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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
In the Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Common Pleas Case No. 2018-CP-22-824

Appellate Case No. 2021-000325

Evarista Juan Lorenzo, Appellant,

v.

Port City Elevator, Inc.; Alan Topper d/b/a All Construction; 2020 Custom Contractors a/k/a 2020 Custom Contractors, LLC; Citadel Site Management, LLC; DVBT Construction a/k/a DVBT Construction, LLC, DVBT Multiservices, LLC; Beverly Construction Group, LLC; Beverly Homes, LLC; Beverly Homebuilders, LLC; Strand Pain Contractors, LLC; Depaz Painting, LLC; Enhanced Heating & Air Conditioning, LLC; Carlton Pender, and Joan Pender, Defendants,

Of Which,

Alan Topper d/b/a All Construction; Citadel Site Management, LLC; Beverly Homes, LLC; Beverly Homebuilders, LLC; Strand Paint Contractors, LLC; Depaz Painting, LLC and Enhanced Heating & Air Conditioning, LLC are the Respondents.

RESPONDENT BEVERLY HOMES, LLC'S FINAL BRIEF



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July 21, 2022

ATTORNEYS FOR RESPONDENT
BEVERLY HOMES, LLC

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STATEMENT OF ISSUES ON APPEAL

- I. Appellant did not raise the issue below that Judge Nettles lacked authority to hear Beverly Homes, LLC's Rule 12(b)(1) motion, and the Rule 12(b)(1) motion was based on additional discovery and deposition testimonies after any earlier motion.
- II. The trial court correctly granted Beverly Homes, LLC's Rule 12(b)(1) Motion based on Appellant's repeated fictitious claim in the litigation that Beverly Homes was a general contractor for the Pender house.
- III. This Court should affirm the lower court based on additional grounds appearing in the record, pursuant to I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

STATEMENT OF THE CASE

Judge Michael Nettles granted Beverly Homes, LLC's Motion to Dismiss by Order filed January 13, 2021. Judge Nettles denied Appellant's Motion for Reconsideration by Order filed March 1, 2021. Appellant appeals from those decisions.

STATEMENT OF FACTS

Beverly Homes, LLC extends its sympathies to Ms. Lorenzo for the injuries she sustained from the fall; however, the record clearly demonstrates that Beverly Homes, LLC did not have any role with the construction of the Pender residence where she suffered her injuries. Appellant's attorney invented the theory against Beverly Homes, LLC that it was "a general contractor" for the Pender home, then tried to abandon that argument against Beverly Homes, LLC when the theory proved futile, and now complains that the trial court incorrectly dismissed Beverly Homes, LLC from this lawsuit.

Among the various defendants in this lawsuit, Plaintiff sued two separate and distinct corporations as "general contractors" for the construction of the Pender residence: Beverly Construction Group, LLC and Beverly Homes, LLC:

Beverly Construction Group, LLC is a licensed general contractor. Beverly Construction Group, LLC was the general contractor for the construction of the Pender residence where Appellant's injury occurred, and has long admitted that status. R., pp. 794-796. Carlton Pender also confirmed that he contracted with Beverly Construction Group, LLC for the construction of the home and Beverly Construction Group, LLC "was responsible of the subject property and coordination of all construction activities...." R. p. 788. Interestingly, Appellant admitted earlier in this litigation that the Penders "contracted with Beverly Construction Group, LLC to build a residential home on the Penders' property." R., p. 786.

Forrest Beverly is the managing member for Beverly Construction Group, LLC. R., p. 379, lines 6-8. Forrest Beverly testified in his deposition, taken before Appellant added Beverly Homes, LLC as a defendant in this lawsuit, that:

- Beverly Construction Group, LLC was responsible for hiring all of the subcontractors for the construction of the Pender home. Deposition of Forrest Beverly, R., p. 382, lines 21-25.
- Beverly Construction Group, LLC hired all of the subcontractors for the construction of the Pender home. R., p. 385, lines 6-8.
- Beverly Construction Group, LLC was responsible for coordinating all of the trades and subcontractors involved with the construction of the Pender home. R., p. 383, lines 1-4.
- Beverly Construction Group, LLC was responsible for inspecting all of the work performed by the subcontractors involved with the construction of the Pender home. R., p. 383, lines 5-8.
- Beverly Construction Group, LLC "would have been the contractor onsite handling the vertical construction of the house." R., p. 392, lines 17-24.
- Beverly Construction Group, LLC employed Jonathan Martin as the construction supervisor for the project. R., p. 383, lines 13-21.
- Jonathan Martin's responsibilities for the Pender project included "coordinat[ing] day-to-day operation of the job, coordinat[ing] subcontractors, and quality control." R., p. 384, lines 6-10.

- Beverly Construction Group, LLC still employed Jonathan Martin as a construction supervisor on the date of Beverly's deposition. R., p. 383, line 22 - p. 384, line 2.
- All invoices from subcontractors should have been addressed to Beverly Construction Group, LLC. R., p. 386, lines 3-20.
- Beverly Construction Group, LLC paid the invoices submitted from subcontractors for the construction of the Pender home. R. p. 386, lines 3-22.
- Beverly Homes, LLC did not have any ownership in the Pender lot, the Pender house, did not have any role with the construction of the Pender house, and did not market or sell the house. R., p. 390, lines 3-16.

By contrast, Beverly Homes, LLC is not a licensed general contractor, has never been a general contractor, has never been a contractor, and has never built a residence. R., p. 61, line 24 – p. 64, line 5. Beverly Homes, LLC is a real estate acquisition company that sells and develops lots. R., p. 53, line 20 – p. 54, line 1. Beverly Homes, LLC does not have any employees, has never had employees, and does not have any payroll. R., p. 59, lines 1-6; R., p. 60, lines 3-8.

Beverly Homes, LLC is owned by Randy Beverly and his son, Forrest Beverly. R., p. 389, lines 16-19. Randy Beverly does not have any ownership interest in Beverly Construction Group, LLC. R., p. 62, lines 13-15. Beverly Homes, LLC was not involved in the construction of the Pender home and did not perform any work at the Pender house. R., p. 62, line 20 - p. 63, line 6; R., p. 240, lines 19-25.

With regards to the Pender house, Beverly Construction Group, LLC built the home on a lot owned by the Penders. In other situations, Beverly Construction Group, LLC has built homes on land owned by Beverly Homes, LLC. But that did happen with the construction of the Pender home. "Beverly Construction Group dealt straight with Carlton Pender to construct the house." R., p. 390, lines 3-8.

Appellant's "Factual Background" in its "Statement of the Case" made several inaccurate claims and glaring omissions with the presentation of facts about Appellant's claims against Beverly Homes, LLC:

(1) Any confusion about the Penders making the two initial checks payable to Beverly Homes, LLC and not Beverly Construction Group, LLC (who was the party to the construction contract) did not result from any instruction by Beverly Homes, LLC for the Penders to pay it that money. As discussed by Randy Beverly, Beverly Homes, LLC did not receive those checks.

Q: Okay. Plaintiff's Exhibit 9 is that a check dated June 17th of 2016?

A: Yes, it is.

Q: And does the check state, "Pay to the Order of Beverly Homes?"

A: Yes, it does.

Q: And does the check indicate it is for deposit Lot 4 Bellevue?

A: Yes, it does.

Q: And is this check for twenty thousand dollars payable to Beverly Homes is it signed by Joan Pender?

A: Yes, ma'am, that appears to be the name.

Q: Do you know why this check was made Pay to the Order of Beverly Homes?

A: No, ma'am, I do not.

Q: Did you—

A: Just a I guess honest mistake on – on Joan Pender's part I guess.

Q: Did you receive this check at any time?

A: Me?

Q: Yes.

A: No, ma'am.

Q: Have you ever seen this check before today?

A: Not that I remember, no, ma'am.

Q: Was this check deposited into the bank account of Beverly Homes, LLC?

A: No, ma'am.

Q: Do you know whether this check was deposited into the bank account for Beverly Construction Group, LLC?

A: I have – I wouldn't – I wouldn't know.

....

- Q: And Plaintiff's Exhibit 10, does the document indicate the check is for plans and survey of Lot 4 Bellevue Phase I?
- A: Yeah, well, the check doesn't say that now. I think written below on the I guess the copy below that.
- Q: Okay. And is this check Pay to the Order of Beverly Homes in the amount of two thousand dollars?
- A: Yes, it is.
- Q: And is this check from the Penders?
- A: Looks so, yes. Yeah, I mean Pender is at the top. I can't read that signature but I'm sure it's from the Penders.
- Q: **Okay. Do you know why this check was made payable Pay to the Order of Beverly Homes?**
- A: **No, ma'am.**

R., p. 102, line 6 - p. 104, line 20 (emphasis added). Rebecca Beverly confirmed that Beverly Homes, LLC did not receive any money from the construction or sale of the Pender house. R. p. 246, line 9 - p. 249, line 21. As Rebecca Beverly testified:

- Q: And is that a check from Carlton or Joan Pender?
- A: Yes.
- Q: And was that check paid To The Order of Beverly Homes in the amount of twenty thousand dollars?
- A: The check is written to Beverly Homes
-
- Q: Do you know why that check was paid To The Order of Beverly Homes?
- A: I do not know why it was written To The Order of Beverly Homes, but as I said earlier many people confuse the names of our various companies.
- Q: Do you know whether this check was returned to the Penders for a new check to be issued?
- A: It was not.
- Q: Okay. Do you know whether this check was deposited.
- A: It was not deposited to Beverly Homes.
- Q: Okay. What account was this check deposited into?

A: I would imagine that it went into Beverly Construction Group, but I have not researched to see.

