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

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SC Court of Appeals

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

FINAL AMENDED BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities....................ii

Statement of Issues on Appeal....................1

Statement of the Case....................2

Statement of the Facts....................5

Argument....................10

1. The trial judge erred in denying Appellant's directed verdict motion based on the licensing of Tri-County and the prohibition on bringing such actions S.C. Code § 40-59-30 imposes on unlicensed builders....................10

2. The Circuit Court erred in setting aside the default of Jeff Gray as it was both an abuse of discretion to do so and an impermissible action since it overruled a different judge's ruling on the same issue....................21

3. The trial judge erred in refusing to submit the licensing issue to the jury and refusing to charge the jury on the licensing requirements for residential home builders in South Carolina....................25

4. The Circuit Court erred in granting summary judgment on the breach of contract claim as to liability where there was conflicting evidence and testimony as to what the contract terms were and what subsequent agreements between the parties existed....................29

5. The Award of Attorney's Fees and Cost Must Be Vacated in the Event the Underlying Judgments are Vacated by the Court As Respondents Would Not Be the "Prevailing Party" Under the Mechanic's Lien Statute....................32

Conclusion....................33

TABLE OF AUTHORITIES

CASES

Buffkin v. Strickland, 280 S.C. 343, 312 S.E.2d 579 (Ct. App. 1984)................17

Columbia Pools, Inc. v. Moon, 284 S.C. 145, 325 S.E.2d 540 (1985)................12

Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979)..................................26, 27

Duckworth v. Cameron, 270 S.C. 647, 244 S.E.2d 217 (1978)........................12

Hayne Federal Credit Union v. Bailey..15

Henderson v. Evans, 268 S.C. 127, 232 S.E.2d 331 (1977)............................12

Middleborough Horizontal Property Regime v. Montedison, S.p.A., 465 S.E.2d 765, 320 S.C. 470 (Ct. App. 1995)..31

Moore v. Moore, 360 S.C. 240, 599 S.E.2d 467 (Ct. App. 2004)..................16, 27

Quinn v. The Sharon Corp., 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000).........15, 23

Roberts, Inc. v. Trust, 274 S.C. 53, 260 S.E.2d 818 (1979)............................12

Sheppard v. Kimbrough, 282 S.C. 348, 318 S.E.2d 573 (Ct. App. 1984).............26

State ex. rel. Medlock v. Love Shop Ltd., 286 S.C. 487, 334 S.E.2d 528 (Ct. App. 1985)..26

Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885, 888 (2009)..27, 29

Terry v. Brasher, 207 S.E.2d 82, 262 S.C. 639 (1974)..................................18

Wagner v. Graham, 296 S.C. 1, 370 S.E.2d 95 (1988)..................................12, 13

Watson v. Harmon, [280 S.C. 214, 312 S.E.2d 8 (1984)................................12

Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989)..28

Williamsburg Rural Water and Sewer Co. Inc. v. Williamsburg County, 593 S.E.2d 154, 357 S.C. 251 (Ct. App. 2003)....................4, 12

Wyman v. Davis, 223 S.C. 172, 74 S.E.2d 694 (1953)....................16

STATUTES

S.C. Code Ann. §29-5-10....................5, 11, 32

S.C. Code Ann. §33-41-210....................15

S.C. Code Ann. §40-11-330....................8, 14

S.C. Code Ann. §40-59-5, et. seq....................10, 12, 23

S.C. Code Ann. §40-59-20....................10, 19, 21

S.C. Code Ann. §40-59-20(6)....................11, 19

S.C. Code Ann. §40-59-30....................1,4,10-13,19, 21-22, 24

S.C. Code Ann. §40-59-105....................19

S.C. Code Ann. §40-59-130....................12

S.C. Code Ann. §40-59-260....................5, 17

Rule 55, SCRCP....................25, 26, 29

Rule 55(c), SCRCP....................27, 28

OTHER AUTHORITIES

Black's Law Dictionary....................20

TABLE OF AUTHORITIES

CASES

Buffkin v. Strickland, 280 S.C. 343, 312 S.E.2d 579 (Ct. App. 1984)................17

