THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas The Honorable Bently D. Price, Circuit Court Judge

---

Appellant Case No. 2024-001197
Civil Action Case No. 2023-CP-23-05339

John M. Hornbeck, III ……Respondent

v.

Milton A. Gatlin …….. Appellant

MOTION TO DISMISS WITH MEMORANDUM

NOW COMES Respondent, John M. Hornbeck, III and hereby requests a dismissal of Appellant's Appeal pursuant to SCACR, 240 based on Appellant's failure comply with SCACR, Rule 207, Rule 208 and Rule 210.

BACKGROUND

Appellant filed his first Initial Brief on August 19, 2024. In response, Respondent filed a Motion to Dismiss for Appellant's failure to argue his Issues on Appeal. The Court issued an Order on November 14, 2024 striking the Appellant's first Initial Brief and requiring Appellant to file his second amended Initial Brief within 30 days of the issuance of the Order. The Order specifically required the Appellant "serve and file a second amended initial brief that complies with this Court's rules." The Court also ordered that "the second amended initial brief shall include references to the transcript, pleadings, orders, exhibits or other materials which may be

properly included in the Record on Appeal to support the salient facts alleged." Appellant filed its second amended Initial Brief on December 16, 2024. Appellant amended and supplemented his issues on appeal from 8 issues on appeal to 11 issues on appeal in contravention of *Henning v Kaye* , 307 S.C. 436, 436-437, 415 S.E.2d 794, 794 (1992).

ARGUMENT/LAW

I. FAILURE TO ADHERE TO THE APPELLATE COURT RULES

In *Henning v Kaye* , 307 S.C. 436, 436, 415 S.E.2d 794, 794 (1992), the Court wrote,

> "[c]ounsel is advised that the South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review. Although this Court would be completely justified in dismissing this appeal based on appellant's numerous violations of the Rules, we decline to do so and deny the motion to dismiss as to the Hennings. Instead, appellant shall, within fifteen (15) days of this order, serve and file an initial brief that does fully comply with Rule 207, SCACR. No changes shall be made to appellant's arguments except that appellant may add citations to the cases listed in the current table of authorities and references to the record as provided by Rule 207(b)(4)." *Id.* 437-438, 794.

In *Henning*, the brief filed by the appellant failed to comply with SCACR in that it was not correctly organized and labeled, the issues were not distinctively headed, the table of authorities was not alphabetized or referenced to the body of the brief, the statement of the case contained contested matter and omitted required information, and the arguments contained no citations to the record or to the cases listed in the table of authorities; however, these rules are not mere technicalities and the appellant [was] required to amend his brief. *Id.* at 794.

A. THE APPELLANT CANNOT CHANGE THE ISSUES ON APPEAL IN HIS AMENDED BREIF

The aforementioned *Henning* case specifically states that no changes are allowed to be made to the amended brief. *Id.* at 794. Because the Appellant is not allowed to make such amendments to his brief, his appeal should be dismissed.

B. FAILURE TO PRESENT A PROPER TABLE OF AUTHORITIES

(SCACR 208(b)(1)(A))

SCRAC Rule 208(b)(1)(A) requires "[a] table of contents, with page references, and a table of cases (alphabetically arranged), statues, and other authorities cited, with references to the pages of the brief where they are cited." Appellant's Table of Authorities are deficient in the following manners to wit:

(1) There is no separate table of cases alphabetically arranged and none of the cases cited have page references;

(2) There is no separate table of statutes and none of the statutes cited have page references; and

(3) Any other authorities are not listed in a separate table of authorities and none of these additional authorities have page references.

In addition to the lack of page references, and proper organization of the Table of Authorities, Appellant never included the following "authorities" in it's Designation of Matter to be Included in the Record on Appeal such that the Court could examine such authorities even if such items are in fact "authorities" contemplated under the rule:

(1) South Carolina Residential Code 2015;

(2) 2015 International Residential Code (IRC);

(3) Gaf Roofing Installation; and

(4) James Hardie Hardie Plank Lapped Siding Installation Instructions

According to *Henning,* the Appellant's initial brief does not meet the criteria to move forward and the appeal should be dismissed.

C. FAILURE TO IDENTIFY A PROPER STANDARD OF REVIEW

(SCACR 208(b)(1)(D))

SCACR 208(b)(1)(D) requires the Appellant's brief to "contain a section with the heading "Standard of Review," which shall concisely set forth the applicable standard of review with citations to relevant case law establishing the standard. If the same standard of review is not applicable to all of the issues, a separate section with a heading of "Standard of Review" shall be included at the start of the argument on each issue with citations to relevant case law establishing this standard of review."

