THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III

Case No. 2007-CP-07-1547

Jorge V. Esguerra ..... Appellant,

v.

Jamie V. Brown, individually and d/b/a Southeastern Services, Robert Baroni, Boyd R. Laughlin and Associated Construction Consultants, Inc., Defendants

Of whom Robert Baroni, Boyd R. Laughlin and Associated Construction Consultants, Inc. are ..... Respondents.

# FINAL BRIEF OF APPELLANT

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## TABLE OF CONTENTS

## Table of Authorities

## STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN ITS ORDER BY INCLUDING FINDINGS OF FACT UNSUPPORTED BY THE EVIDENCE SUBMITTED AT TRIAL?

II. DID THE TRIAL COURT ERR IN ITS ORDER BY RULING THAT THE APPELLANT DID NOT SEEK JUDGMENT AGAINST THE RESPONDENTS FOR NEGLIGENCE PER SE, WHEN THE APPELLANT'S COMPLAINT SHOWS THE CONTRARY, THE STATUTORY VIOLATIONS WERE ADDRESSED AT TRIAL AND THE APPELLANT MOVED TO CONFORM THE PLEADINGS TO THE EVIDENCE?

III. DID THE TRIAL COURT ERR IN ITS ORDER BY FINDING AND CONCLUDING THAT THE PLAINTIFF'S DAMAGES WERE NOT PROXIMATELY CAUSED BY THE ACTS AND OMISSIONS OF BARONI, ACCI AND LAUGHLIN, WHEN THE TESTIMONY AND THE EVIDENCE PRESENTED AT TRIAL REFLECTED THAT THE RESPONDENTS' ACTS AND OMISSIONS WERE IN VIOLATION OF STATUTES MEANT TO PROTECT THE APPELLANT?

IV. DID THE TRIAL COURT ERR IN ITS ORDER BY DISREGARDING THE PRIOR POSITION TAKEN BY BARONI AND ACCI, AND THE RESULTING DECISION OF THE LLR, TO FIND THAT BROWN'S USE OF ACCI'S LICENSE WAS UNILATERAL, UNLAWFUL AND WITHOUT BARONI'S KNOWLEDGE OR PERMISSION?

V. DID THE TRIAL COURT ERR IN ITS ORDER BY HOLDING THAT THE CONSENT AGREEMENT WAS NOT BINDING BECAUSE IT DID NOT PUT BARONI ON NOTICE THAT THE AGREEMENT COULD BE USED AGAINST HIM, WHEN BARONI ADMITTED AT TRIAL THAT HE KNEW HIS RIGHTS BEFORE THE LLR AND HAD WAIVED THE SAME?

VI. DID THE TRIAL COURT ERR IN ITS ORDER BY HOLDING THAT THE "ALLEGED" LICENSE LENDING BY BARONI AND ACCI WAS NOT SUPPORTED BY THE EVIDENCE, WHEN THE EVIDENCE SHOWED THAT BROWN AND BARONI HAD EACH PREVIOUSLY ADMITTED TO LICENSE LENDING?

VII. DID THE TRIAL COURT ERR AT TRIAL BY HALTING APPELLANT'S CROSS-EXAMINATION OF LAUGHLIN AND ALLOWING HIM AND HIS COUNSEL TO DISCUSS LAUGHLIN'S TESTIMONY OUTSIDE OF THE PRESENCE OF THE APPELLANT AND THE TRIAL COURT?

VIII. **DID THE TRIAL COURT ERR IN ITS ORDER BY CONCLUDING THAT THE APPELLANT'S COMPARATIVE NEGLIGENCE EXCEEDED ANY NEGLIGENCE ON THE PART OF THE RESPONDENTS, EVEN THOUGH THE TRIAL COURT AWARDED THE APPELLANT DAMAGES AS AGAINST BROWN, AND BARONI HAD PREVIOUSLY ADMITTED TO LICENSE LENDING?**

IX. **DID THE TRIAL COURT ERR AT TRIAL BY EXCLUDING THE LLR'S INVESTIGATIVE REVIEW COMMITTEE SUMMARY REPORT FROM THE EVIDENCE, WHEN THE SAME REPORT HAD PREVIOUSLY BEEN PROVIDED BY THE RESPONDENTS DIRECTLY TO THE APPELLANT?**

## STATEMENT OF THE CASE

In late 2004, the Appellant contracted with Jamie Brown ("Brown"), an individual the Appellant believed to be a licensed contractor, to renovate the Appellant's vacation home on Hilton Head Island. Prior to commencing work on the contract (R. pp. 240-244), in early 2005, Brown informed the Appellant that he was going to have Respondent Robert Baroni ("Baroni") assist Brown with pulling the permit for the renovation project. After construction began in mid-2005, the Appellant began to see problems with the renovation and Brown's performance in general. Consequently, the Appellant terminated Brown in early 2006.

