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.

RESPONDENTS' FINAL BRIEF

December 23, 2011

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STATEMENT OF THE CASE

Although the Respondents would agree with a majority of the Appellant's Statement of the Case, the Respondents take exception to characterizations of the alleged facts of the case, specifically, Respondent Baroni's communications with Jamie Brown, the individual who renovated the Appellant's home. Respondent Baroni stated that he would assist Brown in obtaining a permit if Brown took certain actions, which Brown never took.

Further, the Appellant characterizes Respondent Baroni's letter of July 2006 to the South Carolina Department of Labor, Licensing and Regulation ("LLR") as a response to the LLR. However, the letter Respondent Baroni sent to the LLR was in response to a letter Respondent Baroni received from the Appellant.

In September 2007, Respondents Baroni and ACCI reached an agreement with the LLR whereby Respondent Baroni did not admit to license lending, but merely admitted that his conduct constituted sufficient grounds for disciplinary action.

Respondents answered the Appellant's Complaint, specifically denying liability and claiming affirmative defenses of comparative negligence, no privity/no contract, sole acts of others, and statute of frauds.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ITS ORDER AS ALL FINDINGS OF FACT IN ITS FINAL ORDER WERE SUPPORTED BY EVIDENCE SUBMITTED AND/OR TESTIMONY PROVIDED DURING TRIAL.

"In an action at law, the trial court's factual findings will not be disturbed upon appeal unless found to be without evidence which reasonably supports the trial court's findings." Fesmire v. Digh, 385 S.C. 296, 683 S.E.2d 803 (Ct. App. 2009) [(citing Townes

Assoc. Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)]. "However, this broad scope of review does not require this Court to disregard the findings at trial or to ignore the fact that the master was in a better position to assess the credibility of the witnesses." *Id.* [citing Laughon v. O'Braitis, 360 S.C. 520, 524-525, 602 S.E.2d 108, 111 (Ct. App. 2004).

A review of the entire trial transcript will quickly dispose of the Appellant's assertions that the Final Judgment Order ("Order") is unsupported by evidence. The record is replete with evidence from the only two individuals who were there and know what happened, on which evidence the Court's Findings of Fact are fully supported. (R. pp. 65-89, p. 92, p. 101, pp. 104-110, p. 114, pp. 115-118, pp. 120-121; see also, R. p. 245, pp. 221-224, pp. 174-175).

The Appellant has taken limited language from the Order, as well as limited evidence, to make his argument. In support of his argument that the Trial Court's Order is unsupported by evidence, the Appellant has totally ignored the extensive testimony provided by Brown and Respondent Baroni during a two-day trial. A few brief, but insightful examples are: When asked "Now I want you to tell the court when you first went to Mr. Baroni, what was his answer about helping you with this project," Brown answered, "He was not interested. He was too busy." (R. p. 101, lines 23-25). This testimony presented by Brown clearly supports the Order as it reflects Baroni's initial refusal to assist Brown. Further, after that portion of the Order which states that Baroni "flatly refused Brown's initial request," the Order goes on to state that "Baroni further indicated that if the plans were in order, he would go with Brown to the Town of Hilton Head and pull a permit under ACCI's license, for them

to do the work." (R. p. 5). Again, Counsel for the Respondents asked, "And did he further tell you that if it was acceptable to him he would go down and pull the permit?" to which Brown responded, "I think that's exactly what he said." (R. p. 104, lines 13-15; see also, lines 16-25). Trial testimony provided by Brown clearly supports the Order.

The Trial Court's Order is replete with supporting testimony from witnesses during trial. When asked, "Did Bob ever give you permission to make application?" Brown responded, "No." (R. p. 104, line 25). Further, when asked, "Did he ever give you permission to go down and pull a permit under his company's name without his knowledge?" Brown responded, "No, he didn't." (R. p. 105, lines 1-2; see also, R. pp. 106-108, pp. 109-110, lines 1-3, p. 115, lines 18-25). The truthfulness of this statement is reflected in the fact that the actual permit application processed by Brown is replete with factual errors including the phone number and address for ACCI, which if Baroni had been involved would not have been the case. (R. p. 245). Further evidence includes when Brown testified that "Bob's involvement was nothing other than him saying to go to Beste." (R. p. 114, lines 18-22; see also, R. p. 103, pp. 115-117, p. 118, lines 9-22, p. 120, lines 17-22, p. 157, lines 14-22). As stated in Fesmire, the Trial Court, in viewing all of the evidence and testimony as a whole, is in a much better position to assess the credibility of Brown and Respondent Baroni, and ultimately, reach a decision as to the merits of the case.

The Appellant's assertion that the LLR opened its investigation of Baroni earlier than the Order states is refuted by the letter from Respondent Baroni to Mr. Ido of the LLR which starts out by saying, "I am in receipt of a letter . . . from Mr. Jorge Esquerra, MD, the Owner of the above referenced address." (R. pp. 174-175). The letter does not state that the

Respondent Baroni is responding to an inquiry from the LLR, but merely to a letter from Appellant. In fact, the case number, 2007-118, assigned by the Office of Investigation and Enforcement of the LLR to its inquiry concerning Baroni and ACCI, suggests that the matter was not opened by the LLR until 2007. Moreover, when the LLR opened its investigation against the Respondents is irrelevant to the issues at hand.

