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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Bentley D. Price

Case No. 2015-CP-07-02047

Appellant Case No. 2023-000222

James R. Brady.....Respondent.

v.

Hilton Head Homes at Allenwood, LLC,
Village Square Development Company, LLC,
Lancaster Redevelopment Corp. and
Gary GrossmanAppellants,

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. THE CIRCUIT COURT ERRED IN REFUSING TO GRANT A DIRECTED VERDICT OR MOTION NOTWITHSTANDING THE VERDICT IN THIS MATTER WHERE THE EVIDENCE SHOWED THE ONLY AGREEMENT THE PLAINTIFF HAD WAS WITH TWO LIMITED LIABILITY COMPANIES DISMISSED BY THE PLAINTIFF AT THE START OF TRIAL WHERE MERGER CLAUSES SHOW THAT THOSE AGREEMENTS SUPERSEDED ANY AND ALL PRIOR REPRESENTATIONS AND WARRANTIES SO THAT THE REMANING DEFENDANT GARY GROSSMAN HAD NO AGREEMENT WITH THE PLAINTIFF

- II. THE CIRCUIT COURT ERRED IN NOT RELYING UPON THE STATUTE OF FRAUDS TO GRANT A DIRECTED VERDICT OR JUDGMENT NOTWITHSTANDING THE VERDICT WHERE THE CHIEF DOCUMENT RELIED UPON BY THE PLAINTIFF WAS AN UNSIGNED LETTER FOR WORK TO BE PERFORMED LONGER THAN IN THE SPACE OF ONE YEAR FROM THE MAKING OF THE LETTER

STATEMENT OF THE CASE

This matter is before this Court appealing the Order of the Honorable Bentley D. Price dated January 13, 2023. (Form 4 Order 1/23/23) In that Order, Judge Price denied the Defendant Gary Grossman's motion for a judgment notwithstanding the verdict and/or vacation of judgment pursuant to Rule 50(b) SCRCivP filed September 7, 2023 (Motion, 9/7/23)

This case commenced with the filing of a Summons and Complaint on August 25, 2015.¹ (Summons and Complaint). In his Complaint, the Plaintiff asserted causes of action for breach of contract, quantum meruit, and conversion arising out of his former employment to market and sell homes at developments on Hilton Head Island. *Id.* There are no causes of action for fraud or negligent misrepresentation. *Id.*

¹ There was an earlier case between these parties which was dismissed pursuant to Rule 40(j). *See Brady v. Hilton Head Homes at Allenwood*, 2009-CP-07-2690 (Order Denying Motion to Refer to Special Referee, 6/16/2015). The current case started anew with the filing of the Summons and Complaint on August 25, 2015

The Defendants Hilton Head Homes at Allenwood, LLC, and Village Square Development, LLC, are South Carolina limited liability companies. *Id.* The Defendant Lancaster Redevelopment Corporation is a Pennsylvania corporation. *Id.* Gary Grossman is an individual residing in Pennsylvania. *Id.* Lancaster Redevelopment Corporation is sole Member of Hilton Head Homes at Allenwood, LLC, and Village Square Development, LLC. (Operating Agreements). Mr. Grossman serves as the President of Lancaster Redevelopment Corporation. *Id.* The Plaintiff never had any employment agreement with Mr. Grossman, but, rather, with these entities. (Letter, Feb. 4, 2004)

The Defendants filed their Answer and Counterclaim on September 14, 2015, setting forth affirmative defenses and causes of action against Mr. Brady. (Answer and Counterclaim). In the Answer and Counterclaim, the Defendants asserted that pursuant to an agreement with Lancaster Redevelopment Corporation, the Plaintiff was to have provided services to Hilton Head Homes at Allenwood, LLC, Village Square Development, LLC, and Lancaster Redevelopment Corporation in connection the construction, sales, and marketing of certain development in Beaufort County. *Id.* The Defendants alleged that loans and advances were given to the Plaintiff for work which was not performed and for which the Defendants would be repaid prior to any distributions to be made to the Plaintiff. *Id.* The Defendants further alleged that the Plaintiff failed to perform so that the Defendants had to hire third parties to complete the Plaintiff's job. *Id.* Hilton Head Homes at Allenwood, LLC, Village Square Development, LLC, and Lancaster Redevelopment Corporation made numerous payments to the Plaintiff in excess of Six Hundred Thousand and No/100 (\$600,000.00) Dollars (Transcript, Vol. II, p. 42) The Defendants asserted causes of action against the Plaintiff for breach of contract and unjust enrichment for actual damages in excess of Six Hundred Thousand and No/100 (\$600,000.00) Dollars in amounts to be determined at trial. *Id.*