Subsequently, the Appellant learned that Brown had not been properly licensed for the renovation project, and he notified the South Carolina Department of Labor, Licensing and Regulation's Contracting Board (the "LLR"), which contacted Brown about the Appellant's allegations. Brown responded to the complaint by letter in July of 2006 (R. pp. 165-166), wherein he admitted the allegations and, further, acknowledged that he had approached Baroni and Respondent Associated Construction Consultants, Inc. ("ACCI"), "who obliged" to help him. Shortly thereafter, Brown was cited for various violations of the South Carolina Code.

The LLR also contacted Respondents Baroni and ACCI about the matter, and Baroni

also responded by letter in July of 2006 (R. pp. 174-175). The LLR's investigation apparently stalled for a time, but, when the investigation was completed, the LLR concluded, based upon, among other things, its interviews with Baroni and Baroni's letter of July, 2006 (R. pp. 174-175), that Baroni and ACCI had engaged in "license lending" with Brown. Eventually, Baroni/ACCI entered into a Consent Agreement (R. pp. 183-187) in September of 2007, wherein Baroni admitted to lending ACCI's license to Brown, and was penalized.[1]

The below action was commenced by the Appellant's filing and service of his initial pleadings (R. pp. 37-44), on or about June 6, 2007, wherein he asserted causes of action against Brown and Baroni and ACCI for negligence, breach of contract, breach of express and implied warranties, violation of the S.C. Unfair Trade Practices Act (the "UTPA"), and negligent misrepresentation. Baroni and ACCI issued a general denial (R. pp. 53-54). Brown did not answer at all and the Appellant applied for Brown's default.[2]

After filing the his lawsuit, he Appellant determined that he also had a cause of action against the primary qualifying party for ACCI's general contractor's license, Boyd Laughlin

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[1]Initially, this information was not produced by Baroni and ACCI in their responses, dated October 2, 2007 (R. pp. 63-64), to the Appellant's First Request for Production. (R. pp. 57-62) However, through their new counsel, Baroni, ACCI and Laughlin later supplemented such responses and provided their previously non-disclosed LLR file. (R. pp. 55-56)

[2]Two affidavits of default were actually filed as to Brown: one for his failure to answer the initial complaint (R. pp. 37-44), and one for his failure to answer the amended complaint. (R. pp. 28-36)

("Laughlin"), and amended his complaint to include Laughlin. Afterward, new counsel for ACCI, Baroni and Laughlin answered the Appellant's amended pleadings. (R. pp. 45-52)

Judgment by default was ultimately issued as against Brown via order of the circuit court dated February 3, 2009, with the question of the Appellant's damages as a result of Brown's default reserved for the full trial against Brown and the other defendants. A bench trial was held before the Beaufort County Master in Equity over a two-day period on November 4 and November 5, 2009. At the end of the proceedings, the trial court directed the parties to submit post-trail memoranda and briefs to assist the court with its analysis of the issues.

Thereafter, the trial court issued its Final Judgment Order, dated May 21, 2010 (the "Order") (R. pp. 3-27), wherein the court found for the Appellant as against Brown on each of the Appellant's causes of action, and found in favor of Baroni, ACCI and Laughlin as against the Appellant on the same causes of action.

The Appellant filed and served his motion for reconsideration, dated June 4, 2010. A hearing on the motion for reconsideration was held before the trial court on July 20, 2010. Eventually, the trial court denied the Appellant's motion for reconsideration by order dated August 25, 2010. (R. pp. 1-2)

The Appellant received the order denying reconsideration on August 25, 2010 and

thereafter filed and served his notice of appeal, dated September 21, 2010, from the Order.[3]

## ARGUMENT

### I. THE ORDER CONTAINS SEVERAL FINDINGS OF FACT THAT ARE NOT SUPPORTED BY THE EVIDENCE SUBMITTED, OR WERE OUTRIGHT REFUTED, DURING THE TRIAL.

The trial court's findings of fact, beginning on page two of the Order (R. p. 4), contain numerous findings that are not supported by the evidence submitted at trial and are therefore erroneous, to wit:

- The trial court found as a fact that Baroni flatly refused Brown's initial request for assistance in getting a permit, according to both Baroni and Brown's testimony. (R. p. 5) This is not supported by Brown's testimony. (R. p. 93, line 18-p. 94, line 3; R. p. 94, lines 18-24; R. p. 95, lines 9-15; R. p. 96, line 17-R. p. 97, line 13; R. p. 119, line 5-p. 121, line 6)
- The trial court found as a fact that Brown admitted that he improperly obtained a permit under ACCI's name without any knowledge on the part of Baroni. (R. p. 5) This is refuted by Brown's testimony, Brown's letters, the letter from Baroni to the LLR and the Consent Agreement. (R. p. 93, line 18-p. 94, line 3; R. p. 94, lines 18-24; R. p. 95, lines 9-15; R. p. 96, line 17-R. p. 97, line 13; R. p. 119, line 5-p. 121, line 6)

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[3]The Appellant's Brief hereinafter refers to Baroni, ACCI and Laughlin – when used collectively – as the "Respondents", to distinguish them from Brown, as the Appellant is only appealing from the Order's holding as to the Respondents, not as to Brown.