R., p. 246, line 9 - p. 247, line 24.

Q: And is that a check that is pay To The Order of Beverly Homes in the amount of two thousand dollars from Carlton A. Pender?

A: The check is written to be paid to the order of Beverly Homes for two thousand dollars from Carlton A. Pender.

...

Q: Okay. Do you know whether this check pay To The Order of Beverly Homes was deposited by Beverly Construction Group, LLC?

A: I don't recall. It was not deposited by Beverly Homes into Beverly Homes' account.

Q: Okay. And how do you know that?

A: I looked back at Beverly Homes' account for this timeframe.

R., p. 248, line 20 - p. 249, line 21.

(2) Appellant mistakenly claimed that Beverly Homes, LLC subcontracted with Port City Elevator in December 2016 to install the elevator at issue in this case. Appellant's Brief, p.3. While true that the proposal submitted from Port City Elevators lists "Elevator for: Beverly Homes, 9007 Highway 544, Myrtle Beach, SC 29588," the plain face of the Contract document showed that "Beverly Construction Group" accepted the contract. Equally important, Port City Elevators submitted the "Final Invoice" for payment to Beverly Construction Group.

Moreover, Forrest Beverly testified before Appellant added Beverly Homes, LLC to the lawsuit, that Beverly Construction Group, LLC hired Port City Elevators for the Pender project and that Beverly Construction Group, LLC's Jonathan Martin¹

¹ Jonathan Martin confirmed at his January 10, 2020 deposition (5 days before Plaintiff added Beverly Homes, LLC as a defendant) that he worked as a construction

signed the contract with Port City Elevators for the elevator in the Pender house. Deposition of Forrest Beverly, page 147, line 23 - page 149, line 20.² Beverly Construction Group, LLC's signature to Port City Elevator's subcontract is below.

18. We propose to furnish and erect the elevator installation as outlined in the accompanying proposal for the sum of \$ 19,500.00 (Nineteen Thousand Five Hundred Dollars)

Respectfully submitted,
Port City Elevator, Inc.
 By: Seth Newman

ACCEPTANCE:
 Firm: Beverly Cons. Group
 By: [Signature]
 Title: Cons. Supv
 Date: 12-6-16

Date: _____
ACCEPTANCE:
 By: _____
 Homeowner
 By: _____
 Homeowner
 Date: _____

R., p. 496. Afterwards, Port City Elevator invoiced Beverly Construction Group, LLC for the elevator to the Pender home.



3334 US Hwy 421, Suite B
 Wilmington, NC 28401

DATE: March 10, 2017
INVOICE # 858
FOR: Pender Final

Bill To:
 Beverly Construction Group, LLC
 9007 Hwy 544
 Myrtle Beach, SC 29588

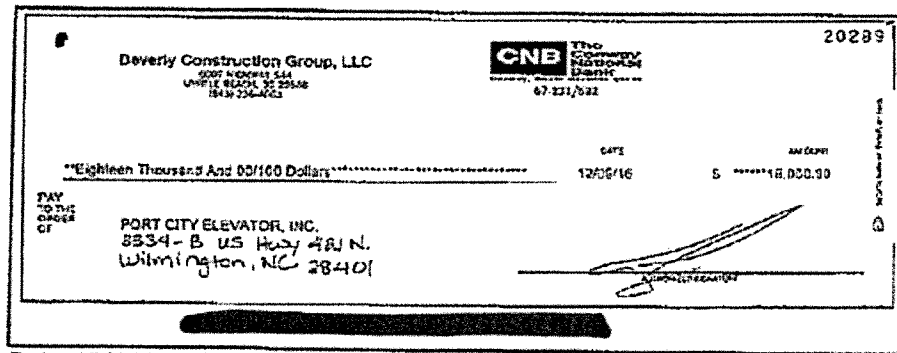
Job Information:
 Pender Residence
 39 Gasparilla Circle
 Murrells Inlet, SC 29576

DESCRIPTION	AMOUNT
Final Invoice for elevator	19,500.00
Added 3 keyed hall calls \$75.00 Ea	225.00
Deposit paid	(9,000.00)

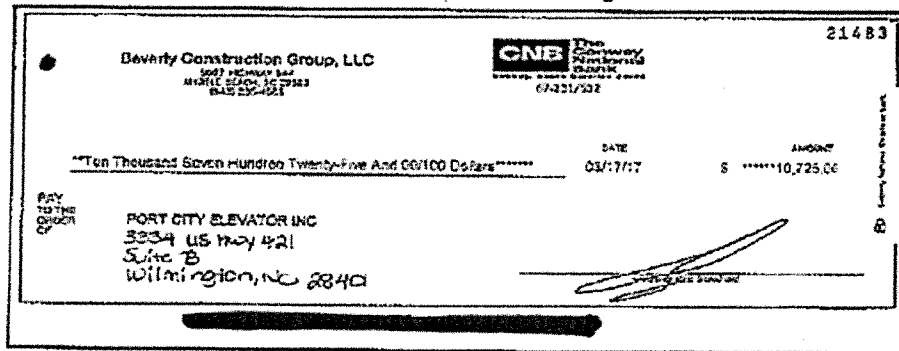
superintendent for Beverly Construction Group, LLC and that he had worked for Beverly Construction Group, LLC for six years at that point. R., p. 395, line 8 - p. 397 8, line 5. Pay stubs provided by Beverly Construction Group, LLC verified Martin's employment by Beverly Construction Group, LLC.

² See Respondent's Motion to Supplement Record on Appeal.

R., p. 20. Further, Beverly Construction Group, LLC paid Port City Elevator for the elevator installation at the Pender home, as shown by the following checks:



Date 12/14/2016 Check 20289 Amount \$18,000.00



Date 3/23/2017 Check 21483 Amount \$10,725.00

Beverly Homes, LLC's Randy Beverly testified that he had no knowledge of the Port City proposal and that no employee of Beverly Homes, LLC ever spoke to an employee of Port City Elevator. R., p. 74, lines 9-16; R., p. 114, line 21 - p. 115, line 3.

(3) Any alleged "Builder Warrantee" that identified Beverly Homes, LLC as the "Builder" of the Pender residence was not generated by Beverly Homes, LLC because it is not a builder of the Pender house.

Q: Okay. And does Plaintiff's Exhibit Number 24 states on the first page, "This limited warranty agreement is extended by Beverly Homes, LLC of Myrtle Beach, South Carolina, the builder, to Carlton and Joan Pender, the purchaser who is the original buyer of the property at Lot 4 Bellevue?"

A: Yes, it does.

Q: And at the top of the paid does it say, "Builder Warrantee Beverly Homes, LLC"?

A: Yes, it does.

Q: And do you know did Beverly Homes, LLC provide a warranty for the Lot 4 Bellevue property ...?

A: No, ma'am.

Q: Do you know why this builder warranty states, Beverly Homes, LLC of Myrtle Beach, South Carolina is the builder?

A: No, ma'am.

Q: Do you know who typed this document?

A: I do not know who did it. I don't know.

...

Q: And underneath Beverly Homes, LLC do you know whose initials are signed on this page?

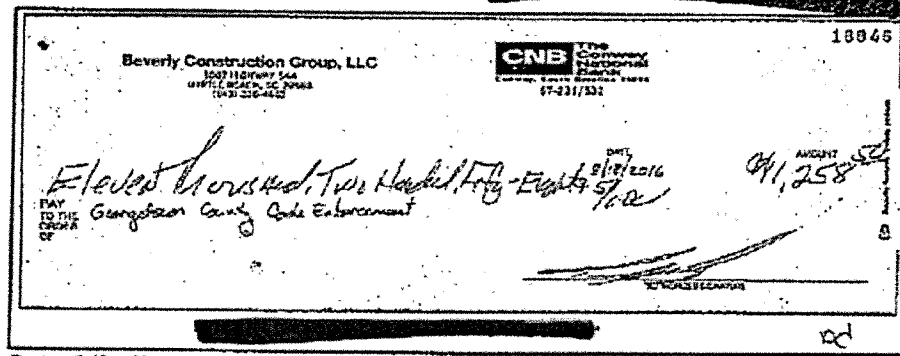
A: Whose initials they are?

Q: Yes.

A: I'm assuming, I can't – the buyers' initials look like maybe the Penders ..., but I can tell the seller says Forrest's initials. I recognize his.

R., p. 141, line 18 - p. 143, line 8. Clearly, the inclusion of Beverly Homes, LLC as the "seller" or "builder" of the Pender house was a clerical mistake by an employee of Beverly Construction Group, LLC because no parties disputes that the Penders contracted with Beverly Construction Group, LLC for the construction of their home. Randy Beverly testified that he did not know why Beverly Homes was listed, but he never signed the document. R., p. 145, lines 2-5. Beverly Homes, LLC also did not have any employee who could have generated the document.

(4) Similarly, clerical mistakes made by clerical staff not employed by Beverly Homes, LLC generated the building permit application. Appellant conveniently omitted from her "Statement of Facts" that Beverly Construction Group, LLC paid Georgetown County for the building permit of the Pender home (check below).



