

THE STATE OF SOUTH CAROLINA  
South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

The Honorable Carmen T Mullen

Civil Action No 06-CP-07-0866

16 Jade Street, LLC,

Respondent/Appellant,

vs

R Design Construction Co , LLC and Carl R Aten, Jr ,  
Individually and in his capacity as principal and agent of  
R Design Construction Co , LLC, Catterson & Sons  
Construction and Michael S Catterson, Individually and in  
his capacity as principal and agent of Catterson & Sons  
Construction,

Defendants,

Of Whom Carl R Aten, Jr , is

Appellant,

and Michael S Catterson, Individually and in  
his capacity as principal and agent of  
Catterson & Sons Construction, is

Respondent,

R Design Construction Co , LLC,

Third Party Plaintiffs,

vs

Kintz Electric,

Third Party Defendant

FINAL BRIEF OF RESPONDENT/APPELLANT

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Beaufort, South Carolina  
December 1, 2010

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES	2
STATEMENT OF ISSUE ON APPEAL	4
STATEMENT OF THE CASE	4
STATEMENT OF THE FACTS	5
STANDARD OF REVIEW	7
ARGUMENT	
I    THE TRIAL COURT DID NOT ERR IN FINDING ATEN PERSONALLY LIABLE FOR THE ACTIONS HE UNDERTOOK AS GENERAL CONTRACTOR ON THE PROJECT	7
A    THE TRIAL COURT FOUND THAT, PURSUANT TO S C CODE §40-59-400 ET SEQ , PERSONAL LIABILITY IS CLEARLY IMPOSED UPON LICENSED INDIVIDUALS	7
B    R DESIGN'S STATUS AS A LIMITED LIABILITY COMPANY DOES NOT PROVIDE AN ABSOLUTE SHIELD TO ATEN FROM INDIVIDUAL LIABILITY GIVEN THE FINDINGS OF THE TRIAL COURT IN THIS CASE	12
CONCLUSION	16

## TABLE OF AUTHORITIES

### South Carolina Cases

<u>All Saints Parish Waccamaw v Protestant Episcopal Church in Diocese South Carolina,</u> 385 S C 428, 685 S E 2D 163 (2009)	10
<u>BPS, Inc v Worthy,</u> 362 S C 319, 608 S E 2d 155 (2005)	13
<u>Brophy v Ament,</u> 2008 WL 48216110 (D N M 2008)	15
<u>Catawba Indian Tribe of S C v State of S C ,</u> 372 S C 519, 642 S E 2d 751 (2007)	7
<u>Clement Contracting Group, Inc v Coating Sys LLC,</u> 881 SO 2d 971 (Ala 2003)	14
<u>Gunnings v Internet Cash Enterprise of Ashville, LLC,</u> 2007 WL 1931291 (W D N C 2007)	15
<u>Hunt v Rabon,</u> 275 S C 475, 272 S E 2d 643 (1980)	13
<u>Knox v Bogan,</u> 332 S C 64, 472 S E 2d 43 (Ct App 1996)	10
<u>Lusk v Callaham,</u> 287 S C 459, 339 S E 2d 156 (Ct App 1986)	11
<u>Mazloom v Mazlocm,</u> 382 S C 307, 675 S E 2d 746 (2009)	14
<u>Multimedia Publishing of South Carolina v J R Mullins,</u> 314 S C 551, 431 S E 2d 569 (1993)	14
<u>People v Pacific Landmark,</u> 129 Cal App 4th 1203, 29 Cal Rpt 3d 193 (2d Dist 2003)	14
<u>State ex rel Cooper v NCCS Loans, Inc ,</u> 174 N C App 630, 624 S E 2d 371 (2005)	15
<u>Town of Summerville v City of N Charleston,</u> 378 S C 107, 662 S E 2d 40 (2008)	7

Verture, Inc v Meshkin,  
429 F Supp 2d 479 (D Conn 2006) 14

**South Carolina Statutes**

S C Code Ann §33-6-220 (1988) 13

S C Code Ann §33-44-101 (2006), et seq 12

S C Code Ann §33-44-407 (2006) 14

S C Code Ann §40-59-10 (2005), et seq 10

S C Code Ann §40-59-400 (2005) 11, 12

S C Code Ann §40-59-410 (2005) 10

**Journals and Articles**

19 Am Jur 2d Limited Liability Companies (2009) 14

Shawn M Flanagan, Piercing the Corporate Veil in South Carolina, 35 S C Law 41 (November, 2006) 15

## STATEMENT OF ISSUE ON APPEAL

I Did the trial court err in ruling that S C Code Ann §40-59-400, governing residential homebuilders, imposes personal liability on members of Limited Liability Companies?