The recognized standard of review for motions for summary judgment is that, "[i]n reviewing a motion for summary judgment, the appellate court applies the same standard of review as the circuit court under Rule 56(c), SCRCP.") *See, Companion Prop. & Cas. Ins. Co. v. Airborne Express, Inc.*, 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006) ; *id.* (Summary judgment should be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."); *id.* at 390-91, 631 S.E.2d at 916. ("Our standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom." (quoting *Estes v. Roper Temp. Servs., Inc.*, 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991). Summary judgment should be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."); *id.* at 390-91, 631 S.E.2d at 916 ("Our standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the

nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom." *Estes v. Roper Temp. Servs., Inc.*, 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991).

Appellant forwards the position that S.C. Code of Laws § 14-8-200 is the proper standard of review. Respondent argues Appellant is incorrect and that the Appellant's proposed standard of review only deals with the Jurisdiction of the Court.

Because the Appellant has failed to properly articulate the standard of review, Appellant's appeal should be dismissed.

D. FAILURE TO PROPERLY STATE THE ISSUES ON APPEAL

(SCACR (b)(1)(B))

SCACR 208(b)(1)(B), Statement of Issues on Appeal provides,

> "[a] statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."

In an appellate brief, separate issues generally should be set forth and argued separately. *State v. Burroughs* 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997). A conclusory argument of an issue by appellant amounts to an abandonment of the issue. *State v. Black* , 319 S.C. 515, 462 S.E.2d 311, rehearing denied (Ct. App. 1995). A broad general statement of issues made by an appellant may be disregarded by the appellate court pursuant to Rule 207(b)(1)(B), SCACR. *Sullivan Co., Inc. v. New Swirl, Inc.* , 313 S.C. 34, 437 S.E.2d 30(1993).

i. Appellant's First Issue on Appeal

The Appellant's first Issue on Appeal reads,

> DID THE JUDGE ERR IN DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OR REOPENING? PLAINTIFF'S MOTION WAS FILED ON 3/29/2023. ONLY AFTER AN EMAIL ON 01/19/2024 CHECKING ON THE STATUS OF THE MOTION, PLAINTIFF RECEIVED AN EMAIL ON 01/24/2024 ADVISING THAT THE MOTION WAS DENIED. ANOTHER EMAIL WAS SENT ON 05/24/2024 ADVISING PLAINTIFF HAD STILL NOT RECEIVED THE ORDER. THE ACTUAL ORDER WAS NOT RECEIVED UNTIL 06/28/2024 AND DID NOT INCLUDE THE SHORT REASONING REQUESTED OF THE DEFENDANT'S ATTORNEY BY THE JUDGE. THE TOTAL TIME WAS 15 MONTHS. WAS THE DENIAL ORDER SELF SERVING AND DID THE JUDGE ACTUALLY READ THE PLAINTIFFS (sic) MOTION?

This "issue on appeal" is hardly coherent much less concise or direct. In fact, it is so compound, incapable to prove, and overly broad and general in nature, that Respondent's counsel does not even know how to address the issue. As such, this issue on appeal should be considered abandoned or simply disregarded by the Court.

ii. Appellant's Second Issue on Appeal

The Appellant's second Issue on Appeal reads,

> "DID THE JUDGE NOT CONSIDER AS MATERIAL THE FACT THAT DEFENDANT'S ATTORNEY CHANGED THE PLAINTIFF'S DEPOSITION TESTIMONY WHICH HE USED THROUGHOUT HIS "MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT" IN ORDER TO GIVE DEFENDANT A DISHONEST ADVANTAGE."

This issue is completely incoherent in that Respondent's lawyer cannot change deposition testimony. Furthermore, there is no evidence that can be presented to the Court of Appeals that there was anything of such nature said or presented to the trial court because there is no transcript of the hearing in the Designation of Matter to be included in the Record on Appeal. As such, this issue on appeal should be considered abandoned or simply disregarded by the Court.

iii. Appellant's Third Issue on Appeal

The Appellant's third Issue on Appeal reads,

> "DID THE JUDGE NOT CONSIDER AS MATERIAL THE FACT THE DEFENDANT'S ATTORNEY REFERRED TO THE "CONTRACT" FAVORABLY FOR THE DEFENDANTS KNOWING THE "CONTRACT" WAS PROVEN TO BE FRAUDULENT, DECIEVING AND ILLEGAL?"

