FORM 13
BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Hon. Bentley D. Price, Circuit Judge 2766

Case No. 2024-001197

Milton A. Gatlin, Appellant,

v.

John M. Hornbeck, III, Respondent.

INITIAL BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

SC Residential Builders Commission

SC Code of Laws Section 40-11-200

SC Code of Laws Section 39-5-10

South Carolina Residential Code 2015

2015 International Residential Code (IRC)

Gaf Roofing Installation

James Hardie Hardie Plank Lapped Siding Installation Instructions

SC Supreme Court, Kennedy V. Columbia Lumber & Mfg. Co., 1989

Hunton & Williams, Emerging Issues In Consumer Litigation, September 2008

Minter. 322 S.C. at 529-30, 473 S.E.2d at 70

Perry v. Green. 313 S.C. 250, 254, 437 S.E.2d 150, 152 (Ct. App. (1993)

STATEMENT OF ISSUES ON APPEAL

1. DID THE JUDGE ERR IN DENYING PLAINTIFF'S “MOTION FOR RECONSIDERATION OR REOPENING”? PLAINTIFF'S MOTION WAS FILED ON 03/29/2023. ONLY AFTER AN EMAIL SENT BY THE PLAINTIFF ~10 MONTHS LATER ON 01/19/2024, CHECKING ON THE STATUS OF THE MOTION, PLAINTIFF RECEIVED AN EMAIL ON 01/24/2024 ADVISING THE MOTION WAS DENIED. ANOTHER EMAIL WAS SENT 4 MONTHS LATER ON 05/24/2024 ADVISING PLAINTIFF HAD STILL NOT RECEIVED THE ORDER. THE ACTUAL ORDER WAS NOT RECEIVED A MONTH LATER ON 06/28/2024 AND DID NOT INCLUDE THE SHORT REASONING REQUESTED OF THE DEFENDANT'S ATTORNEY BY THE JUDGE. THE ATTORNEY EMAILED THE JUDGE AND SAID HE DIDN’T KNOW WHAT THE REASONING SHOULD BE AND TOLD THE JUDGE TO ISSUE THE ORDER WITHOUT ANY REASONING. SO, AFTER 15 MONTHS THE DENIAL ORDER WAS ISSUED WITHOUT ANY REASONING. FURTHERMORE, ON FORM 4 THE CHECKBOX WAS CHECKED THAT STATED “DECISION BY THE COURT. THIS ACTION CAME TO TRIAL OR HEARING BEFORE THE COURT. THE ISSUES HAVE BEEN TRIED OR HEARD AND A DECISION RENDERED.” A HEARING WAS NEVER HELD BUT HAD BEEN REQUESTED BY THE PLAINTIFF. LOOKING AT HOW THE JUDGE HANDLED DISPOSITION OF THE PLAINTIFF’S “MOTION FOR RECONSIDERATION OR REOPENING” HE MAY BE IN VIOLATION OF S.C. APP. CT. R. CANON 3 - A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY.

COMMENTARY:

THE DUTY TO HEAR ALL PROCEEDINGS FAIRLY AND WITH PATIENCE IS NOT INCONSISTENT WITH THE DUTY TO DISPOSE PROMPTLY OF THE BUSINESS OF THE COURT. JUDGES CAN BE EFFICIENT AND BUSINESSLIKE WHILE BEING PATIENT AND DELIBERATE.

2. DID THE JUDGE NOT CONSIDER AS MATERIAL THE FACT THE DEFENDANT'S ATTORNEY CHANGED THE PLAINTIFF'S DEPOSITION TESTIMONY TO INCLUDE "(CCRC)" WHICH HE USED THROUGHOUT HIS "MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT" WHICH GAVE THE DEFENDANTS A DISHONEST ADVANTAGE?
3. DID THE JUDGE NOT CONSIDER AS MATERIAL THE FACT THE DEFENDANT'S ATTORNEY REFERRED TO THE "CONTRACT" FAVORABLY FOR THE DEFENDANTS, KNOWING THE "CONTRACT" HAD BEEN PROVEN IN EARLIER HEARINGS TO BE FRAUDULENT, DECEIVING AND ILLEGAL?
4. DID THE JUDGE NOT CONSIDER AS MATERIAL THE FACT THE DEFENDANT'S ATTORNEY LIED THROUGHOUT HIS "MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT" IN ORDER TO GIVE THE DEFENDANT A DISHONEST ADVANTAGE?
5. 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?

6. 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 SOUTH CAROLINA SUPREME COURT IN 1989 RECOGNIZED EXCEPTIONS TO THE ECONOMIC LOSS RULE IN THE RESIDENTIAL HOMEBUILDING CONTEXT.?
7. DID THE JUDGE NOT CONSIDER THE FACT THE ATTORNEY SERVED HIS "MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT" TO THE APPELLANT 6 DAYS BEFORE THE HEARING REDUCING THE APPELLANT'S TIME TO RESPOND BY 40%?
8. DID THE JUDGE NOT CONSIDER THE NEW EVIDENCE FROM THE RESIDENTIALBUILDING COMMISSION PLACING THE TOTAL LIABILITY ON MR. HORNBECK III?
9. DID THE JUDGE NOT CONSIDER THE FACT THAT CUSTOM CASTLES ROOFING AND CONSTRUCTION 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 THE SITE?
10. 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 THE MANUFACTURERS TO VOID THEIR WARRANTIES?

11. DID THE JUDGE NOT CONSIDER THE ECONOMIC LOSS DUE TO DEVALUATION OF THE APPELLANTS' HOME AND THE HUGE COST PAID BY THE APPELLANTS FOR REPAIRS TO AND COMPLETION OF THE WORK?

STATEMENT REGARDING ORAL ARGUMENT

Appellant Milton A. Gatlin requests oral argument as he believes it can significantly aid in the decisional process in this case.