## STATEMENT OF THE CASE

This appeal arises from the Order of the trial court in this matter, entered October 14, 2009. Therein, the trial court found in favor of the Appellant, 16 Jade Street, LLC (hereinafter "Jade Street") in the amount of \$925,556.00, jointly and severally against R Design Company, LLC (hereinafter "R Design"), Carl R. Aten, Jr. (hereinafter "Aten"), and Catterson & Sons Construction (Catterson & Sons).

The Summons and Complaint was filed by Jade Street in this matter on April 12, 2006, alleging causes of action against the Defendants related to defective construction work. A bench trial was held in Beaufort County before the Honorable Carmen T. Mullen from October 13 through 16, 2008. The Court issued its Order on October 14, 2009 finding in favor of Jade Street on its claims against R Design, Catterson & Sons, and Aten. (R pp. 15-16)<sup>1</sup> The Court found in favor of Michael S. Catterson individually as to the claims asserted by Jade

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<sup>1</sup>

A declaratory judgment action is currently pending on the issue of insurance coverage for R Design and Aten. Additionally, there is a parallel appeal from the Final Order & Judgment by Jade Street on the finding of the trial court in favor of Mr. Catterson on the issue of his individual liability.

Street, and in favor of R Design as to its breach of contract cross-claim against Catterson & Sons (R p 16) Jade Street received the court's Order on November 16, 2009, and the Notice of Intent to Appeal was timely filed on December 4, 2009

#### **STATEMENT OF FACTS**

On July 27, 2004, a contract was executed between the Plaintiff and R Design for the construction of the project Pursuant to the contract between them, R Design was to provide construction supervision services on the project Aten was to direct these efforts as license holder for R Design onsite (R pp 42-44) On September 7, 2004, building permits obtained by Aten on behalf of R Design were issued for the Project and construction began that month (R p 26, lines 16-20, R p 48, lines 2-9) Issues arose with construction between Jade Street and R Design, and ultimately, in March 2005, Jade Street called on Kern-Coleman, the structural engineer of record, to perform an inspection of the as-built condition of the project, to determine its compliance with the plans and specifications, as well as the overall quality of the building construction (R p 27, lines 1-10, R p 28, lines 3-4) Kern-Coleman identified four (4) construction defects in its initial report dated April 1, 2005 (R p 4)

Following Kern-Coleman's inspection, there continued to

be problems onsite between both the owner and R Design and R Design and its subcontractors Catterson & Sons either quit or was terminated on July 22, 2005 (R pp 4-5) Disputes continued after Catterson & Sons' departure from the job, and R Design was terminated from the Project on October 17, 2005 (R p 28, l 17 - R p 29, l 1, R p 30, l 11 - R p 31, l 10, R p 33, lines 15-21, R p 37, lines 5-10)

The following day, Kern- Coleman performed a second inspection on the project, and issued a report on November 16, 2005 that identified a total of thirty-eight (38) defects with the construction of the project (R p 5) The Owner then brought in a new contractor, Anchor Construction, to remedy the existing construction and complete the structures (R p 32, l 19 - R p 33, l 7) In addition, the owner retained an engineer, Randall Still with H2L Consulting Engineers, to address the structural issues identified by Kern Coleman and to assist with the remediation (R p 34, l 12, R p 35, l 3) Anchor, with guidance from H2L, repaired and completed the building This case results