On July 27, 2016, the Plaintiff submitted his Reply to Counterclaim [sic] setting forth some affirmative defenses. (Reply)

Discovery commenced, including the taking of an out of state deposition of Ms. Ginger Griffith, who has worked for Lancaster Redevelopment Corporation as treasurer until the company succumbed to the Great Recession in 2010. (Ginger Griffith Deposition Transcript., 12/20/2018, p.7).

The Plaintiff filed a Motion for Summary Judgment as to the Defendants' Counterclaims on January 1, 2015. (Motion for Summary Judgment, 1/15/2017).

While the motion was pending, the parties participated in mediation which resulted in a provisional settlement which ultimately fell apart. (Transcript, Feb. 6, 2019).

The hearing of the Plaintiff's motion for summary judgment was continued by consent due to scheduling conflicts, including mandatory evacuations order during one of the times the motion was scheduled to be heard. (Consent Order of Continuance, 9/19/18).

The parties filed a Consent Motion for an Order of Protection and for a Status Conference to Set a Trial Date Certain. (Consent Motion, Jan. 23, 2019)

The parties also filed their Memoranda in Support and in Opposition to the Plaintiff's Motion for Summary Judgment on February 4, 2019. (Memorandum in Support of Motion for Summary Judgment with Exhibits; Memorandum in Opposition of Motion for Summary Judgment with Exhibits; 2/4/2019).

The Motion was heard by the Honorable J. Mark Hayes, II, on February 6, 2019, in Beaufort who, two days after the motion hearing, entered his Form 4 Order granting the Plaintiff Summary Judgment. (Order, 2/8/2019).

The case was then appealed to this Court by Notice of Appeal dated February 8, 2019. (Notice of Appeal). Judge Hayes' Final Order was filed March 1, 2019, while this appeal was

pending. (Order 3/1/2019). This Court heard the appeal of the Order of the Honorable J. Mark Hayes, II, dated February 8, 2019. (Form 4 Order, 2/8/19) This Court denied that appeal. (Order April 1, 2022).

The case came to trial before the Honorable Bentley D. Price on August 29 and 30, 2022. (Transcript Vol 1, Vol 2)

At the beginning of the trial of this case on August 29, 2022, the Defendants Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation were dismissed by the Plaintiff. (Transcript, pp 3-4). Only the Defendants Hilton Head Homes at Allenwood, LLC and Village Square Development, LLC, have any written agreement with the Plaintiff. (*Id.* at 4) Lancaster Redevelopment Corporation was the only member of those two limited liability companies. (*Id.*) There were Assignments from 2004 in which the Plaintiff and another individual agreed to be members of those limited liability companies. (*Id.* at 5) Judge Price allowed the corporate defendants to be dismissed. (*Id.* at 20-22)

At the close of evidence, the Defendant moved to amend his answer to assert a Statue of Frauds defense under Rule 15(b) SCRCivP as well as for a directed verdict on all causes of action: breach of contract, quantum meruit, conversion, and for the demand for punitive damages. (Transcript, Vol. II, pp. 100 – 107) As quantum meruit was an equitable claim, it did not go to the jury, by stipulation. (Transcript, Vol. II, p. 105-106). Judge Price denied the motion for a directed verdict as to the breach of contract claim and ruled that the quantum meruit claim was for his determination. (*Id.* at 106). He also declined to charge punitive damages at that time. *Id.* He also denied the motion as to the conversion cause of action. *Id.*

The jury received the case after Judge Price's charges and closing arguments. (*Id.* at 147-148) After deliberations, the jury returned a verdict against the Defendant for \$711,027.00 finding a breach of contract by Gary Grossman and for damages for conversion in the same amount. (Verdict Form)(Transcript Vol. II, pp. 150-151).

After the verdict, Judge Price directed a verdict in favor of Mr. Grossman as to punitive damages and as to quantum meruit. (Transcript Vol, II, p. 154-155).