While this may be the most concise issue Appellant has identified thus far, it is probably best considered as a broad statement and unpreserved for appeal. Furthermore, based on the trial court's granting of the Motion for Summary Judgment it would seem completely unproveable that there was some pervious un-appealed order that determined the Contract was fraudulent, deceiving or illegal. As such, this issue on appeal should be considered abandoned or simply disregarded by the Court.

iv. Appellant's Fourth Issue on Appeal

The Appellant's Fourth Issue on Appeal reads,

> "DID THE JUDGE NOT CONSIDER AS MATERIAL THE FACT THE DEFENDANT'S ATTORNEY LIED THROUGHOUT HIS "MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT" IN ORDER TO GIVE THE DEFENDANT A DISHONEST ADVANTAGE ?"

While this issue on appeal may be capable of interpretation, the time to expose lies or inconsistencies in a memorandum in support is through the memorandum in opposition to the motion or oral argument, but this fourth Issue on Appeal does not comport to the requirement to be concise and not overly broad. The issue is not preserved on the record and is not even articulated well enough because Appellant does not identify what the purported "lies" were. As

such, this issue on appeal should be considered overly broad, abandoned or simply disregarded by the Court.

v. Appellant's Fifth Issue on Appeal

The Appellant's fifth Issue on Appeal reads,

> "DID THE JUDGE NOT CONSIDER AS MATERIAL THE FACT THE DEFENDANT'S ATTORNEY STATED, BY LAW "PLAINTIFFS PREVENTED CCRC FROM PERFORMING IT'S STATUTORY RIGHT TO CURE" KNOWING THE COURT AND RESIDENTIAL BUILDING COMMISSION HAD RULED AGAINST THAT ARGUMENT ?"

First of all, the Residential Building Commission has no authority or jurisdiction to make any sort of ruling on this issue and there is certainly no authority in the table of authorities to support this position. There is also no order recognized in the Designation of Matter to Be Included in the Record on Appeal ("Designation of Matter") that would support this argument. Most importantly in all of these issues on appeal, is that the Appellant always asks, "DID THE JUDGE NOT CONSIDER . . .." The Order on the Motion for Summary Judgment ("Exhibit A") is very well reasoned and supported by case law and statutory law that illuminate the trial court's consideration of all issues presented at the hearing. Other than what is in that Order, this Court could not possibly know what the trial court considered because there is no transcript in the Designation of Matter.

xi. Appellant's Sixth Issue on Appeal

The Appellant's sixth Issue on Appeal reads,

> "DID THE JUDGE NOT CONSIDER AS MATERIAL THE FACT THE DEFENDANT'S ATTORNEY STATED, "I. ALL TORT ACTIONS ARE BARRED BY THE ECONOMIC LOSS RULE" IS A LIE. THE SUPREME COURT IN 1989 RECOGNIZED EXCEPTIONS TO THE ECONOMIC LOSS RULE IN THE RESIDENTIAL HOME BUILDING CONTEXT.?"

The Order on the Motion for Summary Judgment ("**Exhibit A**") is very well reasoned and supported by case law and statutory law that illuminate the trial court's consideration of all issues presented at the hearing. Other than what is in that Order, this Court could not possibly know what the trial court considered because there is no transcript in the Designation of Matter. While this issue on appeal may be capable of interpretation, the time to expose lies or inconsistencies in a memorandum in support is through the memorandum in opposition to the motion or oral argument. Nevertheless, the issue does not comport with the requirement to be concise and not overly broad. The issue is not preserved on the record and is not even articulated well enough because Appellant does not identify what the purported "lies" were. As such, this issue on appeal should be considered abandoned or simply disregarded by the Court.

xii. Appellant's Seventh Issue on Appeal

The Appellant's sixth Issue on Appeal reads,

> "DID THE JUDGE NOT CONSIDER THE FACT THE ATTORNEY SERVED HIS "MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT" TO THE APPELLANT 6 DAYS BEFORE THE HEARING REDUCING APPEALLANTS TIME TO RESPOND BY 40% ?

There is no basis for this Issue on Appeal. Even if this was an appealable error, there is no way to know what the trial court considered because there is no transcript in the Designation of Matter. Secondly, the Appellant changed the number of days of service from 7days to 6 days and his reduction in response time form 30% to %40 in contravention of the holdings of *Henning. Supra at 794.* Appellant also fails to provide any case law in his table of authorities which supports this issue on appeal. For the foregoing reasons, this issue on appeal should be dismissed.

xiii. Appellant's Eighth Issue on Appeal

The Appellant's eighth Issue on Appeal reads,

> "DID THE JUDGE NOT CONSIDER THE NEW EVIDENCE FROM THE RESIDENTIAL BUILDING COMMISSION PLACING TOTAL LIABILITY ON MR. HORNBECK, III?