Date 8/24/2016 Check 18846 Amount \$11,258.50

Further, an objective review of the actual permit application showed numerous colored pens and handwriting that unquestionably demonstrated that an employee of Beverly Construction Group, LLC used a form document and then made a clerical mistake by listing Beverly Homes as the “owner” of the home being constructed. Further, the deed and tax payments showed the Penders owned the lot for approximately three years before construction began. And, the chain of title for the property in question never listed Beverly Homes as the owner of this lot at any point in time. Thus, Beverly Homes, LLC never “owned” the property. Attached is the permit application:

GEORGETOWN COUNTY
 PLANNING & DEVELOPMENT DEPARTMENT
 BUILDING DIVISION

129 Screven Street
 P.O. Drawer 421270
 Georgetown, SC 29442
 (843) 545-3116
 Fax: (843) 545-3296

BUILDING PERMIT APPLICATION

DATE RECEIVED 8/8/2014 PERMIT # 21400

STREET ADDRESS 39 Gasparilla Dr SUBDIVISION/ SECTION OF COUNTY Belle Vue
 LOT 4 BLOCK _____ TAX MAP # 41-0106-036-12-00
 ZONING DISTRICT PD FLOOD ZONE (AE11) (AE14)
 OWNER'S NAME Beverly Homes
 OWNER'S ADDRESS 9007 Hwy 544 TELEPHONE 843-236-4663
 APPLICANT'S NAME Beverly Construction Group, LLC TELEPHONE 843-236-4663
 CONTRACTOR Forrest Beverly SC LICENSE # M113946
 CONTRACTOR'S ADDRESS 9007 Hwy 544 TELEPHONE 843-236-4663
 ARCHITECT/ENGINEER Strand Engineer
 ARCH./ENG. ADDRESS 223 Laurel St Conway SC 29524 TELEPHONE 843-488-1828
 EMAIL ADDRESS FOR CONTACT PERSON Jonathon@beverlyhomessc.com
 PROPOSED USE Residential
 DESCRIBE WORK TO BE DONE New Construction
 VALUE OF CONSTRUCTION 179,250⁰⁰ # OF STORIES _____
 HEATED SQ. FT. 2646 UNHEATED SQ. FT. 3124 TOTAL SQ. FT. 5770
 TYPE OF IMPROVEMENT: NEW CONSTRUCTION (X) ADDITION () REPAIR/REPLACE () DEMOLISH ()
 MOVING () ALTERATION () OTHER () _____
 CONSTRUCTION TYPE: FRAME () METAL () WOOD (X) OTHER _____
 BLDG. EXTERIOR: BRICK () BLOCK () STONE () OTHER (X) _____
 FOR RESIDENTIAL: TOTAL # OF ROOMS 14 # OF BATHS 4 # OF BEDROOMS 3
 HEATING TYPE: HEAT PUMP (X) HOT WATER () CENTRAL AIR CONDITIONING ()
 TYPE OF FUEL: OIL () GAS () ELECTRIC (X) WOOD () COAL () # OF FIRE PLACES _____
 SEWER DISPOSAL: PUBLIC (X) SEPTIC TANK () WATER SUPPLY: PUBLIC (X) WELL ()

SIGNATURE OF CONTRACTOR [Signature] DATE 8/3/15

FOR OFFICE USE ONLY

 FRONT SETBACK: _____
 SIDE SETBACKS: LEFT _____ RIGHT _____
 REAR SETBACK: _____
 OVERALL STRUCTURE HEIGHT: _____
 FINISHED FLOOR ELEVATION: _____

Beverly Homes, LLC never owned the Pender lot. The Penders have owned the lot in question since April 30, 2014 when they purchased it from Conway National Bank for \$83,200.00.

Prepared without benefit of title examination by:
Moore, Johnson & Sarantli Law Firm, P.A.
PO Box 14737, 1271 Glenn's Bay Road
Surfside Beach, South Carolina 29587

201400003512
Filed for Record in
GEORGETOWN SC
WANDA PREVATTE, REGISTER OF DEEDS
04-30-2014 At 02:50:52 pm.
GSED 11.00
STATE TAX 217.10
COUNTY TAX 91.85
Book 2355 Page 1 - 5

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

*Lt 4 Belle
Vue*

LIMITED WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS, Conway National Bank, (hereinafter called "Grantor"), for and in consideration of the sum of Eighty-Three Thousand Two Hundred & 00/100s (\$83,200.00) Dollars to it, hand paid at and before the sealing of these presents, in the State aforesaid, (the receipt of which is hereby acknowledged) has granted, bargained, sold and released and by these Presents does hereby grant, bargain, sell and release unto Carlton E. Pender and Joan B. Pender (hereinafter called "Grantee"), for and during their joint lives and upon the death of either of them, then to the survivor of them, their heirs and assigns forever, in fee simple, together with every contingent remainder and right of reversion, the following described property, located in Georgetown County, South Carolina, to-wit:

THIS PROPERTY IS MORE COMMONLY KNOWN AS 39 GASPARILLA DRIVE, (LOT 4, BELLE VUE), MURRELLS INLET, SC 29576 AND IS MORE PARTICULARLY DESCRIBED IN EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF BY REFERENCE.

R., pp. 419-423. The Penders' purchase occurred approximately three years before construction began on the lot. Further, Georgetown County tax records also show that the Penders paid the property taxes on the property (and later the property and home) since 2014.

Receipt# 2014 051286 *** REAL ESTATE NOTICE ***
TMS 41 0106 0361200

Entered 10/01/2014
Paid 1/12/2015
1,466.75 BK 00000

Name: PENDER CARLTON E
PENDER JOAN B
81 WARRIOR WAY
SHARPSBURG GA 302770000
District: 410 MURRELLS I/GARDEN CTY

Ratio	Acres	Lots	Land Value	# Bld.	Bld.Value	TotValue	TAX	EXEMP-TIONS	Total
						121,500			
Res.									
Farm									
Other	6	1.0	121,500						
Desc	LOT 4 BELLE VUE SLD 428-10								
City-LEVY-County		City Tax	County Tax	WSFD	Serial#	Extra Fees	Total		
	188.3		1,372.71		94.04		1,466.75		
			1,372.71		94.04		1,466.75		
Tax Aftr Exempt		Feb Amt		Mar Amt		PAID	1466.75		
Jan Amt		Fee:		Interest:					
Penalty:									
Comment:							PAID		

R., p. 424. The references to Beverly Homes, LLC as the “owner” of the lot as stated in the various documents raised by Appellant were clearly and succinctly explained by Randy Beverly. He indicated each entry was “an honest, clerical mistake” made by someone not employed with Beverly Homes, LLC. R., p. 108, lines 8-18; p. 115, lines 19 - p. 117, line 22; p. 120, line 10 - p. 121, line 6. An objective evaluation of the building permit request shows, for example, numerous handwriting and numerous pen colors, which indicate some form document was incorrectly used to input the information for permitting with Georgetown County. In any event, Beverly Homes, LLC was not the owner of the lot or property as evidenced by the deed between the Penders and Conway National Bank and the receipts showing the Penders paid the property taxes from 2014 to present.

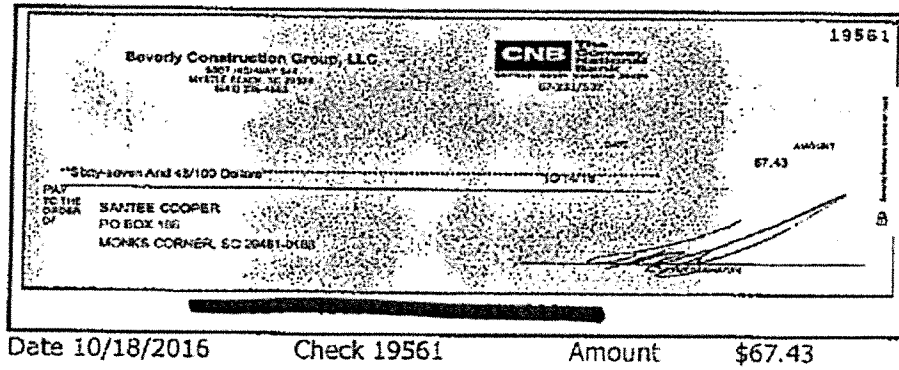
(5) Rebecca Beverly clearly stated in her deposition that the exhibit identified as a “Temporary Service Request” for power to Santee Cooper was (1) not on Beverly Homes, LLC letterhead; (2) was on letterhead that was not used by Beverly Homes, LLC; and (3) has an unidentified person’s handwriting listing Beverly Homes as the homebuilder. R., p. 250, line 8 - p. 252, line 5. Rebecca Beverly surmised that a clerical person for Beverly Construction Group, LLC grabbed the incorrect form document and made a clerical mistake. R., p. 251, lines 7-22.

Randy Beverly testified that the few documents submitted for the request for initial electrical service was:

“[j]ust an honest, clerical mistake in our office. I mean because like we said I mean you look back I mean you can say with LLR Beverly Homes has never had a – a contractor’s license. Never had any license really, but just – I don’t recognize the writing, but somebody just made an honest mistake by putting homebuilders as Beverly Homes.”

R., p. 108, lines 8-18. Randy Beverly confirmed that Beverly Homes did not pay the October 3, 2016 or November 30, 2016 invoices from Santee Cooper for electrical service. R., p. 111, lines 12-14; p. 112, lines 1-15.

Cancelled checks showed that Beverly Construction Group, LLC paid the invoices from Santee Cooper.