Respondent Baroni testified that he was prepared to assist Brown if certain actions were taken, but those actions never were taken by Brown. In his letter to Charles Ido of the LLR, Respondent Baroni candidly stated that Brown asked "me if I was interested in doing work at Harbourwood Villas. ACCI declined the work." (R. pp. 174-175). In the letter, when Respondent Baroni stated that "ACCI did tell Mr. Brown **we** could use my license number to perform . . . a small job" (emphasis added), Baroni goes on to say that Respondent "ACCI never reviewed any drawings, specifications or scope of work" and further, that ACCI "did not: (1) Submit to the Town of Hilton Head an application; (2) Pay for permit; (3) Pick up a permit; (4) Or aware [sic] of any requirement; (5) Had any contact with the Town of Hilton Head or Owner; (6) Received any money." (R. p. 174-175). "**ACCI was not even aware that work was being performed until about 3-4 weeks ago when I received a voicemail from Frank Hodge.**" (emphasis added) (R. pp. 174-175). The letter from Respondent Baroni to Charles Ido of the LLR, which the Appellant is erroneously relying on to challenge the Court's Order, along with extensive trial testimony explaining the letter, do not support the Appellant's position, but rather clearly support the findings of the Trial Court. (see, R. p. 152, lines 6-11; pp. 154-156).

Contrary to Appellant's belief, testimony from Respondent Baroni clearly indicates that he felt he had done nothing wrong. In fact, Respondent Baroni testified at trial, "I didn't feel I was guilty anyway but I will pay the $1,000.00 . . . ." (R. p. 151, lines 24-25; see also, R. p.160, lines 14-19).

Respondent Baroni did in fact think that Respondent Laughlin was at one time an employee and/or shareholder of ACCI, and counsel did not stipulate that he was not, or never was. In his Initial Brief, Appellant's allegation that "[t]his is refuted by the stipulations of the parties and Baroni's trial testimony" (Appellant Initial Brief, p. 5) is not supported by the trial transcript which only indicates that counsel stipulated that Respondent Laughlin did not work for Respondent ACCI **full-time**. (see, R. p. 137, lines 21-25, p. 140, lines 16-25; p. 141, lines 1-7). Common sense dictates, it would be virtually impossible to work full-time for two employers in the construction field. When asked, "Is it your testimony then that sometime prior to my deposition Mr. Laughlin owned shares in ACCI," Respondent Baroni testified, "I believe he did." (R. p. 142, lines 7-9). This testimony supports the Trial Court's Order which found that "at one time Baroni believes Laughlin was not only an employee of ACCI, but was also a shareholder." (R. p. 10). Even if the trial court committed error on this issue, which is disputed, the issues presented by the Appellant are irrelevant, and thereby caused no harm to him.

All of the findings in the Order are strongly supported by both the documentary evidence and extensive testimony provided at trial. As stated above, the Trial Judge is in a better position to determine credibility of evidence and witnesses. The evidence presented at the trial of this matter clearly shows that the Respondents were not involved in the matters

which give rise to the Appellant's Complaint.

II. THE TRIAL COURT DID NOT ERR IN RULING THAT THE APPELLANT DID NOT SEEK JUDGMENT AGAINST THESE RESPONDENTS FOR NEGLIGENCE PER SE, WHEN THE APPELLANT FAILED TO PLEAD SAID CAUSE OF ACTION, AMONG OTHERS, AGAINST THESE RESPONDENTS.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved in appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The Appellant never filed any motion to further amend his pleadings, either prior to, during, or after the trial. The first time that the Appellant raised the issue of amending the pleadings came in a letter to the Honorable Judge Dukes dated December 4, 2009, nearly a month after the close of the case and more than one week after post-trial motions and briefs were submitted, and two days after oral argument on the same had been completed. Foremost, the Respondents take exception to the Appellant's attempt to include the letter to Judge Dukes, dated December 4, 2009, as part of the record in this appeal. In said letter, the appellant stated that he "was not adequately able to address" certain issues during the post-trial arguments. In fact, the Appellant stated in his letter to Judge Dukes that "to the extent necessary, I would move to have the pleadings conform to the evidence presented at trial." As set forth in Wilder Corp., counsel for the Appellant did not preserve this matter for appellate review because he never moved to amend the pleadings during trial, and, as indicated in his letter to Judge Dukes, failed to do so during the post-trial arguments. Lastly, the Judge never ruled upon the matter, as required by Wilder Corp. As such, the Appellant cannot now seek appellate review of this issue.

In his Amended Complaint, in the First, Third, and Sixth Causes of Action, for negligence *per se*, breach of contract, and negligent misrepresentation, respectively, the Appellant did not seek any relief from the Respondents. The Amended Complaint, specifically states, "WHEREFORE, the Plaintiff, having alleged a Complaint against the Defendants herein, would request from this Court an Order as follows: A. As to the First Cause of Action: Granting the Plaintiff judgment **against Defendant Brown** . . . C. As to the Third Cause of Action: Granting the Plaintiff judgment **against Defendant Brown** . . . F. As to the Sixth Cause of Action: Granting the Plaintiff judgment **against Defendant Brown** . . . ." (emphasis added). The Appellant's causes of action for negligence *per se*, breach of contract, and negligent misrepresentation were against Brown only, not Respondents.

Further, the Appellant, in the first cause of action for negligence *per se,* only refers to a violation of S.C. Code of Laws §§ 40-59-30 and 40-59-240(d), both of which refer to a contractor performing work in excess of $5,000.00 without a license. (R. p. 31). The alleged statutory violations cited by the Appellant do not refer to license lending by Respondents in any way, and therefore, do not apply to the Respondents.