On September 7, 2022, Mr. Grossman moved for a judgment notwithstanding the verdict and/or vacation of judgment pursuant to Rule 50(b) SCRCivP. (Motion, 9/7/2022) Judge Price heard that motion on November 2, 2022. (Transcript, 11/2/22) By Order of January 12, 2023, Judge price denied the motion. (Order, 1/12/23). This appeal followed. (Notice of Appeal, 2/10/23)

STATEMENT OF FACTS

This matter comes before the Court after the trial of the case to a jury verdict in August, 2022.

The Defendants Hilton Head Homes at Allenwood, LLC, and Village Square Development Company, LLC, are limited liability companies organized and existing pursuant to the laws of the State of South Carolina, which formerly developed two neighborhoods on Hilton Head. (Transcript, Transcript Vol. II)

The Defendant Lancaster Redevelopment Corporation is a corporation organized and existing pursuant to the laws of the State of Pennsylvania and authorized to conduct business in South Carolina, and the Defendant Gary L. Grossman is a citizen and resident of the State of Pennsylvania. (Summons and Complaint)(Answer and Counterclaim)

Lancaster Redevelopment Corporation is the Member of both Hilton Head Homes at Allenwood, LLC, and Village Square Development Company, LLC. (Letter, Feb. 4, 2004)

Mr. Brady and Mr. Grossman met each other at a national builder's convention in 1998.. (Transcript p. 43, p. 79, p. 80)(Transcript, Vol. II, p. 56) Mr. Brady was interested in Mr. Grossman's panelized building products. (Transcript. pp. 44-45) They eventually became friends, great friends. *Id.* at 45; (Transcript Vol. II, pp. 56-57) Mr. Grossman helped Mr. Brady with a development known as Cypress Harbor in Jasper County. *Id.* at 80; *id.* at 83. Cypress Harbor was actually failing at the time with threats of foreclosure and pursuit of deficiency judgments against Mr. Brady. *Id.* at 83-84. Mr. Grossman advised Mr. Brady that Lancaster Redevelopment Corporation would be the one hundred percent owner of separate limited liability companies that would conduct transactions on Hilton Head regarding townhomes and single family homes. *Id.* at 84-85. Mr. Grossman also arranged for financing and to help get the Cypress Harbor development back on track. (Transcript, Vol. II, p. 51).

Eventually, Mr. Grossman and Mr. Brady entered into negotiations for Mr. Brady to help with a development known as Allenwood. *Id.* at 48. Lancaster Redevelopment Corporation was to be the purchaser of the lots at Allenwood. *Id.* at 81.

In February of 2004, the Plaintiff claimed to have received an unsigned letter setting for the terms of employment . *Id.* (Transcript, Vol. II, p. 44) The letter had Mr. Grossman's name at the top in the letterhead. *Id.* at 49 The letter states that Lancaster Redevelopment Corporation was to purchase certain lots and Hilton Head Homes, LLC, would be developing sixty-four family lots and that the Allenwood project would be separate and hopefully not subject to any creditor of Hilton Head Homes, Inc. versus Hilton Head Homes, LLC. *Id.*

The letter went on to say that Lancaster Redevelopment Corporation would own 100% of the companies but would engage the Plaintiff to work as an independent contractor along with a person named Joy Walker. Again, the letter states that Lancaster Redevelopment Corporation would be engaging the Plaintiff to perform services as an independent contractor subject to those

terms. *Id.* It does not say that Gary Grossman would be engaging Mr. Brady. *Id.* At the beginning of the trial of this case, the Plaintiff dismissed Lancaster Redevelopment Corporation, Hilton Head Homes at Allenwood, LLC, and Village Square Development Company, LLC. (Transcript, pp. 21-22). The letter was not signed by Mr. Grossman. (Letter, *id.*)

At trial, no one could produce a signed copy of the February 2004 letter. (Transcript, Vol. II, p. 18) No one has seen a signed copy. *Id.* at 21 (Transcript, Vol. II, p. 44)

Pursuant to the terms and conditions of an agreement with Lancaster Redevelopment Corporation, the Plaintiff was to have provided services to Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation in connection with the construction, sales, and marketing of those certain development Hilton Head. *Id.* The letter from February clearly stated that Lancaster Redevelopment Corporation would be the party in agreement with Mr. Brady. (Letter, Feb. 2004). Mr. Grossman confirmed that there were to be two limited liability companies to be set up to conduct this business. (Transcript, Vol II, p. 19). He also confirmed he did not sign the letter. *Id.*