Beverly Construction Group, LLC
 3007 HIGHWAY 544
 MYRTLE BEACH, SC 29576
 (843) 336-4463


CNB The Community Development Bank
 67-231/532

19940

DATE 11/15/16 AMOUNT \$ 313.69

Three Hundred Thirteen And 68/100 Dollars

PAY TO THE ORDER OF
 SANTEE COOPER
 PO BOX 188
 Moncks Corner, SC 29401-0188



Date 11/16/2016 Check 19940 Amount \$313.69

Beverly Construction Group, LLC
 3007 HIGHWAY 544
 MYRTLE BEACH, SC 29576
 (843) 336-4463

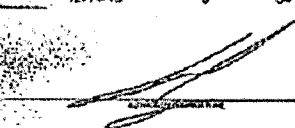
CNB The Community Development Bank
 67-231/532

20326

DATE 12/14/16 AMOUNT \$ 641.78

Six Hundred Forty-One And 78/100 Dollars

PAY TO THE ORDER OF
 SANTEE COOPER
 PO BOX 188
 Moncks Corner, SC 29451-0188



Date 12/19/2016 Check 20326 Amount \$641.78

Beverly Construction Group, LLC
 3007 HIGHWAY 544
 MYRTLE BEACH, SC 29576
 (843) 336-4463


CNB The Community Development Bank
 67-231/532

20701

DATE 01/13/17 AMOUNT \$ 203.44

Two Hundred Three And 44/100 Dollars

PAY TO THE ORDER OF
 SANTEE COOPER
 PO BOX 188
 Moncks Corner, SC 29451-0188



Date 1/18/2017 Check 20701 Amount \$203.44

21069

Beverly Construction Group, LLC
 3031 HIGHWAY 544
 MYRTLE BEACH, SC 29588
 (843) 236-4163

CNB The Community Development Bank of South Carolina
 67-231/532

DATE: 02/18/17 AMOUNT: \$ 158.36

One Hundred Fifty-Eight And 35/100 Dollars

PAY TO THE ORDER OF: **SANTEE COOPER**
 PO BOX 188
 Moncks Corner, SC 29461-0188

[Signature]

Date 2/17/2017 Check 21059 Amount \$158.36

21395

Beverly Construction Group, LLC
 3031 HIGHWAY 544
 MYRTLE BEACH, SC 29588
 (843) 236-4163

CNB The Community Development Bank of South Carolina
 67-231/532

DATE: 03/10/17 AMOUNT: \$ 340.79

Three Hundred Forty And 79/100 Dollars

PAY TO THE ORDER OF: **SANTEE COOPER**
 PO BOX 188
 Moncks Corner, SC 29461-0188

[Signature]

Date 3/14/2017 Check 21395 Amount \$340.79

21805

Beverly Construction Group, LLC
 3031 HIGHWAY 544
 MYRTLE BEACH, SC 29588
 (843) 236-4163

CNB The Community Development Bank of South Carolina
 67-231/532

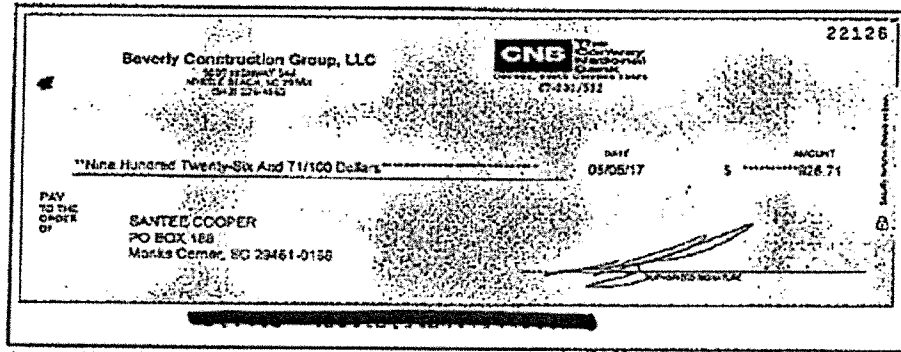
DATE: 04/11/17 AMOUNT: \$ 286.94

Two Hundred Eighty-Six And 94/100 Dollars

PAY TO THE ORDER OF: **SANTEE COOPER**
 PO BOX 188
 Moncks Corner, SC 29461-0188

[Signature]

Date 4/18/2017 Check 21805 Amount \$286.94



Date 5/11/2017 Check 22126 Amount \$926.71

(6) The fact that several subcontractors sent invoices to Beverly Homes, LLC does not create any material issue. Appellant has not offered any subcontract signed by Beverly Homes, LLC or any payment by Beverly Homes, LLC for the construction of the Pender residence. To the contrary, Beverly Construction Group, LLC produced the cancelled checks showing it paid every subcontractor for the work to the Pender house. Further, the affidavits of Rebecca Beverly and Randy Beverly filed in this case detailed the following:

... Beverly Homes, LLC did not pay for any permit, work, or material for the Pender residence and did not receive any money from the construction or sale of the Pender house. R., pp. 605-608.

Further, Beverly Construction Group, LLC paid all invoices and bills referenced in Appellant's Memorandum in Opposition to Defendant Beverly Homes, LLC's Motion for Summary Judgment that involved the Pender house and that were addressed mistakenly by various subcontractors and vendors to "Beverly Homes." R., pp. 605-608.

These payments were made by and drawn on accounts in the name of Beverly Construction Group, LLC. R., pp. 605-608.

Beverly Homes, LLC did not process or have any involvement with the payment of these invoices and bills. R., pp. 605-608.

20751

Beverly Construction Group, LLC
 2007 Highway 544
 Myrtle Beach, SC 29579
 (843) 216-4652

CNB The Community Partnership
 47-231/532

OK
Winters

DATE: 01/23/17 AMOUNT: \$ 6,625.00

Six Thousand Six Hundred Twenty-Five And 00/100 Dollars

PAY TO THE ORDER OF: BSA Quality Construction, LLC
 258 Encore Cr
 Myrtle Beach, SC 29579

Date 1/23/2017 Check 20751 Amount \$6,625.00

20963

Beverly Construction Group, LLC
 2007 Highway 544
 Myrtle Beach, SC 29579
 (843) 216-4652

CNB The Community Partnership
 47-231/532

DATE: 02/03/17 AMOUNT: \$ 13,840.00

Thirteen Thousand Eight Hundred Forty And 00/100 Dollars

PAY TO THE ORDER OF: BSA Quality Construction, LLC
 258 Encore Cr
 Myrtle Beach, SC 29579

Date 2/6/2017 Check 20963 Amount \$13,840.00

21021

Net Director

Beverly Construction Group, LLC
 2007 Highway 544
 Myrtle Beach, SC 29579
 (843) 216-4652

CNB The Community Partnership
 47-231/532

DATE: 02/10/17 AMOUNT: \$ 8,796.00

Eight Thousand Seven Hundred Ninety-Six And 00/100 Dollars

PAY TO THE ORDER OF: BSA QUALITY CONSTRUCTION LLO
 258 ENCORE CIRCLE
 Myrtle Beach, SC 29579

Date 2/14/2017 Check 21021 Amount \$8,796.00

21534

Beverly Construction Group, LLC
 507 Highway 541
 Myrtle Beach, SC 29578
 (843) 236-4563

CNB Community National Bank
 Myrtle Beach, SC
 67-231/532

DATE: 03/23/17 AMOUNT: \$ 11,630.00

Eleven Thousand Six Hundred Thirty And 00/100 Dollars

PAY TO THE ORDER OF: BSA Quality Construction, LLC
 258 Encore Cr
 Myrtle Beach, SC 29578

[Signature]

Date 3/27/2017 Check 21534 Amount \$11,630.00

21617

Beverly Construction Group, LLC
 507 Highway 541
 Myrtle Beach, SC 29578
 (843) 236-4563

CNB Community National Bank
 Myrtle Beach, SC
 67-231/532

DATE: 03/31/17 AMOUNT: \$ 2,451.40

Two Thousand Four Hundred Fifty-One And 40/100 Dollars

PAY TO THE ORDER OF: BSA Quality Construction, LLC
 258 Encore Cr
 Myrtle Beach, SC 29578

[Signature]

Date 4/3/2017 Check 21617 Amount \$2,451.40

21994

Beverly Construction Group, LLC
 507 Highway 541
 Myrtle Beach, SC 29578
 (843) 236-4563

CNB Community National Bank
 Myrtle Beach, SC
 67-231/532

DATE: 04/26/17 AMOUNT: \$ 280.00

Two Hundred Eighty And 00/100 Dollars

PAY TO THE ORDER OF: BSA Quality Construction, LLC
 258 Encore Cr
 Myrtle Beach, SC 29578

[Signature]

Date 5/3/2017 Check 21994 Amount \$280.00

Beverly Construction Group, LLC
 5077 Highway 544
 Myrtle Beach, SC 29578
 (843) 231-4121


CNB The Company
 Commercial Bank
 Myrtle Beach, SC 29578
 (843) 231-5332

18997

DATE: 08/15/16 AMOUNT: 6,150.00

Sixty-one Hundred Fifty And 00/100 Dollars

PAY TO THE ORDER OF STRAND ENGINEERING
 215 LAUREL ST
 CONWAY, SC 29526



Date 8/15/2016 Check 18697 Amount \$6,150.00

Beverly Construction Group, LLC
 5077 Highway 544
 Myrtle Beach, SC 29578
 (843) 231-4121


CNB The Company
 Commercial Bank
 Myrtle Beach, SC 29578
 (843) 231-5332

18996

DATE: 08/26/16 AMOUNT: 8,725.00

Eighty-seven Hundred Twenty-five And 00/100 Dollars

PAY TO THE ORDER OF FAITH LANDSCAPING, LLC
 7032 HWY 134
 CONWAY, SC 29527



Date 8/26/2016 Check 18996 Amount \$8,725.00

Beverly Construction Group, LLC
 5077 Highway 544
 Myrtle Beach, SC 29578
 (843) 231-4121