There is no basis for this Issue on Appeal. Even if this was an appealable error, there is no way to know what the trial court considered because there is no transcript in the Designation of Matter. This argument also fails because, even if the Residential Building Commission ("RBC") has no authority to assign liability as it has no jurisdiction to adjudicate a law suit. Furthermore, because there is no transcript in the Designation of Matter, there is no way to know that the Appellant preserved this issue for appellant review. More importantly, a party cannot submit new evidence in support of its motion to reconsider. *See Dempsey v. Huskey*, 224 S.C. 536, 544, 80 S.E.2d 119, 122 (1954) (per curiam). For the foregoing reasons, this issue on appeal should be dismissed.

xiii. Appellant's Ninth Issue on Appeal

The Appellant's ninth Issue on Appeal reads,

> "DID THE JUDGE NOT CONSIDER THE FACT THAT CUSTOM CASTLES ROOFING AND CONSTRCCTION WAS NOT LICENSED AND LISTED AND THEREFORE IT WAS ILLEGAL FOR CCRC TO PROPOSE TO DO THE ROOFING AND SIDING WORK MUCH LESS ACTUALLY PERFORM WORK ON SITE?"

This Issue on Appeal was not raised in the Appellant's First Initial Brief and by the holdings of *Henning*, it is improper for consideration in this Second Amended Initial Brief.

x. Appellant's Tenth Issue on Appeal

The Appellant's tenth Issue on Appeal reads,

"DID THE JUDGE NOT CONSIDER IT MATERIAL THAT CCRC DID NOT INSTALL THE SYSTEMS IN ACCORDANCE WITH THE 2015 INTERNATIONAL RESIDENTIAL BUILDING CODE OR THE MANUFACTURERS INSTALLATION INSTRUCTIONS WHICH CAUSED MANUFACTURERS TO VOID THEIR WARRANTIES?"

This Issue on Appeal was not raised in the Appellant's First Initial Brief and by the holdings of *Henning*, it is improper for consideration in this Second Amended Initial Brief.

xi. Appellant's Eleventh Issue on Appeal

The Appellant's eleventh Issue on Appeal reads,

"DID THE JUDGE NOT CONSIDER THE ECONOMIC LOSS DUE TO DEVALUATION OF THE APPEALANT'S HOME AND THE HUGE COST PAID BY THE APPELANTS FOR REPAIRS TO AND COMPLETION OF THE WORK?

This Issue on Appeal was not raised in the Appellant's First Initial Brief and by the holdings of *Henning*, it is improper for consideration in this Second Amended Initial Brief.

E. FAILURE TO ARGUE THE STATED ISSUES ON APPEAL

SCACR 208(b)(1)(E)

SCACR 208(b)(1)(E), Argument provides,

"[t]he brief shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority. A party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and summarize the party's contentions."

In an appellate brief, separate issues generally should be set forth and argued separately. *State v. Burroughs* 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997). A conclusory argument of an issue by appellant amounts to an abandonment of the issue. *State v. Black* , 319 S.C. 515, 462 S.E.2d 311 (Ct. App. 1995), rehearing denied. A broad general statement of issues made by an

appellant may be disregarded by the appellate court pursuant to Rule 207(b)(1)(B), SCACR. *Sullivan Co., Inc. v. New Swirl, Inc.* 313 S.C. 34, 437 S.E.2d 30(S.C. 1993). Appellant never provides a separate argument for his issues on appeal. In fact, Appellant's Second Amended Brief makes arguments under the section of the brief entitled "FACTS DISCUSSION OF ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT" and this section does not even mention the Issues on Appeal. Because the Appellant never argues his identified issues on appeal, the appeal should be dismissed.

E. APELLANT'S STATEMENT OF THE CASE DOES NOT COMPORT TO THE RULE

SCACR 208(b)(1)(C)

SCACR 208(b)(1)(C), provides,

> "[t]he statement shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters and shall contain, as a minimum, the following information: the date of the commencement of the action or matter; the nature of the action or matter; the nature of the defense or of the response; the action of the court, jury, master, or administrative tribunal; the date(s) of trial or hearing; the mode of trial; the amount involved on appeal; the date and nature of the order, judgment or decision appealed from; the date of the service of the notice of appeal; the date of and description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal, or may throw light upon the questions involved in the appeal; and any changes made in the parties by death, substitution, or otherwise. Any matters stated or alleged in appellant's statement shall be binding on appellant."

The Appellant's Statement of The Case is deficient for many reasons as set forth to wit:

a. the Statement of the Case does not contain the nature of Respondent's response to the Motion to Reconsider, or Respondent's arguments in support of its Motion for Summary Judgment;

b. the Statement of the Case does not contain the amount involved in the appeal;

c. the Statement of the Case does not contain the date of the service of the Notice of Appeal;

d. the Statement of the Case does not contain the date and description of the Order on Appeal; and

e. the Appellant's Statement of the Case contains (and is replete with) contested matters in contravention with SCACR Rule 208(b)(1)(C).