Columbia Pools, Inc. v. Moon, 284 S.C. 145, 325 S.E.2d 540 (1985)................12

Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979)..................................26, 27

Duckworth v. Cameron, 270 S.C. 647, 244 S.E.2d 217 (1978)........................12

Hayne Federal Credit Union v. Bailey...15

Henderson v. Evans, 268 S.C. 127, 232 S.E.2d 331 (1977)............................12

Middleborough Horizontal Property Regime v. Montedison, S.p.A., 465 S.E.2d 765, 320 S.C. 470 (Ct. App. 1995)...31

Moore v. Moore, 360 S.C. 240, 599 S.E.2d 467 (Ct. App. 2004)......................16, 27

Quinn v. The Sharon Corp., 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000).........15, 23

Roberts, Inc. v. Trust, 274 S.C. 53, 260 S.E.2d 818 (1979)............................12

Sheppard v. Kimbrough, 282 S.C. 348, 318 S.E.2d 573 (Ct. App. 1984)............26

State ex. rel. Medlock v. Love Shop Ltd., 286 S.C. 487, 334 S.E.2d 528 (Ct. App. 1985)..26

Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885, 888 (2009)...27, 29

Terry v. Brasher, 207 S.E.2d 82, 262 S.C. 639 (1974)..................................18

Wagner v. Graham, 296 S.C. 1, 370 S.E.2d 95 (1988)..................................12, 13

Watson v. Harmon, [280 S.C. 214, 312 S.E.2d 8 (1984).................................12

Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989)..28

Williamsburg Rural Water and Sewer Co. Inc. v. Williamsburg County, 593 S.E.2d 154, 357 S.C. 251 (Ct. App. 2003)....................4, 12

Wyman v. Davis, 223 S.C. 172, 74 S.E.2d 694 (1953)....................16

STATUTES

S.C. Code Ann. §29-5-10....................5, 11,

32

S.C. Code Ann. §33-41-210....................15

S.C. Code Ann. §40-11-330....................8, 14

S.C. Code Ann. §40-59-5, et. seq....................10, 12, 23

S.C. Code Ann. §40-59-20....................10, 19, 21

S.C. Code Ann. §40-59-20(6)....................11, 19

S.C. Code Ann. §40-59-30....................1,4,10-

13,19, 21-22, 24

S.C. Code Ann. §40-59-105....................19

S.C. Code Ann. §40-59-130....................12

S.C. Code Ann. §40-59-260....................5, 17

Rule 55, SCRCP....................25,

26, 29

Rule 55(c), SCRCP....................27, 28

OTHER AUTHORITIES

Black's Law Dictionary....................20

STATEMENT OF ISSUES ON APPEAL

1. **Did the trial court err in denying Appellant's Motion for Directed Verdict based on S.C. Code §40-59-30 relating to Tri-County's status as an unlicensed builder?**

2. **Did the trial court err in refusing to give a jury charge on the contractor licensing requirements set forth in S.C. Code §40-59-30?**

3. **Did Judge Macaulay err in setting aside the default of Jeff Gray *sua sponte* as a discovery sanction?**

4. **Did Judge Macaulay err in granting summary judgment on the issue of liability when a genuine issue of material fact existed on this issue?**

5. **Whether the order awarding attorney's fees and costs entered by Judge Macaulay must be overturned in the event the underlying judgments are vacated?**

STATEMENT OF THE CASE

Respondents Tri-County Development, Inc. ("Tri-County") and Melinda Holbrooks filed a mechanic's lien on the home it had contracted to construct for Appellant Christopher A. Pierce ("Pierce") on September 26, 2005 after a dispute arose very close to the end of construction. (R. pp. 451 – 452). The lien was signed by Jeff Gray, a principal of Tri-County. Id. Tri-County and Holbrooks also filed a lawsuit on September 26, 2005, to enforce the mechanic's lien, (R. pp. 39-42), and Pierce subsequently filed a third-party Complaint against the owner of Tri-County, Jeff Gray ("Gray"). (R. pp. 51-85). It is undisputed that neither Tri-County nor Gray were licensed builders at the time the lien and lawsuit were filed.