CNB The Company
 Commercial Bank
 Myrtle Beach, SC 29578
 (843) 231-5332

19149

DATE: 09/12/16 AMOUNT: 10,976.25

Ten Thousand Nine Hundred Seventy-six And 25/100 Dollars

PAY TO THE ORDER OF PALMETTO CONCRETE LLC
 3584 GOOD LUCK RD
 MYRTLE BEACH, SC 29578



Date 9/12/2016 Check 19149 Amount \$10,976.25

19242

Beverly Construction Group, LLC
 7827 REDWATER SUE
 MYRTLE BEACH, SC 29516
 679-229-4632

CNB The Community Bank of Myrtle Beach
 679-229-7532

DATE: 09/19/16 AMOUNT: 3,128.75

Thirty-one Hundred Twenty-eight And 75/100 Dollars

PAY TO THE ORDER OF: PALMETTO CONCRETE LLC
 3584 GOOD LUCK RD
 AYNOR, SC 29511

Date 9/19/2016 Check 19242 Amount \$3,128.75

20257

Beverly Construction Group, LLC
 7827 REDWATER SUE
 MYRTLE BEACH, SC 29516
 679-229-4632

CNB The Community Bank of Myrtle Beach
 679-229-7532

DATE: 12/09/16 AMOUNT: 5,727.74

Five Thousand Seven Hundred Twenty-seven And 74/100 Dollars

PAY TO THE ORDER OF: GALE CONTRACTOR SERVICES
 700 CENTURY CIRCLE
 Conway, SC 29526

Date 12/19/2016 Check 20257 Amount \$5,727.74

21745

Beverly Construction Group, LLC
 7827 REDWATER SUE
 MYRTLE BEACH, SC 29516
 679-229-4632

CNB The Community Bank of Myrtle Beach
 679-229-7532

DATE: 04/07/17 AMOUNT: 4,350.04

Four Thousand Three Hundred Fifty And 04/100 Dollars

PAY TO THE ORDER OF: GALE CONTRACTOR SERVICES
 700 CENTURY CIRCLE
 Conway, SC 29526

Date 4/17/2017 Check 21745 Amount \$4,350.04

19760


Beverly Construction Group, LLC
 2007 Highway 544
 Myrtle Beach, SC 29578
 (843) 235-4544

CNE The Community Bank
 Myrtle Beach, SC 29578
 (843) 231-5112

DATE: 10/31/16 AMOUNT: 25,863.00

Twenty-five Thousand Eight Hundred Sixty-three And 00/100 Dollars

PAY TO THE ORDER OF
 2020 CUSTOM CONTRACTORS
 1087 BURCALE RD
 MYRTLE BEACH, SC 29578



Date 10/31/2016 Check 19760 Amount \$25,863.00

20142

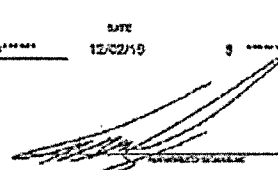
Beverly Construction Group, LLC
 2007 Highway 544
 Myrtle Beach, SC 29578
 (843) 235-4544

CNE The Community Bank
 Myrtle Beach, SC 29578
 (843) 231-5112

DATE: 12/02/16 AMOUNT: \$ 29,702.00

Twenty-Nine Thousand Seven Hundred Two And 00/100 Dollars

PAY TO THE ORDER OF
 2020 CUSTOM CONTRACTORS
 1087 BURCALE RD
 Myrtle Beach, SC 29578



Date 12/5/2016 Check 20142 Amount \$29,702.00

21242


Beverly Construction Group, LLC
 2007 Highway 544
 Myrtle Beach, SC 29578
 (843) 235-4544

CNE The Community Bank
 Myrtle Beach, SC 29578
 (843) 231-5112

DATE: 03/03/17 AMOUNT: \$ 27,171.79

Twenty-Seven Thousand One Hundred Seventy-One And 79/100 Dollars

PAY TO THE ORDER OF
 2020 CUSTOM CONTRACTORS
 1087 BURCALE RD
 Myrtle Beach, SC 29578



Date 3/7/2017 Check 21242 Amount \$27,171.79

Beverly Construction Group, LLC
 427 W. HARTY AVE
 MYRTLE BEACH, SC 29577
 (843) 735-6643


CNB The Community National Bank
 67-231/332

22318

Seven Thousand Ninety-Eight And 00/100 Dollars

DATE 05/22/17 AMOUNT \$ 7,098.00

PAY TO THE ORDER OF
 2020 CUSTOM CONTRACTORS
 1087 BURCALE RD
 Myrtle Beach, SC 29579



Date 5/22/2017 Check 22318 Amount \$7,098.00

Beverly Construction Group, LLC
 427 W. HARTY AVE
 MYRTLE BEACH, SC 29577
 (843) 735-6643

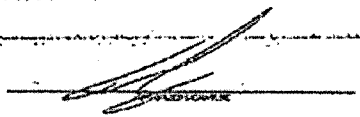
CNB The Community National Bank
 67-231/332

22980

Seventeen Thousand Seven Hundred Thirty-Six And 75/100 Dollars

DATE 07/10/17 AMOUNT \$ 17,736.75

PAY TO THE ORDER OF
 2020 CUSTOM CONTRACTORS
 1087 BURCALE RD
 Myrtle Beach, SC 29579



Date 7/10/2017 Check 22980 Amount \$17,736.75

Beverly Construction Group, LLC
 427 W. HARTY AVE
 MYRTLE BEACH, SC 29577
 (843) 735-6643

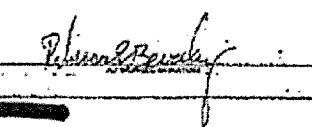
CNB The Community National Bank
 67-231/332

25917

Twenty-Three Thousand Six Hundred Thirteen And 00/100 Dollars

DATE 02/22/18 AMOUNT \$ 23,613.00

PAY TO THE ORDER OF
 2020 CUSTOM CONTRACTORS
 1087 BURCALE RD
 Myrtle Beach, SC 29579



Date 2/12/2018 Check 25917 Amount \$23,613.00

Before filing the lawsuit, Appellant filed a claim for her injuries with the South Carolina Worker's Compensation Commission, and she has continued to pursue that claim for several years. Appellant added Beverly Construction Group, LLC, Beverly Homes, LLC, and Beverly Homebuilders, LLC as defendants to the Second Amended Complaint filed January 15, 2020. Throughout the tort litigation with the Court of Common Pleas, Appellant maintained that Beverly Homes, LLC was a general contractor for the construction of the Pender home where she suffered her injuries.

Appellant made this assertion against Beverly Homes, LLC in written discovery responses, her architect/contractor expert's deposition testimony, and numerous memoranda and arguments made to the court. At all times, Beverly Homes, LLC denied it had any involvement with the project or construction described in the Complaint. R., pp. 724-727. Beverly Homes, LLC is not a contractor and has never been licensed to perform contracting work.

ARGUMENTS

I. Appellant did not raise the issue below that Judge Nettles lacked authority to hear Beverly Homes, LLC's Rule 12(b)(1) motion, and the Rule 12(b)(1) motion was based on additional discovery and deposition testimonies after any earlier motion.

"An appellate court may not ... reverse for any reason appearing in the record. The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that 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." On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000). "Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." Elam v. S.C. DOT, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004). Appellant clearly did not raise this argument to the trial court.

In this matter, Appellant added Beverly Homes, LLC and numerous other defendants to the lawsuit by way of a Second Amended Complaint filed January 15, 2020. Beverly Homes, LLC answered on February 10, 2020 and filed a summary judgment motion on February 21, 2020. Appellant responded to the summary judgment motion by alleging, among other claims, that:

I. Summary Judgment should be denied because Appellant should have a full and fair opportunity to complete discovery.

This case is in the early phase of discovery, with multiple witnesses to be scheduled. There are genuine issues of material facts in this case. Specifically, there are questions as to the control and ownership of the premises. Defendant Beverly Homes, LLC's role and obligations on the construction site, the maintenance and inspections of the subject site, and if subcontractors selected and paid by Defendant Beverly Homes, LLC contributed to Appellant's fall. In any event, Appellant has not had the opportunity to depose all the necessary and material witnesses or complete her investigation. In fact, some of the Defendants have not even appeared in the case or filed an Answer to the lawsuit at this time. Moreover, this information is necessary in order to assess the degree of negligence of each Defendant. It is clear that the drastic remedy of summary judgment should not be granted on the grounds that Defendant Beverly Homes, LLC's motion is premature as discovery is not yet complete and is critical to determine the degree of fault of the various defendants."

R., p. 733. Judge Culbertson denied Beverly Homes' summary judgment motion without a hearing on April 23, 2020.

Later, as the brief filed by Beverly Homes in support of the Rule 12(b)(1) Motion to Dismiss on October 19, 2020 made abundantly clear, Beverly Homes moved at that time based off of the discovery materials, additional facts, and deposition testimonies of various subcontractors and Appellant's expert. R., pp. 346-361. The Rule 12(b)(1) motion clearly alleged different testimony and discovery conducted after the earlier ruling, and new facts learned during that process.

Thereafter, Appellant never argued that Judge Nettles lacked authority to hear the Rule 12(b)(1) motion or that any ruling by Judge Nettles would usurp Judge Culbertson's decision. Appellant did not raise this argument at any of the following:

Appellant's Memorandum In Opposition to Defendant Beverly Homes, LLC's Rule 12(b)(1) Motion to Dismiss (filed September 30, 2020);

Transcript of Record for December 4, 2020 hearing on Rule 12(b)(1);

Appellant's Supplemental Memorandum In Opposition to Defendant Beverly Homes, LLC's Rule 12(b)(1) Motion to Dismiss (filed December 9, 2020) (five days after the motion hearing);

Appellant's Notice of Motion and Motion to Reconsider, Alter, or Amend with Appellant's Memorandum of Law In Support (filed January 24, 2021); and

Transcript of Record for February 23, 2021 hearing on Appellant's Motion to Reconsider, Alter, or Amend.