- The trial court found as a fact that, according to both Brown and Baroni's testimony, Brown's actions were unilateral and without Baroni's permission. (R. p. 6) This is refuted by Brown's testimony, Brown's letters, the letter from Baroni to the LLR and the Consent Agreement. (R. p. 93, line 18-p. 94, line 3; R. p. 94, lines 18-24; R. p. 95, lines 9-15; R. p. 96, line 17-R. p. 97, line 13; R. p. 119, line 5-p. 121, line 6)
- The trial court found as a fact that the Appellant, after firing Brown, never had any conversation with the Respondents, but "[i]nstead, filed a complaint against Brown" with the LLR, and "[n]early a year later, pursuant to further complaints" from the Appellant, the LLR opened an investigation as to Baroni and ACCI. (R. pp. 7-8) This is unsupported by the letter from Baroni to the LLR, dated July 12, 2006, which clearly reflects that Baroni was aware of the Appellant's claims before the LLR, in July of 2006, around the same time the Appellant made his claims against Brown.
- The trial court found as a fact that Baroni wrote a letter to Charles Ido at the LLR indicating that he was merely "prepared" to assist Brown with pulling a permit. (R. p. 8) This is not supported by either the letter from Baroni to the LLR or the Consent Agreement.
- The trial court found as a fact that Baroni felt that he hadn't done anything wrong. (R. p. 9) This is not supported by either the letter from Baroni to the LLR or the Consent Agreement.
- The trial court found as a fact that Baroni at one time believed Laughlin was

an employee of ACCI and was also a shareholder. This is refuted by the stipulations of the parties at trial and Baroni's trial testimony. (R. p. 122, lines 13-14; R. p. 124, lines 16-18; R. p. 125, lines 3-24; R. p. 137, lines 12-25; R. p. 140, lines 9-14; R. p. 143, lines 3-12)

- The trial court found as a fact that Brown "totally corroborated the facts" as to Brown's involvement with Baroni and that Baroni knew nothing about the pulling of the permit. (R. p. 11) This is refuted by Brown's testimony, Brown's letters, the letter from Baroni to the LLR and the Consent Agreement. (R. p. 93, line 18-p. 94, line 3; R. p. 94, lines 18-24; R. p. 95, lines 9-15; R. p. 96, line 17-R. p. 97, line 13; R. p. 119, line 5-p. 121, line 6)[4]

As reflected by the examples hereinabove, the trial court's findings of fact are unsupported, and unsupportable, by the evidence and the Final Judgment Order is accordingly in error.

## II. THE APPELLANT'S AMENDED COMPLAINT CLEARLY SEEKS RELIEF AS AGAINST THE RESPONDENTS AND BROWN FOR NEGLIGENCE PER SE, THE ISSUE OF THE STATUTORY VIOLATIONS WAS TRIED BY CONSENT AND THE APPELLANT MOVED TO CONFORM THE PLEADINGS TO THE EVIDENCE, AND THE TRIAL COURT'S HOLDING OTHERWISE IS CLEARLY ERRONEOUS.

Not only does the Appellant's amended complaint (R. pp. 28-36) explicitly seek relief

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[4]It should be noted that those factual findings that are refuted by the letter from Baroni to the LLR and the Consent Agreement are also refuted by the LLR's Investigative Review Committee Summary Report (R. pp. 176-177), which the trial court erroneously excluded from evidence (*see* Argument IX below).

as against the Respondents and Brown, the Respondents' violation of numerous statutes was addressed in great detail at trial and the Appellant moved to conform the pleadings to the evidence.

Under the SCRCP, a party may amend his pleading by leave of court and leave shall be freely given when justice so requires and does not prejudice any other party. Rule 15(a), SCRCP. The prejudice envisioned by Rule 15 is a lack of notice that a new issue is going to be tried, and a lack of opportunity to refute it. *Pool v. Pool,* 329 S.C. 324, 494 S.E.2d 820, 823 (1998).

When issues are not raised by the pleadings but are tried by express or implied consent of the parties, they will be treated in all respects as though they had nevertheless been raised in the pleadings. Rule 15(b), SCRCP; *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000). Amendments of pleadings are allowed even after judgment to conform to the evidence presented at trial. *Staubes* at 413.

In the instant case, the Appellant's Amended Complaint reflects that he is seeking damages as against "the Defendants" – Brown and the Respondents – for the Appellant's First Cause of Action, negligence per se. (R. p. 31)[5] Moreover, Baroni and Laughlin were examined and cross-examined at length about all of the statutory violations, and the Respondents' counsel informed the trial court that his client desired to testify fully about

[5]Note that the subheading in the Appellant's Amended Complaint for his Third and Sixth Causes of Action state that each of these causes of action are "as to Defendant Brown", in contrast to the First Cause of Action subheading, which makes no such distinction.

them. (R. p. 127, lines 1-12)[6] Obviously, the Respondents had notice of the statutes claimed to be violated and, indeed, took the opportunity to refute them. Lastly, after the trial court indicated to counsel that it would like to see post-trial briefs on the issues (R. p. 164, lines 14-18), the Appellant moved to conform the pleadings to the evidence. (R. pp. 189-191) The trial court's ruling to the contrary is in error.