III. THE TRIAL COURT DID NOT ERR IN FINDING AND CONCLUDING THAT THE APPELLANT'S DAMAGES WERE NOT PROXIMATELY CAUSED BY THESE RESPONDENTS.

Should the Court choose to disregard Appellant's failure to pray for any relief from the Respondents under the First, Third and Sixth Causes of Action, and allow the Appellant to pursue relief from Respondents under those Causes of Action, the Court must still find that the evidence supports the Court's Order in favor of the Respondents.

In his Complaint, the Appellant alleges a violation of §40-59-30 and §40-59-240(d) as the basis for his claim of negligence *per se*. Neither has any applicability to the Respondents, who hold all requisite licenses necessary to perform any work that was performed on the subject property. Said provisions would apply only to Brown, who, based on the evidence presented at trial, does not have the requisite licenses to perform the work he performed for the Appellant.

Although not plead, Appellant, during the trial of this matter, raised the issue that the Respondent Laughlin was in violation of § 40-11-230, on the grounds that Respondent Laughlin no longer has an ownership interest in the entity known as ACCI, as required under sub-section (c), when a qualifying party is serving as the primary qualifying party for two (2) entities, as was the case with Mr. Laughlin. While such was acknowledged by Respondent Laughlin, the absence of an ownership interest which, according to the evidence, was at one time held by the Respondent Laughlin, has no nexus to the events which took place between the Respondents Baroni and ACCI, and Brown. It is not enough for the Appellant to merely assert that a statute has been violated, the Appellant must show that the violation had a direct causal relationship to the damages suffered by the Appellant. [see, Trivelas v. South Carolina Department of Transportation, 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001) Aff'd.; see also, Seal by Causey v. Winburn, 314 S.C. 416, 445 S.E.2d 94 (Ct. App. 1994)]. Even if the Respondent Laughlin still owned a percentage of ownership in ACCI, such would not have had any impact on the interaction between Brown and the Respondents Baroni and ACCI. Having a minority ownership interest in no way translates into having knowledge of every little event in which the majority shareholder or entity is engaged.

The undisputed evidence was that Respondent Laughlin not only had no involvement in any of the work involved in the Appellant's residence, but was totally unaware of the project. Further, the information on the building permit is totally inconsistent with any allegation that Respondent Laughlin was somehow the general contractor or was involved in the project in any capacity, as the permit does not contain any information relating to Respondent Laughlin. Instead, the building permit referenced Jamie Brown's involvement, and while mentioning ACCI, has totally incorrect information relating to said entity.

As stated above, Respondent Baroni did believe that Respondent Laughlin was at one time an employee and/or shareholder of ACCI. When asked, "Is it your testimony then that sometime prior to my deposition Mr. Laughlin owned shares in ACCI," Respondent Baroni testified, "I believe he did." (R. p. 142, lines 7-9).

In support of his argument that the Respondent Laughlin is somehow liable, Appellant cites Burry & Son Homebuilders, Inc. v. Ford, 310 S.C. 529, 426 S.E.2d 313 (1992). However, Burry deals with an unlicensed contractor trying to collect from a homeowner, and has nothing to do with alleged violations of S.C. Code of Laws § 40-11-230 or S.C. Code of Laws § 40-11-240. As such, it is of no precedential value as concerns the issues before this Court.

IV. THE TRIAL COURT DID NOT ERR IN ITS FINAL ORDER BY FINDING THAT BROWN'S USE OF ACCI'S LICENSE WAS UNILATERAL, UNLAWFUL, AND WITHOUT THESE RESPONDENTS' KNOWLEDGE OR PERMISSION.

The uncontroverted facts in evidence are that while Brown followed Respondent Baroni's suggestion to obtain plans and specifications from Greg Beste for Baroni's review, Brown never returned with the same to Respondent Baroni, but instead, of his own volition,

and without the knowledge or consent of Respondent Baroni, made application to the Town of Hilton Head and pulled a permit under ACCI's name (see, R. p. 105, lines 1-2; see also, R. pp. 106-108, p. 109, p. 110, lines 1-3, p. 114, lines 18-22, pp. 115-117, p. 118, lines 9-22, p. 120, lines 17-22, p. 157, lines 14-22). Further, the uncontroverted evidence shows that at no time during Brown's work on the project was Respondent Baroni ever aware that Brown had pulled a permit and was using ACCI's license to perform the project.

Appellant attempts to rely upon the Consent Agreement entered into by Respondents Baroni and ACCI with the LLR as the basis for claiming liability on the part of Respondents Baroni and ACCI to Appellant. In doing so, the Appellant relies upon the doctrine of non-mutual collateral estoppel. Although not plead anywhere in Appellant's Amended Complaint, the Appellant is attempting to use Respondents Baroni and ACCI's Consent Agreement with the LLR, regarding aiding a residential contractor in obtaining permit, in violation of S.C. Code of Laws § 40-11-110(A)(9), as proof that Respondents Baroni and ACCI are liable to the Appellant for damages suffered by virtue of his contracting with Brown. This ignores the undisputed fact that Respondents Baroni and ACCI entered into an agreement for an administrative sanction of a $1,000.00 fine, a public reprimand, and ACCI's license being placed on probation for a period of one year, with the expectation that such would be their only consequences, in order to avoid the considerable expense of having to hire a lawyer to litigate the matter. Having not been properly plead, these Respondents would submit that the Appellant is barred from basing his cause of action for negligence *per se* on such matters. Should the Court find otherwise (which the Respondents would submit would be material error), said non-mutual collateral estoppel is still not a basis for finding

in favor of the Appellant and against the Respondents Baroni and ACCI in this matter.