STATEMENT OF THE CASE

The case stems from a hail storm in the spring of 2017 that damaged the roof and exterior aluminum siding of the appellant's residence. On July 31, 2017 the appellants signed a contract with Custom Castles Roofing and Construction, Inc. (Hereinafter referred to as CCRC) for replacing the roofing on the house and shed. Later after confirming CCRC could replace the aluminum siding, which is no longer available, with a 4" exposure lapped Hardi Plank, the trade name for a fiber cement siding board, for the appellant's Allstate insurance company's estimate, a verbal agreement was made for replacing the siding on the house with 4" exposure, lapped Hardi Plank. Had CCRC not been able to replace the siding for Allstate's estimate then a lower price solution like vinyl siding would need to have been priced.

The roofing subcontractor starting work around the middle of September, 2017 and finished about the end of September, 2017. The siding contractor started work about the second week in September, 2017 and finished around the end of September, 2017.

During installation of the roof the roofer knocked the cap off of the furnace vent but didn't let anyone know. Soon afterwards the appellant noticed the missing cap and requested a new one be installed which the roofer did a few weeks later. When appellant inspected the roof cap installation it was found to be too small for the Type B double wall vent and was installed gooped up with silicone caulking in an effort to make it fit. Appellant discussed the situation with the Greenville County Mechanical inspector who suggested appellant not wait for CCRC to replace the cap but appellant should replace it immediately due to the life safety concerns of fire and carbon monoxide poisoning. The appellant replaced the vent cap himself as recommended.

During the installation of the siding the contractor knocked two large front porch lights off of the exterior wall and accidentally broke a water line located in the kitchen exterior wall. The water leak was repaired by the siding contractor but the hole made in the sheathing was not repaired. It was covered with an old shingle. In addition, the kitchen ceiling had considerable damage caused by the water leak. The ceiling damage was shown to Mr. Hornbeck, III, owner of CCRC, but was never repaired. The two large front porch lights, one with a broken globe were never reinstalled and had to be remounted by the appellant. The broken globe was never replaced.

Before the roofing was finished appellant was asked to pay for the roof work. Appellant asked for an invoice so it could be submitted to Allstate Insurance Co. for payment. Appellant was told it wasn't available but it would be provided very soon so appellant paid 100% of the roofing cost without getting an invoice to turn in. Also, the roofer was not finished because he ran out of shingles.

The siding invoice was not presented until after appellant had inspected both the siding and roofing and found both systems to be incomplete and unacceptable.

When appellate was on a lower roof inspecting the siding, appellant began noticing mistakes in the roof installation. A complete inspection was then done on both systems. As a note, appellant is qualified to make the inspections based on appellant's background. Appellant has been a licensed engineer in South Carolina for 50 years. Before retirement appellant held an unlimited general contractor's license, an unlimited mechanical contractor's license and an unlimited electrical contractor's license in South Carolina. In addition, appellant also held engineering licenses in North Carolina, Georgia, Kentucky and Alabama and construction licenses in North Carolina, Georgia and Dade County, Florida and was a certified project management professional.

The findings of these inspections are listed below.

The following results are due to the faulty construction, lack of supervision, followup and inspection by CCRC.

Gaf, the roofing manufacturer, would not honor their warranty.

James Hardie company, the siding manufacturer, would not honor their warranty.

After CCRC said they had completed the roof and had been paid the full amount, plaintiffs had continuing leaks in two bathrooms, a bedroom, the dining room and den. Due to the incorrect installation strong winds would eventually begin to blow shingles off the roof. After CCRC said they had completed the siding, plaintiffs had two continuing interior leaks around the windows in a bedroom.

Due to the damage to the exterior sheathing during the siding being installed wrong,

moisture and air infiltration would begin reducing energy efficiency, by allowing increased cold/hot air and moisture into the home, reduce the wall's insulation value, set up conditions for mold and mildew growth and allow for insect infestations.

Also, by not coating the sawed edges of the siding, delamination of the siding would eventually begin. Also, the home's curb appeal was reduced

By CCRC not repairing and reinstalling the two exterior lights knocked off the wall by the siding installers, not reinstalling the downspouts removed by the siding installers, by not reinstalling the window shutters removed by the siding installers, by not installing siding with the correct exposure, by leaving a length of siding removed exposing the sheathing, by installing shingles that curved over the eve and rake, by not Installing ridge vents, by not installing drip edge in some areas. In addition, CCRC installed an undersized furnace vent cap filled with caulking that caused a backpressure on the furnace. That backpressure would reduce the furnaces life by causing moisture accumulation and rusting of the furnace due to incomplete combustion. The backpressure would cause a life safety issue by increasing the chance of carbon monoxide escaping from the furnace and entering the homes' bedrooms through the attic. Carbon monoxide tests have shown it easily penetrates sheetrock, even painted sheetrock because carbon monoxide molecules are 1,000 times smaller than the pores in sheetrock and paint barely makes any difference. It's estimated the above items could devalue the plaintiffs' home by as much as 30%, or approximately $100,000.00. Also, code violations could affect insurance claims resulting in thousands of dollars out of the plaintiffs' pocket. (Exhibit F, Plaintiff Losses, Exhibit G, Uncomplete Items, Exhibit H, Siding Installation Defects, Exhibit I, Roofing Installation Defects)

After custom castles roofing and construction were notified of the deficiencies, appellant starting seeking corrective actions to the work. The negotiations failed and appellant filed a complaint in the Greenville County Court of Common Pleas, Thirteenth Judicial Circuit on Feb. 07, 2018. (Case # 2018cp2300695)

Respondent filled a "Motion and Motion to Dismiss" on May 11, 2018. Respondent's "Motion and Motion to Dismiss" **was denied** June 27, 2018.

Respondent filed "Notice of Motion and Motion for Summary Judgment" on Feb. 11, 2019. Respondents "Notice of Motion and Motion for Summary Judgment" **was denied** on April 26, 2019.

Respondent filed a "Notice of Motion and Motion to Dismiss or For Stay of Proceedings" on May 3, 2019. Respondents "Notice of Motion and Motion to Dismiss or For Stay of Proceedings" **was denied** on May 21, 2019.

Respondent filed a "Notice of Motion and Motion to Reconsider" on May 24, 2019. Respondent's "Notice of Motion and Motion to Reconsider" **was denied** on June 17, 2019.