## III. THE EVIDENCE AT TRIAL, INCLUDING THE TESTIMONY OF LAUGHLIN AND BARONI AND STIPULATIONS OF COUNSEL, OVERWHELMINGLY SHOWED THAT THE RESPONDENTS' VIOLATION OF NUMEROUS STATUTES LED DIRECTLY TO BROWN'S PULLING THE PERMIT IN THE NAME OF ACCI AND, IN TURN, THE APPELLANT'S DAMAGES.

At trial, Laughlin admitted to actions in violation of S.C. Code Section 40-11-230, and both he and Baroni admitted to actions of ACCI in violation of Section 40-11-240; the trial court subsequently held in its Order that, even if the Respondents had violated these provisions, there was no liability on the part of the Respondents for the Appellant's damages. This was error.

South Carolina Code Ann. Section 40-11-110(A) allows the LLR Contractor's Board to impose disciplinary action upon a licensee, certificate holder, or other entity or individual if the board finds any of these conditions: ". . . (9) aiding or abetting an unlicenced entity to

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[6]Also, the Respondents are put on notice of the nature of additional statutory violations by virtue of the Fifth Cause of Action for violation of the S.C. Unfair Trade Practices Act ("Upon information and belief, the Defendants' acts and omissions, including but not limited to Defendant Brown engaging or offering to engage in the business of residential building without having first procured a license, and Defendants Laughlin and the Corporate Defendant using the general contractor's license to acquire the residential construction projects while using unlicensed workers that they each failed to supervise, have occurred with other parties in the past and/or are subject to repetition in the future.")

evade the provisions of this chapter, combining or conspiring with an unlicenced entity, allowing one's license to be used by an unlicenced entity, or acting as agent, partner, or associate, or an unlicenced entity". S.C. Code Ann. Section 40-11-230 sets forth that an individual must do the following to become designated by an entity as a primary qualifying party: ". . . (3) submit proof of full-time employment in a responsible management position by the entity for whom the applicant will be the primary qualifying party." This section goes on to state that a "***primary qualifying party may not take other employment that would conflict with the duties as primary qualifying party or diminish the ability to adequately supervise work performed by the licensee***." (Emphasis supplied.)

S.C. Code Ann. Section 40-11-240(A) requires that an entity, to qualify for licensure, must "have a certified qualifying party in full-time employment in a responsible management position". S.C. Code Ann. Section 40-11-270(C) allows licensees to utilize the services of unlicenced subcontractors to perform work (within the limitations of the licensee's license group), ***provided that the licensee provides supervision***. This section goes on to state that "[t]he licensee is fully responsible for any violations of this chapter resulting from the actions of unlicenced subcontractors performing work for the licensee."

The testimony at trial reflected the following:

- Laughlin is not and was not a full-time employee of ACCI. (R. p. 122, lines 13-14; R. p. 128, lines 3-16; R. p. 133, lines 1-8, 17-19; R. p. 134, lines 17-19)
- Laughlin has not submitted proof of full-time employment with ACCI. (R. p. 132, lines 12-17, lines 21-24)

- Laughlin is not an officer of ACCI. (R. p. 124, lines 16-18)
- Laughlin has no ownership of ACCI. (R. p. 136, lines 1-3, lines 11-13; R. p. 140, lines 9-14)
- Laughlin is the primary qualifying party for Task Services, and is President of the same. (R. p. 125, lines 3-25)
- Laughlin and Baroni/ACCI have their own, separate projects, which consist of different types of work. (R. p. 125, lines 3-25)[7]
- Laughlin does not believe that Section 40-11-230(B)(3) applies to him. (R. p. 133, lines 1-5, lines 17-19)
- ACCI is not in compliance with Section 40-11-230. (R. p. 143, lines 3-12)

The case of *Burry & Son Homebuilders, Inc. v. Ford*, 310 S.C. 529, 426 S.E.2d 313 (1992) is instructive here. In that case, Burry sued to recover amounts he believed he was due under a contract with the defendants, who, in turn, defended on the grounds that Burry was an unlicenced builder. Burry argued that his use of licensed employees constituted substantial compliance with (former) S.C. Code Section 40-59-130. The facts showed that one hourly employee of Burry was actually licensed, but worked on the house for only two days and did not use his license to do the work. The Supreme Court noted that such would not constitute substantial compliance with the statute and, in upholding the award of

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[7]Although Laughlin initially testified prior to trial as follows: ***"I am not part of the corporation.*** You know, ***I am the license holder for them, but that is not my corporation*** and I am not an officer on the board. ***I am nothing to the corporation, except I am the qualifier for the license."*** (R. p. 188, lines 3-7) (Emphasis supplied), his subsequent trial testimony seemed to hedge as to these and other strong declarations, especially after his cross-examination was interrupted. (*See* Argument VII below.)

summary judgment to the defendant, the Court further held that "**to allow recovery under these facts would fail to provide any protection to the homeowners and**, therefore, **undermine the purpose of the statute**" requiring a builder to have the requisite licensure. *Burry* at 315. (Emphasis supplied.)

