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**Jun 17 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

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Appellate Case No. 2020-001657  
Trial Court Case No. 2018CP4602502

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Kimberly Ann Condra .....Appellant,

v.

Gregory Scott Childers and Jeffrey Steven Childers.....Respondents.

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FINAL REPLY BRIEF OF APPELLANT

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June 17, 2021

s/ Lucy L. McDow  
SC Bar No. 3790  
P.O. Box 767  
Rock Hill, South Carolina 29731  
(803) 327-1700  
[LucyLMcDow@mcdowlaw.com](mailto:LucyLMcDow@mcdowlaw.com)  
Attorney for Appellant

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**I. REPLY TO THE ARGUMENTS OF THE RESPONDENT GREGORY SCOTT CHILDERS:**

*Childers relies not on any fact evidence that Condra's trust of him was unreasonable, but solely on her obligation to the City of Rock Hill under its exemption permit that he had agreed to replace in order to manage her project as a purportedly licensed and experienced builder.*

The respondent Gregory Childers correctly states one point: this Court cannot second-guess the trial judge by re-weighing the evidence on which he relied in requiring the appellant, Kimberly Condra, to have verified Childers' builders license. No weighing is required because no fact evidence was submitted that showed Condra's reliance on Childers to be unreasonable, and Childers points out none.

Neither the trial judge nor Childers cites any facts, inconsistencies, suggestions, implications, warnings, information, or contrary documents that did or should have put Condra on notice that Childers might not be licensed or that he would not or could not do the complete and legal remodeling project he promised. Childers and the trial court instead impose the absolute burden on Condra (and every other consumer) to verify the license of any alleged licensee with whom they do business or otherwise be barred from fraud and negligent misrepresentation causes of action, even when no evidence suggests misrepresentation or falsity.

Without any evidence suggesting a need for special caution or skepticism by Condra, Childers and the verdict piggyback solely on her ultimate responsibility to the City of Rock Hill to have only legally permitted and Code-compliant construction projects done on her property, regardless of whether she acts as her own, exempt project manager or instead uses a licensed builder as the manager. Condra fully endorses her obligations to local government, as Building Official Mike Nugent described them. She always recognized her obligation to the City, and she suffered for it when the City shut down her project after both she and the Building Official learned

at the same time that it was being managed by an unlicensed builder who had failed to obtain his own required permit.

She was and is an educated and competent person and has never presented herself otherwise. It is to her credit that she carefully complied with the strict requirements to get the exemption allowed by S.C. Code Ann. §40-59-260 that enabled her initially to act as her own contractor. Likewise to her credit is her recognition while acting under §40-59-260 that she had bitten off too much and her remodeling inexperience caused her to need a competent and licensed builder to relieve her of the obligations she had assumed under the exemption statute. Childers and the trial judge have hung her prior exemption around her neck, though. Instead of Childers obtaining the new permit that would have ended that exemption on the City's records, his failure to do so has insulated him against tort responsibility for his wrongdoing.

§40-59-260 was never enacted to have such an effect and Childers suggests no reason why it should be so applied. Instead, he mistakenly weaponizes the public-duty statute to put an enhanced private duty on Condra for his personal tort benefit. Childers and the Court's reliance on the statute to make any homeowner's subsequent trust of a builder unreasonable as a matter of law sadly skews the civil law of fraud and negligent misrepresentation.

***Condra's continued trust of Childers after work began on her project is irrelevant to the reasonableness of her reliance on him in entering into the contract.***

Childers' next point, that Condra should have "caught on" to Childers' misrepresentations after the contract is irrelevant. Childers refers to his continued stalling and spinning of tales to Condra to keep her original permit posted while he worked.<sup>1</sup> His new falsities after he began work have no relevance to her causes of action for fraud in the inducement and negligent

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<sup>1</sup> ROA p. 47, lines 4-21; p. 92, line 25 – p. 93, line 20; p. 112, line 11 – p. 113, line 7.

misrepresentation, however. Condra asserted no cause of action for subsequent breach of the contract or for breach accompanied by fraudulent acts.<sup>2</sup> Only Childers' misrepresentations to induce the contract are evidence of the elements of her claims, not his renewed lies afterwards. See, e.g., *Brown v. Stewart*, 348 S.C. 33, 41-42, 557 S.E.2d 676, 680 (Ct.App.2001) describing inducement evidence. Further, any implicit suggestion now that she should not have kept paying him after her induced down payment of \$24,250 is an argument never presented to the trial court.