Respondent filed an "Appeal/Notice of Appeal" to the Court of Appeals on June 20, 2019. Respondents "Appeal/Notice of Appeal" **was dismissed** on July 19, 2019.

Court's order granting removal of case from the General Docket pursuant to SCRCP Rule 40(j) was filed on Sept. 20, 2021(appellant had requested a continuance for 6 weeks of Radiation and Chemo treatment for cancer but was denied. Court earlier approved a continuance for appellant's attorney to go on vacation in France. Cancer was cured. Not sure if vacation in France turned out as good.)

Case was restored per Rule 40j on Sept. 26, 2022 (new case number was assigned, 2022CP2305339.

Respondent filed a “Motion for Summary Judgement” Nov 16, 2022.
Respondent filed a “Memorandum In Support Of Defendants’ Motion for Summary Judgment” on Feb. 13, 2023 (appellant copied on Feb 14, 2023**)**.
Appellant filed a “Memo In Opposition” on Feb. 21, 2023
Summary judgement hearing was held on Feb. 22, 2023
Summary judgement was granted Mar. 20, 2023
Appellant filed a “Motion for Reconsideration or Reopening” **Mar. 29, 2023**. Plaintiff's “Motion for Reconsideration or Reopening” was denied on **June 28, 2024.**

The original case 2018CP-23-00695 was stricken from the docket pursuant to Rule 40(j) of the South Carolina Rules Of Civil Procedure.in September 2021. The current case 2022-CP-23-05339 placed the case back on the docket in September 2022. There is no difference between the cases other than the number. The facts and the evidence are the same.

Defendants’ first “Summary Judgement Motion”, which was submitted after plaintiffs’ amended complaint, under the old case number, was denied based on finding that genuine issues of material fact remain in dispute. However, defendants second “Summary Judgement Motion” was granted under the new case number.

Rule 56 (c) states “the motion shall be served at least 10 days before the time fixed for the hearing”. It doesn’t say part of the motion shall be filed at least 10 days before the time fixed for the hearing. Part of the defendants’ motion was filed in November 2022, however the “Memorandum in Support of Defendants Motion for Summary Judgment” was not filed until

February 13, 2023 (less than 10 days before the time fixed for the hearing and the days included a federal holiday. With that in mind, please consider the fact the "Memorandum in Support of Defendants' Motion for Summary Judgment" was 100% of the defendants' attorneys' argument at the sj hearing and the reduced time (6 days) did not allow pro se plaintiffs time to sufficiently prepare.

New information was discovered that will have a major impact on the case. The SC Residential Builders Commission informed plaintiff on March 17, 2023 that the person holding the residential builders license is responsible and liable for any and all work a company is performing under that person's residential builders license. Therefore, according to the residential builders commission, Mr. John M. Hornbeck III is responsible and liable for the roofing and siding replacement at plaintiffs' home, regardless of whether CCRC is listed under Mr. Hornbeck's license or not. The fact Mr. Hornbeck obtained the roofing permit in his name and not CCRC, further solidifies his responsibility and liability. (Just for information Mr. Hornbeck never obtained a permit for replacing the roof on the house two doors down from plaintiff.)

STANDARD OF REVIEW

South Carolina Code of Laws Unannotated, Title 14 – Courts, CHAPTER 8, Court of Appeals

ARTICLE III

Jurisdiction, Duties and Procedure

SECTION 14-8-200. Jurisdiction of Court; limitations.

(a) Except as limited by subsection (b) and Section 14-8-260, the court has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit court, family

court, a final decision of an agency, a final decision of an administrative law judge, or the final decision of the Workers' Compensation Commission. This jurisdiction is appellate only, and the court shall apply the same scope of review that the Supreme Court would apply in a similar case. The court has the same authority to issue writs of supersedeas, grant stays, and grant petitions for bail as the Supreme Court would have in a similar case. The court, to the extent the Supreme Court may by rule provide for it to do so, has jurisdiction to entertain petitions for writs of certiorari in post-conviction relief matters pursuant to Section 17-27-100.

(b) Jurisdiction of the court does not extend to appeals of the following, the appeal from which lies of right directly to the Supreme Court:

(1) a final judgment from the circuit court which includes a sentence of death;

(2) a final decision of the Public Service Commission setting public utility rates pursuant to Title 58;

(3) a final judgment involving a challenge on state or federal grounds, to the constitutionality of a state law or county or municipal ordinance where the principal issue is one of the constitutionality of the law or ordinance; however, in a case where the Supreme Court finds that the constitutional question raised is not a significant one, the Supreme Court may transfer the case to the court for final judgment;

(4) a final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the State, its agencies, political subdivisions, public service districts, counties, and municipalities, or any other indebtedness authorized by Article X of the Constitution of this State;

(5) a final judgment from the circuit court pertaining to elections and election procedure;

(6) an order limiting an investigation by a state grand jury pursuant to Section 14-7-1630; and

(7) an order of the family court relating to an abortion by a minor pursuant to Section 44-41-33.

For this Summary Judgement order the "de novo" standard of review should be selected. Under this standard, appellate courts decide for themselves what the law says and what the decision of law should be, without deferring to the trial court's decision.

FACTS
DISCUSSION OF ORDER GRANTING DEFENDANTS' MOTION
FOR SUMMARY JUDGEMENT

a. Breach of Contract

Defendants' Attorney argues: "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."(Order, p. 2, line 7-10)

Attorney's argument fails for the following reasons:

1. Defendants Breached the Contract first by performing illegal acts. Defendant Custom Castles Roofing and Construction, Inc. was not licensed/listed in accordance with SC Code of Laws Title 40 Article 1 Section 40-59-30 License requirement, enforcement of contracts, restraining orders; to perform the roofing and siding replacements on Plaintiffs' home. Therefore from the first day CCRC was on the Plaintiffs' property they were performing illegal acts.
2. Attorney stated "Mr. Gatlin testified in his deposition that he has never paid CCRC in full for the siding." Attorney left out the fact the siding was not complete and never has been completed. (Order, p. 2, line 28-29)
3. Attorney stated "Furthermore,Plaintiff did not endorse over the check from its insurance company to CCRC and therefore breached its Contract with CCRC." (Order, p.2, line 29, p, 3, line 1) The attorney made that statement without knowing whether it was true or false, which amounts to Attorney misconduct for false or misleading statements. The check referred to was not issued by Plaintiffs' Insurance Company until ~3 weeks after CCRC submitted the invoice for the remaing contract amount.(Exhibit O, Payments) The amount paid was a partial payment, from Plaintiffs' personal funds, with the amount remaining being retainage for uncompleted work. The retainage

was never paid due to CCRC never completing the work and Defendant Hornbeck's reneging on correcting work he promised to correct, just as soon as he received Plaintiffs' personal funds check.

