THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Appellate Case No. 2011-202946

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Rivers Lawton McIntosh, Circuit Court Judge

Alexander S. Macaulay, Circuit Court Judge and Trial Judge

Civil Action No.: 2005-CP-37-00788

Tri-County Development, Inc. and
Melinda Holbrooks,.....Respondents.

v.

Christopher A. Pierce,.....Appellant.

Christopher A. Pierce, ...Third Party Plaintiff,

v.

Jeff Gray.....Third Party Defendant.

AND

Tri-County Development, Inc. and Melinda Holbrooks,..... Respondents,

v.

Christopher A. Pierce,.....Appellant

AMENDED INITIAL REPLY BRIEF OF APPELLANT

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I. RESPONDENTS TRI COUNTY AND JEFF GRAY WERE UNLICENSED BUILDERS AND IT WAS CLEAR ERROR FOR THE TRIAL JUDGE TO ALLOW THE ENFORCEMENT OF THE CONTRACT AS A MATTER OF LAW.

A. The Licensing Issue is Properly Preserved for Review.

Respondents assert that the failure by Appellant to renew his directed verdict motion as to the licensing issue at the close of his case results in the issue not being properly preserved for review under Stephens ex. rel. Lillian C. v. CSX Transp., 2012 WL 3025097 (Ct. App. 2012).

In State v. Rosemond, 560 S.E.2d 636, 348 S.C. 621 (Ct. App. 2002), the Court of Appeals considered whether the denial of a motion for directed verdict was properly preserved for review where defense counsel, after the prosecution rested, moved for a directed verdict as to strong arm robbery. After the denial of the motion, the trial court specifically asked defense counsel whether he had any motions, and counsel responded: "just renew my previous objections." Id. at 639-640. On appeal, the Court noted that it was "arguable" that the directed verdict issue was not preserved since defense counsel did not specifically renew his directed verdict motion, but rather made a general reference to renewing his "previous objections." Id. The Court, however, held that "the issue was properly preserved by reference to the original motion for directed verdict" and elected to "address the merits."

Similarly, while arguably having failed to technically renew the directed verdict motion, did, in fact, present it again to the Court at the charge conference, when he again argued that the Court should charge the licensing statues, stating that "as far as [sections] 40-11, the LLR specifically identifies those sections as applying to the Plaintiffs in my

case. I was advised by them that they did. That's all I would have to say on that." (Trial Tr., R. pp. 331-2). Furthermore, in his closing argument, Appellant further stated, over objection, "in closing, I would say to you that it is undisputed that Jeff Gray, the plaintiff here, is an unlicensed residential building contractor. Jeff Gray owns unlicensed Tri-County Development - - " (Trial Tr., R. p. 339).

Similarly, while the Appellant, as a *pro se* litigant, may not be entitled to special treatment by the trial court and is tasked with responsibility for his case regardless of whether represented by counsel, it is certainly shown in the trial transcript that Appellant repeatedly sought to introduce the licensure issue and repeatedly sought to have the licensure issue charged to the jury. In short, the licensure issue was always front and center in Appellant's case. Accordingly, Appellant would assert that by referring to the licensure issue repeatedly after his initial directed verdict motion, the motion was "renewed" in form, if not fact.

B. Denial of Appellant's Motion for Directed Verdict Was Clear Error.

Appellant explored the licensing issue in great detail within its Amended Initial Brief and would rely upon same in responding to Respondents' position that they were either in "substantial compliance" with the licensing requirements and/or that Respondents Tri County and Jeff Gray, despite presenting themselves as the general contractor in charge of building Appellant's home and entering into a contract for same, were, in fact, not the contractor on the job but were merely engaged in a "de facto joint venture" with Melinda Holbrooks. Respondents assert that Appellant seeks to elevate "form over function" and that they were in "substantial compliance" with the licensing requirements. The scenarios are inapposite to South Carolina law, and for good reason.

As noted in the Initial Brief, Tri-County can certainly act as an (unlicensed) general contractor and build "spec" homes on property owned by it, using a licensed subcontractor for the construction. In this scenario, if something goes wrong, the unlicensed property owner has only himself to sue. See S.C. Code Ann. §40-59-260. This is a classic example of "to each his own" and reflects the legislature's interest in preserving landowners' rights to do what they wish with their land. However, when third parties – read, members of the general public a/k/a "consumers"- require contracting services, the law is clear: unlicensed contractors may not bring actions to enforce contracts for residential contracts.

S.C. Code §40-59-30(B), as it read when the Contract at bar was entered into in 2004, states[1]:

> A person or firm who has not first procured a license may not bring an action at law or in equity to enforce the provisions of a contract for residential building or residential specialty contracting which the person or firm entered into in violation of this chapter.

S.C. Code §40-59-30(B) as it existed at the time the Contract was entered into prohibits an unlicensed home builder such as Tri-County from "bring[ing] an action in law or equity to enforce the provisions of a contract for residential building...."