Even if collateral estoppel could apply (which it does not), there are exceptions to rule, which are specifically, applicable to Respondent Baroni's entry into the Consent Agreement with the LLR. "A party may assert non-mutual collateral estoppel to thwart re-litigation of a **previously litigated issue** unless the party sought to be precluded did not have a full and fair opportunity to litigate the issue in the first proceeding, or **unless other circumstances justify providing the party an opportunity to re-litigate the issue.**" Wade v. Berkeley County, 330 S.C. 311, 317, 498 S.E.2d 684 (Ct. App. 1998) (emphasis added). "Factors in determining the defense of collateral estoppel . . . include whether the doctrine is used offensively or defensively, and whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action." Pye v. Aycock, 325 S.C. 426, 436, 480 S.E.2d 455 (Ct. App. 1997). "The party asserting collateral estoppel **must prove that the issue was actually litigated and directly determined in the prior action** and that the matter or fact directly in issue was necessary to support the first judgment." Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001) (emphasis added).

The Respondent has not provided any proof that the issue of license lending was **"actually litigated."** Conversely, rather than expending large amounts of money defending the issue, Respondent Baroni entered into a Consent Agreement with the State Contractors' Licensing Board ("Board"), and agreed to pay a minimal fine and be on probation for one (1) year. The Board never actually adjudicated whether Baroni and ACCI lent their license to Brown. The Consent Agreement lacks any factual findings to support its conclusion that

Baroni and ACCI violated SC Code of Laws § 40-11-110(a)(9), other than "Respondent aided . . . a residential contractor in obtaining permits and documents to perform commercial work . . . ." The Consent Agreement further states that the "Respondent admits that the Respondent's action in this matter is in violation of SC Code of Laws § 40-11-110(a)(9)(1976, as amended) and that the conduct in this matter constitutes sufficient grounds **for disciplinary or corrective action**." (emphasis added.) Respondent Baroni never admitted that he lent his license to Brown, or which portion of the statute he violated, **he merely admitted that his conduct constituted sufficient grounds for disciplinary action**. It would be unfair and prejudicial to hold that Respondent Baroni's agreement constituted actual litigation of the matter.

Even if the issue of whether Baroni and ACCI lent their license to Brown was litigated, **"[t]here are numerous exceptions to the application of . . . collateral estoppel."** Nelson v. QHG of South Carolina, Inc., 354 S.C. 290, 306, 580 S.E.2d 171 (Ct. App. 2003)(Aff'd in part and rev'd in part on a different issue). Adopting Restatement (Second) of Judgments § 28, the Court of Appeals stated that "[a]lthough an issue is litigated and determined by a valid and final judgment, . . . , relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: . . . (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts (clearly such is the case here where one compares an informal administrative proceeding versus a trial in Circuit Court). . . (5) There is a clear and convincing need for a new determination of the issue . . . (b) **because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in a subsequent**

action, or (c) **because the party sought to be precluded, . . ., did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.**" (emphasis added) Id. at 307.

No evidence was submitted to the Court indicating that there was a relation between what Baroni had agreed to do for Brown, and what Brown actually did without his consent, and, further, there could be no nexus between what Baroni had done and the damages suffered by the Respondent. Moreover, it should be noted that the original Complaint which had been served upon the Defendant ACCI, prior to Baroni entering into his agreement with the LLR, specifically limited its negligence *per se* action against the Defendant Brown only, as the statutes referenced therein could not have been violated by ACCI, which possesses the requisite licenses to do the work for which Defendant Brown did not have a license to perform. Further, the only other cause of action in which the issue of licensure is even touched upon as concerns the corporate Defendant, ACCI, was the Fifth Cause of Action alleging unfair trade practices in which the Plaintiff alleged "the corporate Defendant using its general contractor's license to acquire the residential construction projects (sic) while using unlicensed workers that had failed to supervise, have occurred with other parties in the past and/or are subject to repetition in the future." Such allegation could in no way render it foreseeable to Baroni that his subsequent entering into an agreement with the LLR for an administrative sanction and monetary fine, would thereafter be used against him under an amended complaint in which the exact same language was utilized. Specifically, neither Respondent ACCI nor Respondent Baroni used ACCI's general contractor's license for any aspect of the subject project. Also, the subject project was not a residential construction, but

rather a commercial construction, hence the need for a general contractor's license. Further, the Respondent, ACCI, uses only fully licensed workers on its projects, or, if using a laborer such as an unlicensed carpenter, that laborer is under the specific supervision of a licensed carpenter. The Respondent, ACCI, had not, in relation to the subject project, used any workers, period, as the corporation was not involved in any way in the subject project. As for the allegation that the Respondent, ACCI, had used unlicensed workers, or failed to supervise the workers on any project in the past, such was not true, for as stated above, the corporation only uses licensed tradesmen for all of their projects and to the extent any laborers are hired in any craft, such laborers are supervised by licensed tradesmen. Finally, as testified to by Respondent Baroni, his incentive for signing that agreement with the LLR was that he was going to receive a minimal administrative reprimand in the form of a $1,000.00 fine and a year's probation, as opposed to spending thousands of dollars to have a full blown hearing in which he would be represented by an attorney before the LLR. (see, R. p.151, lines 1-25, p. 158, lines 21-25, p. 160, lines 18-25). Based on all three (3) factors, the offensive use of collateral estoppel to impose an action for negligence *per se* upon the Respondents Baroni and ACCI is inappropriate.