***Childers' personal opinion now that Condra's reliance on him was reckless does not cure the trial court's failure to make such a finding.***

To remedy the trial judge's failure to find that Condra's initial reliance was "reckless" rather than simply "careless," Childers offers his own personal opinion. He opines that her reliance was reckless. The trial judge made no such finding, however, nor did he ever articulate whether he had applied a standard of mere negligence or the more demanding standard of reckless disregard to the reasonable reliance test.

To the extent that Childer's license status was so readily available to Condra as to make her trust of him "reckless," Childers points to no testimony by Childers or any other witness that the license status of builders was available online in June of 2017. While Condra could have demanded to see Childers' paper license, no testimony confirmed that builder licensing information was available online on any site in June of 2017, and she herself testified that she had no idea she might find it online at that time.

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<sup>2</sup> ROA p. 226, lines 8-25; p. 219, lines 17-21; pp. 404-405. The absence of causes of action against Childers for simple breach of contract or breach accompanied by a fraudulent act was not an oversight, but a conscious choice. As counsel informed the judge, because of Childers' shaky financial status, a judgment for Condra based on those two causes of action would have allowed Childers to easily sidestep payment by simply filing bankruptcy later. See the exceptions for discharge of debts in the Bankruptcy Code at 11 U.S.C.A. §523(a)(2)(A).

***Childers’ argument that Lenz bars Condra from a UTPA claim against him continues to stretch Lenz beyond its meaning and intended effect.***

Childers’ argument regarding his breach of the South Carolina Unfair Trade Practices Act (S.C. Code Ann. §39-5-10 et seq. – “the UTPA”), does not rehabilitate *Lenz v. Walsh*, 362 S.C. 603, 608 S.E.2d 471 (Ct.App. 2005) as a bar to a UTPA recovery. Childers’ quote of Condra’s counsel, for example, is truncated and deceptive. Counsel’s full statement to the trial judge on the UTPA at the hearing on the motion for reconsideration was:

Ours is different in that we – it’s not solely based on – what makes it unfair and deceptive is that he wasn’t licensed, yes, but the damages result were that he did a botched and incomplete job apart from license or no license. He did that kind of job and she was induced to allow him to do it because he lied to get the contract with her and then as a direct result of all of that he took her \$52,000 and it cost her I think ninety something thousand dollars to get his work fixed and completed because he was incompetent.<sup>3</sup>

Childers offers no explanation why it is appropriate to rely on the *Lenz* case, which has nothing to do with and never mentions the UTPA, to bar Condra’s otherwise strongly established claim as a victim of a set of willfully unfair and deceptive acts in the trade of construction.

**II. REPLY TO THE ARGUMENTS OF THE RESPONDENT JEFFREY STEVEN CHILDERS**

***Condra’s negligence cause of action***

The trial judge found that Steve Childers’ breach of S.C. Code Ann. §40-1-110(c) was negligence per se and a breach of his statutory duty to Condra, and that conclusion is the law of the case. *Buckner v. Preferred Mutual Insurance Company*, 255 S.C. 159, 177 S.E.2d 544 (1970). The order limited its basis for the grant of a directed verdict to Steve Childers on the ground that, although he had breached the regulatory statute and his statutory duty of care to Condra, she had

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<sup>3</sup> ROA p. 478, lines 6-16.

not proved his breach proximately caused any of her damages. The Court's Amended Order on Motion to Reconsider concluded that "15. A statute can establish a duty to a plaintiff. A breach of the duty can be found with a showing of violation of the statute. The finding of a statutory violation, however, does not end the inquiry. The causation of the injury must also be evaluated. Violation of a statute, while negligence per se, did not support recovery of damages because the violation was not the cause of the injury."<sup>4</sup>

Steve Childer's illegal furtherance of his brother's project was found to be "not the proximate cause of plaintiff's damages as Steve made no misrepresentations and there was no evidence Steve did anything but perform competent work as a subcontractor."<sup>5</sup> That conclusion compartmentalizes Steve's role to the quality of Steve's own incomplete work. The proximate-cause focus should have been on whether Steve's illegal participation in the overall scheme helped enable and further his brother's fraudulent project.

Steve Childers' participation as a licensed builder in helping an unlicensed and incompetent builder acquire money by dodging the law is exactly the cause and effect that §40-1-110(c) intends to prevent. As noted earlier, Title 40, starting with §40-1-10, expresses throughout the harm and danger to consumers that unlicensed and incompetent builders present. So great is the harm a Gregory Childers can do by undertaking projects he is incompetent to perform, that the Code prohibits licensed builders like Steve from enabling him by participating in the project. The cause-and-effect, and Condra's damages, arise from Steve's enabling and furthering a project that his brother could not do and did not finish.