4. Attorney stated "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."" (Order, p. 3, line 7-8) The Attorney committed fraudulent misrepresentation by changing Plaintiffs deposition testimony to include (CCRC) in the quoted part of the statement which says "running them (CCRC) off". By doing so Attorney intentionally intended to change the deposition to include everyone associated with the work when the deposition actually says, we got into an argument and I told them to get off of my property, which was reffering to Mr. George Huth and Mr. John Von der Lieth. In addition the date inferred by the statement was not included because Attorney did not know what the date was. His inferred date was October 21, 2017, which he didn't know. The actual date was October 14, 2017, which he didn't know. Also, Plaintiff can prove he didn't "run them (CCRC) off" by copy of a check paid to the siding installers for helping Plaintiff with lawn reconstruction after stopping work on the siding when Hornbeck told them he wasn't paying for any items on the agreed upon corections list. (Exhibit M, Siding Installers Check) Plaintiff also has proof of who was run off and when in a text message from Mr.George Huth. (Exhibit L, Mr. George Huth, et al, Texts)
5. Attorney stated "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. (Order, p. 3, Line 12-14) It was determined under the previous case number the Defendants had no statutory right to cue because they were not licensed and the Residential Builders Commission would not allow CCRC back on Plaintiffs' site to complete any work. Attorney should have known that before making this false statement.

6. Attorney's statement saying "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." (Order, p. 3, line 19-21) failed, therefore Defendants are not entitled to Summary Judgement on Breach of Contract.

b. Quantum Meruit

Defendants argued that Plaintiffs never confered a benefit upon Defendants.(Order, p. 4, line 2)

Plaintiffs disagree for the following reasons:

1. The Plaintiff conferred a benefit upon the Defendants in the form of payments for work never completed & work that was faulty and never corrected. (Exhibit F, Plaintiff Losses, Exhibit G, Uncomplete Items, Exhibit H, Siding Installation Defects & Exhibit I, Roofing Installation Defects)
   (a) Roofing and Siding were not installed in accordance with the 2015 International Residential Code and the Manufacturers' Installation Instructions (Exhibit K, Code Requirements & Installation Instructions) which resulted in roof leaks even after replacement of the roof and wall leaks even after replacement of the siding.Defendants never corrected the defective work.
   (b) Defendants never reinstalled downspouts removed by them.
   (c) Defendants never reinstalled shutters removed by them.
   (d) Plaintiffs replaced the undersized furnace vent cap installed by Defendants.
   (e) Defendants never repaired ceiling damage from a water leak caused by Defendants.
   (f) Plaintiffs reinstalled exterior lights knocked off the wall by Defendants.

(g)Defendants never replaced the light fixture globe broken by Defendants.

2. The Defendants realized a benefit in the form of work stated on the contract that was never done. (Exhibit C, Contract & Exhibit F, Plaintiff Losses)

   (a) Remove Trash From Roof, Gutters & Yard

   (b) Protect Landscaping Where Applicable

   (c) Roll Yard With Magnetics Roller

   (d) Quality Control Inspection

   (e) Valley Ice & Water Shield

   (f) Ridge Vents

   (g) Emergency Repair (Tarps on Roof)

3. Plaintiffs paid for supervision that was not done. Project manager Mr. George Huth was out of town the entire week siding was being installed and only came by the first day roofing started and at the end of roofing installation to collect payment and advise Plaintiffs they ran out of shingles and would complete the roofing as soon as they could get additional ones. The other person involved, other than Hornbeck, was Mr. John Von der Lieth who told Plaintiffs he was a salesman and new nothing about construction. (Exhibit F, Plaintiff Losses)
4. Plaintiffs did not receive payment for costs incured by Plaintiffs for completing work in the contract not done by Defendants or for completing work that was promised to be corrected by Defendants that was never done. (Exhibit F, Plaintiff Losses)
5. There is a statement that says the Defendants were never fully paid. The amount Defendants were not not paid was retainage for work never completed but costs were incured by the Plaintiffs for having to complete the work themselves..(Exhibit F, Plaintiff Losses)

Therefore, the Motion for Summary Judgment on the Quantum Meruit cause of action should not be granted.

c. Breach of Contract Accompanied by a Fraudulent Act

Plaintiff erred in thinking Defendants' Attorney was required to take into account all previous testimonial or documentary evidence.

Attorney stated:

"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."
"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."

"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." (Order, p. 4, line 19-31, p. 5, line 1-18)

Plaintiffs aver as follows:

:"To recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish (1) the contract was breached; (2) the breach was accomplished with a fraudulent intention; and (3) the breach was accompanied by a fraudulent act. Minter, 322 S.C. at 529-30, 473 S.E.2d at 70.

1. The contract was breached by John M Hornbeck III by stating on the contract, CCRC was Licensed, Bonded and Insured. (Exhibit C, Contract)

2. The breach was accomplished with fraudulent intention based on Defendants proposing to do the work when Defendants knowingly knew it was illegal to propose to do the work without being licensed/listed. In addition the Defendants knowingly submitted a contract that was illegal to submit without a license/listing and knowingly submitted a contract that included fraudulent information about CCRC being licensed, bonded, insured and the types of work they legally did. (Exhibit C, Contract)
3. The fraudulent information on the contract was intentionally included to deceive potential clients.. The contract was a custom preprinted multicopy form with fill in the blanks and check boxes. Obviously, the contract was designed to be used on a regular basis by Defendants with knowledge of the fradulent content which would unjustly benefit the Defendants monetarily and be unfair to legally licensed contractors. (Exhibit C, Contract)

"In an action for breach of contract accompanied by a fraudulent act, the fraudulent act element is met by any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design." Perry v. Green, 313 S.C. 250, 254, 437 S.E.2d 150, 152 (Ct. App. 1993).