The Plaintiff often informed the Defendants Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation that he could not cover the workload required of him in order to receive commissions and other compensation. *Id.*

The Defendants Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation made numerous payments to the Plaintiff in spite of his inability to perform as promised and as relied upon by Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation. (Answer and Counterclaim)

Also in that letter, Mr. Grossman's companies, and Mr. Grossman individually, had to be paid back prior to any profits or distributions to anyone else. (Transcript, Vol II, p. 17)

In July of 2004, five months after the February, 2004, letter, Mr. Brady, along with a gentleman named Arthur F. Long, Jr., entered into two Assignment of Interest agreements with Hilton Head Homes at Allenwood, LLC, and Village Square Development Company, LLC. (Assignment of Interest and Written Consent in Lieu of a Special Meeting of the Members of Hilton Head Homes at Allenwood, LLC, and Assignment of Interest and Written Consent in Lieu of a Special Meeting of the Members of Village Square Development). Those two Assignment agreements are the only signed contracts by and between the Plaintiff and any party to this dispute. *Id.* (Transcript, Vol II, p. 83)

Both Assignments contain the following language:

9.5 Entire Agreement. This assignment constitutes the entire agreement between the parties pertaining to its subject matter, and it supersedes all prior and contemporaneous agreements, representations, and understandings. No supplement, modification, or amendment of this assignment will be binding unless executed in writing by all parties.

(Assignments).

The Operating Agreements are for those same entities for which Lancaster Redevelopment Corporation is the only member of both limited liability companies. (Transcript *Id.* at 86. Mr. Brady concurred. *Id.* Mr. Grossman confirmed that Lancaster Redevelopment Corporation is the member and manager of both limited liability companies. (Transcript, Vol. II, p. 59, p. 60)

Mr. Brady acknowledged his signatures on both Assignments. *Id.* at 87, p. 89. Mr. Grossman testified that he thought there was an inked and signed deal when Mr. Brady signed the Assignments. (Transcript, Vol. II, p. 23)

Mr. Brady also acknowledged the language in Paragraph 9.5 of the Assignments. (Transcript, *id.* at 88, p. 89) Mr. Grossman recognized the same language. (Transcript, Vol. II, pp. 62-63)

By virtue of these signatures, Mr. Brady became a six percent owner of both of the limited liability companies with no other signed agreement being presented at trial. *Id.* at 91.

There are no causes of action in the Complaint for fraud or negligent misrepresentation. (Complaint)

In September, 2007, Ginger Griffith, who worked as the treasurer for Lancaster Redevelopment Corporation, wrote to Mr. Brady regarding an analysis of compensation to be paid to him as a result of his employment. (Letter, Sept. 13, 2007)

In her correspondence, Ms. Griffith advised that under the terms of the agreement with Lancaster Redevelopment Corporation, past due receivables were to be repaid first. (Letter, *id.*) She also advised that given carrying costs, there could be no additional monthly expenses funded. *Id.*

Mr. Brady even acknowledged that all cash invested by Mr. Grossman, an entity known as Forest Homes, and Lancaster Redevelopment Corporation would have to be repaid prior to any profit distributions to Mr. Brady. (Transcript, pp. 94-95) Mr. Brady acknowledged that one hundred per cent of the loans from Lancaster Redevelopment Corporation had to be repaid as a priority distribution. *Id.* at 103-104

Mr. Brady did not guaranty any debt for Village Square or for Hilton Head Homes at Allenwood. (Transcript p. 99) He brought nothing to court showing the hours worked. *Id.* Mr. Grossman personally guaranteed over three million dollars in debt for the Allenwood development. (Transcript, Vol. II, p. 52, p. 54)

Ms. Griffith gave her deposition in this matter on December 20, 2018. (Griffith Depo., 12/20/18).