Gray was properly served, but failed to timely answer, the third-party Complaint filed by Pierce and an Order for Judgment by Default was signed by the Honorable Alexander Macaulay and filed on September 26, 2006. (R. pp. 1-2). Gray ultimately retained an attorney whose motion to set aside the Order of Default which was denied by the Honorable J. Cordell Maddox, Jr. (R. p. 3).

Shortly thereafter, Pierce's attorney was forced to withdraw from the case for reasons unrelated to the case and Pierce remained unrepresented from that point forward. Pierce did not immediately file for a hearing on damages against Gray. Tri-County and Holbrooks were forced to retain alternate counsel as well. The case was extended much longer than would otherwise be expected due in part to delays related to the parties being without counsel. Many motions and discovery hearings were held, but for the purposes of this brief, only the hearings that are relevant to the issues on appeal are addressed.

A motions hearing was held April 6, 2009, before the Honorable Alexander S. Macaulay on Tri-County and Holbrooks' motion to compel discovery responses, among other motions from both parties. Tri-County and Holbrooks were asking the court for an order compelling Pierce to produce damage supports for the offset he was claiming. These were the same damages that Pierce would have presented at a damages hearing for his default judgment against Jeff Gray. There was no pending motion to vacate the Order of Default against Gray before Judge Macaulay at this hearing – such motion for relief having already been heard and denied by Judge Maddox. While Pierce contended that he was unaware of the specific discovery court, Judge Macaulay, in his order filed May 5, 2009, as amended, granted the motion to compel and vacated the order of default against Jeff Gray, *sua sponte*, as a sanction against Pierce for perceived discovery abuse. (R. pp. 5-7). Pierce filed an appeal to the Court of Appeals on this ruling and it was rejected as interlocutory in an order dated July 8, 2009. (R. pp. 11-12).

On November 1, 2010, the Honorable R. Lawton McIntosh heard Pierce's motions to dissolve the mechanic's lien and for summary judgment, along with Tri-County and Holbrooks' motions for summary judgment. In his order filed August 31, 2011, Judge McIntosh denied Pierce's motion to dissolve the mechanic's lien and summary judgment motion, ruling that the issue of the proper licensing (or lack thereof) of Tri-County and its ability to enforce the construction contract would be for the jury. Judge McIntosh did, however, find in the Plaintiffs' favor for breach of contract as to liability only. (R. pp. 21-32) (finding that "issues of fact exists (*sic)* as to whether the Plaintiffs were properly licensed" and therefore denying Defendant's motion for Summary Judgment "on that ground" and holding that "Plaintiffs are entitled to Judgment

as a matter of law as to liability only with the following caveat: the question of whether Defendant Holbrook and Tri-County Development, Inc. were properly licensed to enforce the contract . . . Defendant shall be allowed to attempt to establish a right to a set-off and the issue as to whether Plaintiff's (*sic)* were properly licensed.") Prior to the filing of the Order, Judge McIntosh wrote to the parties in December 2010 to reiterate his ruling on this issue, writing that "I am granting the Plaintiff's motion as to Defendant's liability only, with the following caveat: the question whether Defendant Holbrook and Tri-County Development are in a joint venture with regard to this project and whether Defendant Holbrook as properly licensed with the LLC may be properly challenged at trial as well as to the monies owed to the Plaintiff. Therefore, the Plaintiff will have to establish the amount of his damages at trial and the Defendant shall be allowed to establish the right to a set-off, if any, to challenge the existence of a joint venture and licensure." (R. p. 454).

