THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable J. Derham Cole

The Honorable G.D. Morgan, Jr.

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Appeal Case No.: 2023-001529

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Zachary Leland Moody and Kristina L. Moody ..... Appellants,

v.

Gabriela B. Lopez a/k/a Gabriela Baltazar Lopez-Gutierrez, an individual, Leopoldo Vera Hernandez, an individual, Santa Fe Construction, LLC, Juan Carlos Maldonado, an individual, ServPro of Pickens County d/b/a Blue Moon Enterprises, Inc., Scott D. Caufield, an individual, TCT1, LLC, d/b/a Keller Williams Western Upstate, The Haro Group of Keller Williams, Creasy Construction, LLC, Harry James Creasy, an individual, and John Allen Drew, an individual, ..... Defendants

Of Which Servpro of Pickens County d/b/a Blue Moon Enterprises, Inc., and TCT1, LLC d/b/a Keller Williams Western Upstate, ..... Respondents.

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# FINAL BRIEF OF RESPONDENT SERVPRO OF PICKENS COUNTY D/B/A BLUE MOON ENTERPRISES, INC.

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II. Whether the Trial Court properly ruled that Blue Moon neither owed nor violated any legal duty on which Appellants may base a claim for negligence.

III. Whether the Trial Court properly held that Appellants failed to comply with South Carolina's Notice and Opportunity to Cure Construction Dwellings Act which bars their claim for completed repairs.

IV. Whether the Trial Court's ruling in favor of the Respondent on Civil Conspiracy and Equitable Indemnity must be affirmed, as Appellants have abandoned their appeal of these causes of action.

## STATEMENT OF THE CASE

This is an appeal from two separate orders granting summary judgment in favor of two separate respondents on different grounds. The first order was issued by the Honorable J. Derham Cole granting summary judgment to Respondent, ServPro of Pickens County d/b/a Blue Moon Enterprises, Inc. (hereinafter "Respondent" or "Blue Moon"). The second granted summary judgment to Respondent, TCT1, LLC d/b/a Keller Williams Upstate (hereinafter "Respondent Keller Williams"). This brief addresses the first order as to Blue Moon only.

## I. FACTUAL BACKGROUND

This action was brought by Zachary Leland Moody and Kristina L. Moody (hereinafter "Appellants") whose alleged claims arise from the purchase, construction and repair of a single-family residence located at 221 Foxhound Road, Simpsonville, South Carolina 29680 (hereinafter "Home"). (R. pp. 62-80) Appellants allege that they purchased the Home from Defendant, Gabriela B. Lopez (hereinafter "Lopez"). Lopez is alleged to be married to Defendant, Leopoldo Vera Hernandez (hereinafter "Hernandez"). Hernandez is or was, upon information and belief, an employee of Santa Fe Construction, LLC (hereinafter "Santa Fe"), a company alleged to be owned by Defendant, Juan Carlos Maldonado (hereinafter "Maldonado"). Respondent Keller Williams served as the Appellants' real estate agent when they purchased the Home. During the purchase of the Home, Lopez provided a disclosure statement as required by *S.C. Code Ann*. § 27-50-10 (R. p. 67 at ¶ 26 and R. pp. 205-207).

Appellants allege that after the purchase of the Home was completed, they began to experience water intrusion issues in 2018. (R. p. 68 at ¶31) Appellants retained Defendant, John Allen Drew (hereinafter "Drew"), to investigate and repair the issues. (*Id.* at ¶33) Appellants allege that Defendant, Creasy Construction, LLC, and/or Harry James Creasy (collectively

hereinafter "Creasy") "lent" Drew its construction license to perform repairs, as Drew was unlicensed. (*Id*. at ¶¶34-35) Appellants allege that Drew "walked off" the project without completing repairs although he had been paid. (R. p. 69 at ¶37)

After the issues were discovered, the Appellants obtained the building file for the original construction of the Home from the City of Simpsonville. The permit application lists Scott Caufield (hereinafter "Caufield") as the contact person for the contractor and Lopez as the owner. (R. p. 109) "Blue Moon Enterprises" is listed on the Permit Application as the contractor. *Id.* Payment for the permit was made by a check issued from the account of Santa Fe. (R. p. 110)

On August 7, 2019, Appellants filed a Complaint against Blue Moon with the South Carolina Department of Labor, Licensing and Regulation (hereinafter "SCLLR") (R. p. 116). Blue Moon informed SCLLR that its license had been used to construct the Home without its knowledge by its former employee, Caufield. (R. p. 107 at ¶14) On January 16, 2020, after performing an investigation, SCLLR dismissed the action against Blue Moon. (R. p. 117)