Ms. Griffith testified that as of September of 2007, the housing marking was falling apart and there was standing inventory that could not be sold (Depo. p. 37). There were rumblings of foreclosures and other hostile actions by lenders against the formerly dismissed entities around this time. (Depo. p. 38)(Transcript Vol. II, p. 51) There could be no payments to Mr. Brady accordingly. (*Id.*; Letter of 9/13/2007)

Mr. Grossman testified that in 2007, his companies were in technical default with their lender, Sea Island Bank. (Transcript, Vol. II, p. 51). Sea Island Bank sent its first notice of default on July 10, 2007. (Transcript, Vol. II, p. 67) The bank ended its reserves for the companies in September of 2007. (*Id.* at 69) This was after Ms. Griffith sent her letter to Mr. Brady. (*Id.*) Between 2007 and 2009, the banks were “tightening the screws” according to Mr. Grossman. (*Id.* at 73)

Ms. Griffith testified that Mr. Brady was advanced sums during his employment by Hilton Head Homes and by Village Square against fees earned. *Id.* These advances were never repaid to the Defendants. Any incentive management fees were to be paid after the initial debts from Lancaster Redevelopment or Mr. Grossman were repaid. (Depo., p. 37)

In correspondence to Mr. Brady of September 13, 2007, Ms. Griffith wrote

Given the carrying costs of the inventory, and past due receivables to Forest Homes from Allenwood, the monthly carrying costs at Cypress Harbor and our massive increase in overhead associated with the new plant, LRC [Lancaster Redevelopment Corporation] simply cannot fund any additional monthly expenses.

(Letter of 9/13/2007)

Mr. Grossman acknowledged that there were sums due to Mr. Brady from the limited liability companies. (Transcript, Vol. II, p. 36, p. 93) Mr. Grossman stipulated that money was

owed, just not by himself individually. (Transcript, Vol. II, pp. 93-94) Mr. Grossman even agreed to lend ten thousand dollars (\$10,000.00) to Lancaster Redevelopment Corporation to give money to Mr. Brady for business development. (Transcript, Vol. II., pp. 38-39). This dispute ended the friendship between Mr. Brady and Mr. Grossman: the biggest tragedy in the whole dispute. (*Id.* at 40)

As indicated, it was always Lancaster Redevelopment Corporation which had an agreement or intended to have an agreement with Mr. Brady, and not the only individual Defendant, Gary Grossman. (*Id.*; *see also*, Feb. 2004 Letter) Lancaster Redevelopment Corporation and not Mr. Grossman, was going to purchase and develop everything.(Transcript, Vol. II, p. 48) Eventually, Mr. Brady had to deal with numerous foreclosures, more than he could count, involving entities or the developments he had. (Transcript, *id.* at 110-111).

STANDARD OF REVIEW

Under the state standard, a trial court should not grant JNOV where evidence yields more than one inference. *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004) An appellate court may not overturn the decision of a trial court under the state standard if there is any evidence to support the trial court's ruling. *Rogers v. Norfolk Southern Corp.*, 356 S.C. 85, 588 S.E.2d 87 (2003). The Supreme Court has further held that in ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. *Steinke v. S.C. Dep't of Labor Licensing and Regulation*, 356 S.C. 373, 520 S.E.2d 142 (1999).

ARGUMENT

- I. THE CIRCUIT COURT ERRED IN REFUSING TO GRANT A DIRECTED VERDICT OR MOTION NOTWITHSTANDING THE VERDICT IN THIS MATTER WHERE THE EVIDENCE SHOWED THE ONLY AGREEMENT THE PLAINTIFF HAD WAS WITH TWO LIMITED LIABILITY COMPANIES DISMISSED BY THE PLAINTIFF AT THE START OF TRIAL WHERE MERGER CLAUSES SHOW THAT THOSE AGREEMENTS SUPERSEDED ANY AND ALL PRIOR REPRESENTATIONS AND WARRANTIES SO THAT THE REMANING DEFENDANT GARY GROSSMAN HAD NO AGREEMENT WITH THE PLAINTIFF

The trial court erred in not granting a directed verdict and, subsequent, a judgment notwithstanding a verdict where the Entire Agreement language contained in the Paragraph 9.5 of the Assignments set forth entire agreement and language and merged all representations into those Assignments.

As set forth above, language is as follows:

9.5 Entire Agreement. This assignment constitutes the entire agreement between the parties pertaining to its subject matter, and it supersedes all prior and contemporaneous agreements, representations, and understandings. No supplement, modification, or amendment of this assignment will be binding unless executed in writing by all parties.

(Assignments)

With such language in place and relied upon and agreed to by Mr. Brady, his reliance on any earlier representations from an unsigned letter February 2004 is misplaced and should have led to a directed verdict and JNOV.