The case was tried before a jury November 28-29, 2011 and at trial, Judge Macaulay permitted the case to go forward on the question of damages alone. Pierce raised the issue of the applicability of S.C. Code §40-59-30 multiple times during the trial and while Judge Macaulay ruled that Tri-County was not a licensed builder, he declined to find that Tri-County was therefore prohibited from enforcing the contract pursuant to §40-59-30, and refused to allow the issue go to the jury.[1] The jury returned a verdict of $23,591.07. (R. p. 36). Pierce filed a motion to reconsider which was denied. Respondents thereafter made a motion for attorneys' fees pursuant to S.C. Code Ann.

[1] It appears that Judge Macaulay may not have been aware of Judge McIntosh's specific ruling that the licensure issue, and attendant enforceability issue, were to be questions for the jury. Appellant would contend that Judge McIntosh's Order was the "law of the case" and it was clear and reversible error for the trial judge to refuse to submit the issue to the jury. See Williamsburg Rural Water and Sewer Co. Inc. v. Williamsburg County Water and Sewer Authority, 593 S.E.2d 154, 357 S.C. 251 (Ct. App. 2003) (noting that an unappealed ruling is the law of the case)

§29-5-10, seeking their fees plus pre-judgment interest. On March 26, 2013, Judge Macaulay entered an order awarding Respondents attorneys' fees and costs in the amount of $34,000, plus pre-judgment interest in the amount of $12,751.12. Petitioner's motion for reconsideration was denied. Following the trial of this case, Pierce retained the undersigned attorney and this appeal followed.[2]

STATEMENT OF THE FACTS

Tri-County is a corporation owned and operated by Jeff Gray that, until contracting to build Pierce's home, acted almost exclusively as a property developer. Tri-County is not a licensed home builder and Jeff Gray, its principal, holds no such license. Tri-County's business model involved purchasing property and then contracting with a licensed home builder, often Melinda Holbrooks, to construct "spec" home(s) on the property and then sell them to the general public. (R. p. 250, l. 14- p. 251, l. 12) Melinda Holbrooks is not an owner, officer, or employee of any type of Tri-County. Holbrooks owns and operated her own construction company with her husband Nathan Holbrooks called Holbrooks Construction. In their business dealings to that point, Jeff Gray with Tri-County would "put up the money and [the Holbrooks] would do all the work." (R. p. 252, lines 3-12)

In mid-2004, Pierce owned a vacant lot and was in the market to have a home constructed on the lot. He admired the homes he would see in the developments Tri-County was building in and decided to contact Tri-County about building a home on his lot. At Pierce's request, Pierce's father met with Jeff Gray to inquire about the construction of a home on Pierce's lot. Jeff Gray testified that Mr. Pierce's father

[2] The Respondents, upon receiving a favorable verdict, made a motion for attorney's fees and pre-judgment interest under the Mechanic's Lien Statute, and an Order awarding such was granted March 26, 2013 for an additional $46,751.12, but since this award was issued after this appeal was filed, this amount is not currently pending before this Court. However, Appellant reserves the right to appeal the award of attorney's fees in the event that this Appeal is denied in whole or in part.

"wanted to I guess basically use my services to build his son a home." (R., p. 52, lines 1-2)

There are no licensing requirements for the owner of a tract of land when he or she is contracting directly with a licensed builder to build a home (see S.C. Code §40-59-260). Neither Tri-County nor Jeff Gray personally were licensed residential builders and building a home for someone other than himself was something that Gray - and Tri-County - had never done. (R. p. 269, lines 2-11) His business model prior to building this home was to direct the construction activities of the Holbrooks, purchase materials as needed, pay the Holbrooks and all of the sub-contractors for their work, and oversee the projects. (R., p.250, l. 11 – p. 251, l. 12) Since Tri-County did not own Mr. Pierce's lot, it should have simply referred Pierce to Holbrooks. Instead, Tri-County and Jeff Gray chose to keep the proverbial "hand in the pot" and decided to become a party to the contract for the construction of Pierce's home, despite being unlicensed. Tri-County then entered into a contract to construct a home on Pierce's lot on July 24, 2004 (the "Contract"). (R. p. 440 – 450).