4. The breach was accompanied by a fraudulet act when CCRC knowingly started working on contract stated items without being licensed/listed and by hiring an unlicensed/listed roofing subcontractor. Plaintiffs had to complete contracted items that were never done. (Exhibit F, Plaintiff Losses)
5. Defendants promised to do corrective work in order to receive payment for faulty work then reneged and never corrected the work which Plaintiffs then had to pay for.(Exhibit F, Plaintiff Losses)
6. The Defendants included fraudulent information on CCRC's website to deceive their potential clients. For example, Defendants bragged about work being done in Willmington, North Carolina, but intentionally did not tell they were not licensed to work in North Carolina. (Exhibit D, False Advertising)

Therefore, Defendants' Motion for Summary Judgment as to Plaintiff's cause of action for Breach of Contract Accompanied by a Fraudulent Act should not be granted.

d. Fraud or Fraud in the Inducement

Plaintiff erred again in thinking Defendants' Attorney was required to take into account all previous testimonial or documentary evidence.

Attorney stated:
"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." (Order, p. 5, line 24-25, p.6, line 1-31)

Plaintiff avers as follows:

"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."

In addition:

"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."

Fraud in the inducement occurs when a person tricks another person into signing an agreement to one's disadvantage by using fraudulent statements and representations. Because fraud negates the "meeting of the minds" required of a contract, the injured party can seek damages or terminate the contract. Had the Plantiff known about all the fraudlent and deceiving information Plaintiff would never have entered into an agreement with CCRC. (Exhibit C, Contract & Exhibit D, False Advertising) The Plaintiff had a right to beliieve Defendants. Plaintiff never would have signed a contract with the Defendants for the following reasons:

1. Plaintiff knew ahead of time based on nearly 50 years working as a prrofessional in Engineeering and Construction it was illegal for Plaintiff to hire an unlicensed/listed contractor for his work because of it's cost.

2. Plaintiff knew ahead of time it was illegal for a contractor to even propose to do work if contractor was not licensed/listed and bonded for the work.

3. Plaintiff knew ahead of time it was illegal for an unlicensed/unlisted contractor to offer a contract for doing Plaintiffs' work.

4. Plaintiff new ahead of time licensed residential builders were required to purchase a Surety bond.

5. Plaintiff knew ahead of time it was not wise to hire an uninsured contractor.

6. Plaintiff knew ahead of time specialty subcontractors (Roofing) were required to have a license or be registered for the work and had to purchase a Surety bond unless a licensed residential builder accepted liability for the work and provided supervision and inspected the work to ensure the work met the required regulations, codes and accepted practice.

7. Plaintiffs knew ahead of time that experience counts and hiring an inexperienced or incompetent contractor could be disastrous.

Defendants proposed to do work knowing it was illegal to propose work without being licensed.

Defendants offered a contract knowing it was illegal to offer a contract without being licensed. work without being licensed.

Defendants offered a contract knowing it included fraudulent and misleading information. Plaintiffs had a right to believe the contract wording. (Exhibit C, Contract)

Defendants performed work without concern about laws, codes and installation requirements which produced installations with major defects which they refused to correct. The knowingly fraudulent activity placed a large financial burden on the Plaintiffs. (Exhibit F, Plaintiffs Losses)

Therefore, Motion for Summary Judgment as to this cause of action should not be granted.

d. Fraud or Fraud in the Inducement

Attorney Stated:
"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." (Order, p. 5, line 24-25, p. 6, line 1- 31, p. 7, line 1-2)

Plaintiffs avers as follows:

1. The Defendants' made representations to the Plaintiff.
2. The representations were false. (Exhibit C, Contract)
3. The representations were material to the Plaintiffs decision to enter into the contract.
4. The Defendants had knowledge of the representations' falsity or exhibited a reckless disregard of its truth or falsity.
5. Defendants' intent was that the representations be acted upon by the Plaintiff.
6. Based on Defendants' website, Facebook pages and standardized contract Defendants had been using the false representations for quite some time with much success.
7. The Plaintiff was ignorant of its falsity.
8. The Plaintiff relied on the representations' truth.
9. The Plaintiff had a right to rely on the truth of the representations.
10. Damage was suffered by the Plaintiff as a direct and proximate result of the Defendants' misrepresentation.
11. Plaintiffs relied on their insurance settlement to provide the funds to repair the hail storms damage.
12. Plaintiffs had a right to rely on their insurance settlement.
13. Plaintiffs suffered considerable losses due to Defendants representations on the contract and throughout the project. (Exhibit F, Plaintiff Losses, Exhibit, Exhibit, G Uncomplete Items, Exhibit H, Siding Installation Defects, Exhibit I, Roofing Installation Defects)

For these reasons, Defendants' Motion for Summary Judgment as to this cause of action should not be granted

e. Negligent Misrepresentation

Attorney stated:
"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." (Order, p. 7, line 4-28)

Plaintiffs avers as follows:

1. Defendant Hornbeck made promises followed by "We trusted you, now you need to trust us ". The promises were reneged on as soon as payment was received and Plaintiffs ended up paying for the work associated with the broken promises. (Exhibit F, Plaintiff Losses)
2. When the Plaintiff told Defendant Hornbeck Mr. Huth had way overpurchased siding, pointing to the leftover stact of material (HardiPlank, fastners provided by the Distributor that were never used and two cases of caulking that were never applied), and asking for the excess materials to be removed, Mr. Hornbeck told Plaintiff, Mr. Huth did not order the material but that he did. After Mr. Hornbeck said that, Plaintiff made the comment, I know your company did, after which Mr. Hornbeck said he meant he had personally ordered the material. Later Mr. Hornbeck denied making the statement. Who would bother denying making a statement like that unless they had become concerned about their personal liabity. (Exhibit F, Plaintiff Losses)