## II. PROCEDURAL HISTORY

Appellants filed this lawsuit on April 28, 2020, against Lopez, Hernandez, Santa Fe/Maldonado, Drew, Creasy, Respondent Keller Williams, Blue Moon, and Caufield. (R. pp. 42-61, and 62-80) Appellants alleged that Blue Moon was the contractor of the Home and pled the following causes of action against it: (1) Conspiracy; (2) Implied Warranty; (3) Negligence and Negligent Supervision; and (4) Equitable Indemnity. *Id.* Appellants allege, "Upon information and belief, Hernandez, Maldonado and Caufield supervised the construction of the Home." (R. p. 66) Appellants allege that they have been damaged in that they have had to pay for repairs, and they will be required to make additional repairs. This includes repairs performed by CAP Construction in the amount of $109,805.00 and $42,500.00 paid to Drew. A Default Judgment

was entered against Caufield and Drew. (R. p. 64 at ¶7). Appellants have reached settlements with Lopez, Hernandez and Creasy who were dismissed from the lawsuit.

## III. THE MOTION AT ISSUE

On September 27, 2022, Respondent Blue Moon filed its Notice of Motion and Motion for Summary Judgment of Servpro of Pickens County d/b/a Blue Moon Enterprises with exhibits and with a memorandum of law included (hereinafter "Motion"). (R. pp. 92-129) The Motion sought summary judgment on the following grounds: (1) Appellants have no evidence that Blue Moon participated in a civil conspiracy; (2) Blue Moon did not build or sell the Home which is required for any implied warranty to arise; (3) Appellants have no evidence that Blue Moon violated a legal duty owed to them supporting a negligence claim; (4) Appellants were not subjected to a claim by a third-party and as such have no claim for indemnity; and (5) Appellants' claims are barred by the South Carolina Notice and Opportunity to Cure Construction Dwellings Act ("Right to Cure Act" or "Act"). *Id.*

In support of the Motion, Blue Moon filed the affidavit of Jeff Smith, the owner of Blue Moon ("Blue Moon Affidavit"). (R. pp. 106-8) In the Blue Moon Affidavit, Mr. Smith states the following:

- Blue Moon does not and has never performed original construction of new residential houses;
- Blue Moon does not sell and has not sold any residential homes;
- Blue Moon is in the business of performing repairs and mitigation services for customers who experience loss as a result of incident such as fire and/or water damage;
- To conduct its business, Blue Moon holds a South Carolina General Contractor's License number 117299;
- Caufield was employed by Blue Moon as a Production Manager;
- Caufield was previously the qualifier for Blue Moon's General Contractor's license;

- Smith became aware that Caufield was making charges on his company credit card and against other company accounts that were for his personal benefit;

- As a result of these charges Caufield was terminated on November 25, 2016;

- Caufield executed a Confession of Judgment in the amount of $27,956.73 to Blue Moon;

- Caufield was consistently making payments toward this judgment until sometime in 2020;

- Smith was not aware that Caufield used Blue Moon's license to construct the Home located at 221 Foxhound Road, Simpsonville, South Carolina until he received a notice of Complaint from the SCLLR dated August 7, 2029 [sic];

- Smith cooperated in SCLLR's investigation and informed SCLLR that Blue Moon's license had been used to construct the Home without its knowledge;

- Initially Smith believed that personal charges made by Caufield may have been used for the construction of the Home;

- An investigation has been performed and Blue Moon has not been able to confirm that any charges made by Caufield against accounts of Blue Moon were used for the construction of the Home;

- The SCLLR action was dismissed without any action required on behalf of Blue Moon;

- Blue Moon did not contract to build the Home;

- Blue Moon did not build the Home;

- Blue Moon did not receive any payment for the construction of the Home;

- Blue Moon did not sell the Home;

- Blue Moon did not receive any compensation for the construction or sale of the Home; and

- Blue Moon did not receive any written notice under the Right to Cure Act from the Moodys related to repairs at the Home.

*Id.*

A hearing on the Motion was held in Greenville on January 4, 2023, before the Honorable J. Derham Cole. At the time of the hearing, the case (which had been pending for almost three (3) years) was set for trial during the term of March 3, 2023. (R. p. 277, lines 8-14) At the hearing,

the Appellants put forth no evidence that disputed the testimony set forth in the Blue Moon Affidavit. *See* Transcript of Record, generally. (R. pp. 273-88)

On June 2, 2023, a Form 4 Order was entered granting summary judgment in favor of Respondent Blue Moon and instructing counsel for Respondent to prepare and submit a formal order. (R. pp. 1-4) On July 10, 2023, the formal Order Granting Motion for Summary Judgment of Servpro of Pickens County d/b/a Blue Moon Enterprises, Inc. was entered. (R. pp. 5-20) Appellants filed a Motion to Alter or Amend on July 19, 2023. (R. pp. 191-194) This motion was denied. (R. pp. 35-38)