As reflected in the aforesaid Code sections (qualifying party may not take other employment that would conflict with his duties or diminish his ability to supervise work performed by the licensee) and elaborated upon in *Burry*, the obvious intent and import of the statutory scheme at issue here is to insure that the homeowner/consumer is protected by requiring a qualifying party to oversee its license and licensee, and insure that the licensee does not allow the license to be used improperly – such as lending the license out to an unlicensed builder.[8]

In the instant case, the overwhelming evidence presented at trial showed clearly that the Respondents were in violation of numerous sections of the S.C. Code under Title 40, Chapter 11 ("Contractors"), which led directly to the Appellant's damages. If Laughlin had complied with the Code and had supervised his licensee (ACCI), and had been actually involved in its operations and business, instead of abdicating the license to Baroni,[9] Baroni

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[8]This position is further underscored by South Carolina's longstanding policy of protecting consumers by prohibiting a party from maintaining an action to recover amounts claimed due for work performed as an unlicensed builder. *See generally Duckworth v. Cameron*, 270 S.C. 647, 244 S.E.2d 217 (1978); *Roberta, Inc. v. Trust*, 274 S.C. 53, 260 S.E.2d 818 (1979); *Columbia Pools, Inc. v. Moon*, 284 S.C. 145, 325 S.E.2d 540 (1985), and the discussion at Argument VIII below.

[9]Note the following exchange at trial between Laughlin and his counsel: "Q. If you didn't have confidence in Mr. Baroni's abilities and experience in this field, ***would you allow your license to be with ACCI***? A. Absolutely not." (R. p. 135, lines 8-11) (Emphasis supplied.)

would have been unable to lend ACCI's license to Brown, who, in turn, would have been unable to pull the permit and perform the negligent work on the Appellant's property. The trial judge erred in holding otherwise.[10]

## IV. BARONI UNEQUIVOCALLY ADMITTED TO LICENSE LENDING BEFORE A S.C. ADMINISTRATIVE TRIBUNAL, WHICH RULED ACCORDINGLY, AND IT WAS ERROR FOR THE TRIAL COURT TO IGNORE SUCH RULING TO HOLD THAT BROWN'S ACTIONS WERE UNILATERAL, UNLAWFUL AND/OR WITHOUT THE KNOWLEDGE AND PERMISSION OF THE RESPONDENTS.

The evidence at trial included both the unqualified admission of Baroni and ACCI before the LLR that they had engaged in license lending with Brown, as well as the LLR's resultant and commensurate finding of the same, and the trial court's rulings to the contrary were erroneous.

Collateral estoppel, also known as issue preclusion, prohibits a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. *Carolina Renewal, Inc. v. South Carolina Dept. of Transp.*, 2009 WL 3246817, 2 (Ct.App.2009), *quoting Judy v. Judy,* 383 S.C. 1, 677 S.E.2d 213 (Ct.App.2009). While the traditional use of collateral estoppel required mutuality of parties to prevent relitigation, modern courts recognize the mutuality requirement is not

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[10]For the same reasons set forth hereinabove, the trial court's holding that the Appellant failed to provide "any evidence that Baroni's or ACCI's actions were unfair or deceptive" (Order, p. 22)(R. p. 24), for purposes of the Appellant's claim for violation of the Unfair Trade Practices Act, is also in error. Significantly, the trial court's Order did not apply that holding to Laughlin and, therefore, absent a finding of the trial court that the Appellant did not provide evidence of Laughlin's unfair and deceptive acts, it was error for the trial court not to award the Appellant damages as against Laughlin for this claim.

necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues. *Carolina Renewal quoting Snavely v. AMISUB of S.C., Inc.,* 379 S.C. 386, 665 S.E.2d 222 (Ct.App.2008).

The decision of an administrative tribunal will usually preclude the relitigation of the issues addressed by that tribunal in a collateral action. *Bennett v. South Carolina Dep't of Corrections,* 305 S.C. 310, 408 S.E.2d 230 (1991); *Hainer v. American Medical Intern., Inc.*, 320 S.C. 316, 465 S.E.2d 112 (Ct.App.1995).

The Consent Agreement entered into by Baroni and ACCI and the LLR – wherein Baroni and ACCI acknowledged that they had engaged in license lending with Brown so as to allow Brown to pull the permit for the Appellant's project – constitutes and constituted a decision of the LLR, an administrative tribunal. Not only was it the LLR's decision, but Baroni and ACCI concurred with it and joined in the decision, by virtue of the Consent Agreement. Baroni and ACCI should have been prohibited by the trial court from relitigating this issue, and testifying in direct conflict with their position before the LLR (i.e., that Baroni lent ACCI's license to Brown), thereby allowing Baroni and ACCI to maintain a contrary position before the circuit court. In turn, it was error for the trial court to rule in favor of Baroni and ACCI, based upon such contrary position.[11]

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[11]Indeed, the trial court's findings and conclusions in this regard has led to an absurd passage in the Order, to wit:

> Lastly, Defendant Baroni has been disciplined by the State Contractor's Licensing Board . . . *for his minimal discussions* with Brown in this matter. Such disciplinary action is more than sufficient *as a deterrent against future misconduct.*(R. p. 25) (Emphasis supplied.)