3. When told by the Plaintiff, Hardi Plank starter strips were not installed, Mr. Hornbeck said many of his clients didn't want starter strips installed. Who in their right mind would believe such a statement when it clearly states in the installation instructions starter strips are to be installed. Undobutedly Mr. Hornbeck has never read the Hardi Plank installation instructions or seen the instructions that are printed on the HardiPlank wrapper. (Exhibit I, Siding Installation Defects & Exhibit F, Plaintiff Losses)
4. When told by the Plaintiff the Hardi Plank was not properly fastened in most cases, Mr. Hornbeck said Contractors new better ways of installing materials than the manufacturers. Again that is unbeleviable since the 2015 Interntional Residential Code includes requirements for installing fiber cement siding planks, including fastner types and spacing, that were not followed by CCRC. Also, Hardi Planks' installation instructions follow the building code which requires the installation to be capable of withstanding 70 mph winds (in the Greenville County area & 110 mph in some other areas of the state). The installation requirements were also confirmed in discussions with a Hardi Plank technical representative. (Exhibit H & Exhibit F, Plaintiff Losses)
5. When Plaintiff told Mr. Hornbeck the workers were not following OSHA's requirements for sawing HardiPlanks Mr. Hornbeck said he wasn't worried about OSHA because he had plenty of money and plenty of lawyers. The reason Plaintiff told Mr. Hornbeck about the OSHA requirements wasn't to keep Mr. Hornbeck out of trouble but was for Plaintiff's concern about the workers exposure to Silica dust which is a known carcinogen. Obviously Mr. Hornbeck only had himself in mind. In addition Plaintiffs had to clean up the silica dust left behind from the sawing operation.(Exhibit G, Uncomplete Items)

For these reasons, Defendants' Motion for Summary Judgment as to this cause of action should not be granted

f. Negligence

Attorney stated:

"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." (Order, p. 7, line 28-31, p. 8, line 1-3)

Plaintiffs avers as follows:

Attorney's argument fails in the residential homebuilding context. The SC Supreme Court recognized two exceptions to the economic loss rule.

> "In creating the new exceptions, the court rejected the majority view of the economic loss doctrine, stating that view "employs a legal framework that focuses on consequence, not action." *Id.* at *3. The South Carolina Supreme Court in 1989 had recognized exceptions to the economic loss rule in the residential homebuilding context. In *Kennedy v. Columbia Lumber & Mfg. Co.*, South Carolina recognized tort liability for builders who "place defective and inferior construction into the stream of commerce" if the construction violates industry standards or poses a serious risk of physical injury. *Id.* at *4 (Hunton & Williams, Emerging Issues In Consumer Ligitation, September 2008)

CCRC performed defective, faulty and inferior construction by intentionally sidestepping the 2015 International Residential Code, the siding manufacturers' and roofing manufacturers' installation instructions and not meeting accepted industry standards for construction.

The following results are due to the faulty construction, lack of supervision, followup and inspection by CCRC.

1. GAF, the roofing manufacturer, would not honor their warranty.
2. James Hardie Company, the siding manufacturer, would not honor their warranty.

3. After CCRC said they had completed the roof and had been paid the full amount, Plaintiffs had continuing leaks in two bathrooms, a bedroom, the dining room and den. Due to the incorrect installation strong winds would eventually begin to blow shingles off the roof. After CCRC said they had completed the siding, Plaintiffs had two continuing interior leaks around the windows in a bedroom. Due to the damage to the exterior sheathing during the siding being installed wrong, moisture and air infiltration would begin reducing energy efficiency, by allowing increased cold/hot air and moisture into the home, reduce the wall's insulation value, set up conditions for mold and mildew growth and allow for insect infestations. Also by not coating the sawed edges of the siding, delamination of the siding would eventually begin. Also the home's curb appeal was reduced by CCRC not repairing and reinstalling the two exterior lights knocked off the wall by the siding installers, not reinstalling the downspouts removed by the siding installers, by not reinstalling the window shutters removed by the siding installers, by not installing siding with the correct exposure, by leaving a length of siding removed exposing the sheathing, by installing shingles that curved over the eve and rake, by not installing ridge vents, by not installing drip edge in some areas. In addition, CCRC installed an undersized furnace vent cap filled with caulking that caused a backpressure on the furnace. That backpressure would reduce the furnaces life by causing moisture accumulation and rusting of the furnace due to incomplete combustion. The backpressure would cause a life safety issue by inreasing the chance of carbon monoxide excaping from the furnace and entering the homes' bedrooms through the attic. Carbon monoxide tests have shown it easily penetrates sheetrock, even painted sheetrock because carbon monoxide moleules are 1,000 times smaller than the pores in sheetrock.and paint barely makes any difference. It's estimated the above items could devalue the Plaintiffs home by as much as 30%, or approximately $100,000.00. Also, code violations could affect insurance claims.resulting in thousands of dollars out of the Plaintiffs' pocket.

(Exhibit F, Plaintiff Losses, Exhibit G, Uncomplete Items, Exhibit H, Siding Installation Defects, Exhibit I, Roofing Installation Defects)

For these reasons, Defendants' Motion for Summary Judgment as to this cause of action should not be granted

g. Unfair Trade Practices Act Violation

Attorney stated:
"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." (Order, p. 8, line 5-24)

Plaintiffs disagree and aver as follows:

"In South Carolina, as in most jurisdictions, unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. *See South Carolina Unfair Trade Practices Act* (the "Act"), S.C. Code Ann. §39-5-10, et seq. In order to be actionable, an act must be unfair or deceptive, and must have an impact upon the public interest. Impact on public interest may be established if

the act or practice has the potential for repetition. Potential for repetition may be demonstrated by showing the same kind of action previously occurred, making it likely it will continue to occur without deterrence, or by showing a company's procedures create the potential for repetition of the unfair and deceptive act. (Author, Cheryl D. Shoun, Nexen/Pruitt)

SECTION 39-5-20. Unfair methods of competition and unfair or deceptive acts or practices unlawful; application of federal act.
(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
(b) It is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to Section 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended. (SC Code of Laws, Title 39, Chapter 5, Unfair Trade Practices, Article 1, General Provisions)

Defendants Unfair Trade Practices that affect licensed, law abiding diligent, and honest Residential Builders includes:

1. Inferring CCRC has three offices, one in Anderson and two in Greenville County when they don't have any. According to contract employees all meetings are held at Hornbeck's house.