**STANDARD OF REVIEW**

Statutory interpretation is a matter of law Catawba Indian Tribe of S C v State of S C, 372 S C 519, 642 S E 2d 751 (2007) Because the determination of the proper interpretation of a statute is a question of law, this Court may review the issue de novo Town of Summerville v City of N Charleston, 378 S C 107, 110, 662 S E 2d 40, 41 (2008)

**ARGUMENT**

I THE TRIAL COURT DID NOT ERR IN FINDING ATEN PERSONALLY LIABLE FOR THE ACTIONS HE UNDERTOOK AS GENERAL CONTRACTOR ON THE PROJECT

A THE TRIAL COURT FOUND THAT, PURSUANT TO S C CODE §40-59-400 ET SEQ , PERSONAL LIABILITY IS CLEARLY IMPOSED UPON LICENSED INDIVIDUALS

The Plaintiff in the action below brought claims against the companies, R Design and Catterson & Sons, as well as against the individual owner/operators of those companies, Aten and Catterson, alleging negligence and breach of implied warranties in the performance of their duties as builder and subcontractor on the Jade Street project Among the various findings of fact and law in it's Final Order & Judgment, the trial court found <sup>2</sup>

1 The Plaintiff paid R Design substantial amounts on

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<sup>2</sup>  
There were sixteen (16) enumerated findings of fact and conclusions of law, excluding subparts, in the Final Order & Judgment These are generally those findings and conclusions pertinent to this issue on appeal

the project contract (R p 8),

2 The Plaintiff had the right to rely upon R Design to construct the project in accordance with the plans, specifications, applicable building codes and industry standards (R p 8),

3 Aten was the residential homebuilder license holder for R Design. Because he was not a passive license holder, but was onsite daily and personally involved in construction process, he is individually liable for the negligence of his company (R p 9),

4 R Design impliedly warranted that its work would be in accordance with the plans, specifications, building codes and industry standards (R p 10),

5 R Design had a duty to the Plaintiff to build the project in accordance with the plans and specifications, applicable building codes and industry standards (R p 10),

6 There were construction defects on the project prior to the termination and/or resignation of R Design (R p 10),

7 The defects in construction were directly due to the negligence of R Design and Aten (R pp 13-14),

8 R Design breached its duties to the Plaintiff  
(Final Order & Judgment, R p 14),

9 As active license holder, Aten is individually  
responsible for the negligence of his company (R  
p 14)

Thus, the trial court determined that Aten was individually  
liable for the acts and/or omissions of R Design In  
determining that Aten was personally liable for the acts  
and/or omissions of R Design, the trial court found that

[P]ursuant to S C Code §40-59-400 et  
seq (2005), the Defendant Carl Aten was  
the "resident licensee" for the company,  
as defined by the statute, not just a  
mere member The Defendant Carl Aten was  
in "responsible charge" of the project,  
and the statute provides that the license  
holder in responsible charge "assumes  
professional responsibility for the  
building services" that the Defendant R  
Design Construction Co provided to the  
Plaintiff S C Code Ann §40-50-400  
(2005) With regards to the causes of  
action for negligence, breach of implied  
warranties and damage to property, I find  
that the Defendant Aten was more than a  
mere member manager He was the "resident  
licensee," pursuant to S C Code §40-59-  
400 (2005), and as such, he assume  
professional responsibility for the  
project Additionally, I find that the  
term "professional responsibility" is  
broad enough to include civil liability  
for negligently providing building  
services Therefore, the Defendant Carl  
Aten is individually liable in this  
matter as the licensee under the theories  
of negligence, breach of implied  
warranty, for damage to the Plaintiff's  
property

(R pp 9-10)