It is difficult to determine from the Contract who the actual parties are and what their respective duties and responsibilities are. Tri-County is defined as the "Contractor" in the Recitals on page one and Melinda Holbrooks is not mentioned in the recitals at all. The Contract does not identify anyone as a "Developer" and there are no duties identified for a "Developer" specified in the Contract. On the signature page, however, Melinda Holbrooks signed as the "Contractor" and Jeff Gray signed for Tri-County as the "Developer". Nothing in the Contract sets forth the relationship between Tri-County and Holbrooks.

When examining how Tri-County and Holbrooks interacted with each other, it is even more difficult to determine the true nature of their relationship. While Jeff Gray claimed to be only the "financier" of this project, Pierce's job was handled in the exact same way as Gray and Holbrooks handled their prior construction jobs, with Melinda Holbrooks working as a 1099 independent contractor for Gray, as he directed the project and paid her and all the other sub-contractors. (R. p. 438, l. 17 – p. 439, l. 6) (R. p. 428, l. 12 – p. 429, l. 6) Jeff Gray was also the one who dealt directly with Pierce on a regular basis. Melinda Holbrooks testified that she was not an employee of Tri-County and that she considered herself to be a sub-contractor and received a 1099 from Tri-County for this project. Id. This would indicate that she was not even a party to the contract, but rather acting simply as a sub-contractor. This also suggests that Tri-County was acting as the general contractor on Pierce's home (despite being unlicensed). According to Jeff Gray, Tri-County was "to line up subcontractors, and to pay them and to oversee to make sure the work was performed before they got paid." (R. p. 438, l. 17 – p. 439, l. 6) With Tri-County/Jeff Gray overseeing the work and paying all of the sub-contractors, including Holbrooks, it appears that Tri-County had the type of control over the project a general contractor normally would. (R. p. 296, lines 15-18; R. p. 438, l. 17 – p. 439, l. 6). With no mention of Holbrooks in the recitals, no payments from Pierce to her, and her own stature as a 1099 contractor, a real question exists as to whether or not Melinda Holbrooks was even a party to the Contract or simply a sub-contractor of Tri-County.

Since Tri-County and Holbrooks presented themselves as one entity or argued that they were a joint venture throughout this case - and the trial judge based certain rulings on this premise - is important to note that there is no mention in the Contract or

the pleadings that Tri-County and Melinda Holbrooks formed a joint venture or a partnership for the construction of Pierce's home. The Contract lists them as two separate entities; the lawsuit was brought in the name of Tri-County and Melinda Holbrooks; and, finally, there was never any motion made to add a joint venture or a partnership as a party plaintiff, nor did the court ever order that a joint venture or partnership be added as a party plaintiff. It is also worth noting that an unlicensed contractor may not be a party to a joint venture bid for construction. S.C. Code §40-11-330.

Construction for the home went forward as planned, with Pierce paying Tri-County the installments generally as scheduled. Pierce dealt directly with Jeff Gray, not Melinda Holbrooks, for questions and issues that arose during construction. For example, Pierce requested that Gray allow him to put in the driveway himself to which Jeff Gray agreed to and gave him a $2,500 allowance (R. p. 255, l. 25 – p. 256, l. 10). As another example, near the end of the project on April 25, 2005, Chris Pierce sent Jeff Gray, not Melinda Holbrooks, an e-mail inquiring into the tasks remaining before completion of the home. (R. p. 257, lines 3-18).