For the foregoing reasons, the Appellant's appeal should be dismissed.

CONCLUSION

Because Appellant has failed to adhere to the South Carolina Appellant Rules in the contents of its Initial Brief, Appellant's appeal should be dismissed.

Respectfully submitted,

s/ Wendell L. Hawkins
Wendell L. Hawkins (S.C. Bar #: 13583)
Wendell L. Hawkins, PA
9 Buena Vista Way, Ste B. Greenville, SC 29615
(864) 848-9370 (Ph) (864) 243-8137 (Fax)
wlh@wlhawkinslawfirm.com
Attorneys for Respondents

December 27, 2024
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS
Milton A. Gatlin and Marla S. Gatlin,	)	C/A No. 2022-CP-23-05339
Plaintiffs,	)	
vs.	)	**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
John M. Hornbeck, III, Custom Castles Roofing and Construction, Inc., and Custom Castles Construction, LLC	)	
Defendants.	)	

THIS MATTER CAME BEFORE THE COURT, upon motion of Defendants', John M. Hornbeck, III, Custom Castles Roofing and Construction, Inc., and Custom Castles Construction, LLC (hereinafter collectively referred to as "Defendants") Motion for Summary Judgment on Plaintiffs' the causes of action for : (1) Breach of Contract; (2) Quantum Meruit; (3) Breach of Contract Accompanied by a Fraudulent Act; (4) Fraud or Fraud in the Inducement; (5) Negligent Misrepresentation; (6) Negligence; (7) Unfair Trade Practices Act Violation; and (8) Disregard of Corporate Entity. A hearing was conducted on February 22, 2023. Present at the hearing was Wendell L. Hawkins, Esq. on behalf of the Defendants and Milton A. Gatlin appeared *pro se*.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Hansson v. Scalise Builders of South Carolina,* 374 S.C. 352, 650 S.E.2d 68 (2007); *Helms Realty, Inc. v. Gibson-Wall Co.,* 363 S.C. 334, 611 S.E.2d 485 (2005); *BPS, Inc. v. Worthy,* 362 S.C. 319, 608 S.E.2d 155 (Ct.App.2005). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields,* 354 S.C.

58, 580 S.E.2d 433 (2003); *Rumpf v. Massachusetts Mut. Life Ins. Co.,* 357 S.C. 386, 593 S.E.2d 183 (Ct.App.2004). "[W]hen a party has moved for summary judgment[,] the opposing party may not rest upon the mere allegations or denials of his pleading to defeat it." *Fowler v. Hunter*, 380 S.C. 121, 125, 668 S.E.2d 803, 805 (Ct. App. 2008). "Rather, the non-moving party must set forth specific facts demonstrating to the court there is a genuine issue for trial." *Id.*

a. Breach of Contract

Plaintiff's claim of Breach of Contract against one or more of Defendants fails for three reasons: (1) Plaintiff Breached the Contract first; (2) Plaintiff's anticipatory breach of the Contract excused further performance of Defendants; and (3) Plaintiff prevented CCRC from performing its duties under the contract.

> "Where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom all liability for the nonperformance rests." *Silver v. Aabstract Pools & Spas, Inc.,* 376 S.C. 585, 594, 658 S.E.2d 539, 543 (Ct.App.2008) (internal quotation marks omitted). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language."; *B.L.G. Enters., Inc. v. First Fin. Ins. Co.,* 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used."; *Beach Co. v. Twillman, Ltd.,* 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct.App.2002) "[T]erms in a contract provision must be construed using their plain, ordinary and popular meaning."; *Hardee v. Hardee,* 355 S .C. 382, 387, 585 S.E.2d 501, 503 (2003) "The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous."

The Contract required that all sums received form the insurance company be paid to CCRC within 7 days of receipt. The Contract further states, "[f]ailure to do so will be a breach of this Contract. Mr. Gatlin testified in his deposition that he has never paid CCRC in full for the siding. Furthermore, Plaintiff did not endorse over the check from its insurance company to

CCRC and therefore breached its Contract with CCRC. "The failure to pay an installment of the contract price as provided in a building or construction contract is a substantial breach of the contract, and gives the contractor the right to consider the contract at an end, to cease work, and to recover the value of work already performed." *Zemp Constr. Co. v. Harmon Bros. Constr. Co.*, 225 S.C. 361, 366, 82 S.E.2d 531, 533 (1954). (*cited in*, *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 593, 658 S.E.2d 539, 543 (Ct. App. 2008)).

