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 REPLY BRIEF OF APPELLANT

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I. THE RESPONDENTS' STATEMENT OF THE CASE, LIKE THE FINAL RULING OF THE TRIAL COURT, IS PARADOXICAL.

The Statement of the Case found in the Respondents' Initial Brief (the "Brief") highlights the paradox inherent in both the Respondents' arguments and the trial court's Final Judgment Order, dated May 21, 2010 (the "Order") (R. pp. 3-27): although the Respondents contend that Baroni "merely admitted that his conduct constituted sufficient grounds for disciplinary action" (Respondents' Brief, p.1) – which necessarily presumes that Baroni engaged in misconduct (otherwise, there would be no "grounds for disciplinary action") – they nevertheless stop short of identifying such conduct.[1] However, as the findings of the Investigative Review Committee (IRC) and the Consent Agreement (R. pp. 183-187) entered into by the Respondents clearly reflect, that conduct was, in fact, license lending with Jamie Brown. The Respondents' arguments and the Order's findings to the contrary are simply not sustainable when exposed to even mild scrutiny.

II. DESPITE THE TRIAL COURT'S HOLDING OTHERWISE, BOTH THE RESPONDENTS' BRIEF AND THE TRIAL COURT'S ORDER REFLECT THE ADMISSIONS MADE BY THE RESPONDENTS OF ENGAGING IN LICENSE LENDING.

The Respondents' contention at page 2 of their Brief that Jamie Brown's testimony "clearly supports the Order as it reflects Baroni's initial refusal" to assist Brown, while

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[1]The closest the trial court comes to identification of such conduct is found on page 23 of its Order (R. p. 25), where the trial court makes a vague reference to Respondent Baroni having been disciplined by the State Contractor's Licensing Board for his "minimal discussions with Brown".

antithetical to the Respondents' earlier position,[2] may be accurate as far as it goes; however, although Respondent Baroni might have "initially" attached some conditions to ACCI's assistance, he ultimately relented and, as he admitted to the S.C. Department of Labor, Licensing and Regulation's Contracting Board (the "LLR"), an administrative tribunal, he and ACCI engaged in license lending with Brown.

On page 4 of their Brief, the Respondents cite a critical line from Respondent Baroni's letter of July 12, 2006, to wit: ". . . ACCI did tell Mr. Brown we could use my license number to perform . . . a small job . . .". (R. p. 174) Again, this is both accurate and directly in line with the LLR's findings, the trial evidence, testimony submitted by Jamie Brown and by Respondent Baroni's own admission. The fact that Respondents acknowledge in their Brief that ACCI never reviewed drawings, submitted no application to the Town of Hilton Head, never paid for a permit, and was not aware that work was being performed merely goes to the issue of ACCI's failure to supervise Jaime Brown once ACCI lent its license to him for the Appellant's project. What such acknowledgment does not do, however, is detract from Respondent Baroni's clear admission that he and ACCI engaged in license lending with Jamie Brown.

III. THE RESPONDENTS' PROFESSED INABILITY TO COMPLY WITH SOUTH CAROLINA LAW IS IMMATERIAL.

While the Respondents assert, at page 5 of their Brief, that common sense will not allow one to work full time for two employers in the construction field, this argument simply

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[2]*See* Footnote 5 below.

ignores that dictates of S.C. Code § 40-11-240(A).[3] Whether the Respondents are incapable of complying with state law neither supports their arguments nor explains the erroneous Order by the trial court.

IV. THE ISSUE OF THE SUFFICIENCY OF THE APPELLANT'S MOTION TO CONFORM HIS PLEADINGS TO THE EVIDENCE HAS BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW.

The Respondents' reliance on *Wilder Corp. v. Wilke,* 330 S.S. 71, 76, 497 S.E.2d 731, 733 (1998) (Brief, page 6) – apparently for the proposition that the Appellant is prohibited from arguing that his pleadings should have been amended post-trial to conform to the evidence, because the Appellant's motion for reconsideration does not reference this issue – is misplaced. The Appellant, subsequent to the trial, specifically moved, to the extent necessary, to have the pleadings conform to the evidence presented. (R. pp. 189-191) The trial court apparently ruled on the Appellant's motion in this regard, so there was no need to address the same in his motion for reconsideration.[4] "Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it." *Wilder Corp.* at 77. The Respondents' argument to the contrary is meritless.