In addition to the above factors, the Court of Appeals has adopted Restatement (Second) of Judgments § 29, which provides for additional circumstances that should be taken into consideration. Those circumstances, along with those identified in Restatement § 28, include ". . . (2) The forum in the second action affords a party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being

differently determined; .. . (8) Other compelling circumstances make it appropriate that the party be permitted to re-litigate the issue." **"Even when the elements of res judicata and collateral estoppel have been met, they will not be rigidly or mechanically applied, and the application of the doctrines may be precluded where unfairness or injustice results."** Nelson at 314.

When Respondents Baroni and ACCI entered into the Consent Agreement with the State Contractors' Licensing Board, Respondent Baroni could not have logically thought that the issue of whether he lent his license to Brown would arise in the existing action for damages related to defective work performed by Brown. Because he was unaware that the issue of license lending would arise, as it was not alleged against ACCI in the original Complaint which had been served on him, Respondent Baroni did not have an incentive to defend the issue during the LLR proceeding, for, as testified by him, it would have cost him an exorbitant amount of money to defend the matter in the LLR action. Further, he believed that neither ACCI, nor him acting as the President of ACCI, had done anything wrong insofar as ACCI's involvement on the Esquerra project, and he was fully confident that the facts, when they came out in his defense of the lawsuit, would fully vindicate ACCI. Knowing what was alleged in the original Complaint and what the evidence would be when said matter came to trial, Baroni, as a lay person, could not have in any way anticipated that his administrative agreement with the LLR would somehow be used against ACCI, or especially himself, since he wasn't even a party to the original lawsuit, in this matter. Had Respondent Baroni known that the Appellant would amend his pleadings and then try to bootstrap the administrative agreement as evidence to be used against ACCI and him when the lawsuit

came to heard, he would have vigorously defended the issue. It would be unfair and unjust to preclude Respondents Baroni and ACCI from re-litigating (**actually litigating for the first time**), the issue of license lending. As such, the exceptions in Restatement (Second) of Judgments §§ 28 and 29 were properly applied by the Court to allow Respondents Baroni and ACCI to fully defend the issue raised by the Plaintiff.

But for the Appellant's misplaced attempt to use non-mutual collateral estoppel from an administrative proceeding that so vastly differed from the case at hand, in terms of its consequences and ramifications, the Appellant has no case whatsoever. The evidence clearly showed, when fully litigated, that Respondents Baroni and ACCI did not actually lend their license to Brown, but rather agreed to cooperate with Brown, provided he performed certain tasks and came back with appropriate plans and specifications for **Respondent Baroni's review**. Brown having failed to do so, and further, having undeniably illegally made application to the Town and pulled the permit under Respondent ACCI's name, without any knowledge or consent on the part of Respondents Baroni and ACCI, it would be manifestly unjust to in any way hold Respondents Baroni and ACCI liable for the Appellant's decision not only to hire an unlicensed contractor to perform the work, but to allow him to continue to perform the same in the face of overwhelming evidence that he was unqualified to so perform, which the Appellant either knew or had reason to know.

S.C. Code of Laws § 40-11-110(A)(9) states that the "board may impose disciplinary action upon a licensee . . . [for] aiding or abetting an unlicensed entity to evade the provisions of this chapter, combining or conspiring with an unlicensed entity, allowing one's license to be used by an unlicensed entity, or acting as an agent, partner, or associate, or an

unlicensed entity."

In our case, Respondents Baroni and ACCI did not agree or conspire to let the Brown use their license. Initially, Brown approached Respondent Baroni not once, but twice, about using Respondent Baroni's and ACCI's license for the project. Respondent Baroni flatly refused Brown's first inquiry and then, when requested by the Regime Manager to see if he could assist Brown in the matter, Respondent Baroni informed Brown that he first needed to go get appropriate plans and specifications from an architect, Greg Beste, for Respondent Baroni to review, **and then, if everything was in order**, Respondent Baroni would pull a permit under ACCI for the project. The uncontroverted facts in evidence are that while Brown did follow Respondent Baroni's suggestion and did obtain plans and specifications from Greg Beste, he never returned with the same to Respondent Baroni, but instead, of his own volition, and without the knowledge or consent of Respondent Baroni, made application to the Town of Hilton Head and pulled a permit under ACCI's name (see, R. p. 245; see also, R. pp. 221-221, pp. 223-224). The uncontroverted evidence further shows that at no time during Brown's work on the project was Respondent Baroni ever aware that Brown had pulled a permit and was using ACCI's license to perform the project, and that the first Respondent Baroni learned of this was when Town agent Frank Hodge contacted him, in response to a complaint from the Appellant, in the spring of 2006, more than two (2) months after the Appellant had terminated Brown's services.