Contrary to his testimony that Melinda Holbrooks was the only one to deal with the sub-contractors on the job, Jeff Gray dealt directly with the sub-contractors. Jeff Gray testified that he purchased cabinets, plumbing and electrical supplies and had dealt with these suppliers and contractors before. (R. p. 263, l. 17 – p. 265, l. 17), (R. p. 438, l. 17 – p. 439, l. 6). Jeff Gray testified that he was the one who paid the sub-contractors. (R. p. 296, lines 15-18). Jeff Gray also testified that his role on the project was to "oversee to make sure the work was performed" and to "make sure that the work was

performed and everyone got paid." (R. p. 258, lines 18-20), (R. p. 438, l. 17 – p. 439, l. 6). Generally speaking, Jeff Gray demonstrated very detailed knowledge throughout cross-examination and his depositions about every allowance and about every small item that was, and was not, performed, indicating an intimate familiarity with the project that someone who had simply "fronted" the money could not possibly have. (R. pages 278-296). While Jeff Gray testified he was just the "financier" of the project, (R. p. 96, lines 3-6) it is clear from his own statements and the facts shown above that he was much more intimately involved in the actual construction and supervision of the project.

With the home being close to completion, Pierce took issue with some of the work and refused to pay the final two installment totaling $33,000 until the issues were resolved. Needless to say, the issues were not resolved and Pierce eventually asked Tri-County and Holbrooks not to come on his property. Pierce completed the home with the help of other contractors, and claimed these expenses as an offset to any claim Tri-County or Holbrooks had against him. The last installment payment Pierce elected not to make was the basis for the mechanic's lien and lawsuit.

Despite the fact the Melinda Holbrooks testified in her deposition that she had been fully paid for all of her work, a mechanic's lien in her name and Tri-County's name was filed September 26, 2006, signed by Jeff Gray. (R. p. 430, lines 15-17). Pierce later moved to dissolve the mechanic's lien on the grounds that the party that signed the mechanic's lien, Jeff Gray on behalf of Tri-County, is not a licensed builder and that Melinda Holbrooks had no right to file the mechanic's lien because she had been paid for all of her work. Pierce further argued that the mechanic's lien should be dissolved because it was filed more than 90 days after the last work on the home had been

completed. Tri-County and Holbrooks conceded that no improvements to the actual home were performed within 90 days of the filing of the mechanic's lien, but argue that the mechanic's lien was timely filed since a port-a-let was removed from Pierce's property just within the 90 day period. Appellant knows of no authority for an unlicensed contactor to act as an agent or to sign a mechanic's lien on behalf of a licensed contractor; quite simply, such a situation would violate the public policy of South Carolina.

Tri-County brought this suit arguing that it is owed unpaid money on a contract to construct a home that it constructed for Pierce. At the same time, Tri-County argues that it did *not actually construct* Pierce's home, thereby seeking to avoid the licensing requirements under §40-59-5 et seq. It is this contradiction that the lower court struggled with throughout this litigation, and which must now be determined, finally, in the instant appeal.

ARGUMENT

1. **Both the trial judge and the presiding judge at summary judgment erred as a matter of law in ruling that S.C. Code §40-59-30 did not prohibit Tri-County from enforcing the Contract and from filing the mechanic's lien even though it was not a "Residential Builder" as defined by S.C. Code §40-59-20 and therefore not subject to the limitations on filing mechanic's liens and bringing claims in law or equity to enforce a construction contracts. Furthermore, the trial judge also erred as a matter of law in refusing to submit the licensure issue under §40-59-30(B) to the jury.**

Tri-County does not allege to be a licensed home builder in its Complaint or otherwise. Its owner and operator, Jeff Gray, never testified that he was a licensed builder nor did he submit a building license for Tri-County at trial or prior. Jeff Gray testified at his deposition that he – and by extension Tri-County - was not a licensed home builder. (R. p. 434, l. 21 – p. 435, l. 4; R. p. 436, lines 20-21).

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...." The fact that Tri-County is not a licensed home builder has lead to multiple errors at the summary judgment phase of the case and at trial relating to this issue. Since all of these errors are based on this fact, both arguments relating to this issue are argued in this portion of the brief.

S.C. Code §40-59-30(B), as it read when the Contract was entered into in 2004, states[3]:

> 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.

The terms "residential builder" and "residential building" are defined in S.C. Code §40-59-20(6) as follows:

> "Residential builder" means one who constructs, superintends, or offers to construct or superintend the construction, repair, improvement, or re-improvement of a residential building or structure which is not over three floors in height and which does not have more than sixteen units in any single apartment building, when the cost of the undertaking exceeds five thousand dollars. Anyone who engages or offers to engage in such undertaking in this State is considered to have engaged in the business of residential building.