## V. BARONI TESTIFIED AT TRIAL THAT HE WAS AWARE OF THE ENTIRE RANGE OF RIGHTS HE HAD IN THE LLR PROCEEDING, INCLUDING THE RIGHT TO DEMAND A FULL HEARING, AND HE KNOWINGLY WAIVED THOSE RIGHTS WHEN HE ADMITTED TO LICENSE LENDING.

Given the testimony of Baroni that he understood his rights when he entered into the Consent Agreement, it was clear error for the trial court to rule that the Consent Agreement was invalid because Baroni did not know the Agreement would be used later in a subsequent proceeding.

Collateral estoppel can prevent a party from relitigating issues actually determined in a prior action, if the party estopped had a full and fair opportunity to litigate the issue in the first action. *Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 465 S.E.2d 765 (Ct.App.1995).

At trial, Baroni made no secret of the fact that he consented to the disciplinary findings of the LLR, and he acknowledged that, with the Consent Agreement, the LLR found that he and ACCI had engaged in license lending. (R. p. 149, lines 12-14) Moreover, he knew he was admitting to the violation, he understood he was consenting to the LLR's punishment, he knew he was waiving any further Conclusions of Law from the LLR (R. p. 150, lines 7-17) and he understood and had full knowledge of his right to ask for a hearing.

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Considering that the Order repeatedly holds that Brown unlawfully and without permission used ACCI's license, and that Baroni had no knowledge that the license was going to be used by Brown (despite Baroni's clear admissions to the LLR of the exact opposite), it seems paradoxical that the trial court would first acknowledge Baroni's discipline by the LLR, and then conclude that such discipline is a sufficient "deterrent against future misconduct"on the part of Baroni, given the Court's obvious conclusion that Baroni had committed no misconduct.

(R. p. 144, lines 6-11; R. p. 151, lines 1-14) The trial court's finding and holding to the contrary is not supported by the evidence, and is erroneous.[12]

## VI. EVEN WITHOUT THE CONSENT AGREEMENT, THE EVIDENCE AT TRIAL EXPLICITLY SHOWED THAT ACCI'S LICENSE WAS LENT TO BROWN BY BARONI.

The Consent Agreement only reinforces the testimonial and documentary evidence at trial, which fully demonstrated that Baroni engaged in license lending with Brown, and the trial court's ruling to the contrary is simply not supported by the evidence, to wit:

- The Appellant testified that, prior to construction on his project, Brown called the Appellant and said that Baroni was "helping (Brown) obtain the permit" (R. p. 65, line 18-p. 66, line 17); Brown, in turn, corroborated this testimony. (R. p. 98, lines 1-4, lines 11-16; R. p. 113, lines 22-25)
- Brown testified that Baroni obliged to help him by allowing him to use ACCI's license. (R. p. 94, lines 103)
- Brown's letter of July 16, 2006 to Charles Ido at the LLR states that Baroni obliged to help him by allowing him to use ACCI's license.
- Brown's letter of July 20, 2007 to the Appellant (R. p. 170) confesses Brown's "regret" at "[g]etting Mr. Baroni involved" and asking for "that favor"; he further testified at trial that the "favor" was Baroni allowing him

[12]In this regard, the trial court is also in error for holding that the Consent Agreement and Baroni's admission is not binding on him because Baroni's rationale for executing the Consent Agreement was merely to avoid the expense of litigation and attorney's fees (R. p. 20) and that Baroni had no "incentive" to defend himself in the LLR proceeding. (R. p. 22)

to use ACCI's license. (R. p. 95, lines 9-15)

- With the July 20, 2007 letter to the Appellant, Brown apologized for everything, including, but not limited to, engaging in license lending with Baroni. (R. p. 96, lines 17-25)
- Brown testified that he pulled down the permit for the Appellant's project with Baroni's knowledge and authorization. (R. p. 99, lines 15-25; R. p. 118, lines 2-10)
- Brown testified that, after the litigation had commenced, Baroni told him that Baroni was going to give Brown a job to allow Brown to pay Baroni back for what Baroni had lost in the litigation. (R. p. 100, lines 5-8)
- Brown's handwritten first draft of his July 20, 2007 letter to the Appellant (R. pp. 171-173) includes the line: "I know that by law it is illegal to practice license lending, but it happens."
- Baroni and ACCI's letter to Charles Ido of the LLR dated July 12, 2006 states that "*ACCI* did *tell Mr. Brown we could use my license* . . . to perform what was described by Mr. Brown . . . on [sic] a small job." (Emphasis supplied.)(R. p. 174)
- Baroni testified that his letter was "exactly the sequence of what took place" (R. p. 153, lines 16-20), and that the letter constituted the "facts of what happened"(R. p. 159, lines 4-6); he further acknowledged that the LLR, based on the letter Baroni sent them, determined he had engaged in license lending.