The reasoning of the trial court and its findings of fact are sound and supported by clear statutory authority. In actions at law tried without a jury, findings of fact by the judge will not be disturbed on appeal unless found to be without evidence which reasonably supports them. All Saints Parish Waccamaw v Protestant Episcopal Church in Diocese of South Carolina, 385 S C 428, 685 S E 2d 163 (2009), Knox v Bogan, 322 S C 64, 472 S E 2d 43 (Ct App 1996). S C Code §40-59-10 (2005), et seq, governs the licensure of residential homebuilders and specialty contractors. In order for a business to operate as a contracting company, it must have a licensed qualifying builder or contractor as an employee. S C Code §40-59-410 (2005). The trial court based its findings of fact related to Aten's individual liability upon Aten's own trial testimony. Aten is the owner and managing member of R Design, LLC (R p 38, lines 6-10). He is the license holder for R Design, and he hangs his license with R Design (R p 39, lines 8-13). Aten himself took the test for licensure, paid for and made the application for the license, and the license was issued to him individually (R p 39, lines 14-22). He is the resident licensee for R Design (R p 41, lines 11-14). Pursuant to his contract on the project, he agreed to supervise the construction of the

project using his best skill and attention (R p 44, lines 17-25, R p 47, lines 7-12) He alone was responsible for the supervision of construction services provided by R Design (R p 43, lines 2-5) He had the final decisions as to what would be done by R Design on the project (R p 43, lines 6-9) He was solely responsible for the means, methods, techniques, consequences and procedures of the work done on the project (R p 47, lines 3-8) If the project was not built in accordance with the applicable building code, then he as license holder for R Design, is personally responsible (R p 48, lines 5-8) Therefore, pursuant to S C Code §40-59-400 (2005), et seq ,the trial court found that Aten was the "resident licensee" for R Design, as defined by the statute, and not just a mere member Aten was in "responsible charge" of the project, and the statute provides that the license holder in responsible charge "assumes professional responsibility for the building services" provided to the Plaintiff on the project S C Code Ann §40-59-400 (2005)

Based upon the foregoing it is clear that the factual findings of the trial court were supported by the testimony of Aten himself The Appellant has couched his appeal as a question of law, and indeed, when facts are undisputed and susceptible of only one inference, the issue presented for review is one purely of law Lusk v Callahan, 287 S C 459,

339 S E 2d 156 (Ct App 1986) In this case, based upon a clear reading of S C Code Ann §40-59-400 (2005), the trial court was correct in its finding that Aten is individually liable for his negligence in the construction of the project

B R DESIGN'S STATUS AS A LIMITED LIABILITY COMPANY DOES NOT PROVIDE AN ABSOLUTE SHIELD TO ATEN FROM INDIVIDUAL LIABILITY GIVEN THE FINDINGS OF THE TRIAL COURT IN THIS CASE

In its Final Order & Judgment, the trial court examined the argument by Aten that, because of R Design's status as a Limited Liability Company, he was insulated from personal liability for his acts and omissions in this case. The trial court properly rejected that argument and found that Aten, as discussed *supra*, was personally liable. The Appellant argues that, pursuant to the provisions of the Uniform Limited Liability Company Act of 1996, S C Code § 33-44-101, *et seq*, the provisions of the Act limiting liability for LLC members trumps those of the statutes governing the licensure and professional responsibilities of South Carolina home builders.

The courts of South Carolina have not had the occasion to issue a decision directly addressing Member liability for torts in the context of an LLC. However, the courts have discussed at some length the existence of such liability in the case of incorporated businesses. The South Carolina

Supreme Court has recognized that generally the reason for the creation of a corporation is to limit liability Hunt v Rabon, 275 S C 475, 477, 272 S E 2d 643, 644 (1980) However, South Carolina law is clear that the immunity of shareholders, officers or directors in a corporation is not absolute S C Code §33-6-220(b) (1988) specifically provides that a shareholder of a corporation may become personally liable for the acts of a corporation by reason of his own acts or conduct The South Carolina Supreme Court has also recognized, in accordance with S C Code §33-6-220(b), that an officer or director may incur liability if he is shown to have participated in or directed the tortious act Id In fact, the Supreme Court has held that *nothing* in the law shields a corporate director from direct liability in tort for his own actions BPS, Inc v Worthy, 362 S C 319, 328, 608 S E 2d 155, 160 (2005) (emphasis added) A corporate director is personally liable for any tortious acts he participated in or directed, and the corporate veil does not protect such employee or officer from liability for his own actions Id at 328-329, 60 S E 2d at 160-161 This important protection has been carved out of the State statutes of incorporation specifically to prevent an individual from using a corporate entity to shield him from liability for his tortious conduct The Supreme Court has gone as far as to specifically explain

that "an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell " Multimedia Publishing of South Carolina v J R Mullins, 314 S C 551, 556, 431 S E 2d 569, 573 (1993)