It is further evident that the Plaintiffs committed an anticipatory breach of the Contract by only partially paying CCRC for the siding and then "running them (CCRC) off." Mr. Gatlin testified to this in his deposition testimony. "In general, an anticipatory breach of contract is one committed before the time has come when there is a present duty of performance, and is the outcome of words or acts evincing an intention to refuse performance in the future.". 30 S.C. Jur. Contracts § 66 (1999). Furthermore, Plaintiffs prevented CCRC from performing it's statutory right to cure pursuant to the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code of Laws § 40-59-810. The Court of Appeals, in *Champion v. Whaley* , said, "[t]his is simply an instance of the general rule that one who prevents a condition of a contract cannot rely on the other party's resulting nonperformance in an action on the contract." *Champion v. Whaley*, 280 S.C. 116, 120, 311 S.E.2d 404, 406 (Ct. App. 1984) *citing Farrow v. Martin,* 16 S.C.L. (Harp.) 409 (1824); *Young v. Hunter,* 6 N.Y. (2 Selden) 203 (1852*); Fisher v. Drewett,* (1878) 48 L.J.Q.B. 32. Because of the breach and anticipatory breach of contract, the Defendants were relieved of any further duty under the contract and Defendants are entitled to Summary Judgment.

b. Quantum Meruit

Plaintiffs included a Quantum Meruit cause of action in their Amended Complaint. Defendants argued that Plaintiffs never conferred a benefit upon Defendants.

> To prevail on a quantum meruit claim, a plaintiff must establish (1) he conferred a benefit upon the defendant; (2) the defendant realized that benefit; and (3) retention of the benefit by the defendant under the circumstances make it inequitable for the defendant to retain it without paying its value. *Swanson v. Stratos,* 350 S.C. 116, 121, 564 S.E.2d 117, 119 (Ct.App.2002); *see also Earthscapes Unlimited, Inc. v. Ulbrich,* 390 S.C. 609, 616–17, 703 S.E.2d 221, 225 (2010) (providing the same requirements). *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012).

Because Defendants supplied materials and labor for which they have not fully been paid, Defendant CCRC was actually the one conferring the benefit upon the Plaintiffs. Plaintiff provided insufficient proof and no law to refute Defendants' presentation to the Court on this issue and the cause of action and the Motion for Summary Judgment on the Quantum Meruit cause of action is granted.

c. Breach of Contract Accompanied by a Fraudulent Act

With respect to Plaintiffs' cause of action for Breach of Contract Accompanied by a Fraudulent Act, Defendants argued that the damages claimed by the Plaintiffs for this cause of action are the same as under their Breach of Contract cause of action. Plaintiffs have not identified any separate damage specific to this cause of action.

> "In order to recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish: (1) a breach of contract; (2) that the breach was accomplished with a fraudulent intention, and (3) that the breach was accompanied by a fraudulent act." *Smith v. Canal Ins. Co.,* 275 S.C. 256, 269 S.E.2d 348 (1980). *Minter v. GOCT, Inc.,* 322 S.C. 525, 529–30, 473 S.E.2d 67, 70 (Ct. App. 1996).

Moreover, in order to support an allegation of fraud, the basis of such claim must be ***plead with particularity*** (emphasis added). Rule 9(b), SCRCP provides the following:

> **(b) Fraud, Mistake, Condition of Mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake ***shall be stated with particularity***. Malice, intent, knowledge, and other condition of mind of a person may be averred generally (emphasis added).

Plaintiffs' cause of action fails to meet this pleading requirement. No specific facts are alleged. Plaintiffs cause of action is a mere recitation of the elements.

> "Although the cases involving breach of contract accompanied by a fraudulent act do not present an easy formula for defining a "fraudulent act," it is clear that the fraudulent act alleged must be an act done with the intent to deceive. H. Lightsey, *South Carolina Code Pleading* at 97 (1976); *see, e.g., Lancaster v. Smithco, Inc.*, 238 S.C. 15, 119 S.E.2d 145 (1961). *Donaldson v. Temple,* 96 S.C. 240, 80 S.E. 437 (1913). In this instance, the counterclaim contains no allegation that either of the alleged fraudulent acts accompanying the breach of the agreement was committed with an intent to defraud either Murray or the Partnership." *Save Charleston Found. v. Murray*, 286 S.C. 170, 181, 333 S.E.2d 60, 67 (Ct. App. 1985)

Plaintiffs' cause of action fails to meet the "particularity" requirements of SCRCP 9(b), fails to allege the fraudulent acts that accompanied the breach and there is no proof that any fraudulent act was intended to deceive the Plaintiffs.