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<sup>4</sup> ROA pp. 13-14.

<sup>5</sup> ROA p. 14.

Condra entered into the contract with Greg Childers based on Greg's misrepresentations alone. She does not contend otherwise. Condra demonstrated, however, through the Rock Hill Building Official's testimony that when Steve enabled the project by assisting his brother, Steve himself was obligated to make sure he was working on a legal, accurately permitted job, supervised either by the licensed builder identified in the issued permit or by Condra herself under the exemption she had earlier obtained:

Q. Now, when a licensed builder applies say to do a remodeling project for a home in the city and its going to involve specialty contractors – specialty subcontractors, do those specialty subs also have to apply to get a license for the scope of their work?

A. If it's a homebuilder they can list their subcontractors on the same permit. They have to give us all their license information and all that stuff so we check those things. But for the customer's benefit we allow them to do it on the same permit.

Q. All the way down you check and confirm licensing for all the subs whether the homeowners doing it?

A. Yes, we would.<sup>6</sup>

...

Q. Do you expect licensed builders and subcontractors working in the city to know their obligations about permits?

A. We do.

Q. If a job starts out – let me start that over. If a residential builder or residential specialty contractor begins work or undertakes work on a project, do you expect that person to check to make sure that the permitting is adequate to cover that work?

A. Yes.

Q. And will the permit that have [sic] been issued reflect whether it is or not?

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<sup>6</sup> ROA p. 151, line 22 – p. 152, line 9.

A. They have a pretty specific scope outlined. It's not like a general fix the house kind of thing. It has very specific outlines with plans.

Q. And will any permits that have already been issued will they specify what subcontractor have [sic] been authorized to do work?

A. Yes.

Q. So reading a permit would reveal all of that to anyone, is that correct?

A. It will. What will happen like in some circumstances those individual plumbers, electricians and mechanical people would have permits of their own. So if you read the building permit you might not get all that information because there is three other permits that go along with it. Although there's probably a note on there saying see that permit.<sup>7</sup>

...

Q. And if a subcontractor or a contractor shows up and sees a building permit at the property is it that person's obligation to check that permit and make sure that his or her work is covered under it?

A. They should.<sup>8</sup>

Steve took none of those steps. He knew, of course, that he himself had not gotten the permit by pledging his own builder's license and liability to the City or to Condra. He knew that he had no contract with Condra; he was instead working as a subcontractor for Greg. He even continued to work in blinders after he was put on actual notice of irregularities. Knowing Greg was the builder in charge and the person with whom he had contracted, he began working and continued working in the face of a displayed, inapplicable exemption permit.

He continued working even when Condra personally told him she had given up supervising the job herself. He continued working after he failed to get his own subcontractor permit from the City, which was required of him regardless of who the project manager was.

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<sup>7</sup> ROA p. 154, line 3 – p. 155, line 5.

<sup>8</sup> ROA p. 166, lines 9-13.

Finally, he started and continued work with the background of a long family and work history with his brother that would reasonably have familiarized him with Greg's lack of a license and competence, or at least put him on notice to inquire.

The judge's sole focus on the apparent sufficiency of Steve's own work was too narrow and disregarded the statutory burden Steve assumed not to aid and abet his brother's illegal project. That Steve did not personally induce Condra's contract with Greg or personally induce her to pay Greg was immaterial. As a matter of law, by assisting Greg in the illegal project, Steve enabled Greg to carry out his fraud.

Proximate cause, both legal and factual, is a required element for recovery even for per se negligence, of course. *Locklear v. Southeastern Stages*, 193 S.C. 309, 8 S.E.2d 321, 324-325 (1940); *Whitlaw v. Kroger Co.*, 306 S.C. 51, 54, 410 S.E.2d 251, 252-253 (1991). Whether Steve helped instigate the project remains unknown, but Condra's evidence showed he enabled it by agreeing to do, and then doing, part of the work. At a minimum, the evidence showed that, while Condra had paid Greg most of the contract price before Steve appeared on the project, she did not pay Greg the remaining \$9,250 balance until after Steve did his partial work.<sup>9</sup> It was Steve's work that, although incomplete, reassured her that the project was progressing and would be completed, thereby justifying and resulting in her final disbursement of \$9,250 Greg.<sup>10</sup>

The victim must sufficiently show that the damage was foreseeable and that it would not have occurred "but for" the defendant's negligence. *Whitlaw*, 306 S.C. at 54, 410 S.E.2d at 253. But for Steve's illegal participation and his silence about the apparent irregularities, Condra would

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<sup>9</sup> ROA p. 52, line 22 – p. 54, line 9; pp. 96-99; pp. 251-255.