## IV. THIS APPEAL

On September 25, 2023, Appellants filed a Notice of Appeal as to the Blue Moon Summary Judgment Order. On the same date, a Notice of Appeal was filed by Appellants regarding the granting of summary judgment to Respondent Keller Williams. The two appeals were consolidated. This appeal was dismissed by an Order filed on December 8, 2023, for Appellants' failure to timely order the transcript. Appellants moved to reinstate the appeal on December 11, 2023. This motion was granted on January 5, 2024, via an Order requiring Appellants to file their initial brief and designation of matter within thirty (30) days of said order. On February 5, 2024, Appellants filed a Motion for Extension of Time to File Appellants' Initial Brief and Designation of Matter. This Court entered an Order extending the time for filing Appellants' initial brief and designation of matter until February 20, 2024. Appellants filed and served their initial brief (hereinafter "Appellants' Brief") and designation of matter on February 21, 2024. Blue Moon obtained a thirty (30) day extension to file its initial brief and designation of matter.

## STANDARD OF REVIEW

The standard of review as to a motion for summary judgment was recently set forth as follows in *Marlowe v. S.C. DOT*, 441 S.C. 319, 328-29, 893 S.E.2d 21, 26-27 (Ct. App. 2023):

> "In reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court." *Hawkins v. City of Greenville*, 358 S.C. 280, 289, 594 S.E.2d 557, 562 (Ct. App. 2004). "The proper standard [under Rule 56(c), SCRCP] is the genuine issue of material fact standard." *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023)] (internal quotations omitted) (rejecting the "mere scintilla" standard for summary judgment). "Summary judgment is proper when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Hawkins*, 358 S.C. at 289, 594 S.E.2d at 562 (quoting Rule 56(c), SCRCP). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Id*. at 288, 594 S.E.2d at 561 (quoting *McNair v. Rainsford*, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998)). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Id*. (quoting *Lanham v. Blue Cross & Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 361-62, 563 S.E.2d 331, 333 (2002)). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Ray v. City of Rock Hill*, 434 S.C. 39, 45, [] 862 S.E.2d 259, 262 (2021) (quoting *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333). "When the circuit court grants summary judgment on a question of law, we review the ruling de novo." *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Grp*., 413 S.C. 630, 634-35, 776 S.E.2d 434, 437 (Ct. App. 2015).

## ARGUMENT

While the doctrine of *caveat emptor* has been eroded under South Carolina law to protect innocent homebuyers, it has not eroded to the point to impose liability on a party whose contractor's license was used to construct a home without its knowledge, which happened in this instance. The erosion of *caveat emptor* began in an effort to address the number of houses being built by a "new breed of superdeveloper" who built homes on a speculative basis. *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.E.2d 335, 343, 384 S.E.2d 730, 735 (1989). It is undisputed that Blue Moon is not a builder or developer who builds and/or sells houses, but instead held a general contractor's license for the purpose of performing repairs to buildings that suffered fire and/or water damage. It is also undisputed that the Appellants purchased their Home from Lopez without obtaining any information about the builder. The only evidence that the Appellants have put forth for the purpose of imposing any liability on Blue Moon is the appearance of its name and license number on a building permit application bearing the name and signature of its former employee, Caufield, and submitted to the City of Simpsonville. (R. p. 109) Appellants rely on this and this alone as evidence to impose liability on Blue Moon, but this is not sufficient evidence to support any cause of action that they assert.

It is the Appellants' burden to show this Court that a genuine issue of fact exists. *See Kitchen Planners v. Friedman*, 892 S.E.2d at 302 (holding that non-moving party must establish a genuine issue of fact to defeat summary judgment). Appellants cite no authority that the building permit alone creates liability as a matter of law under any theory, and as such, this permit application in and of itself is not sufficient to create a genuine issue of fact. Appellants presented no evidence to the Court that Blue Moon funded, sold, built, or even knew of the construction of

this Home. They do not even present any evidence that Blue Moon should have known that Caufield was using its license to build the Home. As such, they fail to put forth law or evidence to show that there is a genuine issue of fact that warrants reversal of any ruling by the Trial Court in this matter. The ruling of the Trial Court must be affirmed.

## I. THE TRIAL COURT PROPERLY RULED THAT BLUE MOON DID NOT GIVE AN IMPLIED WARRANTY OF WORKMANLIKE SERVICE FOR THE HOME AS A MATTER OF LAW.