The Appellant admitted that at no time was he aware that the permit had been pulled under ACCI's name, nor did he ever have any contact with Respondent, Baroni. (R. pp. 66-70, 89). There is no evidence that showed that Respondents Baroni or ACCI were involved

in any way in the project, and, in fact, the evidence shows exactly the opposite (see, R. p. 111, lines 15-24). One need only to look at the permit to see that it is full of inaccurate information related to ACCI, which corroborates the admission of Brown that he pulled the permit in ACCI's name without Respondent Baroni's knowledge. Had Respondent Baroni been involved in actually lending his license to Brown on this project, then logically the permit would have been properly filled out and a check would have been issued from ACCI for the fee. The evidence clearly shows such was not the case.

It is significant that only Brown signed the permit because it, along with all of the testimony and evidence, clearly showed that Brown was in no way associated with ACCI. Further, the information on the permit is totally inconsistent with the allegations that Baroni and ACCI lent their license to Brown or were involved in the project, as the permit contains: (1) a random toll-free telephone number not associated with Baroni or ACCI; and (2) Baroni's personal address, not ACCI's business address. (see, R. p. 245). Another factor indicating Baroni's and ACCI's lack of participation is that Brown made the payments for the permit to the Town of Hilton Head Island with checks from Southeastern Services. (see, R. pp. 221-224).

In accepting those checks, the Town violated its own rules and policies, as testified to by Nancy Heath from the Town's Building and Plans Department. (R. pp. 161-163). The Town is only supposed to accept a check for a permit drawn by the property owner themself or **an account on the name of the company shown on the permit**, as a safeguard to prevent permits from being pulled by unlicensed contractors. But for the Town's failure to perform its duties in this regard, Brown should not have been able to pull a permit under ACCI's

license. Neither the Town of Hilton Head nor the Appellant verified that Respondents Baroni and ACCI were managing or supervising the project, nor did the Town or the Appellant verify that Brown and/or Southeastern Services was a licensed contractor. The foregoing facts have all been confirmed by testimony and/or evidence presented at trial, and nothing was presented contradicting the same. (R. p. 70, pp. 72-75, pp. 90-91, p. 101, pp. 161-163).

Notwithstanding that there is no nexus by which anything Respondent Laughlin did or did not do in any way contributed to the damages suffered by the Appellant, the theory of non-mutual collateral estoppel is being proposed as a means to somehow bootstrap liability upon the Respondent, Laughlin. "Only a party to a prior action or one in privity with the party can be precluded from re-litigating an issue on the basis of collateral estoppel." Carrigg v. Cannon, 347 S.C. 75, 80, 552 S.E.2d 767, 770 (Ct. App. 2001). "To be in privity, a party's legal interests must have been litigated in the prior proceeding." Wade v. Berkeley County, 330 S.C. 311, 317, 498 S.E.2d 684 (Ct. App. 1998). see also, Richburg v. Baughman, 290 S.C. 431, 351 S.E.2d 164 (1986), which held "privity deals with a person's relationship to the subject matter of the previous litigation, not to the relationships between entities" and Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994), holding "having an interest in the same question or in proving or disproving the same set of facts does not establish privity . . . nor is privity found when the litigated question might affect a person's liability as a judicial precedent in a subsequent action." In our case, collateral estoppel cannot preclude Laughlin from litigating the issue of license lending because: (1)Laughlin was not a party to the action before the State Contractors' Licensing

Board; and (2) Laughlin's legal interests were not litigated in the action before the Licensing Board, thus no privity. Not only has the Appellant failed to provide evidence or testimony that Respondent Laughlin was a party to the disciplinary action before the Licensing Board, the action itself and the Consent Agreement expressly reflect that the matter involves Respondents Robert Baroni, and Associated Construction Consultants, Inc., and no one else, other than the LLR. Nowhere does the Consent Agreement name or even mention Respondent Laughlin, much less allege that he did anything wrong.

Respondent Laughlin not having been a party to the proceedings before the LLR, he cannot, under any theory, including non-mutual collateral estoppel, be bound by the finding of the Consent Agreement entered into by Respondents Baroni and ACCI. Therefore, there is absolutely no evidence before the Court to support a finding of either negligence *per se*, or negligence against Respondent Laughlin in this matter.

V. THE TRIAL DID NOT ERR IN ITS FINAL ORDER IN HOLDING THAT THE CONSENT AGREEMENT WAS NOT BINDING BECAUSE THE PROCEEDING BEFORE THE LLR WAS NOT A FULL LITIGATION ON THE MERITS OF THE MATTER, AND THUS, COLLATERAL ESTOPPEL COULD NOT BAR BARONI AND ACCI FROM LITIGATING THE MATTER.

The Respondents would respectfully direct the Court to the arguments set forth above.

VI. THE TRIAL COURT DID NOT ERR IN ITS FINAL ORDER BY HOLDING THAT LICENSE LENDING, AS ALLEGED BY THE APPELLANT, WAS NOT SUPPORTED BY EVIDENCE.

The Respondents would respectfully direct the Court to the arguments set forth above.

VII. THE TRIAL COURT DID NOT ERR IN ALLOWING LAUGHLIN AND HIS COUNSEL TO CONSULT ABOUT POSSIBLE TESTIMONY THAT WOULD HAVE BEEN PROTECTED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

As set forth in Wilder Corp., "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved in appellate review." The Appellant did not preserve this issue during trial, in that counsel for the Appellant failed to object at the time the Trial Court halted the proceedings (see, R. p. 127, lines 1-25). Further, testifying about such issues could have had criminal implications, and counsel merely consulted with Laughlin about his Fifth (5th) Amendment rights.