<sup>10</sup> ROA p. 52, line 22 – p. 54, line 9; pp. 251-255.

not have paid and lost at least the final \$9,250. Likewise, it was eminently foreseeable throughout to Steve that he was furthering Greg's project and enabling Greg to profit by it.

To be liable for Condra's damages, Steve's negligence does not have to be the sole cause of the injury; it is sufficient if it is a concurring cause. *Matthews v. Porter*, 239 S.C. 620, 627-628, 124 S.E.2d 321, 325 (1962). Greg's own fraud was not an intervening cause so as to relieve Steve of liability, of course, because Steve knew or should have known of the illegality and the statutory prohibition against his own participation when he worked on it.

### ***Breach of the UTPA cause of action***

The trial judge likewise found that Steve performed competent work and therefore did nothing "unfair or deceptive" within the meaning of the UTPA. That overlooks Steve's breach of his statutory duty as a licensee not to enable an illegal project. His illegal assistance to an illegal scheme, particularly after he was on notice of the irregularities, was offensive to the public policy expressed by §40-1-110(c). "An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive." *Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry*, 403 S.C. 623, 636, 743 S.E.2d 808, 816 (2013).

"Indeed, the 'in the public interest' aspect of an Attorney General SCUTPA claim mirrors one of the underlying purposes of the FTCA—namely, "to make clear that the protection of the consumer from unfair trade practices, equally with the protection of competitors and the competitive process, is a concern of public policy." Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8349 (1964). *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 414 S.C. 33, 64, 777 S.E.2d 176, 192 (2015).

Condra presented ample evidence to support her negligence and UTPA claims against Steve. In light of the sufficiency of her prima facie case and the demanding test that must be passed for a grant of directed judgment, it was error to dismiss Steve by directed verdict. Condra's evidence against him sufficiently established his liability and responsibility for damages to warrant a rebuttal. Her evidence should not have been found wanting.

#### CONCLUSION

The Court of Appeals can provide more than one remedy to redress the errors of the trial court. Steve Childers' directed verdict should be reversed and the case against him remanded for a new trial on both of Condra's causes of actions for negligence and breach of the UTPA.

With regard to Gregory Childers, Condra's damages were uncontested. She presented evidence of actual damages in the amount of \$102,577, representing the \$90,465 price of having all of his promised work fully completed; the \$112 in legal fees she incurred to have the Carter Lumber mechanic's lien removed; and the \$12,000 in her loss of use of the value of her house during the extended completion time necessitated by his abandonment of the project.<sup>11</sup> Gregory Childers did not submit any evidence or testimony contradicting Condra's damages.

The most efficient judicial result as to Gregory Childers would be to reverse the trial court's verdict and have judgment entered for Condra's proven actual damages under each of her three causes of action, with remand to the trial court to consider additional awards of punitive or statutory treble damages, consideration of pre-judgment interest, and any statutory attorney-fee award, all depending on Condra's election of her remedies.

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<sup>11</sup> ROA p. 45, line 10 – p. 47, line 3; p. 70, line 19 – p. 71, line 3; p. 72, line 20 – p. 73, line 23; p. 54, lines 16-23; p. 84, lines 3-5 and 6-13; p. 85, line 15 – p. 86, line 12; p. 86, line 19 – p. 87, line 8.

Leaving either trial court order unchanged has consequences for Condra, but just as important to this Court, it has profound implications for future South Carolina victims whom the tort law and the South Carolina Unfair Trade Practices Act have long and rightly protected.

Respectfully submitted,

June 17, 2021

s/ Lucy L. McDow  
SC Bar No. 3790  
P.O. Box 767  
Rock Hill, South Carolina 29731  
(803) 327-1700  
[LucyLMcDow@mcdowlaw.com](mailto:LucyLMcDow@mcdowlaw.com)  
Attorney for Appellant

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APPELLANT'S CERTIFICATE OF RULE 211(b) COMPLIANCE

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I certify that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

June 17, 2021

s/ Lucy L. McDow  
SC Bar No. 3790  
P.O. Box 767  
Rock Hill, South Carolina 29731  
(803) 327-1700  
[LucyLMcDow@mcdownlaw.com](mailto:LucyLMcDow@mcdownlaw.com)  
Attorney for Appellant