Because Blue Moon did not participate in the construction of the Home or even know that it was being built, no implied warranty of workmanlike service was given by Blue Moon. South Carolina law recognizes an implied warranty of workmanlike service as follows, "[A] builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent workmanlike manner." *Kennedy v. Columbia Lumber*, 384 S.E.2d at 736. While privity of contract is not required to bring this cause of action in the residential construction context, this warranty liability is "characterized" as "arising from the construction contract to which a builder is a party." *Id*. (citing *Carolina Winds Owners' Ass'n, Inc. v. Joe Harden Builder, Inc.*, 297 S.C. 74, 843, 374 S.E. 2d. 897, 903 (Ct. App. 1988)). Appellants assert that because Blue Moon's license was used to pull the building permit for the Home, it has given this implied warranty even though there is no evidence that it participated in the construction of the Home in any way. This position is not supported by either fact or law.

Appellants put forth no legal authority to support their contention that the use of Blue Moon's license to obtain the Home's building permit alone establishes that the implied warranty of workmanlike services arises. In *Smith v. Breedlove*, 377 S.C. 415, 661 S.E.2d 67 (2008), the Supreme Court refused to impose this implied warranty on Breedlove, a homeowner who pulled the building permit to construct his personal residence which he later sold. The court looked at

the totality of the circumstances and stated that even though Breedlove pulled his own permit, the "rationale supporting the imposition of liability for breach of an implied warranty of workmanlike service is that the purchaser is forced to rely on the skill of the professional builder." *Id*. at 72. The court found that Breedlove never held himself out as a licensed contractor, nor did he represent that he had any expertise in construction. *Id*. There was no reliance by the purchaser, Smith, on the skill of Breedlove. *Id*. The court did not find any implied warranty because Breedlove was "not in the business of constructing homes and because our policy of protecting purchasers, who must rely on the skill and expertise of professional builders, is not implicated by the facts to this case." *Id*. The mere fact that Breedlove pulled the building permit was not sufficient for the court to imply this warranty liability.

Likewise, here, Appellants present no evidence of conduct on the part of Blue Moon to support this warranty claim. Blue Moon was not a party to a contract to construct the Home. (R. pp. 106-8). Blue Moon is not in the business of constructing homes. *Id.* While Blue Moon's general contractor's license was used to obtain the building permit, there is no evidence that it participated in the construction of the Home. *Id.* Blue Moon received no financial benefit from the construction of the Home, and it did not fund the Home's construction. *Id.* Appellants have put forth no evidence that Blue Moon's former employee, Caufield, participated in the construction of the Home, other than his purported signature on the application for the permit obtained by Lopez. (R. p. 109) Appellants put forth no evidence of the circumstances under which Lopez's permit was pulled and as such, there is no evidence of reliance by any party on Blue Moon related to the Home. The Appellants themselves did not know who constructed the Home before they purchased it, and they were not aware that Blue Moon's name was on the permit before they purchased it. (R. pp. 112-3)

At the hearing on the motion for summary judgment, it was the Appellants' burden to put forth evidence to support their claim and show the existence of a "genuine issue of fact." *See Kitchen Planners v. Friedman*, 892 S.E.2d at 302. *See also Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991)("Where the plaintiff relies solely upon the pleadings, files no counter-affidavits and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56 [SCRCP] to grant summary judgment, if, under the facts presented by the defendants, he was entitled to judgment as a matter of law"); *West v. Gladney*, 341 S.C. 127, 135, 533 S.E.2d 334, 338 (Ct. App. 2000)("[T]his court ordinarily will not consider statements of fact presented only in an attorney's argument in determining whether a genuine issue of material fact exists sufficient to preclude summary judgment"). Appellants put forth no evidence or testimony to refute the Blue Moon Affidavit. (Transcript, generally.) The appearance of Blue Moon's license number on the building permit application, with nothing more, is simply not sufficient to establish a genuine issue of fact that this implied warranty applies in this instance.

**A. Blue Moon had no imputed knowledge of the use of its license to construct the Home.**

Appellants' argument that Blue Moon had imputed knowledge that its license was being used to pull the permit for the Home is not supported by law or evidence. As cited by the Plaintiff, "**Subject to certain qualifications and exceptions** [...], it is well settled that, if an officer or agent of a corporation acquires or possesses knowledge of facts, **in the course of his employment, and as to matters which are within the scope of his authority**, his knowledge is imputable to the corporation." *Equitable Tr. Co. v. Columbia Nat'l Bank*, 145 S.C. 91, 115, 142 S.E. 811, 818 (1928)(emphasis supplied). "However, **if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master's business**, his conduct falls

outside the scope of his employment." *Crittenden v. Thompson-Walker Co.*, 288 S.C. 112, 116, 341 S.E.2d 385, 387 (Ct. App. 1986)(citing *Hancock v. Aiken Mills*, 180 S.C. 93, 185 S.E. 188 (1936); *Hyde v. Southern Grocery Stores*, 197 S.C. 263, 15 S.E.2d 353 (1941))(emphasis supplied).