Pierce raised the issue of the prohibition set forth in S.C. Code §40-59-30(B) of an unlicensed residential builder from bringing this type of action in his directed verdict

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[3] 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."

motion at the close of the Plaintiffs' case. (R. p. 299, l. 16 – p. 302). He also requested that this issue be submitted to the jury. The trial judge denied both the motion for directed verdict and denied the jury charge request. (R. p. 106). In denying the motion for directed verdict, the trial judge reasoned that since Tri-County was not a 'residential builder', section 40-59-5 et. seq. didn't apply to it. (R. p. 302, lines 3-15). He summarized his rationale when he denied Pierce's request to include a jury charge on S.C. Code §40-59-30(B) by stating that this code section "does not apply because there was a finding that the contractor, Melinda Holbrooks, was registered and licensed throughout the conduct of this contract." (R. p. 331, lines 2-5). However, this ruling is in direct contradiction to Judge McIntosh's August 16, 2011 Order (and letter of December 21, 2010) whereupon he ruled that the licensure issue was a question of fact for the jury, thereby creating the "law of the case" since the ruling was unappealed by the Plaintiffs (now Respondents) at that time. See Williamsburg Rural Water v. Williamsburg County, supra. Additionally, the ruling neglects to consider the evidence before the Court – that Gray and Tri-County acted as the contractor on the project, albeit an unlicensed one.

The court has strictly construed the provision currently codified in South Carolina code section 40-59-30[4] against the unlicensed builder. The court in Wagner v. Graham, 296 S.C. 1, 370 S.E.2d 95 (S.C. App. 1988) summarized the case law on this issue holding as follows:

> **The intent of the Legislature to protect the public by requiring home builders to be licensed is emphasized by that portion of the statute quoted above which makes a violation of the act a criminal offense.**

[4] In each of the cases cited in the quote from *Wagner* below, the court is considering the predecessor statute to S.C. Code §40-59-30 which was S.C. Code §40-59-130. S.C. Code §40-59-130 was amended and recodified as S.C. Code §40-59-30 by 2002 Act No. 359, §1 but is substantially the same in that it contains the same language prohibiting an unlicensed contractor from bringing a suit to enforce a contract to build a home.

> Construction of this statute has been before our appellate courts on several occasions. See, *Henderson v. Evans,* 268 S.C. 127, 232 S.E.2d 331 (1977); *Watson v. Harmon*, [280 S.C. 214, 312 S.E.2d 8 (1984)]; *Roberts, 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 *Duckworth v. Cameron,* 270 S.C. 647, 244 S.E.2d 217 (1978). The Court has consistently honored the statute even though the result in some of the cases appears to be drastic.

Wagner at 96 (emphasis added).

While the case law is clear and unwavering that an unlicensed contractor cannot bring this type of suit, the trial court's ruling in this case raises a slightly different issue and appears to be an issue of first impression for this court: can an admittedly unlicensed party to a contract for the construction of a residential home circumvent the prohibitions of enforcing such a contract found in S.C. Code §40-59-30(B) by arguing that a second party to the same contract is licensed and did the actual construction?

Determining the actual legal relationship between Tri-County and Melinda Holbrooks is critical to the analysis of whether section 40-59-30(B) applies to Tri-County. Tri-County could conceivably be covered by Holbrooks' contractor's license if (1) she was an employee of Tri-County; (2) if Tri-County was a sub-contractor of Holbrooks; or (3) if Tri-County and Holbrooks formed a joint venture or partnership. Each of these possibilities is addressed below.