Furthermore, there is a heightened burden of proof for Fraud. Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence. *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). Plaintiffs have asserted fraud, but have failed to provide any evidence which is clear, cogent and convincing to prove such allegations.

Defendants' Motion for Summary Judgment as to Plaintiff's cause of action for Breach of Contract Accompanied by a Fraudulent Act is granted for lack of damages, for noncompliance of pleading requirements and lack of clear, cogent, and convincing evidence to refute the law and evidence presented by Defendants.

d. Fraud or Fraud in the Inducement

While the Plaintiffs successfully include each element of Fraud in their Complaint, they again fail to plead with any particularity.

> "In order to prevail on a claim for Fraud, the Plaintiff must prove the following: A cause of action for fraud requires: (1) a representation of fact; (2) its falsity; (3) its materiality; (4) either knowledge of the falsity of the representation or reckless disregard of its truth or falsity; (5) the intent that the representation be acted on; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the truth of the representation; (8) the hearer's right to rely on the representation; and (9) the hearer's consequent and proximate injury." *Schnellmann v. Roettger,* 373 S.C. 379, 645 S.E.2d 239 (2007). *Hollman v. Woolfson*, 384 S.C. 571, 579–80, 683 S.E.2d 495, 499 (2009).

Plaintiffs advanced no argument at the hearing that would overcome the Defendants' arguments for summary judgment on this issue and therefore, the Court grants Defendants' Motion for Summary Judgment of this issue.

Plaintiffs have not articulated or provided evidence of any specific damages suffered as a result of the Defendants' misrepresentations. The Plaintiffs in this case rely upon a single allegation that the work performed by CCRC was deficient, nothing more. Also, this cause of action does not include the elements for Fraud in the Inducement.

> "In order to prevail on a claim for Fraud in the Inducement, the Plaintiff must prove the following: To establish a claim or defense of fraud in the inducement, a plaintiff must prove the nine elements of fraud as well as the following three elements: "(1) that the alleged fraudfeasor made a false representation relating to a present or preexisting fact; (2) that the alleged fraudfeasor intended to deceive him; and (3) that he had a right to rely on the representation made to him." *Darby v. Waterboggan of Myrtle Beach, Inc.,* 288 S.C. 579, 584, 344 S.E.2d 153, 155 (Ct.App.1986). *Moseley v. All Things Possible, Inc.,* 388 S.C. 31, 36, 694 S.E.2d 43, 45 (Ct. App. 2010), aff'd, 395 S.C. 492, 719 S.E.2d 656 (2011).

Again, there is a heightened burden of proof for Fraud. Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence. *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). *See also, Hancock*, 381 S.C. at 330–31, 673 S.E.2d at 803 (2009) (stating in cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment). Plaintiffs have asserted fraud, but have provided no proof of that and there is certainly no evidence

which is clear, cogent and convincing to prove such allegations. For these reasons, Defendants' Motion for Summary Judgment as to this cause of action is granted.

e. Negligent Misrepresentation

Defendants also seek Summary Judgment as to Plaintiffs cause of action for Negligent Misrepresentation. Again, Plaintiffs have failed to identify any damages specific to this cause of action. Moreover, Plaintiffs have failed to prove how any damages claimed in this case were proximately caused by any alleged representation made by the Defendants.

> "To prove a claim for the common law tort of negligent misrepresentation, the following elements must be established:
> (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the ***proximate result of his reliance on the representation***." *West v. Gladney,* 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct.App.2000) (emphasis added).
>
> "Evidence of a ***mere broken promise*** is not sufficient to prove negligent misrepresentation." *Sauner v. Pub. Serv. Auth. of S.C.,* 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003) (*quoting Winburn v. Ins. Co. of N. Am.,* 287 S.C. 435, 443, 339 S.E.2d 142, 147 (Ct.App.1985)). Ordinarily, to be actionable, a statement must relate to a present or preexisting fact, and cannot be predicated on unfulfilled promises or statements as to future events. *Davis v. Upton,* 250 S.C. 288, 291, 157 S.E.2d 567, 568 (1967). *Turner v. Milliman*, 392 S.C. 116, 123, 708 S.E.2d 766, 769–70 (2011) (emphasis added).