2. By getting away with utilizing a fraudulent contract.

3. Pretending they have direct employees engaged in supervising, performing and inspecting their work when they don't. According to two of Hornbecks' contract employees, John Hornbeck is the only payroll employee of Custom Castles Roofing and Construction, Inc. and Custom Castles Construction, Inc.

4. Operating CCRC for years without being licensed/listed, not being bonded and not carrying general liability or workers compensation insurance which opens clients up to numerous types of claims.

5. For not providing services in accordance with building codes, manufacturers installation requirements and not following accepted practice.

6. By negligent hiring of contract employees and subcontractors.

7. By making false advertising claims on Facebook and the Defendants website.

For these reasons, Defendants' Motion for Summary Judgment as to this cause of action should not be granted

h. Disregard of Corporate Entity

Attorney stated:
"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 July31, 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." (Order, p. 9, line 1-32)

The Plaintiffs avers as follows:

Defendants Hornbeck and CCC argue, in their old motion to dismiss, that they are not parties to the contract at issue in this action and that Defendants CCC and CCRC are legally separate entities. As such, Defendants Hornbeck and CCC should be dismissed as it is their opinion that no claim has been made that can reach them under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. These are grossly inaccurate legal conclusions for the following reasons."

A. The Corporate Veil Should Be Pierced

Plaintiffs allege in paragraph 4 of their complaint that Defendant companies are under the same corporate umbrella. Defendants CCC and CCRC are corporate shells of Defendant Hornbeck, thus the corporate veil should be pierced. It is Plaintiffs' belief that piercing the veil will reveal that Defendant Hornbeck is in reality a sole proprietor instead of merely the owner and/or majority shareholder and/or officer of Defendant companies; that Defendant CCC was not in reality a limited liability company, but rather a sole proprietorship; and that Defendant CCRC is not in reality a corporation, but rather a sole proprietorship.

Under the two-prong test laid out in Sturkie v. Sif7y, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984), eight factors must be considered in determining whether corporate formalities are being observed by the dominant shareholders for the first prong. The factors are:

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;
8) the fact that the corporation was merely a facade for the operations of the dominant stockholder.

"The conclusion to disregard the corporate entity must involve a number of the eight factors, but need not involve them all." Dumas v. Infosafe Corp., 320 S.C. 188, 192, 463 S.E.2d 641 (Ct. App. 1995). Evidence currently in Plaintiffs' possession indicates that Defendants CCC and CCRC are merely facades for the operations of Defendant Hornbeck who, upon information and belief, is the majority shareholder.

Defendants allege that Defendant companies are separate and distinct. However, as Defendants have already admitted in their answer pleading, Defendant CCC did business as Defendant CCRC. At the time the contracted work took place Defendant CCRC did not have a contracting license registered to it, but Defendant CCC had Defendant Hornbeck's licensed to it, as stated in paragraph 10 of Plaintiffs' complaint. Defendant Hornbeck used his license to obtain the re-roofing permit in his name.

CCC was not listed on Greenville Counties website as contractor or subcontractor for a contract where Defendant CCRC was the promisor. If the Defendant companies are distinct and separate as Defendants allege then Defendant CCRC should have had its own registered contracting license. Upon information and belief, it was Defendant Hornbeck, solely and without consultation of any other officers/ directors of the Defendant companies that made the decision to do this. Defendant Hornbeck's actions indicate that he was and is using both Defendant companies as facades for his own operations as a general contractor which none of the Defendants are.

The second prong of the test requires Plaintiffs to show that injustice or fundamental unfairness will occur if the veil is not pierced by proving "that (1) the

defendant was aware of the plaintiff's claim against the corporation, and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard to the plaintiff's claim in the property." Dumas, 320 S.C. at 192, 463 S.E.2d at 644. "The essence of the fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell." Multimedia Publ'g of S. C., Inc. v. Mullins, 314 S.C. 551, 556, 431 S.E.2d 569, 573 (1993).

As to the first prong, Defendants were made aware of Plaintiffs' claim at least as far back as February 2018 when they initiated this suit. As to the second prong, Defendant Hornbeck acted in a self-serving manner in disregard to Plaintiffs' by dissolving Defendant CCC in March 2018. Plaintiffs believe it will show property that would otherwise have been subject to Plaintiffs' claim against Defendant CCC was either transferred to Defendant CCRC's or Defendant Hornbeck's possession. These are the actions of an "an individual businessman . . . to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell." Id Therefore, it is necessary to pierce the corporate veil in order to insure fairness to Plaintiffs.

B. Defendants' Interests Are So Amalgamated As To Blur the Lines Between the Parties.

In the alternative, Defendants CCC, CCRC, and Hornbeck have interests that are amalgamated as to blur the lines between the parties. In Kincaid v. Landing Development Corp., 289 S.C. 89, 344 S.E.2d 869 (S.C. App. 1986), the Defendants of that case argued that the trial court erred in refusing to distinguish Defendant RMG from the other Defendants because they were merely the sales and marketing agent for the development. Kincaid vs Landing Development Corp., S.C. 89, 344 S.E.2d 869, 874 (S.C. App. 1986). The evidence showed that all of the Defendant companies had officers and shareholders that were mostly the same for each company; that all of the Defendant companies' offices were located at the same place concurrently; that when a Plaintiff called Defendant RMG regarding an issue with their house someone would show up to deal with it; and a letter with an RMG letterhead with the notation "A Development, Construction, Sales, and

Property Management Company." Id. The Court held that "the evidence revealed] an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities."' Id. As a result, each of the Defendants were all held to be liable for the torts alleged. See Kincaid vs Landing Development corp., S.C. 89, 344 S.E.2d 869 (S.C. App. 1986).