R., pp. 281-345; 552-570; 461-538, 571-700; 701-715. None of those matters have any objection lodged by Appellant that Judge Nettles could not entertain Beverly Homes, LLC's motion. As stated by the Supreme Court in the FOU, L.L.C. decision:

Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, laws and arguments. See Roche v. South Carolina Alcoholic Beverage Control Comm'n, 263 S.C. 451, 211 S.E.2d 243 (1975) (purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal). The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case....

338 S.C. at 422, 526 S.E.2d at 724.

II. The trial court correctly granted Beverly Homes, LLC's Rule 12(b)(1) Motion based on Appellant's repeated fictitious claim in the litigation that Beverly Homes was a general contractor for the Pender house.

At no point has Beverly Homes ever claimed it was a contractor or a general contractor. The only people who made that claim were Appellant's attorneys and Appellant's hired expert, Robin Roberts. On September 11, 2020, the trial court granted Beverly Construction Group, LLC's Motion to Dismiss and concluded Beverly Construction Group "[wa]s a statutory employer of the Appellant and, therefore, Appellant's recovery against this Defendant is limited to the Workers' Compensation Act." R., pp. 797-799.³

Appellant did not appeal the ruling dismissing Beverly Construction Group, LLC, so she has admitted in this litigation that she was to be considered a statutory employee of the general contractor for the home and any tort recovery would be barred against the general contractors of the Pender home. That admission is significant because Beverly Homes, LLC based its motion to dismiss on the same arguments made by Beverly Construction Group, LLC because of Appellant's repeated contentions in written discovery responses, depositions, motions, and memoranda that Beverly Construction Group, Inc. and Beverly Homes, LLC were general contractors for the construction of the Pender residence. Specifically, Plaintiff's expert Roberts stated: "In general, as being co-prime contractors, this whole thing is their creation." R., p. 529, lines 8-10. Beverly Homes has never contended it was or is a contractor or a general contractor. Further, Appellant's brief cites the "Builder's Warrantee" given to the Penders as evidence that Beverly Homes, LLC was a general contractor for the Pender construction.⁴

As the trial court's Order reflected, Appellant position to the trial court was that Beverly Homes, LLC was a general contractor for the Pender house:

³ Beverly Homes, LLC's motion to dismiss did not get scheduled for the September 11, 2020 date when the clerk of court scheduled the hearing on Beverly Construction Group, LLC's Motion to Dismiss.

⁴ The inclusion of Beverly Homes, LLC as the builder on the "Builder Warrantee" was a clerical mistake as testified to by Randy Beverly and was incorrectly included by an office staff member in the Residential Construction Contract between the Penders and Beverly Construction Group, LLC. R., p. 100, line 6 - p. 101, line 6; p. 141, line 18 - p. 145, line 5. Further support for the conclusion of the clerical mistake is evidenced by the fact Randy Beverly of Beverly Construction Group, LLC signed the warranty document.

A. In response to Beverly Homes, LLC's summary judgment motion, Appellant's March 23, 2020 memorandum argued:

- "Appellant was working at a construction site at or near 39 Gasparilla Circle, Murrells Inlet, South Carolina where Defendants were also performing work."
- "Appellant alleges personal injury against Defendants as a result of her fall down an unmarked and open elevator shaft that was created and/or was under the control of Defendants."
- "The [Second Amended Complaint]" enumerated causes of action against Defendants including negligence in the creation, maintenance, and/or allowance of a dangerous condition on the premises."
- "It is clear that Defendant Beverly Homes LLC had a duty of care to Appellant since Beverly Homes LLC had control over the subject premises and control over the hiring of specific subcontractors performing work at the property."
- "Specifically, there are questions as to the control and ownership of the premises, Defendant Beverly Homes, LLC's role and obligations on the subject construction site, the maintenance and inspections of the subject site, and if subcontractors selected and paid by Defendant Beverly Homes LLC contributed to Appellant's fall."
- "... [I]t is clear that the subcontractors believed that Beverly Homes had hired them and was responsible for payment of the services provided at the [Pender] home."
- "The evidence shows that Beverly Homes hired specific subcontractors to work at the subject premises which indicates Beverly Homes LLC had control over the property and work being performed at the property."
- Beverly Homes, LLC requested temporary electrical services from Santee Cooper and included a "Residential Service Extension" listing Beverly Homes as the "Home Builder" on the application.
- Various subcontractors sent invoices to Beverly Homes for work done at the Pender residence.

R., pp. 731-738.

B. Appellant's June 19, 2020 reply memorandum continued to assert that Beverly Homes, LLC was a general contractor for the Pender house. In that memorandum, Appellant claimed:

- "... [I]t is clear that Defendant Beverly Homes LLC hired subcontractors to perform work at the subject property including Aaron Horne of 2020 Custom Contractors and entered into subcontracts for work to be performed at the subject property which demonstrates the control Defendant Beverly Homes LLC had over the subcontractors performing the work at the subject premises which lead to the subject incident. We intend to prove that Defendant Beverly Homes LLC selected and hired incompetent subcontractors to perform the construction work at the subject premises and failed to adequately supervise and ensure the property safety measures and training of the subcontractors it hired."

...

- "When one general contractor hires a subcontractor to perform work, that general contractor remains responsible for the subcontractor's work and has control over the subcontractor it hired even if another general contractor or homeowner ultimately pays the subcontractor's invoice for the work performed." (emphasis added).

R., pp. 771, 774-775.

C. Appellant's expert (Robin Roberts) also echoed Appellant's claims that Beverly Homes was a general contractor for the construction of the Pender residence. In his deposition, he stated:

- Beverly Construction Group, LLC and Beverly Homes, LLC were "co-prime contractors" for the construction of the Pender residence.
- "In general, as being co-prime contractors, this whole thing is their creation."

- “So I think those things make[] them a co-prime contractor on the site; whether they intended to or not, that is what happened. Then they would have the same obligations as any other contractor or subcontractor on the site.”

R., p. 364, lines 1-18; p. 366, lines 3-4; p. 372, lines 7-10.

Roberts also opined his belief that Beverly Homes, LLC may have liability as an “employer” under the Occupational Safety and Health Administration (OSHA) rules. R., p. 369, line 23 - p. 374, line 4. Further, Roberts said every one of his opinions about Beverly Homes, LLC in this litigation were based on his belief that Beverly Homes behaved as a contractor on the Pender home and was a “co-prime contractor” with Beverly Construction Group, LLC. R., p. 367, line 2 - p. 368, line 23.

- D. At the December 4, 2020 hearing, Appellant conceded that she had claimed Beverly Homes was a general contractor for the Pender house.
- E. Appellant’s December 9, 2020 supplemental memorandum argued, among other things,:

- “The ‘Builder Warrantee’ proves that Beverly Homes LLC had some control over the premises because it states ‘[t]his Limited Warranty Agreement is extended by Beverly Homes, LLC, of Myrtle Beach, SC, the Builder, to Carlton & Joan Pender, the Purchaser, who is the original Buyer of the property at: Lot 4 Belle Vue....The Builder Warrantee lists ‘Beverly Homes, LLC’ in the heading on the first page and at the bottom of each page where it signed and initialed on June 17, 2016, by Beverly Homes LLC as the builder of this property to the buyers.”

R., pp. 463-464.

- “In general, as being co-prime contractors, this whole thing is their creation.”

- “So I think those things make[] them a co-prime contractor on the site; whether they intended to or not, that is what happened. Then they would have the same obligations as any other contractor or subcontractor on the site.”

R., p. 364, lines 1-18; p. 366, lines 3-4; p. 372, lines 7-10.

The interior painting work performed by Appellant when she was injured was clearly an activity that was an important part of the business or trade when constructing a new home and is a “necessary, essential, and integral part” of any general contractor’s trade or business. Completion of interior painting of a newly constructed home was part of the construction process for the Pender house and for construction of new homes generally. R., p. 413, lines 16-19. Gerald Rion (painting subcontractor) testified that interior painting was “an essential part” and a “very important” element of constructing new residential homes. R., p. 438, lines 6-16.

Further, painting of the interior walls and trim was a specific element of the “Specifications” for the Pender house and essential to the satisfaction of the contract with the general contractor for the construction of the Pender house. R., pp. 440, 443. In addition, the Penders’ contract required completion of the interior painting of the home as part of the construction process, with the Penders selecting the paint color. R., pp. 433-436; pp. 440-451. Clearly, the Penders would not have accepted the home or thought the contract fully completed until the interior painting was completed to their satisfaction. In addition, the “Builder Warranties” that Appellant claimed were the responsibility of Beverly Homes, LLC obligated the general contractor to substantially conform the construction-related activities to the Specifications and any change orders. R., p. 456.

Thus, interior painting of the Pender residence was an activity that was “a necessary, essential, and integral part of the general contractor’s trade, business, or occupation” and required work by the contract documents between the general contractor and the Penders. The trial court clearly recognized that Appellant made the same claims against Beverly Construction Group, Inc. and Beverly Homes, LLC that each was a general contractor for the Penders’ home, and afforded both the same

dismissal under Rule 12(b)(1), SCRCP, based on Appellant's arguments.⁵ Appellant's interior painting work of a new home under construction certainly was an important part of the trade and business of the general contractor (and any general contractor performing residential or multi-family housing) and was "necessary, essential, and integral" to the completion of the home and the delivery of the new home to the Penders. Appellant was not performing maintenance or repair work, as was being performed by the injured worker in the recent decision of Keene v. CNA Holdings, LLC, S.C. S.Ct. Op. No. 28052 (filed August 11, 2021).