Respondents admit that the only person or entity who possessed South Carolina licensure was Melinda Holbrooks. Respondents admit that Holbrooks was neither an owner, officer, or employee of Tri-County. Respondents admit that Holbrooks received a

[1] S.C. Code §40-59-30(B) was amended effective June 2, 2009 to read as follows: "(B) Notwithstanding Section 29-5-10, or another provision of law, a person or firm who first has not procured a license or registered with the commission and is required to do so by law may not file a mechanics' lien or bring an action at law or in equity to enforce the provisions of a contract for residential building or residential specialty contracting which the person or firm entered into in violation of this chapter."

1099 for Pierce's job, and further admit that Holbrooks was "paid in full" for the Pierce job. In short, Holbrooks was a classic "subcontractor" on the job. However, while this arrangement may have worked for building "spec" homes on TriCounty or Gray's own property, it simply cannot pass muster under South Carolina law requiring that entities and individuals hold licenses when building homes for members of the general public. Whether acting as a general contractor or a residential home builder, Respondents cannot avoid the plain language of sections 40-59-30 and 40-11-330 of the South Carolina Code of Laws – they must have licenses to enter into contracts for the construction of homes for the public. Simply employing a subcontractor with a license – as Melinda Holbrooks was – is insufficient.

Respondents argue that they are entitled to have their contract honored under a "substantial compliance" theory. In Burry & Son Homebuilders, Inc. v. Ford, 426 S.E.2d 313, 310 S.C. 529 (1992), the Appellant sought to enforce a contract for the construction of a home against the owner by filing suit, asserting that it was entitled to recover even though LLR testified that he was unlicensed. The court granted the homeowner's motion for summary judgment as to the Burry's complaint, finding as a matter of law that Burry was unlicensed and therefore could not bring an action to enforce the contract. Id. at 314-315.

On appeal, Burry argued that because he employed **licensed** employees, he was in "substantial compliance" with S.C. Code Ann. §40-59-130. The Supreme Court rejected this argument, noting that "**the mandate of this statutory provision is clear and umambiguous" and reasoning that "to allow recovery under these facts would fail to**

provide any protection to the homeowners and, therefore, undermine the purpose of the statute." (emphasis added).

Similarly, here Tri-County and Jeff Gray allege that because they employed Melinda Holbrooks (who was, in fact, licensed), they are entitled to a "pass" on the licensing requirement because of "substantial compliance." The evidence before the court, outlined extensively in the Initial Brief [2], shows that Tri County was the face, contact, and decision-maker on Appellant's home from start to finish and in no way took on a lesser role in the project. The evidence before the Court also that Tri County was identified, correctly, as the "contractor" in the Contract. In short, if an argument for "substantial compliance" is validated by this Court, the licensing statutes will be rendered meaningless and the consumer protections tossed aside. The licensing statutes do not "elevate form over function" as Respondents assert; rather, they play a key role in ensuring that only licensed contractors can enforce contracts for residential construction.

C. The failure to charge the jury on the LLR statute was clear error.

Respondents argue that the judge properly refused to charge §40-59-30(B) and, furthermore, that it was not properly preserved for review.

First, the Honorable R. Lawton McIntosh, in his order dated August 16, 2011 (and letter of December 21, 2010), ruled that the licensure issue was a question of fact for the jury. By failing to charge the jury on the licensing statutes, the trial court ignored the ruling of Judge McIntosh and severely prejudiced the Appellant's case. The issue is preserved by virtue of Judge McIntosh's Order, and also through the actions of

[2] See, e.g., Amended Initial Brief at pp. 8-9 (Jeff Gray dealt directly with subcontractors; dealt directly with Chris Pierce; ordered cabinets, plumbing, and electrical supplies) and a pp.17-18 (Jeff Gray testified that his role was to line up subcontractors, and to pay them, and to oversee to make sure the work was performed before they got paid)

Appellant, who, throughout the trial, sought to introduce the licensing issue again and again, as outlined extensively in the Initial Brief. Additionally, he moved for directed verdict on the licensing issue, and also sought to argue it in his closing argument, over the Court's objection. In short, Appellant's objections and arguments were "renewed" again and again, but ignored. Appellant clearly requested that the licensing charge be included and the fact that he took no exception to the charges as read does not change the fact that he asked the charge to be included and that it was denied.

II. JUDGE MACAULAY'S RULING SETTING ASIDE THE ENTRY OF DEFAULT WAS NOT HARMLESS ERROR.

As a threshold issue, Judge Macaulay had no authority to reverse the decision of Judge Maddox as thoroughly set forth in Section III of Appellant's initial brief. *See* Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979); Sheppard v. Kimbrough, 282 S.C. 348, 318 S.E.2d 573 (Ct. App. 1984); State ex. rel. Medlock v. Love Shop Ltd., 286 S.C. 487, 334 S.E.2d 528 (Ct. App. 1985).