Here, the undisputed Blue Moon Affidavit establishes that if Caufield pulled the permit to construct the Home, it was not done in the course and scope of his employment for Blue Moon. (R. pp. 106-8) This Affidavit establishes that Blue Moon is not in the business of building residential houses, and that it was not contracted to build this Home. *Id*. It states that Blue Moon was not aware that its license had been used to pull the permit for the Home until it received the SCLLR Complaint. *Id*. The Affidavit also states that Blue Moon has not found that any of its funds were used for the construction of the Home. *Id*. The permit was paid for by a check from Santa Fe, not Blue Moon. (R. p. 110) Blue Moon did not receive any payment or compensation for the construction of the Home. (R. p. 108 at ¶22) Therefore, there is no evidence that Caufield was acting in the course and scope of his employment in submitting the permit application.

**B. SCLLR did not find violations of law or regulation against Blue Moon.**

Additionally, SCLLR found that Blue Moon owed no obligation regarding the Home even though its license number appeared on the permit. On August 7, 2019, SCLLR informed Blue Moon that Appellants had filed a complaint against it complaining of the water intrusion complained of in this lawsuit. (R. p. 116) When the Appellants filed their complaint against Blue Moon, the SCLLR board was required to investigate their complaint by law. *S.C. Code Ann.* § 40-11-80 (SCLLR "shall investigate complaints and violations"). Blue Moon cooperated with SCLLR's investigation and informed them that its license had been used without its knowledge. (R. pp. 106-8) The SCLLR board had the authority to order Blue Moon to take remedial action if

it was in violation of law or regulation. *Id*. at §§ 70 (SCLLR may "order an entity or individual found in violation of this chapter or a regulation promulgated under this chapter to take remedial action"). On February 14, 2020, SCLLR informed Blue Moon that it had completed its investigation and the Appellant's complaint was dismissed. (R. p. 117)

In sum, the Appellants do not put forth any evidence to support the implication of any warranty on the part of Blue Moon based on the undisputed fact that its license was used to pull the permit to construct the Home **without its knowledge**. Therefore, the Trial Court properly found that Blue Moon was entitled to judgment as a matter of law on this theory of warranty[1].

## II. THE TRIAL COURT PROPERLY FOUND THAT BLUE MOON NEITHER OWED NOR VIOLATED ANY LEGAL DUTY ON WHICH APPELLANTS MAY BASE A CLAIM FOR NEGLIGENCE.

Because Appellants cannot prove that Blue Moon owed or violated any legal duty with respect to the construction of the Home, Appellants have no basis for recovery in negligence. In order to establish a claim for negligence, Appellants must show, "(1) [Respondent] owes a duty of care to the [Appellant]; (2) [Respondent] breached the duty by a negligent act or omission; (3) [Respondent's] breach was the actual or proximate cause of the [Appellant's] injury; and (4) [Appellant] suffered an injury or damages." *Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the [Respondent] to the [Appellant]." *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). "Without a duty, there is no actionable negligence." *Id*. "The existence of a duty owed is a question of law for the courts." *Washington v. Lexington Cty.*

[1] The Blue Moon Summary Judgment Order also granted Blue Moon summary judgment as to the implied warranty of habitability. (R. pp. 10-11). Appellant's Initial Brief does not address this. As such, Appellants have abandoned this issue. *See Fields v. Melrose P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993)("An issue raised on appeal but not argued in the brief is deemed abandoned").

*Jail*, 337 S.C. 400, 405, 523 S.E.2d 204, 206 (Ct. App. 1999). Here, Appellants argue that Blue Moon was negligent either as the prime contractor, or under theories of negligent supervision or vicarious liability related to the conduct of Caufield. None of these three theories are supported by fact or law.

### A. Blue Moon neither owed nor breached any duty in the construction of the Home.

Because Blue Moon did not build the Home, it neither owed nor breached any duty in its construction. In *Kennedy v. Columbia Lumber*, 384 S.E.2d at 734, the South Carolina Supreme Court recognized a tort action against a builder of residential construction where the builder violates (1) an applicable building code, (2) deviates from industry standards, or (3) constructs a house that he knows or should know will pose a serious risk of physical harm. Appellants put forth no evidence to dispute the Blue Moon Affidavit which states that Blue Moon did not even know that the Home was being built using its license and as such, it did not and could not have known that the Home would pose any risk of harm. (R. pp. 106-8) *See also* Transcript, generally. (R. pp. 273-288) Appellants also fail to put forth any evidence that Blue Moon committed any building code violations or that it violated any industry standards. As discussed above, Appellants filed a complaint against Blue Moon with SCLLR, but it was dismissed. (R. pp. 116-7) As such, Appellants cannot establish that Blue Moon violated a legal duty owed to Appellants.