Any reliance on any other document is misplaced as the Assignment contained the entire agreement of all which were merged into Assignment language. This case is analogous to *Wilson v. Landstrom*, 281 S.C. 260, 315 S.E.2d 130 (Ct. App. 1984) in which this Court went through the doctrine of merger arising out of a deed, another form of contract. Citing the

Supreme Court case of *Charleston Western Carolina Railway Co. v. Joyce* (1957), this Court expounded as follows:

The doctrine of merger is founded upon the privilege, which parties always possess, of changing their contract obligations by further agreements prior to performance. The execution, delivery, and acceptance of a deed varying from the terms of antecedent contract indicated an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed. [Citations omitted.] **** **Where there is no mistake or fraud** a deed executed subsequently to the making of an executory contract for the sale of land is generally regarded as conclusive evidence of a previous modification of the executory contract. A deed executed subsequent to the making of an executory contract for the sale of land supersedes that contract.

231 S.C. at 504-505, 99 S.E. 2d 1983 (quoting with approval from *Snyder v. Roberts*, 45 Wn.2d 865, 278 P.2d 348 (1955), and from 55 Am.Jur., Vendor and Purchaser, Para. 327) (emphasis added)

The same should be said to this case as to contracts entered into after any alleged agreement to enter into an agreement and which contains Entire Agreement language without any fraud or mistake. Here, there is no fraud or mistake alleged. There was no evidence of either presented or pled. This has been good law in South Carolina for over two hundred years. The terms of a completely integrated agreement cannot be varied or contradicted by parol evidence of prior contemporaneous agreements not included in the writing. *Wilson, id.* at 260, 315 S.E.2d 130; *Armour Fertilizer Works v. Hyman*, 120 S.C. 375, 113 S.E. 330 (1922); *M'Dowall v. Beckly*, 9 S.C.L. (2 Mill)(1818). The Assignments were completely integrated agreements by and between Mr. Brady and two of the Defendants which he dismissed. All representations and agreements were contained therein and the trial court should have granted its directed verdict, and, subsequently, its JNOV.

Similarly, in *Redwend Ltd. Partnership v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003), this Court examined an entire agreement clause contained in a partnership

withdrawal agreement. *Id.* That withdrawal agreement contained language similar to that of Paragraph 9.5 in the Assignments at issue in this case stating it contained the “entire agreement and understanding” between the parties. *Id.* In *Redwend*, the trial court granted summary judgment to the withdrawing partner in a case alleging fraud and negligent misrepresentation stating the entire agreement language barred reliance by the other partner. *Id.* This Court disagreed due to the causes of action for fraud and negligent misrepresentation. *Id.* Neither of those causes of action were pled in this case. The Court cited the case relied upon by the trial court, which is on point here: *One-O-One Enters., Inc. v. Varuson* , 848 F.2d 1283 (D.C.Cir. 1988). One may not reasonably rely on prior representations where the agreement “supersede[s] any and all previous understandings and agreements.” *Id.* at 1286, as cited in *Redwend, id.* That is exactly what happened between the parties here. Mr. Brady cannot rely on unsigned letter from February of 2004 when the July of 2004 Assignments contained a valid and enforceable entire agreement clause. Mr. Brady admitted signing that document and admitted its language at trial (Transcript p. 108) His reliance on any earlier agreement is barred and misplaced. Accordingly, the trial court should have granted a directed verdict as well as a judgment notwithstanding the verdict.

A contract with an Entire Agreement provision should be enforced as written unless there are allegations of fraud or negligent misrepresentation, none of which there are in this case. In *Slack v. James*, 364 S.C. 609, 614 S.E.2d 636 (2005), the Supreme Court examined a real property sales contract that contained an Entire Agreement provision. After entering into a sales contract, the buyer of the property discovered there was an sewer easement running across the property. *Id.* The buyers refused to close claiming they had asked the sellers’ real estate agent about easements and that agent informed them there were none. *Id.* The sellers sued for breach of contract and the sellers counterclaimed for fraud, negligent misrepresentation and violations

of the South Carolina Unfair Trade Practices Act (the UTPA). *Id.* The trial court dismissed the counterclaims for fraud, negligent misrepresentation, the UTPA, and parts of the buyers' breach of contract claim. *Id.* The trial court focused on the lack of reliance and the doctrine of merger. *Id.* This Court reversed. *Id.* The Supreme Court upheld this Court's ruling. *Id.* The entire agreement language "did not afford any protection to Sellers against allegations of fraud and negligent misrepresentation". *Id.* However, breach of contract or other claims are precluded by the parol evidence rule and the entire agreement language. *Id.* The same is true in this case. Accordingly, not granting a directed verdict or JNOV constitutes an error of law.