The Appellant cites "a change in Laughlin's testimony after the break." (Appellant's Brief, p. 123, line 17). However, a review of the trial transcript indicates that the substance of Respondent Laughlin's testimony did not change. **Prior to** consulting with counsel, Laughlin testified that "[l]ast I knew I was Secretary-Treasurer" of ACCI (see, R. p., line 7). Further, when asked if he was "just a party that allows ACCI to get a general contractor's license," Laughlin testified that "I still share the office, I am still there everyday . . . I may still be the Secretary-Treasurer." (see, R. p. 125, lines 1-5). **After consulting with his attorney**, Respondent Laughlin testified that "we meet every morning, we would meet in the afternoon. We discuss. . . . I mean we start off there every morning and go over projects. We go over what we are doing, what's going on." (R. p. 130, lines 1-8). Further, Respondent Laughlin testified that "We set this up eight years ago and we renew our license every two years. . . . I believe, you know as Secretary-Treasurer I believe I had an ownership in the corporation." (R. p. 131, lines 4-9). As shown by the testimony above, after consulting with

counsel about criminal implications, nothing substantially changed in Respondent Laughlin's testimony, as alleged by the Appellant.

VIII. THE TRIAL COURT DID NOT ERR IN ITS FINAL ORDER BY CONCLUDING THAT THE APPELLANT WAS COMPARATIVELY NEGLIGENT.

"Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause **only when without such negligence the injury would not have occurred or could have been avoided**. (emphasis added). Hanselmann v. McCardle, 275 S.C. 46, 48, 267 S.E.2d 531, 533 (1980). "Proximate cause is the efficient or direct cause; the thing that brings about the complained of injuries." Platt v. CSX Transportation, Inc., 665 S.E.2d 631, 640 (Ct. App. 2008). Furthermore, even if the other tests for proximate cause have been met, which Respondent Baroni and ACCI submit they have not, the **negligence of the Appellant must not exceed that of the Respondents**. see, Estate of Haley Ex. Rel. Haley v. Brown, 370 S.C. 240, 634 S.E.2d 62 (Ct. App. 2006), noting Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991)(a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant); Ott v. Pittman, 320 S.C. 72, 463 S.E.2d 101 (Ct. App. 1995)(under the doctrine of comparative negligence, negligence by the plaintiff does not automatically bar recovery by the plaintiff unless his negligence is greater than that of the defendant); Hopson v. Clary, 321 S.C. 312, 468 S.E.2d 305 (Ct. App. 1996)(stating plaintiff's claim was barred under comparative negligence doctrine because plaintiff's own negligence was, as a matter of law, greater than any negligence attributable to defendant and the more determinative factor in causing the accident); Hurd v. Williamsburg County, 363 S.C. 421, 611 S.E.2d 488 (2005)(under the comparative negligence doctrine, a plaintiff may only recover damages if

his own negligence is not greater than that of the defendant).

Appellant's argument that it is inconsistent for the Court to find for Appellant against Defendant, Brown, and find Appellant's negligence exceeded that of the Respondents, is misplaced. Appellant was awarded a **default judgment** against Brown thereby precluding Brown from litigating any issue other than damages. The Respondents, on the other hand, were not so barred and the evidence overwhelmingly shows that if for some reason the Court were to determine the Respondents' actions were tangentially related to Appellant's damages, then clearly the Appellant was far more negligent in his actions and omissions than were the Respondents. Thus, the Appellant is barred from recovering from Respondents under the doctrine of comparative negligence.

The Appellant, Dr. Jorge Esguerra, is, by virtue of his being a radiologist, obviously a very intelligent individual. The Appellant failed to act as a reasonable man of far less intelligence, much less acting as a reasonable man for someone with his intelligence. The Appellant had every opportunity, before contracting with Brown, to investigate his credentials, ascertain what licenses he possessed, what insurance coverages he carried, as well as his capability of performing the contracted for work in a timely manner. The Appellant did none of this, as would a reasonable person, but instead found Brown by virtue of the fact that Brown was installing **a sliding door** in a neighboring unit. At no time did the Appellant request any details regarding Brown's license or insurance, nor did the Appellant engage in any kind of detailed review of Brown's references. Instead, he spoke briefly with a woman who said Brown's work was okay, and accompanied Brown to a unit where the ceiling and other areas had been damaged by a water leak, which was documented

by pictures in Brown's possession. At no time did the Appellant ever inquire of references regarding Brown's licensure, his timeliness in completing the work he was contracted to perform, or his capabilities to perform extensive tiling of floor and new construction/additions to existing rooms (see, R. pp. 70-76). Had the Appellant inquired into any of these matters, especially Brown's licensure, he would have discovered that Brown did not possess the requisite skills and licenses, nor the manpower to timely complete the requested project. As the Appellant admitted during cross-examination, had he checked Brown's license and discovered he did not have the proper license, he would not have hired Brown to do the job. Thus, but for that act of gross negligence on the part of Dr. Esguerra, none of the damages as suffered by him could have occurred (see, R. p. 74, lines 13-25, p. 75, lines 1-6).