Appellants rely solely on the fact that Blue Moon's name appears on the building permit as its basis and evidence of any liability in negligence. In *Smith v. Breedlove*, 677 S.E.2d at 72, the court also rejected the mere pulling of a permit as a sufficient basis for a negligence action. The court found that the builder/seller who pulled a building permit did not owe a duty on which a negligence claim could be based "because he did not undertake and agree to construct the residence for [the purchaser] or for anyone else." *Id*. The court upheld the trial court's finding

that "the undertaking or agreement to construct a dwelling for another" is what creates the legal duty to exercise and use due care in the construction of the dwelling. *Id.* Negligence liability was not imposed on Breedlove even though he pulled the home's permit and had it constructed himself. Here, Blue Moon did not contract with anyone to construct the Home and did nothing to undertake to build the residence. As such, Appellants have put forth no basis for a negligence claim against Blue Moon.

**B. Appellants cannot establish a claim for Negligent Supervision of Caufield.**

Appellants' argument that Blue Moon is liable under a theory of "negligent supervision" of Caufield for allegedly pulling the permit is not supported by law or evidence. As explained in *Degenhart v. Knights of Columbus*, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992), a case cited by Appellants, negligent supervision is a theory of liability against an employer for actions of its employee who is "acting outside the scope of his employment." In order to prove that an employer has a duty to control its employee outside of the scope of his employment, a claimant must show: (1) the employee was on the premises of the employer or was using a chattel of the employer; (2) the employer knew or had reason to know that he had the ability to control his employee; and (3) the employer "knows or has reason to know of the necessity and opportunity for exercising such control." *Id.* In *Degenhart*, the court found that the Knights of Columbus owed no duty to protect Degenharts from their dealings with its employee in his individual capacity, and therefore, had no liability under this theory. Likewise, the Appellants here have put forth no evidence to establish that Blue Moon has any liability for Caufield's actions under a theory of negligent supervision.

First, Appellants' argument that Blue Moon's general contractor's license is a "chattel" is without merit. "The word chattel, in its ordinary signification, includes every species of property which is not real estate or freehold." *Gay's Gold*, 80 U.S. (80 Wall.) 358, 362 (1871) A "license"

is traditionally defined as a privilege, rather than a piece of property. *See Heslep v. State Highway Dep't*, 171 S.C. 186, 189, 171 S.E. 913, 914 (1933)("A license is merely a permit or privilege to do what otherwise would be unlawful."); *See also Fed. Land Bank v. Bd. of Cty. Comm'rs*, 368 U.S. 146, 154 n.23, 82 S. Ct. 282, 288 (1961)( "The word 'license,' means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing; (citations omitted)"). Appellants cite no authority that a general contractor's license is a piece of property or a "chattel."

Second, Appellants fail to meet their burden of putting forth evidence that Blue Moon had the ability to exert control over Caufield when he allegedly pulled the permit. The Blue Moon Affidavit establishes that Blue Moon did not know that Caufield used its license to construct the Home until the SCLLR action was filed. (R. p. 107 at ¶13) Appellants offer no evidence to dispute this. *See* Transcript, generally. (R. pp. 273-288) The permit was paid for by a check from Santa Fe, not Blue Moon. (R. p. 110) Appellants offer no evidence that Blue Moon had any notice of the use of its license to construct the Home.

Kristina Moody herself established that a building permit can be pulled in the City of Simpsonville Building Department using a builder's license without the license holder being contacted. Mrs. Moody testified that she was personally able to pull a permit for repairs to the Home from the City of Simpsonville using Creasy's license:

> **Q. Okay. So on the City of Simpsonville permit application, even though Mr. Creasy's contact information [sic] on there, you were able to submit that permit with just your signature, correct?**
>
> A. Correct.
>
> **Q. And nothing was required directly from Mr. Creasy for you to be able to obtain that permit, correct?**
>
> A. Correct.

(R. p. 115, lines 14-22)

Finally, Appellants put forth no evidence that Blue Moon knew or should have known of the necessity to exercise control of Caufield's use of its general contractor's license. Appellants present no evidence that Blue Moon knew or should have known that Caufield was using its license for purposes other than Blue Moon's restoration work. Blue Moon became aware that Caufield was misusing his company credit card and terminated him in 2016. (R. p. 107 at ¶9 and 10). This was well after the building permit for the Home was pulled in 2014. (R. p. 109) Appellants present no evidence that Blue Moon had any reason to suspect that Caufield might misuse its license in 2014 when this permit was pulled. As such, Appellants fail to meet their burden in proving that their alleged damages were caused by negligent supervision of Caufield by Blue Moon.