In Freeman Mech. V. J.W. Bateson Co., 316 S.C. 95, 447 S.E.2d 197 (1994), the South Carolina Supreme Court held that the prime contractor "enjoy[ed] the immunity created by the [South Carolina Workers' Compensation] Act from common law claims because the prime contractor was potentially liable under the South Carolina Workers' Compensation Act for injuries to a subcontractor's employee. In that case, the Court stated:

Under the Workers' Compensation Act, the prime contractor is liable for workers' compensation where the sub-contractor's employee is injured on the job. S.C. Code Ann. § 42-1-410 (1985). The doctrine of "statutory employee" is well developed in South Carolina. The employee of the sub-contractor may look to the prime contractor for workers' compensation benefits without regard to whether the sub-contractor is covered by a workers' compensation insurance policy. Where the prime contractor pays for the sub-contractor's employee's injuries through the doctrine of "statutory employee," the prime contractor is entitled to indemnification from the sub-contractor. S.C. Code Ann. § 42-1-440 (1985). Thus, under our workers' compensation scheme, the sub-contractor is primarily liable and the primary contractor secondarily liable for workers' compensation benefits to the sub-contractor's employee.

⁵ Beverly Homes did not have worker's compensation insurance because it was not a contractor, did not perform contracting duties, and did not have any employees. Appellant pursued her Worker's Compensation claim in this matter and recovered against the painting entities that employed her.

While the prime contractor is secondarily liable for work-related injuries to the employees of the sub-contractor, the sub-contractor has no such secondary liability for employees of the sub-contractor, the sub-contractor has no such secondary liability for employees of the prime contractor or employees of other sub-contractors on the job....The majority rule is that one who has obligations under the Act enjoys the immunities under the Act.

316 S.C. at 97-98, 447 S.E.2d at 198-199 (case citations omitted).

III. This Court should affirm the lower court based on additional grounds appearing in the record, pursuant to I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

In I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), the South Carolina Supreme Court allowed the prevailing party to present additional issues and arguments as a basis to affirm the lower court's ruling for a reason other than one primarily relied upon by the lower court. Id., 338 S.C. at 417, 526 S.E.2d at 722. In that case, the Court wrote:

In revising the appellate court rules, we intended to abandon restrictions surrounding additional sustaining grounds and allow a more flexible process. We chose to avoid the term "additional sustaining ground" in the present appellate court rules. Instead, the present rules provide simply that 'respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c), [SCACR]." Rule 208(b)(2), SCACR. Rule 220(c), in turn, provides that "the appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal."

....

Under the present rules, a respondent – the "winner" in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court....

The basis for respondent's additional sustaining grounds must appear in the record on appeal, but other requirements contained in former rules and pre-1990 precedent no longer apply....

The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.

Id., 338 S.C. at 418-420, 526 S.E.2d at 722-723. Therefore, any discussion about the propriety of trial court actions to dismiss Beverly Homes, LLC under an "Alternate and Separate Ground" appears unnecessary.⁶

Throughout arguments made during briefing before the hearings on the original motion and motion for reconsideration, at argument of the underlying motion and motion for reconsideration, and in briefing filed after the hearings, Appellant (a) was and was not the general contractor, (b) was the owner of the Pender house, (c) was not the owner of the Pender house; and/or (d) had liability because it somehow had "control" over the construction project.

The trial court recognized that Appellant could not have it both ways. As Judge Ralph King Anderson once said, "a litigant cannot 'blow both hot and cold.'" Quinn v. Sharon Corp., 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000) (Judge Ralph King Anderson concurring). Judge Anderson continued: "Deceit and dishonesty are anathema of justice. 'The chief security and safeguard for the purity and efficiency of the administration of justice is to be found in the proper reverence for the sanctity of an oath.' Judicial estoppel guarantees the protection of the judiciary from the perversion created by a party's inconsistent averments." Id.

In Quinn, the appellant previously filed an answer and counterclaim admitting that he had no authority to bind a corporation and that his daughter owner and operated the corporation. Appellant later claimed that he was the corporation's sole owner. Id., 327 S.C. at 252, 489 S.E.2d at 477. The Quinn court held Appellant's

⁶ Respondent respectfully disagrees with Appellant's contention that the circuit court could not act *sua sponte* in this matter given the numerous memoranda and arguments made by Appellant on the issues. A basis for this alternative and separate ruling can also be found under Rule 12(c), SCRCP, and with the procedural rulings in the following cases: Reliford v. Mitsubishi Motors Credit of Am., Inc., 2004 S.C. App. Unpub. LEXIS 556 (S.C. Ct. App. 2004) (affirming trial court's *sua sponte* order granting summary judgment to a non-moving party); Horne v. Beason, 285 S.C. 518, 331 S.E.2d 342 (1985) (affirming trial court's *sua sponte* order dismissing the mayor and councilmen from a wrongful death case filed against the City and arresting officers). Here, Appellant made the arguments on the matters ruled upon at the December 4, 2020 hearing with Appellant's December 9, 2020 supplemental memorandum filed after arguments of counsel.

second claim was barred by judicial estoppel because of the earlier assertions. Id. “Were we to allow [appellant] to change his position as to the facts and now claim ownership of the Corporation, ‘the truth-seeking function of the judicial process [would be] undermined.’” Id., 343 S.C. at 415, 540 S.E.2d at 476. The doctrine of judicial estoppel prohibits a party that has assumed a particular position in a judicial proceeding from adopting an inconsistent posture in subsequent proceedings. See e.g., Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997). Pursuant to the doctrine of judicial estoppel, Plaintiff should be precluded from adopting a position that is in conflict with the position taken earlier.

At the December 4, 2020 hearing and in the subsequent December 9, 2020 supplemental memorandum, Appellant pivoted from the “general contractor” argument and moved away from the opinions of her architect/contractor expert Roberts, who said all of his opinions against Beverly Homes were based on his belief that Beverly Homes was a “co-prime contractor” with the now-dismissed Beverly Construction Group. Appellant’s theory was that Beverly Homes, LLC had liability because it “had control over the premises and was negligent.” R., p. 463. As part of that argument, Appellant alleged that Beverly Homes, LLC “owned” the Pender lot where the house was built. R., p. 464. Appellant also argued Beverly Homes, LLC exercised “control” over the Pender lot and construction.

To assert a negligence claim under South Carolina law, a Appellant must show that (1) defendant owed her a duty of care; (2) defendant breached this duty by a negligent act or omission; (3) defendant’s breach was the proximate cause of her injuries; and (4) she suffered injury or damages. Dorrell v. S.C. DOT, 361 S.C. 312, 605 S.E.2d 12 (2004). An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the Appellant. Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). Without a duty, no actionable negligence exists. Id. “The existence of a duty owed is a question of law for the courts.” Doe v. Greenville County Sch. Dist., 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007) (citing Doe v. Batson, 345 S.C. 316, 323, 548 S.E.2d 854, 857 (2001)).

South Carolina law recognizes four general classifications of persons who come onto a property: (1) adult trespassers; (2) invitees (invited business guests, such as shopper at a store); (3) licensees (social guests); and (4) children. Sims v. Gilles, 541 S.E.2d 857, 861 (S.C. 2001). Different standards of care apply to each classification. An invitee “is a person who enters onto the property of another at the express or implied invitation of the property owner.” Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 441, 494 S.E.2d 827, 831 (Ct. App. 1997). An invitee is on the owner’s property to benefit the owner and not themselves. Sims v. Giles, 541 S.E.2d 857 (S.C. Ct. App. 2001). An “invitee” is different than a “licensee” because an “invitee confers a benefit on the landowner.” Sims v. Giles, 343 S.C. 708, 541 S.E.2d 857 (Ct. App. 2001) (holding that a power company’s meter reader was an invitee when entering the customer’s property).

The property owner owes an invitee “the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty.” Israel v. Carolina Bar-B-Que, Inc., 292 S.C. 282, 289, 356 S.E.2d 123, 128 (Ct. App. 1987). An owner of property is not an insurer of the invitee’s safety. The owner owes an invitee the duty to use reasonable care to discover unreasonably dangerous conditions on the premises and (1) either put the premises in a reasonably safe condition for the use and manner consistent with the purpose of the invitation to come on the property or (2) warn the invitee of the dangers which the owner knew or should have known about. Crocker v. Barr, 397 S.E.2d 665 (S.C. Ct. App. 1990).

“Under a premises liability theory, a contractor generally equates to an invitor and assumes the same duties that the landowner has, including the duty to warn of dangers or defects known to him but unknown to others.” Larimore v. Carolina Power & Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000).

The trial court correctly ruled that Appellant’s arguments made at these hearings and within the subsequent supplemental memorandum failed as a matter of law, as evidenced by the alternate ruling by the trial court. Those claims and the failure of proof provide this Court with the record it needs to affirm the dismissal of

Beverly Homes, LLC from this litigation, pursuant to the rule announced in On, LLC v. Town of Mount Pleasant.

(1) Appellant offered no proof Beverly Homes, LLC had knowledge of any defect or dangerous condition at the Pender residence.

Randy Beverly (owner of Beverly Homes, LLC) testified Beverly Homes, LLC (1) did not perform any work at the Pender house; (2) did not go inside the house; (3) did not inspect the house; (4) did not hire any subcontractors for the house; and (5) did not supervise any person or company doing work at the house. R., p. 63, line 3 - p. 67, line 17. The following exchanges between Appellant's attorney and Randy Beverly were revealing:

Q: Would you agree that Beverly Homes, LLC was not involved with the construction of the Pender Residence?