It is generally accepted that "when the statutory privilege of doing business in the limited liability form is employed as a cloak for the evasion of obligations, as a mask behind which to do injustice or invoked to subvert equity, the separate personality of the limited liability company will be disregarded Am Jur 2d Limited Liability Companies §19 (2009) The South Carolina Supreme Court has upheld this general principle with respect to individual member liability in the face of unlawful distributions See e g Mazloom v Mazloom, 382 S C 307, 675 S E 2d 746 (2009) (holding that a member who assents to an unlawful distribution is personally liable pursuant to S C Code §33-44-407(a) (2006)) However, the principle that a member of an LLC who has personally directed and participated in a tort shall not be shielded by his status as a member of an LLC has been examined and upheld in a number of other jurisdictions See e g Verture Inc v Meshkin, 429 F Supp 2d 479 (D Conn 2006), People v Pacific Landmark, 129 Cal App 4th 1203, 29 Cal Rpt 3d 193 (2d Dist 2003), Clement Contracting Group Inc v Coating Sys LLC, 991 So 2d 971 (Ala

2003), Brophy v Ament, 2008 WL 48216110 (D N M 2008),  
Gunnings v Internet Cash Enterprise of Ashville, LLC, 2007 WL  
1931291 (W D N C 2007), State ex Rel Cooper v NCCS Loans,  
Inc, 174 N C App 630, 624 S E 2d 371 (2005) Indeed, it has  
been presumed that South Carolina limited liability companies  
would enjoy the same liability provisions as statutory close  
corporations, given their similarities Shawn M Flanagan,  
Piercing the Corporate Veil In South Carolina, 35 S C Law  
November 18, 2006

Because of his personal involvement in the daily  
operations of the work on the project at issue in this case,  
and because of the personal responsibilities imputed to him by  
virtue of his license as a home builder contractor in the  
State of South Carolina, the trial court was correct in its  
finding that Aten should be held individually liable for his  
acts and/or omissions during the construction of the project  
Aten is the member-manager of a "limited" liability company  
It would be counter-intuitive to presume that the liability  
provisions applicable to limited liability companies do  
anything other than provide a reasonable limitation on the  
business liability of the company It would be unreasonable to  
read the provisions of the Uniform Limited Liability Company  
Act to provide a complete shield to all liability of its  
members for any acts taken under the corporate guise

## **CONCLUSION**

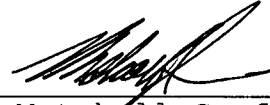
For the reasons discussed herein, the trial court should be upheld and this Court should affirm that Aten is personally liable for the acts or omissions undertaken by him on behalf of R Design. In so finding, this Court will follow the multitude of other jurisdictions and effectuate the clear intent of the legislature in preventing individuals from using a corporate shell as a shield to protect them from liability for their own tortious conduct.

**SIGNATURE BLOCK FOLLOWS ON NEXT PAGE**

Respectfully submitted,

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By



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December 1, 2010

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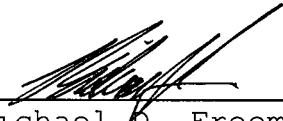
**CERTIFICATE OF COUNSEL**

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The undersigned certified that this Final Brief complies with  
Rule 211(b), SCACR

December 1, 2010

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Third Party Plaintiffs,

Kintz Electric

Third Party Defendant

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**PROOF OF SERVICE**

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I, Michael D Freeman, with the law firm of GRIFFITH, SADLER & SHARP, P A , Attorneys for Respondents/Appellants, 16 Jade Street, LLC, hereby certify that on December 1, 2010, I served a copy of the Final Brief of Respondent upon all counsel of record listed below, via first-class mail, postage pre-paid to the following addresses

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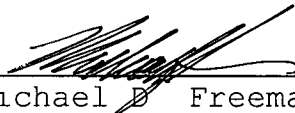
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