**C. Appellants cannot establish that Blue Moon is vicariously liable for Caufield.**

There is also no basis for vicarious liability on the part of Blue Moon for Caufield's actions because there is no evidence that Caufield was acting on behalf of his employer when he allegedly pulled the permit for the Home. While the negligent supervision discussed in *Dagenhart* imposes liability to an employer where an employee is acting **outside** of the scope of his employment, an employer is vicariously liable for injuries to a third party that result from torts the employee commits **within the scope of employment**. *See Froneberger v. Smith*, 406 S.C. 37, 748 S.E.2d 625 (Ct. App. 2013) (Discussing doctrine of *respondent superior*). In establishing vicarious liability, the question to ask is whether the employee's actions were "(1) in furtherance of [the employer's] business and (2) reasonably necessary to accomplish the purpose of [his] employment." *Id.* at 633. **Where the employee is acting in his own interests, there is no vicarious liability**. *See Kase v. Ebert*, 392 S.C. 57, 61-62, 707 S.E.2d 456, 458 (Ct. App. 2011) (emphasis supplied). "On the other hand, if the servant acts for some independent purpose of his

own, wholly disconnected with the furtherance of his master's business, his conduct falls outside the scope of his employment." *Crittenden v. Thompson-Walker Co*., 341 S.E.2d at 387. "If a servant steps aside from the master's business for **some purpose wholly disconnected with his employment**, [] the relation of master and servant is **temporarily suspended**; and this is so **no matter how short the time**, and the **master is not liable for his acts during such time**." *Lane v. Modern Music, Inc*., 244 S.C. 299, 305, 136 S.E.2d 713, 716 (1964) (emphasis supplied).

An employee is not always acting on behalf of his employer. In *Armstrong v. Food lion, Inc.*, 371 S.C. 271, 639 S.E.2d 50 (2006), the Supreme Court upheld a direct verdict in favor of a store whose employees attacked two customers who were shopping in the store with box cutters. Even though the employees were working in the store, the court refused to hold the store liable for the acts of the employees finding that they were not acting for or furthering the business of their employer. Citing *Lane v. Modern Music*, 244 S.C. at 299, the court held that because there was no proof that the store employees were acting in the scope of their employment, the store was not legally liable.

Here, Appellants also offer no proof that Caufield was acting for any purpose of Blue Moon in obtaining the permit to construct the Home. Again, Blue Moon is not in the business of building homes; it received no payment for building the Home; and it did not contract to build the Home. (R. pp. 106-8). There is no evidence that Caufield used Blue Moon's license to benefit Blue Moon in any way or to further its business. As such, Blue Moon is not responsible for any action by Caufield in pulling the permit for his own unknown purpose.

## III. THE TRIAL COURT PROPERLY HELD THAT APPELLANTS FAILED TO COMPLY WITH SOUTH CAROLINA'S NOTICE AND OPPORTUNITY TO CURE CONSTRUCTION DWELLINGS ACT WHICH BARS THEIR CLAIM FOR COMPLETED REPAIRS.

Because Appellants completed certain repairs without first complying with the requirements of the Right to Cure Act, any claims for these repairs are barred because compliance with the Act became impossible. The Right to Cure Act, found at S.C. Code Ann. §§ 40-59-810 *et seq*., gives contractors the right to cure alleged "Construction defect[s]"[2] in a "dwelling."[3] The Act specifically requires a "claimant"[4] to "serve"[5] "a written notice of claim on the contractor" no less than ninety days before filing an "action"[6] against a contractor or subcontractor arising out of the construction of a dwelling meeting specific requirements of the Act. §§840(A)-(B). The Act provides that when a claimant fails to comply with the Act before filing a civil action the trial court "shall" stay the action to give the contractor the rights afforded to it under the Act.

Here, Appellants seek payment for repairs which were performed without giving the requisite written notice to Blue Moon, and as such, the Trial Court found that compliance with the Act was impossible, and a stay would serve no useful purpose. In a similar situation, former South Carolina Supreme Court Justice, Jean Hoefer Toal, ruled at the trial level that where a homeowner failed to comply with the requirements of the Act ***before proceeding with the repairs***, any action for damages ***must be dismissed*** because after the repairs are completed compliance with the Act became impossible. *See McIntire v. Seaquest Dev. Co.*, 2017 S.C. C.P. LEXIS 252, C/A. No. 2016 CP-10-1833 (May 1, 2017), *Rev'd on other grounds* at No. 2019-UP-413, 2019 S.C. App. Unpub. LEXIS 429, 2019 WL 7369272 (Ct. App. Dec. 31, 2019), *cert. denied* at 2020 S.C. Unpub.

