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**Aug 04 2022**

**SC Court of Appeals**

**THE STATE OF SOUTH CAROLINA**  
**In the Court of Appeals**  

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**APPEAL FROM CHARLESTON SCINTY**  
**Court of Common Pleas**

**The Honorable Henry W. Brown**  
**Special Referee**  

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**Appellate Case Number 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 Co., LLC, ..... Third-Party Defendants.**

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**RESPONDENTS' RESPONSE TO BROWN CONTRACTORS' PETITION FOR WRIT  
OF CERTIORARI**

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## **STATEMENT OF THE CASE**

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

The Respondents answered (Amended Answer, R. pp. 33-47), denying any liability to the Petitioner, alleging that the lien was defective because the Petitioner 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 Respondents 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 the Petitioner was not properly licensed and that his ostensible "qualifier," Vuong Nguyen, 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 the Petitioner's claim. He found in favor of the Respondents 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. 7196, pp. 97-103). The Respondents 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 Respondents 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. The Court of Appeals issued an opinion affirming the rulings of the Special Referee on April 20, 2022. Petitioner filed a petition for Rehearing on May 5, 2022, which was denied on May 19, 2022. Petitioner filed this Petition for Writ of Certiorari on June 21, 2022.

### **STANDARD OF REVIEW**

Under Rule 242 (b), SCACR, certiorari is to be granted in very limited circumstances, none of which are applicable in this case:

- *(b) Considerations Governing Review. A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:*
- *Where there are novel questions of law.*
- *Where there is a dissent in the decision of the Court of Appeals.*
- *Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.*
- *Where substantial constitutional issues are directly involved.*
- *Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.*

### **ARGUMENTS**

Petitioner argues that there are novel questions of law but there are not. Further, and as more fully discussed below, Petitioner's arguments are without merit and the petition should be denied.

- I. Petitioner Misapplies *16 Jade Street, LLC V. r. Design Constr. Co.*, 405 S.C. 384, 747 S.E.2d 770 (2013), and the fact that he was unlicensed and had no legal qualifier precludes his recovery.

The Petitioner makes the same arguments as he made in the Court of Appeals, and in sum, he argues that A) the Special Referee erred in holding that the licensing requirements of the LLR were relevant and controlling; B) that the Petitioner was properly licensed in that he had a valid qualifier and a valid Certificate of Authorization. Each of those essential arguments are addressed herein.

A. The Petitioner misapplies *16 Jade Street*, which is irrelevant to the issue of whether the Petitioner was properly licensed, and therefore, entitled to payment. *16 Jade Street* concerns whether LLR regulations confer a private right of action. The issue addressed by the Special Referee was the Respondents' *defense* to the Petitioner's claim for payment based on the fact that the Petitioner was not properly licensed, not whether or not the Respondents had a claim against the Petitioner because he was improperly licensed.

The law of South Carolina is crystal clear that a contractor who is not properly licensed when he performs a job has no right to be paid. Section § 40-59-30, *S.C. Code, Ann.*, prohibits an unlicensed residential builder from filing a mechanic's lien. The statute provides, in relevant part, as follows:

(B) Notwithstanding Section 29-5-10, or another provision of law, a person or firm who first has not procured a license or registered with the commission and is required to do so by law may not file a mechanics' lien or bring an action at law or in equity to enforce the provisions of a contract for residential building or residential specialty contracting which the person or firm entered into in violation of this chapter.

This is also clearly expressed in numerous cases. See, *Lenz v. Walsh*, 362 S.C. 603, 607, 608 S.E.2d 471, 473 (Ct. App. 2005) ("South Carolina courts have held that, pursuant to the statute, a builder who is not licensed at the time he enters into a contract for residential construction may not bring an action to enforce the provisions of the contract); and *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 57, 742 S.E.2d 359, 361 (2013). *16 Jade Street* did not change that law and is

irrelevant with respect to that issue. The Special Referee's finding that the Petitioner was not "properly licensed" is fully supported by the facts and should not be disturbed.