Similarly, evidence already in Plaintiffs' possession reveals that such an amalgamation exists regarding the Defendants in this case. Both Defendants CCC and CCRC shared the same office and website concurrently at the time Plaintiffs entered into contract with Defendant CCRC. Indeed, even though Defendant CCC has dissolved since the beginning of this case they continue to have an active Facebook page that exists concurrently with Defendant CCRC's. Both of these Facebook pages have a website link for www.customcastles.net. Defendants CCC and CCRC used the same graphic logo concurrently. Defendant CCC has roofing listed as one of the services that it provides on its Facebook page concurrently with Defendant CCRC which has "Roofing" in its name. Defendant Hornbeck obtained the re-roofing permit required to perform the contract on his behalf and not that of the Defendant CCRC. Evidence in Plaintiffs' possession also tends to indicate that Defendant Hornbeck was the registered agent of each Defendant company concurrently and that they had the same physical location registered with the Department of Labor, Licensing, and Registration. Plaintiffs also believe that continued discovery will reveal that the Defendant companies have many if not all of the same officers or shareholders.

All of this evidence shows that the lines between the Defendants as separate entities is blurred and that Defendant Hornbeck's and Defendant CCC's interests and activities are amalgamated with Defendant CCRC's.

C. Defendant Hornbeck is individually Liable for SCUTPA Violation

Plaintiffs allege in paragraphs 57-60 of their complaint that Defendant(s) have engaged in activities in violation of the South Carolina Unfair Trade Practices Act (SCUTPA). SCUTPA makes directors and officers of companies that conduct unfair or deceptive trade practices liable for those acts if they directed, participated in, or exercised direct control over said activities. Code 1976, S 39-5-10 et seq. As an officer, director,

or controlling person of the Defendant companies, Defendant Hornbeck is jointly and severably liable for violations of the SCUTPA because he has participated in or directed unfair or deceptive acts performed by the Defendant Companies. See Neeltec Enterprises, Inc. v. Long, 402 S.C. 524, 741 S.E.2d 767 (S.C.App. 2013). As the sole or majority shareholder and directing controlling officer of the Defendant CCC and Defendant CCRC. Upon information and belief, Defendant Hornbeck directed and participated in the following deceptive acts (Compl. 18 - 19):

1. False representations that Defendant CCRC was operating with a valid contractor's license at the time Plaintiffs entered into contract with Defendant CCRC (Compl. 156));
2. These false representations were made on the Custom Castles website;
3. These false representations are made on Defendant CCRC's form contracts;
4. False representations that Defendant CCRC has regular employees other than Defendant Hornbeck. Specifically, John Von der Lieth has business cards identifying him as the Director of Client relations and Defendant Hornbeck has acknowledged him as such on Defendant CCRC's Facebook page. Mr. Von der Lieth is in fact a sub-contractor hired by Defendant Hornbeck and not a regular employee of Defendant CCRC. In addition, George Huth presented himself as a project manager of CCRC and in fact he is also a sub-contractor; That Defendant Hornbeck used his residential builders license to obtain a re-roofing permit with the County of Greenville for Defendant CCRC's contract with Plaintiffs;
5. False representations that Defendant CCRC is registered with the County of Greenville to do business there; and
6. False representations that Defendant CCRC maintains an office at 33 Market Point Drive, Greenville, SC which is false and Defendant CCC maintains an office at 3300 N. Main St. Ste D in Anderson, SC which in fact is only a post office box at a UPS Store. Mr. Von Der Lieth told

Plaintiffs that Defendant CCRC's real office is Defendant Hornbeck's house and he met Defendant Hornbeck there numerous times for business purposes.

7. Defendant Hornbeck did not apply for the re-roofing permit for Plaintiffs' home until October 25, 2017 which is after he stopped work on Plaintiffs' home.

The above-mentioned actions are also capable of repetition and thus have an adverse impact on the public interest. C+eSadigi v. Daghihfekr, 36 F. Supp. 2d 279 (D.S.C. 1999). As Defendant CCC and Defendant CCRC concurrently existed for some years it is likely that Defendant Hornbeck has repeated these deceptive acts with other customers. See Barnes v. Jones Chevrolet co., 292 S.C. 607, 358 S.E.2d 156 (Ct.App. 1987); York v. Conway Ford, Inc., 325 S.C. 170, 480 S.E.2d 726 (19%).

These acts were purposefully deceptive in concept and nature and either under the direction of Defendant Hornbeck or had his participation in them.

After filing the Complaint, the Plaintiffs have discovered evidence they believe show that each of the Defendant corporations are either alter egos of Defendant John M. Hornbeck, Ill or, alternatively, the lines distinguishing the parties is blurred to the point where they have amalgamated interests and activities.

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

Attorney stated:
"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." (Order, p. 10, line 1-10)

The Defendants' Attorney erred based on the fact the Attorney did not do Due Diligence and used case law that was misleading. The Economic Loss Rule does not apply

in South Carolina in the residential homebuilding context. The SC Supreme Court recognized two exceptions to the economic loss rule.

> "In creating the new exceptions, the court rejected the majority view of the economic loss doctrine, stating that view "employs a legal framework that focuses on consequence, not action." *ld.* at *3. The South Carolina Supreme Court in 1989 had recognized exceptions to the economic loss rule in the residential homebuilding context. In *Kennedy v. Columbia Lumber & Mfg. Co.*, South Carolina recognized tort liability for builders who "place defective and inferior construction into the stream of commerce" if the construction violates industry standards or poses a serious risk of physical injury. *ld.* at *4 Hunton & Williams, Emerging Issues In Consumer Ligitation, September 2008)

Therefore, Defendants are not entitled to Summary Judgement on this issue.

Argument

For the reasons stated above the Respondent is not entitled to Summary Judgment due to there being genuine issues of material fact that remain in dispute.

Conclusion

This Court should reverse the judgment of the Circuit Court.

Respectfully Submitted,

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