Because Plaintiffs have failed to identify any misrepresentations or damages related to this cause of action, Defendants are entitled to Summary Judgment.

f. Negligence

Plaintiffs' negligence claim is barred by the Economic Loss Rule. "A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie." *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54–55, 463 S.E.2d 85, 88 (1995). In the case at hand, the

Contract sets for the duties of CCRC and the Plaintiff. Plaintiff's sole remedy is under contract law and the Negligence claim is duplicative and barred by the Economic Loss Rule and Defendants are entitled to Summary Judgment on this issue.

g. Unfair Trade Practices Act Violation

Plaintiffs' SCUTPA claim fails as a matter of law because it is a private dispute that does not affect the public interest. "Our courts have made it clear that UTPA is not available to redress a private wrong where the public interest is unaffected. UTPA is not an alternative vehicle to pursue an alleged breach of contract. Even an intentional breach of a contract does not rise to the level of a violation of UTPA." *Dove Data Prod., Inc. v. DeVeaux*, 2008 WL 98641167 at (Ct. App. 2008) (internal citations omitted). This matter is a private dispute between a homeowner and contractor for which Plaintiffs cannot seek recovery under the SCUTPA.

Moreover, Plaintiffs failed to properly plead this cause of action.

> "To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." *Wright v. Craft,* 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct.App.2006).

Plaintiffs failed to allege that the unfair or deceptive act affected the public interest. Moreover, Plaintiffs fails to allege that they suffered monetary damage or property loss as a result of the Defendant's unfair or deceptive acts.

Plaintiff has provided no proof or law in this hearing to refute the Defendants' allegations in the motion and therefore Defendants' Motion for Summary Judgment as to Plaintiffs' cause of action for South Carolina Unfair Trade Practice Act Violation is granted.

h. Disregard of Corporate Entity

Plaintiffs have brought a cause of action against the Defendants seeking to hold John Hornbeck personally liable for the acts of CCRC.

> It is generally recognized that a corporation is an entity that is separate and distinct from, and its debts are not the individual debts of, its officers and stockholders. *Hunting,* 359 S.C. at 223, 597 S.E.2d at 806 (*citing DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.,* 540 F.2d 681, 683 (4th Cir.1976)). Although the corporate entity may be disregarded in some situations, piercing the corporate veil is not a doctrine to be applied without substantial reflection. *Baker v. Equitable Leasing Corp.,* 275 S.C. 359, 367, 271 S.E.2d 596, 600 (1980) ("However, 'piercing the corporate veil' is not a doctrine to be applied without substantial reflection."). *Mid-S. Mgt. Co. Inc. v. Sherwood Dev. Corp.,* 374 S.C. 588, 597, 649 S.E.2d 135, 140 (Ct. App. 2007).

The only contract at issue in this case is the one between CCRC and Plaintiffs dated July 31, 2017. Moreover, Plaintiff, Milton Gatlin, testified in his deposition that he never even met John Hornbeck until after the siding and roof was replaced by CCRC at his house.

Plaintiffs have submitted no evidence or law at this hearing to support this cause of action. In order to determine whether the corporate formalities were observed under the first prong of the *Sturkie* test, the courts consider eight factors:

> (1) whether the corporation was grossly undercapitalized;
> (2) failure to observe corporate formalities;
> (3) non-payment of dividends;
> (4) insolvency of the debtor corporation at the time;
> (5) siphoning of funds of the corporation by the dominant stockholder;
> (6) non-functioning of other officers or directors;
> (7) absence of corporate records; and
> (8) the fact that the corporation was merely a façade for the operations of the dominant stockholder. *Mid-S. Mgt. Co. Inc. v. Sherwood Dev. Corp.,* 374 S.C. 588, 598, 649 S.E.2d 135, 140–41 (Ct. App. 2007).

During his deposition, Milton Gatlin, admitted to having no personal knowledge about the "Sturkie factors" and Defendant entities. Plaintiffs presented no evidence to pursue this case of action. For this reason, Defendants' Motion for Summary Judgment on disregarding the corporate entity is granted.

i. All Tort Actions are Barred by the Economic Loss Rule

All of Plaintiff's tort claims are barred by the Economic Loss Rule. "A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie." *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54–55, 463 S.E.2d 85, 88 (1995). In the case at hand, the Contract sets forth the duties of CCRC and the Plaintiff. Plaintiff's sole remedy is under contract law and any tort claim that arises out of the same circumstances, actions and facts are duplicative and barred by the Economic Loss Rule and Defendants' Motion for Summary Judgment on dismissal of the tort actions is granted.

IT IS THEREFORE ADJUDGED ORDERED AND DECREED that the Defendant's Motion for Summary Judgment on all Plaintiff's causes of action are granted.

IT IS SO ORDERED!

JUDGE'S SIGNATURE PAGE TO FOLLOW

Greenville Common Pleas

Case Caption: Milton A Gatlin , plaintiff, et al vs. John M Hornbeck III , defendant, et al

Case Number: 2022CP2305339

Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

EXHIBIT A