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[3]This section sets forth, in pertinent part: "(A) To qualify for licensure, an entity must: . . . (2) **have a certified qualifying party in full-time employment in a responsible management position** . . . ." It is undisputed that Respondent Laughlin was the qualifying party for Respondent ACCI's license, and that he was not a full-time employee in a responsible management position at ACCI.

[4]*See* Order, ¶4 (R. p. 15): "Even if the Court had conformed the pleadings to the evidence . . ."

V. THE ISSUE OF WHETHER THE RESPONDENTS' ACTIONS VIOLATED SOUTH CAROLINA LAW HAS BEEN PRESERVED FOR APPELLATE REVIEW.

The Respondents' arguments, found on pages 8 and 11 of their Brief, to the effect that the Appellant is barred from basing his cause of action for negligence *per se* on the Respondents' admission of engaging in license lending is unavailing; the issue of the various statutes violated by the Respondents was tried by consent, and the trial court ruled on the matter, preserving the issue for appellate review. The Respondents have not cross-appealed from the trial court's Order in this regard and cannot now assert the Appellant is so barred.

VI. THE EXCEPTIONS TO THE COLLATERAL ESTOPPEL RULE ARE INAPPLICABLE IN THIS CASE.

The Respondents' citation of the various exceptions to the collateral estoppel rule are irrelevant, as such exceptions do not apply here. The evidence is overwhelming that Respondents Baroni and ACCI were fully aware that they could have litigated the issue of license lending before the LLR and, moreover, that: they consented to the disciplinary findings of the LLR, and that with the Consent Agreement (R. pp. 183-187), the LLR found that they had engaged in license lending(R. p. 149, lines 12-14); Baroni knew he was admitting to the violation, he understood he was consenting to the LLR's punishment, and that he was waiving any further Conclusions of Law from the LLR (R. p. 150, lines 7-17); and that he understood and had full knowledge of his right to ask for a hearing (R. p. 144, lines 6-11; R. p. 151, lines 1-14), but did not do so. Moreover, the Respondents' argument

that the State Contractors Licensing Board did not adjudicate whether Respondents Baroni and ACCI lent the license to Jamie Brown is likewise unavailing, given that Baroni and ACCI voluntarily entered into a consent order which specifically found that they had engaged in license lending with Brown.

VII. THE EVIDENCE DOES NOT SUPPORT THE RESPONDENTS' ARGUMENT, OR THE TRIAL COURT'S FINDING, THAT RESPONDENTS BARONI AND ACCI HAD NO INCENTIVE TO DEFEND THE LLR MATTER.

The Respondents' contention, at page 15 of their Brief, that "Respondent Baroni did not have an incentive to defend the issue during the LLR proceeding" because he was "unaware that the issue of license lending would arise" is simply wrong. Note the following sequence of events:

- On June 11, 2007, the Appellant filed his original complaint (R. pp. 37-44) against both Brown and ACCI, alleging that "Defendant Brown entered into an agreement with the Corporate Defendant (ACCI) whereby it would allow Defendant Brown to use its general contractor's license to, upon information and belief, to pull down the permit for the project" (R. p. 38).
- On June 19, the original complaint was served on ACCI.
- On July 2, the LLR's IRC Summary Report (R. pp. 176-182) was generated, which found that Respondents ACCI and Baroni had engaged in license lending, based upon the admissions of Respondent Baroni.
- On July 18, Respondent ACCI served its answer (R. pp. 53-54) to the original

complaint (R. pp. 37-44), wherein it asserted that "ACC [sic] agreed, preliminarily, to let Defendant Brown use ACCI's license . . .". (R. p. 53) Note that this response is not inconsistent with the findings in the IRC Summary Report from two weeks prior.[5]

- On August 10, the Appellant served Respondent ACCI with its First Request for Production (R. pp. 57-62), which sought, among other items, copies of any "statements or other correspondence" given by ACCI (R. p. 58), and copies of any and all documents "related to the construction at issue".(R. P. 61)
- On August 27, Respondents ACCI and Baroni entered into the consent agreement admitting that they had engaged in license lending with Brown.
- On October 7, Respondent ACCI, by and through Baroni,[6] answered the Appellant's Request for Production. (R. pp. 63-64) The Respondents failed to disclose either the consent agreement with the LLR or the IRC Summary Report.