Second, Appellant notes that Respondent provides no argument or authority to support its statement that vacating the entry of default and overturning Judge Maddox's motion to reconsider was not an abuse of discretion. Respondent simply argues that if it was an abuse of discretion, that it was harmless error. A default judgment against an individual can hardly be deemed so inconsequential.

In support of its position, Respondent argues that Appellant did not present any evidence at trial that Jeff Gray was personally liable and could not because Jeff Gray had no contract with Appellant. This is the very reason why the ruling was prejudicial. Without the default judgment, Appellant had a very difficult time presenting evidence that Jeff Gray was personally liable to him. With the default judgment, he had to present

no such evidence. The prejudice is that by vacating the entry of default, Appellant was then unable to prove liability against Jeff Gray personally. As a result, this Court should reverse Judge Macaulay's ruling vacating the entry of default against Jeff Gray.

III. SUMMARY JUDGMENT WAS IMPROPER GIVEN THAT THE CONTRACT WAS AMBIGUOUS AND THE LICENSING ISSUE WAS PROPERLY FOR THE JURY

The circuit court granted summary judgment to the Respondents on their breach of contract claim, despite the fact that one of the parties to the contract, Melinda Holbrooks (identified in Respondents' brief as a "*de facto joint venturer*" of Tri-County) testified unequivocally that she was "paid in full", thereby creating a question of fact for the jury. Furthermore, the contract itself – which alternately designates both Tri-County and Melinda Holbrooks as the general contractor – is ambiguous on its face and therefore the construction and enforcement of the contract is for the jury. See Middleborough Horizontal Property Regime vs. Montedison, S.p.A., 465 S.E.2d, 320 S.C. 470 (Ct. App. 1995). Finally, testimony from all the parties indicated differing views as to whether the contract was breached, and by whom. Respondents argue that the finding of the circuit court that that "there was no material issue of fact that exists that Appellant breached the contract" was "harmless error", See Resp. Amend. Initial Brief at p. 12, and that the real problem was Appellant's failure to submit evidence of damages. However, this is putting the cart before the horse. The real issue was whether liability under the contract was properly decided at the summary judgment stage – given the conflicting testimony and evidence, along with the pending issue of whether Respondents could even bring suit on the contract given their lack of licensing.

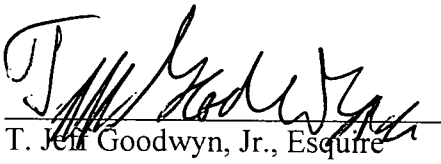
IV. THE AWARD OF ATTORNEY'S FEES AND COSTS MUST BE VACATED IN THE EVENT THE UNDERLYING JUDGMENTS ARE VACATED BY THE COURT.

Appellant submits that in the event the underlying judgments are vacated, then the Respondents could no longer be considered the "prevailing party" under the Mechanic's Lien statute, S.C. Code Ann. §29-5-10, and, accordingly, the award of fees, costs, and prejudgment interest must be reversed.

CONCLUSION

For the reasons set forth in his Amended Initial Brief, and incorporated herein, the Appellant respectfully requests that the Court reverse the rulings of the lower courts, remand the case for a new trial, enter judgment in his favor on the breach of contract claim, and reinstate the entry of default judgment against Jeff Gray, plus such other and further relief as this Court may deem just and proper.

Respectfully Submitted,



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June 27, 2014

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PROOF OF SERVICE

I certify that I have served the **Amended Initial Reply Brief of Appellant** on Thomas E. Dudley, III, Esquire, Attorney for the Respondents at the address below by depositing a copy of same in the United States Mail, postage prepaid, on June 27, 2014.

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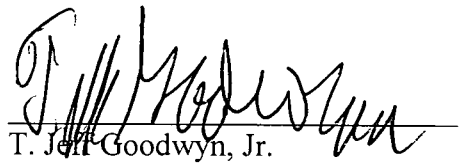

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June 27, 2014

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RE: *Tri-County Development, Inc. and Melinda Holbrooks v. Christopher A. Pierce; Christopher A. Pierce v. Jeff Gray and Tri-County Development, Inc. and Melinda Holbrooks v. Christopher A. Pierce*
Civil Action No.: 2005-CP-37-00788
Appellate Case No.: 2011-202946
Our File No.: 3500-0014

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of the Amended Initial Reply Brief of Appellant, along with the Proof of Service, in regard to the above-referenced matter. Please return a clocked-in copy to me in the self-addressed stamped envelope provided.

By copy of this letter and as evidenced by the attached Proof of Service, I am serving a copy of the Amended Initial Reply Brief on Thomas E. Dudley, III, Esquire, counsel for the Respondents.

Please accept my highest regards.

Sincerely,

T. Jeff Goodwyn, Jr.

TJG/msb
Enclosure
cc: Thomas E. Dudley, III, Esquire
Chris Pierce