A: Yes, ma'am.

...

Q: And do you agree with that statement that Defendant [] Beverly Homes, LLC did not perform work at and was not involved with the construction of the Pender Residence?

A: Yes, ma'am.

R., p. 62, line 24 - p. 63, line 2; p. 83, lines 14-18. In sum, Appellant did not provide any evidence that Beverly Homes, LLC knew anything about any alleged dangerous condition at the Pender home while it was under construction. Accordingly, Beverly Homes, LLC did not breach any duty. This holding is consistent with the determination in Larimore v. Carolina Power & Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000).

(2) Beverly Homes, LLC never owned the Pender lot.

The Penders have owned the lot in question since April 30, 2014 when they purchased it from Conway National Bank for \$83,200.00.

Prepared without benefit of title examination by:
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201400003512
Filed for Record in
GEORGETOWN SC
WANDA PREVATTE, REGISTER OF DEEDS
04-30-2014 At 02:50:52 p.m.
DEED 11.00
STATE TAX 217.10
COUNTY TAX 91.85
Book 2355 Page 1 - 5

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

*Lot 4 Belle
Vue*

LIMITED WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS, Conway National Bank, (hereinafter called "Grantor"), for and in consideration of the sum of Eighty-Three Thousand Two Hundred & 00/100s (\$83,200.00) Dollars to it, hand paid at and before the sealing of these presents, in the State aforesaid, (the receipt of which is hereby acknowledged) has granted, bargained, sold and released and by these Presents does hereby grant, bargain, sell and release unto Carlton E. Pender and Joan B. Pender (hereinafter called "Grantee"), for and during their joint lives and upon the death of either of them, then to the survivor of them, their heirs and assigns forever, in fee simple, together with every contingent remainder and right of reversion, the following described property, located in Georgetown County, South Carolina, to-wit:

THIS PROPERTY IS MORE COMMONLY KNOWN AS 39 GASPARILLA DRIVE, (LOT 4, BELLE VUE), MURRELLS INLET, SC 29576 AND IS MORE PARTICULARLY DESCRIBED IN EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF BY REFERENCE.

R., pp. 419-423. The Penders' purchase occurred approximately three years before construction began on the lot. Further, Georgetown County tax records also show that the Penders have paid the property taxes on the property (and later the property and home) since 2014.

Receipt# 2014 051286 *** REAL ESTATE NOTICE ***
 TMS 41 0106 0361200

Entered 10/01/2014
 Paid 1/12/2015
 1,466.75 BK

00000

Name: PENDER CARLTON E
 PENDER JOAN B
 81 WARRIOR WAY
 SHARPSBURG GA 302770000
 District: 410 MURRELS I/GARDEN CTY

Res.	Ratio	Acres	Lots	Land Value	# Bld.	Bld.Value	TotValue	TAX EXEMP- TIONS	Total
Farm			1.0	121,500			121,500		
Other	6								
Desc	LOT 4 BELLE VUE SLD 428-10					Serial#			
City-LEVY-County		City Tax		County Tax	WSFD	012.9	Extra Fees		1,466.75
	188.3			1,372.71		94.04			1,466.75
Tax Aftr Exempt				1,372.71		94.04			
Jan Amt		Feb Amt			Mar Amt		PAID		1466.75
Penalty:		Fee:			Interest:				
Comment:									

PAID

The references to Beverly Homes, LLC as the "owner" of the lot as stated in the various documents raised by Appellant were clearly and succinctly explained by Randy Beverly. He indicated each entry was "an honest, clerical mistake" made by someone not employed by Beverly Homes, LLC. R., p. 108, lines 8-18; p. 115, lines 19 - p. 117, line 22; p. 120, line 10 - p. 121, line 6. As discussed in the "Statement of Facts," an objective evaluation of the building permit request shows, for example, numerous handwriting and numerous pen colors, which indicate some form document was incorrectly used to input the information for permitting with Georgetown County. In any event, Beverly Homes, LLC was not the owner of the lot or property as evidenced by the deed between the Penders and Conway National Bank and the receipts showing the Penders paid the property taxes from 2014 to present.

(3) Appellant did not prove the claim that Beverly Homes "had control" of the Pender property or construction.

Appellant did not produce any evidence that any employee of Beverly Homes, LLC ever set foot on the Pender lot before or during construction, and it would be impossible for a Beverly Homes, LLC employee to have been on the construction site because Beverly Homes, LLC did not have any employees. Appellant also did not produce any evidence that Beverly Homes, LLC directed the construction of the

Pender home. To the contrary, before Appellant sued any Beverly entity in this case, Forrest Beverly (the owner of the general contractor, Beverly Construction, LLC) was deposed by Appellant. He testified:

- Beverly Construction Group, LLC was responsible for hiring all of the subcontractors for the construction of the new home at 39 Gasparilla Circle. R., p. 382, lines 21-25.
- Beverly Construction Group, LLC hired all of the subcontractors for the construction of the new home at 39 Gasparilla Circle. R., p. 385, lines 6-8.
- Beverly Construction Group, LLC was responsible for coordinating all of the trades and subcontractors involved with the construction of the new home at 39 Gasparilla Circle. R., p. 383, lines 1-4.
- Beverly Construction Group, LLC was responsible for inspecting all of the work performed by the subcontractors involved with the construction of the new home at 39 Gasparilla Circle. R., p. 383, lines 5-8.
- Beverly Construction Group, LLC “would have been the contractor onsite handling the vertical construction of the house.” R., p. 392, lines 17-24.
- Beverly Construction Group, LLC employed Jonathan Martin as the construction supervisor for the project. R., p. 383, lines 13-21.
- Jonathan Martin’s responsibilities for the project at 39 Gasparilla Circle included “coordinat[ing] day-to-day operation of the job, coordinat[ing] subcontractors, and quality control.” R., p. 384, lines 6-10.
- Beverly Construction Group, LLC still employed Jonathan Martin as a construction supervisor on the date of Beverly’s deposition. R., p. 383, line 22 - p. 384, line 2.
- All invoices from subcontractors should have been addressed to Beverly Construction Group, LLC. R., p. 386, lines 3-20.
- Beverly Construction Group, LLC paid the invoices submitted from subcontractors for the construction of the new home at 39 Gasparilla Circle. R., p. 386, lines 3-22.

Further, an objective analysis of the documents submitted by Appellant actually prove Beverly Homes, LLC had zero involvement with the Pender property or the construction. As shown previously, Beverly Homes, LLC did not subcontract with the elevator vendor and did not pay that elevator vendor. In fact, Beverly Homes, LLC did not pay any subcontractor, vendor, governmental entity, or service provider involved with the Pender construction.

Clearly, Beverly Homes never owned the lot or the home. And, Appellant did not produce any dispute of material fact to support her contention that Beverly Homes exerted any control or was legally in position to take any actions regarding the safety of the site or the elevator on or around the date of Appellant's unfortunate accident. Appellant's arguments did not show that Beverly Homes, LLC ever set foot on the property or had any control over the site or the subcontractors. Documents submitted by Beverly Construction Group, LLC supported the contention by Beverly Construction Group, LLC and Beverly Homes, LLC that Beverly Homes, LLC did not have any involvement with the construction of the Pender house and any clerical mistake was done by someone other than an employee of Beverly Homes, LLC. Thus, Appellant does not establish any legal duty owed by Beverly Homes, LLC or any breach of any duty of care. Clark v. Greenville County, 313 S.C. 205, 437 S.E.2d 117 (1993). Accordingly, Appellant's pivot to the "ownership and control" issue failed as a matter of law.

CONCLUSION

For these reasons, Beverly Homes, LLC respectfully asks this Court to affirm the trial court's ruling.



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July 21, 2022

ATTORNEYS FOR RESPONDENT
BEVERLY HOMES, LLC

RECEIVED

Jul 21 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
In the Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Common Pleas Case No. 2018-CP-22-824

Appellate Case No. 2021-000325

Evarista Juan Lorenzo, Appellant,

v.

Port City Elevator, Inc.; Alan Topper d/b/a All Construction; 2020 Custom Contractors a/k/a 2020 Custom Contractors, LLC; Citadel Site Management, LLC; DVBT Construction a/k/a DVBT Construction, LLC, DVBT Multiservices, LLC; Beverly Construction Group, LLC; Beverly Homes, LLC; Beverly Homebuilders, LLC; Strand Pain Contractors, LLC; Depaz Painting, LLC; Enhanced Heating & Air Conditioning, LLC; Carlton Pender, and Joan Pender, Defendants,

Of Which,

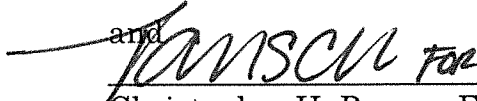
Alan Topper d/b/a All Construction; Citadel Site Management, LLC; Beverly Homes, LLC; Beverly Homebuilders, LLC; Strand Paint Contractors, LLC; Depaz Painting, LLC and Enhanced Heating & Air Conditioning, LLC are the Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that Respondent Beverly Homes, LLC's Final Brief complies with Rule 211(b), SCACR. Respectfully submitted,



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PROOF OF SERVICE

The undersigned, certifies that she served a copy of **Respondent Beverly Homes, LLC's Final Brief** upon all other counsel of record by emailing a copy to:

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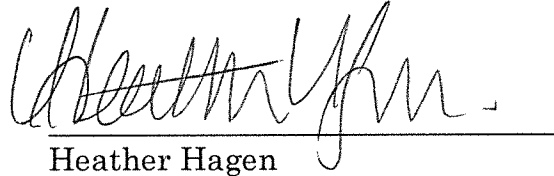
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