(R. p. 160, lines 13-16)[13]

Even without the LLR proceeding and Consent Agreement stemming from the same, the overwhelming evidence at trial conclusively demonstrated that Baroni and Brown engaged in license lending for the Appellant's renovation project, and the trial court erred by finding otherwise.[14]

## VII. THE TRIAL COURT ERRED IN HALTING THE APPELLANT'S CROSS-EXAMINATION OF LAUGHLIN TO ALLOW LAUGHLIN TO CONSULT WITH HIS ATTORNEY IN THE MIDDLE OF THE TRIAL, TO THE PREJUDICE OF THE APPELLANT.

The Appellant's case was prejudiced when the trial court allowed Boyd Laughlin to cease testifying in a cross-examination and consult with his counsel outside of the presence of the court and the Appellant's counsel.

In the middle of the Appellant's cross-examination of Laughlin, after Laughlin's counsel informed the trial court he would not allow his client to answer further questions about Laughlin's violations of the statutes(R. p. 126, lines 10-13), the trial court went off the record and allowed Laughlin to leave the witness chair and discuss the matter with counsel outside of the room and outside of the presence of the Appellant's counsel. (R. p. 127, lines

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[13]The LLR's Investigative Review Committee Summary Report, which was erroneously excluded by the trial court, also plainly evidences Baroni's admission in this regard (*see* Argument IX below).

[14]The trial court acknowledges in its Order that, if ACCI/Baroni had pulled the permit (or, presumably, if the permit was pulled on their behalf), a duty would have arisen for ACCI/Baroni to supervise the project, and cites the case of *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 384 S.E.2d 736 (1989) for such proposition. It has been undisputed by the parties in the pleadings, during the litigation and at trial of this matter that neither Baroni nor Laughlin supervised or oversaw Brown during any phase of the Appellant's project, or even visited the job site.

1-12)[15] A review of the trial transcript in this matter reflects a change in Laughlin's testimony after the break. For example, when challenged as to whether he was involved with ACCI on a daily basis, Laughlin asserted, "Sure I am", and gave a litany of ways in which he was supposedly involved on a day-to-day basis with ACCI. (R. p. 129, line 14- p. 130, line 1) When confronted with his previous, contradictory testimony (*see* Footnote7), Laughlin answered: "Maybe I answered that question wrong." (R. p. 130, lines 13-25)

Accordingly, the trial court's allowing Laughlin to break and recess in the middle of the Appellant's cross-examination prejudiced the Appellant and was erroneous.

## VIII. THE APPELLANT WAS OWED A DUTY BY THE RESPONDENTS AND BROWN, AS EVIDENCED BY THE TRIAL COURT'S AWARDING OF SIGNIFICANT DAMAGES AS AGAINST BROWN, WHICH DUTY WAS BREACHED BY BARONI'S ADMITTED LICENSE LENDING TO BROWN.

The trial court, in another paradoxical ruling, found against Brown on all of the Appellant's causes of action, and awarded significant damages as a result, but nevertheless held that the Appellant's negligence was greater than that of the Respondents, who admittedly lent the license to Brown which enabled him to do the work. This was error and not supported by the evidence.

An unlicensed contractor may not recover on a contract. *W & N Const. Co., Inc. v. Williams,* 322 S.C. 448, 472 S.E.2d 622 (1996). The law of estoppel, even if a homeowner was at the time of the contract aware that the contractor did not have a license, will not apply

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[15]Although the recess of Laughlin's testimony is not reflected at this portion of the trial transcript, the Appellant's counsel recalls the event on the second day of trial (R. pp. 138, line 20-p. 139, line 9), and his concerns regarding the same.

to benefit the unlicensed contractor, as the statutory scheme requiring homebuilders to have the proper licensure are in place for the benefit of the public. *See Wagner v. Graham*, 296 S.C. 1, 370 S.E.2d 95 (Ct.App.1988)

In the *W & N* case, our Supreme Court made it clear that the "rationale" of the licensing statutes in South Carolina (relating to both general contractors and residential building contractors) is that such statutes "protect the public". Moreover, the Court goes on to note that permitting unlicensed contractors to circumvent licensing requirements by simply paying a small fine would "defeat the legislative intent" of such statutes. *Id.* at 450. Clearly, the licensing statutes are for the benefit of the consumer and homeowner in South Carolina. Nowhere in the statutory scheme is there any reference to an affirmative duty of a homeowner to take extra steps to protect himself from a contractors' misrepresentations.

In the case of *Goheen v. DiLaura,* 2008 WL 1991621, 3 (Ky.App.2008), the Kentucky Court of Appeals is even more explicit regarding the duties of a homeowner. In that case, the homeowner (DiLaura) sued Goheen for construction defects and Goheen, arguing that DiLaura had prepared the parties' contract, requested a comparative fault jury instruction, which was denied by the circuit court. In upholding the circuit court, the Court of Appeals specifically held:

> Because this case is about the defective construction of the DiLauras' house, and the DiLauras had no duty regarding the construction of their home, the DiLauras are not at "fault," as that term is defined for purposes of comparative negligence. *Id.* at 5-6.