Here, the Petitioner was not properly licensed. The Petitioner had no license that would have enabled him to pull the permit or perform the work he contracted with the Respondents to perform (and was actually paid to perform because the Petitioner did not disclose that he was not licensed to the Respondents). The only way to have become "properly licensed" was for the Petitioner to have *honestly* followed the requirements of the LLR to use the license of a qualifier. The evidence supports the Special Referee's finding that the Petitioner failed to do that.

The statutory regulations for use of a qualifying license are clear. The qualifier (here, Vuong Nguyen or "Nguyen") 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 firm<sup>1</sup> 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.

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<sup>1</sup> "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.

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

As found by the Special Referee, the Petitioner was not properly licensed and was therefore not entitled to payment and his claim was properly denied.

B. Since the evidence was clear that Nguyen does not fit the statutory requirements of a qualifier under the applicable statute, the Petitioner resorts to other, inapplicable statutes and argue that under those statutes, Nguyen would be considered an "employee," and would then satisfy the requirements of the LLR qualifier statute. (LLR documentation, R. pp. 640-683)

To make that argument, the Petitioner is curiously forced to argue now that since Nguyen could be fired by the Petitioner, he would thus be an "employee" for workers compensation and other purposes, and thus fits the statutory requirement for a qualifier to enable the Petitioner to use the Certificate of Authority. That argument actually supports the Respondents' case and is a basis to affirm, not reverse, the Special Referee.

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, Nguyen, is actually being controlled and could be fired by the unlicensed person, is what the qualifier statute seeks to avoid, not encourage.

Nguyen was not an employee or in “responsible charge of construction” for the Petitioner and does not satisfy the statutory requirement to be a qualifier. It is irrelevant whether the Workers Compensation Commission or the IRS may deem him an employee for their purposes.

C. Furthermore, as explicitly found by the Special Referee, even if the Petitioner's Certificate of Authorization were somehow valid, it was not timely since it was not obtained until *after* the Petitioner offered contractor's services to the Respondents and began the Respondents 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 (Nugyen'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 Contractors, 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.*

The Special Referee's findings in this regard are fully supported by the evidence and the Court of Appeals properly affirmed the Special Referee.

II. The Right to Cure Act is inapplicable because Respondents, the homeowners, did not file an action and Petitioner waived his right to any relief under the Right to Cure Act.

Petitioner argues that notice was required under the South Carolina Right to Cure, statute, S.C. Ann. § 40-49-830 (“The South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act., also known as the “*Right to Cure Act*”). This argument lacks merit for two primary reasons.

First, a homeowner is required to give notice under the Right to Cure Act, before “*filing the action*”. Here the homeowners, the Respondents, did not *file the action*. They merely responded to the action which was first filed by Petitioner, who filed a defective and meritless mechanic’s lien foreclosure action. Nothing about the Right to Cure Act requires a homeowner to forebear asserting defenses or counterclaims to an action filed by a contractor.

Second, Petitioner argues that his failure require compliance with the Right to Cure Act is excused because it would have been futile because, he now says, the Respondents repaired the Home. That contention is completely meritless. Petitioner does not cite a single piece of evidence in support of that contention because it is not true. This matter was pending for a period of approximately three (3) years before the Special Referee held a trial and the evidence in the case establishes that Respondents repeatedly advised of the alleged defects (through discovery and letters) and offered Petitioner numerous opportunities to inspect and repair the defective construction at the Home (R. pp. 846-849, 868, 886, 898-901). In addition, Respondents claim for damages was largely based upon *estimates* (R. pp. 6792,829, 851, 856-857) to repair the Home, since the required repairs had not been implemented even as late as the date of trial.

Further, Respondents fully responded to all of Petitioners grounds for appeal, whether addressed directly or were subsumed in other arguments.

### **CONCLUSION**

The arguments of Petitioner are meritless or without evidentiary support and a Writ of Certiorari is not authorized under Rule 242, *SCACR*, and Petitioners petition should be denied.

SIGNATURE BLOCK TO FOLLOW

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**PROOF OF SERVICE**

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I certify that I have served a copy of the Respondents' Response to Brown Contractors' Petition for Writ of Certiorari by electronic mail on this 4th day of August, 2022, addressed to the following:

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