, limited liability partnership, professional association, professional corporation, business corporation, limited liability company, joint venture, or other legally constituted organization which offers or provides building services through licensed residential builders, residential specialty contractors, or home inspectors. § 40-59-400.

Ngyuen was not an owner, as Brown was the sole member of Brown Contractors, LLC. Ngyuen was also not an “employee” and was not in “responsible charge of construction”. Ngyuen was a subcontractor and was paid as a subcontractor for Brown and billed the McMarlins as a subcontractor, even including overhead and profit for himself on the McMarlin job. (Jay Brown Trial Testimony, R. pp. 169-172, p. 175). Further, Ngyuen was not in responsible charge of construction. Brown admitted that he was in charge of construction and that he had the right to hire and fire Ngyuen at will (Jay Brown Trial Testimony, R. p. 134, lines 23-24).

As found by the Special Referee, Brown was not properly licensed and was, therefore, not entitled to payment and his claim, which commenced this action, was properly denied.

The point of the Certificate of Authority requirements is to ensure that the person whose license is used to pull the permit is *in charge* of construction for the company for whom the qualifier is employed. Here, the person *in charge* at all times was Jay Brown, who was unlicensed. The fact that the person who is licensed, Ngyuen, is actually being controlled and could be fired by the unlicensed person, is what the qualifier statute seeks to avoid, not encourage (Jay Brown Trial Testimony, R. p. 134, lines 23-24).

Furthermore, as explicitly found by the Special Referee, even if Brown’s Certificate of Authorization were somehow valid, it was not timely since it was not obtained until *after* Brown offered contractor’s services to the McMarlins and began the McMarlin job, meaning he was in violation of the statute. Specially, the Special Referee found as follows:

The application submitted to the state office of Labor License and Regulation in support of Brown’s request for a certificate of authorization is Defendant’s Exhibit 5. In that exhibit, Brown and the license holder, Mr. Nguyen, both attest that Mr. Nguyen is an employee of Brown Contractors, LLC [which as noted above is not true]. The application lists license number 20738 (Ngyuen’s license) as the qualifying license, and the application is dated June 6, 2012. The COA was first

issued in January 2013. Defendants' Exhibit 3 is a COA with an issue date of April 16, 2014 (R. p. 652). There is no suggestion that Brown Constructors, LLC had been issued a COA at the time work commenced on the McMarlin home, no later than August 2012. On Brown's pay applications (R. pp. 845, 902-903, 905-906) the contract date is stated to be January 23, 2012, five (5) months before an application for a COA was submitted to the state's licensing board.

Because of that, Brown Constructors, LLC's mechanic's lien was invalid and the McMarlins were awarded their fees. Then, however, the Special Referee and the Court of Appeals both conclude that that is a liability of Brown Constructors, LLC only, completely ignoring the inescapable fact that Jay Brown made the misrepresentations on the application, offered contractor services to the McMarlins and personally filed the defective mechanics lien.

2. The Defects in the McMarlin's Home Proximately Resulted from Jay Brown's Personal Activities and Management of the McMarlin Project.

The McMarlins also proved, by a preponderance of the evidence, that Jay Brown completely managed Brown Constructors, LLC, actively managed the McMarlin job itself, and was personally paid a management fee to manage that job. (R. pp. 173-174).

In this case, the evidence adduced at trial, and the evidence discussed in the briefs and in oral argument, establishes irrefutably that the harm caused to the McMarlins was the direct and proximate result of the actionable conduct of Jay Brown acting in his personal capacity.

As pointed out in the briefs and at oral argument, Brown Constructors, LLC was a single member LLC where Mr. Brown had complete control of all aspects of the operation of that LLC. That included the hiring, firing, and management of all subcontractors including those subcontractors who defectively constructed the McMarlin Home, which resulted in the damages awarded to the McMarlins by a Special Referee. Mr. Brown's *personal* involvement is *admitted* by Brown who, in his filings with this Court, actually argued that he, along with Vuong Nguyen, was personally on-site directing the construction of the McMarlin Home. At page 18 of the Final

Brief of the Appellate/Respondent, Mr. Brown admits that his subcontractor and illegitimate qualifier, Nguyen, regularly "...met and received instructions from Brown Contractors' owner, Jay Brown, including instructions to meet the highest standards of construction." Mr. Brown carefully and explicitly notes that those instructions were from Mr. Brown personally, as the owner of Brown Contractors, LLC. On page 19 of the same brief, Mr. Brown also writes as follows:

Based on the evidence adduced to the Court, thus, he [meaning Nguyen] also meets the test of a "resident licensee" and "responsible charge" under S.C. Code Ann. § 40-59-400(1) because he was assigned to the project, was there almost every day and provided direct control and personal supervision. *The fact that Jay Brown did the same thing does not in any way make Nguyen less of a "qualifier."*

Thus, Brown again distinguishes between himself and Brown Contractors, LLC and admits that he was at the project "almost every day" and provided "direct control and personal supervision" over the project. Those are Brown's own words which establish his personal involvement in the shoddy work that was performed at the McMarlin Home.

As pointed out at trial and in the appellate record, there is ample other evidence which compels a finding that the damages incurred by the McMarlins are the direct and proximate result of Jay Brown's personal tortious conduct. That includes his sole authority to hire, fire and direct subcontractors and the fact that Jay Brown was *personally* paid the "project management fee" independent of the cost of construction of the house charged by Brown Contractors, LLC.

In addition, the Special Referee found that Mr. Brown was not properly licensed, having personally made misrepresentations on the licensure application, and had improperly and defectively filed a mechanic's lien against the McMarlins, for which the Special Referee awarded the McMarlins substantial attorney's fees and costs. Brown *personally* signed the relevant documentation, including the faulty and defective mechanic's lien, the dismissal of which resulted in an award of attorney's fees in favor of the McMarlins in the amount of \$133,161.00. A corporate

entity cannot, of its own accord, make faulty representations and pursue inherently defective claims. That can only be done by a person or people. In this instance those actions were undertaken by Jay Brown.

All of that evidence conclusively establishes that the damages incurred by the McMarlins were the direct and proximal result of *at least* the concurrent negligence of Mr. Brown, personally. To hold otherwise was to ignore the record.

CONCLUSION

The rulings of the Special Referee and the Court of Appeals have resulted in a grievous wrong. They have both concluded that the McMarlins have suffered substantial damages at the hands of Brown Constructors, LLC, which is unrecoverable. In doing so they shielded their eyes from the fact that everything done by Brown Constructors, LLC was done by and through Jay Brown personally. He directed construction at the McMarlin Home, selected and retained all subcontractors and accepted a project management fee in addition to the \$1,200,000 the McMarlins paid him before he abandoned the job. He also offered contractor services to the McMarlins without a license, misrepresented himself and his company to the LLR, and filed a defective a defective mechanics lien, which no LLC could have done by itself.

The facts supported a finding of personal liability against Jay Brown and the Supreme Court should impose that judgment.

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