The chronology above clearly reflects that, not only was Respondent Baroni aware that the issue of license lending had already arisen in the Appellant's original Complaint at the time Baroni admitted to the same before the LLR, but Baroni failed to produce evidence

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[5]It is also interesting to note that this response is the converse of the aforesaid declaration from page 2 of the Respondents' Brief: "This testimony presented by Brown clearly supports the Order as it reflects ***Baroni's initial refusal to assist Brown***." (Emphasis supplied.)

[6]Respondent Baroni was now apparently acting *pro se* at this point, as the Respondents' first counsel had moved to be relieved.

of such in response to the Appellant's discovery requests. For the Respondents to come along at this late date and attempt to rewrite the history of this case to support the trial court's Order is disingenuous, at best.

XV. THE TRIAL COURT'S FINDING OF COMPARATIVE NEGLIGENCE ON THE PART OF THE APPELLANT IS INCONSISTENT WITH ITS AWARD OF SIGNIFICANT DAMAGES AS AGAINST JAMIE BROWN.

As a preliminary matter, the Respondents's reliance, at page 23 of their Brief, upon the import of Jamie Brown's default in this case is misplaced. Given the evidence of license lending among the parties (not to mention Brown's own, written admission of the same[7]), Brown's acknowledgment that he performed the construction work at issue, and the overwhelming evidence of Brown's shoddy work product, it is unlikely that the trial court would have reached a different result regarding Brown's liability had he timely answered, in any event. Moreover, despite his default, Jamie Brown was present throughout the entire two-day trial and cross-examined witnesses regarding the Appellant's damages.

Nevertheless, the trial court awarded the Appellant significant monetary damages stemming from the substandard construction work. Jamie Brown would not have been able to perform such work without pulling down the building permit; Brown would have not been able to pull down the building permit without the use of Respondent ACCI's license; Respondents ACCI and Baroni were found to have lent the said license directly to Brown, and, further, admitted to lending such license. Thus, the trial court's ruling on comparative

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[7]*See* Brown's handwritten first draft of his July 20, 2007 letter to the Appellant. (R. pp. 171-173)

negligence is incongruous: if the Appellant's supposed failure to adequately investigate Brown prior to the commencement of the project was a significant enough "breach of duty" to defeat the Respondents' breach of duty (that is, lending the license to Brown and then failing to supervise him),[8] then such comparative negligence should have been more than sufficient to reduce the Appellant's damages as against Brown, who was only able to do the work with the Respondents' admitted collaboration.

XVI. THE ISSUE OF WHETHER THE LLR's IRC SUMMARY REPORT WAS PROPERLY EXCLUDED BY THE TRIAL COURT HAS BEEN PRESERVED FOR APPELLATE REVIEW.

The Respondents' argument at page 27 of their brief regarding the LLR's IRC Summary Report is unavailing. The Appellant is not required to preserve any issue relating to this Summary Report in his motion to reconsider, given that the court ruled against the Appellant at trial when he raised the issue by attempting to admit a copy of the report into evidence. The court's ruling at trial preserved the issue for appellate review. "In matters of appeal, so far as it appears, all that this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower Court and passed upon by that Court." *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939). The Respondents' argument to the contrary is simply incorrect.

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[8]It should be noted that, not only have the Respondents failed to demonstrate the legal basis for the Appellant's alleged duty to go behind Jamie Brown and confirm his licensing, but no such case law or statutory requirement is set forth in the trial court's Order. (R. pp. 3-27)

CONCLUSION

For the reasons contained hereinabove, as well as those found in Appellant's Initial Brief, the trial court's Final Judgment Order, dated May 21, 2010, should be reversed.

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CERTIFICATE OF COUNSEL

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

December 30, 2011

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