II. THE CIRCUIT COURT ERRED IN NOT RELYING UPON THE STATUTE OF FRAUDS TO GRANT A DIRECTED VERDICT OR JUDGMENT NOTWITHSTANDING THE VERDICT WHERE THE CHIEF DOCUMENT RELIED UPON BY THE PLAINTIFF WAS AN UNSIGNED LETTER FOR WORK TO BE PERFORMED LONGER THAN IN THE SPACE OF ONE YEAR FROM THE MAKING OF THE LETTER

The alleged agreement was not signed and violates the Statute of Frauds. S.C. Code Ann. §32-3-10(5) and Mr. Grossman cannot be charged with the terms thereof where it was never signed by him.

Mr. Brady agreed that the 2004 letter could not have been fulfilled within a year:

Q. So this agreement from 2004 was in place for well over a year; correct?

A. This was – this is what we agreed on to go forward with that development

(Transcript p. 108) In fact, he said it would be "lead-up time" before the development would be up and running. *Id.* Failure to render that in a writing signed by Mr. Grossman makes it unenforceable.

As in *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d (1989), in this case there was not any contract that cannot be performed within one year must be in writing and signed by the parting

against whom it is seeking to be enforced. S.C. Code Ann. §32-3-10. Also, a contract required to be in writing by the South Carolina cannot be orally modified. *Windham v. Honeycutt*, 279 S.C. 109, 302 S.E2d 856 (1983)(court held evidence of oral modification of the real estate contract as violative of the Statute of Frauds). The Plaintiff argued part performance at trial. (Transcript Vol. II, pp 100-103). However, in order to remove an agreement from the Statute of Frauds, there must be acts related clearly and unequivocally to the agreement, exclusive of any other relation to between the parties touching such agreement. *Player, supra*, (citing *Aust v. Beard*, 230 S.C. 515, 96 S.E.2d 558 (1957); *Gibson v. Hrysikos*, 293 S.C. 8, 358 S.E.2d. 173 (Ct. App. 1987)) Here, the evidence was that Mr. Grossman intended for there to be agreements with Hilton Head Homes at Allenwood, LLC; Village Square Development Company, LLC; Lancaster Redevelopment Corporation which he acknowledged. (Transcript Vol II, p. 18) There was not testimony of actions by Mr. Grossman other than acknowledgment that these three companies owed Mr. Brady compensation (Transcript, Vol. II, p. 36, p. 93) Mr. Grossman stipulated that money was owed, just not by himself individually. (Transcript, Vol. II, pp. 93-94) Mr. Grossman even agreed to lend ten thousand dollars (\$10,000.00) to Lancaster Redevelopment Corporation to give money to Mr. Brady for business development. (Transcript, Vol. II., pp. 38-39). There was no evidence presented that Mr. Grossman ever did anything to lend credence to a partial performance individually. (Transcript, Transcript Vol. II).

The Court should have allowed the amendment of the pleadings to conform to the evidence under Rule 15(b) SRCivP. Such amendments are to be liberally allowed when no prejudice to the opposing party will result. *Harvey v. Strickland*, 350 S.C. 303, 566 S.E.2d 529 (2002). Here, there is no prejudice when no party could produce a signed copy of the letter from 2004 and the entire case hinges upon that document, which violates the Statute of Frauds where the Plaintiff introduced the letter, discussed the letter at length, and where the evidence showed

that Mr. Grossman intended for the corporate entities to be bound to the obligations to the Plaintiff. It was the Plaintiff who made this an issue throughout the trial, and the amendment should have been allowed.

CONCLUSION

The Circuit Court improperly denied the motions for directed verdict, for JNOV, and to allow the amendment of pleadings to conform to the evidence.

For these reasons, the decision of the Circuit Court should be REVERSED.

Respectfully submitted:

Mt. Pleasant, South Carolina
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