In the instant case, the Appellant, a doctor who resides full time in Ohio, testified that Brown indicated that he had the proper licensure for the job and that he would be working with Baroni to pull down the permit (a fact Baroni subsequently admitted). The Appellant had

no further duty, and did everything he could to protect himself while his vacation home was being renovated. The South Carolina statutory scheme is clear that the legislative intent is to protect the homeowner.

Moreover, the trial court's ruling that the Appellant's negligence far exceeded that of the Respondents is belied by the fact that the court awarded the Appellant damages in the amount of hundreds of thousands of dollars as against Brown. In effect, the trial court ruled that the Appellant was not *at all* comparatively negligent in relation to Brown, but was *more than fifty percent* negligent in relation to the Respondents, who lent the license to Brown sufficient for him to pull down the permit to do the negligent work in the first place. This was error on the part of the trial court.

## IX. THE INVESTIGATIVE REVIEW COMMITTEE (IRC) SUMMARY REPORT WAS VOLUNTARILY PRODUCED BY THE RESPONDENT THROUGH DISCOVERY AND IT WAS ERROR FOR THE TRIAL COURT TO EXCLUDE THE SAME FROM EVIDENCE ON THE GROUNDS OF CONFIDENTIALITY AND/OR PRIVILEGE.

The trial court's exclusion from evidence of the IRC Summary Report, a significant piece of evidence in the Appellant's case, was erroneous, as any claim of privilege or confidentiality had long since been waived, and was prejudicial to the Appellant's case.

The IRC Summary Report was willingly produced by the Respondents during discovery, and was neither objected to nor included on a privilege log. At the trial, the Respondents nevertheless asserted for the first time, via motion *in limine*, that the Summary Report was privileged under S.C. Code Ann. Sections 40-1-190 and 40-11-190. The Appellant, in turn, argued that any such privilege was waived when the Report was produced

during discovery.

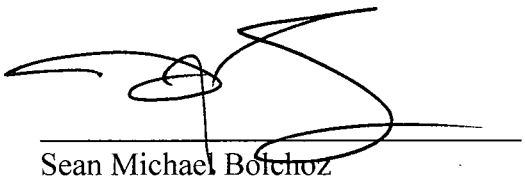
The trial court nevertheless ruled that the IRC Summary Report is confidential, and thereby excluded it from evidence despite the Appellant's proffer of same. The court indicated that only the LLR can waive its own internal confidentiality with regard to use of the document. (R. p. 145, lines 4-12, p. 146, line18-p. 148, line 6) However, it was the Respondents who demanded at trial the exclusion of the Summary Report, thereby asserting a privilege to a document which they had willingly produced to the Appellant.

The Summary Report states that the "facts reveal by means of documents and telephone interviews that [Baroni and ACCI] had allowed a non-licensed contractor to obtain a permit . . . without being properly licensed (**Licensed Lending**) . . ." [sic]. Moreover, the Report goes on to state that "[Baroni and ACCI's] letter of explanation admits to license lending as did investigators [sic] phone interview with [Baroni]". (R. p. 176) This was crucial evidence for the Appellant's case, it was given by the LLR to the Respondents who, in turn, produced it during discovery – with no reference to a privilege log – and it should not have been excluded by the trial court.

## CONCLUSION

The trial court in the instant case committed reversible error by including unsupported findings of fact in its Final Judgment Order, by ruling in favor of the Respondents on all of the Appellant's causes of action, by disregarding the Respondents' prior admissions and findings of the S.C. LLR Contractor's Board, by allowing a Respondent to confer with counsel during his cross-examination, by finding the Appellant comparatively

negligent, by excluding relevant evidence, and by misstating and misapplying applicable South Carolina law, and the trial court's Final Judgment Order should be reversed.



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December 30, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III

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Case No. 2007-CP-07-1547

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Jorge V. Esguerra ..... Appellant,

v.

Jamie V. Brown, individually and d/b/a Southeastern Services, Robert Baroni, Boyd R. Laughlin and Associated Construction Consultants, Inc ..... Respondents.

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## CERTIFICATE OF COUNSEL

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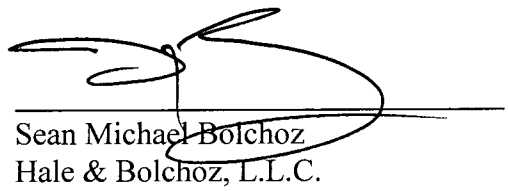
The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

December 30, 2011



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Of whom Robert Baroni, Boyd R. Laughlin and Associated Construction Consultants, Inc. are ..... Respondents.

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**PROOF OF SERVICE**

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I certify that I have served the Final Brief of Appellant and Final Reply Brief of Appellant by depositing a copy of the same in the United States Mail, postage prepaid on January 3, 2012, addressed to the other attorney of record James F. Berl, Esquire.

January 3, 2012

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