

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

JUL 06 2020

**SC Court of Appeals**

The Honorable Henry W. Brown  
Special Referee

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APPELLATE CASE NO.: 2019-000513

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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, LLC,  
.....Third-Party Defendants.

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**FINAL CROSS-APPEAL BRIEF OF THE APPELLANT/RESPONDENT**

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Robert B. Varnado (SC Bar # 0007085)  
BROWN & VARNADO LLC  
P.O. Box 1127  
Mount Pleasant, South Carolina 29465  
(843) 737-7300  
*Attorneys for Appellant/Respondent and  
Third-Party Defendants.*

June 29, 2020  
Mt. Pleasant, South Carolina

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## **STATEMENT OF ISSUES ON APPEAL**

Did the Special Referee err in misapplying the law of personal liability; make a ruling unsupported by the evidence; and/or fail to rule in favor of the McMarlins' alter ego and amalgamation claims?

## **STATEMENT OF THE CASE**

The Appellant/Respondents would give the identical statement of the case in this brief as was made in their June 29, 2020 Final Brief.

## **STANDARD OF REVIEW**

“When reviewing an action at law, referred to a master or special referee for final judgment with direct appeal to the supreme court or the court of appeals, the appellate court's jurisdiction is limited to correcting errors of law, and the appellate court will not disturb the master or special referee's findings of fact as long as they are reasonably supported by the evidence.” *Allen v. Pinnacle Healthcare Sys., LLC*, 394 S.C. 268, 272, 715 S.E.2d 362, 364 (Ct. App. 2011).

## **ARGUMENT**

- A. The Special Referee did not misapply the law of personal liability; make a ruling unsupported by the evidence; and/or err in failing to rule in favor of the McMarlins' alter ego and amalgamation claims.**

As opposed to Brown-Contractors' final brief of June 29, 2020, the McMarlins' initial cross-appeal brief of does not raise a true error of law. Rather, it really seeks to call into question the Special Referee's findings of *fact* – casting it as an “error of law” but all the while trying to get the Court of Appeals to disturb his factual ruling.

First, the McMarlins' brief unequivocally states that the "Order correctly states the general premise of law with respect to liability of an individual who is a member of an [sic] LLC." (See Br. p. 4). Thus, the McMarlins are *admitting* that the Special Referee did not make an error of *law*.

The McMarlins then tell us that the error comes in the Special Referee's "*assessing* [of] whether or not Jay Brown should have been afforded the protection of an LLC in the first instance (emphasis added)." (See Br. p 5). Here, the word "assessing" really speaks to the Special Referee's application of the facts to the law.

As a result, the McMarlins are attempting to do what the Court of Appeals cannot – disturbing a special referee's findings of fact which are reasonably supported by the evidence. *Allen*, 394 S.C. at 272, 715 S.E.2d at 364 (Ct. App. 2011); *Ritter & Assoc's, Inc. v. Buchanan Volkswagen, Inc.*, 405 S.C. 643, 649, 748 S.E.2d 801, 804 (Ct. App. 2013). And in the case at bar, the Special Referee makes a clear, concise and compelling statement of fact when he writes: "as to the specific element of damages found herein, there is not sufficient evidence of Jay Brown's personal negligence to impose liability on Mr. Brown." [R. 018]. The Court of Appeals should not be fooled.

The McMarlins go on at some length about how the facts of the case do not support the Special Referee's findings. (*Id.*)<sup>1</sup> They say, rather self-servingly, that they believed that they were hiring Jay Brown who they wrongfully believed to be licensed – apparently ignoring the contracts they did not sign, or the bills that they paid no attention to. the

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<sup>1</sup> Curiously, on pp 5-6 of the McMarlins' Brief, there is not one citation to the law, which is the same as not making an argument at all. See *Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) ("Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal.").

Respondents/Appellants' cherry-pick some of the facts which serve them best, ignoring others which do not. In any event, in his Order the Special Referee exhaustively covered all of their elements that they base their appeal upon. [R. 018]. Moreover, he considered and ruled against the McMarlins' criteria, as contained in their Rule 59 (e) motion, in his *Order Denying the Parties' Rule 59(e) Motions*. [R. 97-103; 20-21].

Once again, the McMarlins said that the Special Referee got the law right. Try as they might, they cannot succeed in turning a *factual* dispute – in which the Special Referee ruled against them – into a *legal* dispute.

Turning to the issue of alter ego and amalgamation, in Section II of their Brief (Br. pp. 7-10), there is little in the Record on Appeal to show that the McMarlins' preserved this issue to the Special Referee, which is shown by the fact that the Special Referee did not rule on them.

However, in their Statement of Facts – which is binding upon them – the McMarlins state that the Special Referee “ruled that the McMarlins had failed to establish the personal liability of Jay Brown.” (Br. p. 2). Moreover, he ruled that “as to the specific element of damages found herein, there is not sufficient evidence of Jay Brown’s personal negligence to impose liability on Mr. Brown.” [R. 018]. Therefore, the McMarlins can flesh out their alter ego and amalgamation theories, but once again they cannot turn a *factual* dispute into a *legal* dispute.

The Special Referee ruled against them and his finding of fact, adequately supported by his evidentiary ruling, should not be overturned.

CONCLUSION

The McMarlins got a judgment for \$346,693.00 against Brown Contractors which is on appeal. This is not a case where they can claim that the Special Referee treated them unfairly or inequitably. For these reasons, and any other reasons that the Court finds in the Record, that the Third-Party Respondents request that the Special Referee's ruling on the cross-appeal be AFFIRMED.

Respectfully submitted



Robert B. Varnado (SC Bar # 0007085)  
BROWN & VARNADO LLC  
P.O. Box 1127  
Mount Pleasant, South Carolina 29465  
(843) 737-7300  
*Attorneys for Appellant/Respondent and  
Third-Party Defendants.*

June 29, 2019  
Mt. Pleasant, South Carolina

**CERTIFICATE OF COMPLIANCE WITH RULE 211(b), SCACR**

I hereby certify that this Brief complies with Rule 211(b), SCACR.



Robert B. Varnado (SC Bar # 0007085)

June 29, 2020  
at Mt. Pleasant, South Carolina