As if that is not enough, the evidence clearly showed that the Appellant was on notice, for a period of several months, that Brown was having trouble pulling a permit, which should have been a red flag, especially in light of the fact that the Appellant admitted that his close friend, George Bombadier, a neighbor in the same condominium complex, had advised him there should be no problems pulling a permit (see, R. pp. 76-81; see also, p. 102, lines 17-25). This red flag was ignored by the Appellant. Likewise, when Brown admitted to the Appellant that someone else was helping him try to get the permit (arguably Respondent Baroni), the Appellant failed to inquire as to who Respondent Baroni was, what his role was in the matter, and why there continued to be a problem. Had the Appellant made any of those inquiries, he would have discovered that Brown did not possess the requisite license and, as stated by the Appellant in open Court, had he known Brown did not have the proper

license, he would not have hired him to do the job (see, R. p. 92, lines 9-14).

The Appellant's negligent actions and omissions continued long after the permitting issue was resolved, as Appellant admitted he received messages from his neighbor, George Bombadier, informing him that Brown was on the job site very sparingly, one or two days per month, and then only for a few hours. When the Appellant inquired of Brown regarding completing the project in accordance with their amended contract, Brown basically blew him off with the statement that he had other jobs with which he was involved (see, R. pp. 196-219; see also, R. p. 112). This was another huge red flag for the Appellant that Brown was not set up and had inadequate resources to perform the contracted for work in a timely manner. Notwithstanding Brown's extensive delays, and the Appellant's own discovery that the addition to his premises was not being constructed in accordance with the conceptual plan which he believed he had communicated to Brown, (he never reviewed the actual plans with Brown) as well as countless other problems with Brown's work, all of which were known to the Appellant, the Appellant allowed Brown to continue to work (see, R. pp.82-88). Further, as the project dragged on month after month, Appellant continued to pay Brown without notifying Brown that he considered the work defective (see, R. pp. 196-219). This went on to the point where the Appellant had paid Brown basically ninety percent (90%) of the contracted for price, and the evidence shows that the Appellant clearly had innumerable opportunities during this time to terminate Brown's services and complete the project in a timely and proper fashion, but failed to exercise the degree of care that a reasonable man would have exercised under the facts and circumstances then existing.

The acts of Respondents Baroni and ACCI, having consisted solely in offering to help

Brown get a permit **if he obtained proper plans and specs and came back with such information for Baroni to review**, and having occurred at the very inception of this matter, after the Appellant had contracted with Brown, pale in comparison to the negligence of the Appellant in not adequately investigating Brown's credentials, and then once problems arose, first with the obtaining of a permit, and then with the actual performance by Brown not terminating his services. The Appellant, without question, had countless opportunities to avoid the damages suffered in this matter, or to significantly mitigate the same, had he only exercised reasonable care and prudence once problems began to occur (see, R. pp. 196-219). These problems not occurring all at one time, but over an extended period of time, the Appellant had multiple opportunities to either totally avoid, or certainly mitigate his damages in this matter, and failed to do the same. As such, the Appellant's negligence clearly outweighs any negligence on the part of Respondents Baroni and ACCI, and thus, under the comparative negligence rule, the Appellant is barred from collecting from the Respondents.

IX. THE TRIAL COURT DID NOT ERR IN EXCLUDING THE LLR'S INVESTIGATIVE SUMMARY REPORT, AS IT IS PRIVILEGED UNDER SC CODE OF LAWS § 40-1-190.

First and foremost, the Appellant did not preserve this issue in his motion to reconsider, and thus, is barred from raising this issue on appeal. Moreover, the Respondent would assert that the IRC Summary Report is privileged information. Pursuant to S.C. Code of Laws § 40-11-190, "[i]nvestigations and proceedings conducted under this chapter are confidential and all communications are privileged as provided in Section 40-1-190." S.C. Code of Laws § 40-1-190 states, "[a] communication, whether oral or written, made by or on behalf of a person, to the director or board or person designated by the director or board

to investigate or hear matters relating to discipline of a licensee, . . ., is privileged and no action or proceeding, civil or criminal, may be brought against the person, by or on whose behalf the communication is made." While Respondents turned over the summary report pursuant to discovery requests, such production does not equal a waiver of the statutory privilege against such being used in a civil action against that person.

The IRC Summary Report was clearly part of the investigation by the LLR against Respondents Baroni and ACCI, and therefore, privileged under the statutory scheme of S.C. Code of Laws § 40-11-190 . Even if this Court finds that the IRC Summary Report is not privileged, such that it should have been admitted into evidence, the failure to admit it was not prejudicial, as the multitude of other evidence and testimony provided by Brown and Respondents Baroni and ACCI to the Trial Court clearly support the Order.

CONCLUSION

For the foregoing reasons in accordance with applicable law, the Respondents respectfully submit that the Appellant's Appeal be denied.

Respectfully submitted,

December 23, 2011

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of Common Pleas

The Honorable Marvin H. Dukes, III

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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.,.....Defendants,

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

CERTIFICATE AND PROOF OF SERVICE

I certify that I have served the Respondents' Final Brief on the Appellant, by depositing a copy thereof in the United States Mail, postage prepaid, this 4th day of January, 2012, addressed to his counsel of record at: Post Office Box 22561, Hilton Head Island, South Carolina 29925.

January 4th, 2012

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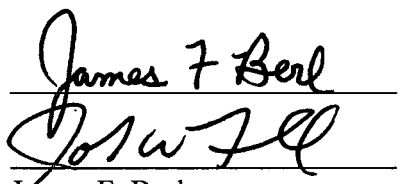
CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Respondents' Final Brief complies with Rule 211(b), SCACR.

January 9, 2012



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