[2] As defined by the Right to Cure Act "Construction defect" includes a "deficiency in or a deficiency arising out of the design, specifications, surveying, planning, supervision, or observation of construction or construction of residential improvements..." § 820(3).
[3] As defined by the Right to Cure Act a "Dwelling" includes a single-family residence…" §820(4).
[4] Under the Act a "Claimant" means a homeowner, including a subsequent purchaser, who asserts a claim against a contractor concerning a defect in the design, construction, condition or sale of a dwelling. §820(2)
[5] The Act requires service by certified mail. §820(5)
[6] Under the Act an "Action" includes a civil lawsuit for damages. §820(1).

LEXIS 66 (R. pp. 118-129). Justice Toal reasoned that it would be impossible to comply with the Act even under the provision allowing a stay because the repairs had been completed.

In this instance the Trial Court made the same finding. In response to the Motion, Appellants did not present any evidence to the Trial Court to show that they complied with the Act. Appellants freely admit that they paid Drew to perform repairs in the amount of $42,500.00 prior to filing this lawsuit and without giving Blue Moon notice before proceeding with them. (R. p. 114, lines 10 – 115, line 8) Appellants also presented no evidence to the Trial Court of compliance with the Right to Cure Act prior to completing the repairs to the Home performed by CAP Construction in the amount of $109,805.00. As such, the Appellants proceeded with repairs in a manner that made compliance with the Act impossible. Thus, Appellants cannot recover the $109,805.00 paid to CAP Construction or the $42,500.00 paid to Drew.

Appellant's argument that Blue Moon is "judicially estopped" from asserting this alternative defense is without merit. Under the doctrine of judicial estoppel, "When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him (citations omitted)." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997). Here, Blue Moon does not seek to change the facts. While Blue Moon disputes that it was the general contractor who built the Home, it does not dispute that it is a licensed contractor. While affirmation of the Trial Court's rulings above would make this a moot point, Blue Moon is entitled to the benefits of the Right to Cure Act and may enforce those rights if necessary. No inconsistent position of the facts is taken at all.

## IV. THE TRIAL COURT'S RULING IN FAVOR OF THE RESPONDENT ON CIVIL CONSPIRACY AND EQUITABLE INDEMNITY MUST BE AFFIRMED, AS APPELLANTS HAVE ABANDONED THEIR APPEAL OF THESE CAUSES OF ACTION.

Because Appellants do not address the rulings of the Trial Court on the causes of action of Civil Conspiracy and Equitable Indemnity in their brief, Appellants have abandoned their appeal of these issues. "An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court." *Fields v. Melrose P'ship*, 439 S.E.2d at 285 (Citing *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). Appellants brief does not mention these causes of action, and they may not address them for the first time in a reply brief. *Id*. at n. 3 ("[A]n appellant may not use the reply brief to argue issues not argued in his brief in chief). As such, the Trial Court's grant of summary judgment in favor of Blue Moon as to civil conspiracy and equitable indemnity must be affirmed.

## CONCLUSION

In sum, the fact that an employee used Blue Moon's general contractor's license to pull a building permit for the Home without its knowledge is not in and of itself sufficient to impose liability in warranty or tort on Blue Moon for construction deficiencies in the Home. Just weeks before trial, Appellants presented no evidence or argument to support any claim asserted by Appellants against Blue Moon. The Trial Court's order must therefore be affirmed.

Respectfully submitted,

*s/Allen Leland DuPre*

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September 10, 2024

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In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable J. Derham Cole

The Honorable G.D. Morgan, Jr.

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Appeal Case No.: 2023-001529

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Zachery Leland Moody and Kristina L. Moody ..... Appellants,

v.

Gabriela B. Lopez a/k/a Gabriela Baltazar Lopez-Gutierrez, an individual, Leopoldo Vera Hernandez, an individual, Santa Fe Construction, LLC, Juan Carlos Maldonado, an individual, ServPro of Pickens County d/b/a Blue Moon Enterprises, Inc., Scott D. Caufield, an individual, TCT1, LLC, d/b/a Keller Williams Western Upstate, Creasy Construction, LLC, Harry James Creasy, an individual, and John Allen Drew, an individual, ..... Defendants

Of Which Servpro of Pickens County d/b/a Blue Moon Enterprises, Inc., and TCT1, LLC d/b/a Keller Williams Western Upstate, ..... Respondents.

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## CERTIFICATE OF COUNSEL

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The undersigned hereby certifies that Respondence Servpro of Pickens County d/b/a Blue Moon Enterprises, Inc.'s Final Brief complies with Rule 211(b), South Carolina Rules of Appellate Practice

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September 10, 2024