It is clear that Melinda Holbrooks was not an employee of Tri-County. She testified that she was not an employee of Tri-County and was a 1099 subcontractor of Tri-County (R. p. 428, lines 12-19). Melinda Holbrooks received a 1099 for the work she performed on this job. Id. Melinda Holbrooks testified that she actually owned her own contracting company, J&H Builders, and Tri-County made payment checks for Ms. Holbrooks' work on this job payable to J&H Builders (R. p. 429, lines 16-19). She was

treated in this job the same way she had been treated in all of the other prior jobs she performed for Tri-County when Tri-County was the actual land owner and contracted with her to build the homes. It is clear from this testimony and the record as a whole that Melinda Holbrooks was not an employee of Tri-County.

Furthermore, there are no conceivable facts which would support the idea that Tri-County was a subcontractor of Melinda Holbrooks. As stated above, it was Holbrooks that received 1099's from Tri-County. Melinda Holbrooks answered to Tri-County and Melinda Holbrooks received the 1099 from Tri-County, not the other way around. If anyone was the sub-contractor, it was Holbrooks. Tri-County acted more like the general contractor by financing the work, making sure the work was performed, and paying the subcontractors. There is no evidence that Melinda Holbrooks ever sought payment from Mr. Pierce directly, and in fact, she testified that she was paid in full for the job by Tri-County.

With respect to the possibility that Tri-County and Holbrooks were a joint venture, this is strictly prohibited by statutory law. An unlicensed contractor may not be a party to a joint venture bid for construction. S.C. Code §40-11-330. As a result, Respondent's claims that they were a joint venture at the summary judgment hearing means that the joint venture should never have been found to be a legal entity by the trial court and any findings relying on a joint venture existing are erroneous and must be reversed. (R. pp. 479-480).

There is No Evidence of a Partnership Between Tri-County and Melinda Holbrooks

A threshold consideration in determining whether Tri-County and Holbrooks are a partnership is how Tri-County and Holbrooks consider their position relative to one

another. Counsel for Tri-County and Melinda Holbrooks took the position and argued at the summary judgment hearing on November 1, 2010 that they were in a *joint venture*, not a partnership. (R. pp. 479-480). At trial, Jeff Gray never testified as to Tri-County's relationship with Holbrooks and counsel never argued that they were connected in any fashion.

If Tri-County and Melinda Holbrooks are now arguing that they are a partnership, Appellant would argue that they are judicially estopped from doing so as they have already asserted that they were in a joint venture. See Quinn v. The Sharon Corporation, 343 S.C. 411, 540 S.E.2d 474, 475-476 (Ct. App. 2000) (noting that "[t]he supreme court expressly adopted the doctrine of judicial estoppel, as it relates to matters of fact, in the case of *Hayne Federal Credit Union v. Bailey.* The doctrine precludes a party from adopting a position in conflict with one previously taken in the same or related litigation. The purpose of the doctrine is not to protect litigants from allegedly improper or deceitful conduct by their adversaries, but to protect the integrity of the judicial process and the courts . . . When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.") (internal citations omitted). Furthermore, should this Court determine that the respondents were not estopped from arguing the existence of a partnership; Appellant would assert that no evidence exists to support such a characterization of their relationship.

"A partnership is an association of two or more persons to carry on as co-owners a business for profit. . ." S.C. Code §33-41-210. In the instant case, it was undisputed that Jeff Gray was the sole owner of Tri-County Development. (R. p. 250). It is undisputed that Melinda Holbrooks has been paid by Tri-County in full for the work she

performed on Appellant's home. (R. p. 429, lines 20-24). It is further undisputed that Holbrooks was paid by Tri County for the services she performed, and was issued a 1099 for her services at the end of the year. (R. p. 428, lines 17-19). In the instant case, there was no "carrying on as co-owners a business for profit". Jeff Gray paid Melinda Holbrooks to complete the duties of Tri-County under its contract with Appellant; she acted as a subcontractor on the job, by virtue of being issued a 1099.

When determining whether a partnership exists, the South Carolina courts have held that "[o]ne of the most important tests as to the existence of a partnership is the intention of the parties. To determine whether a partnership exists, the following tests are used: (1) the sharing of profits and losses; (2) community of interest in capital or property; and (3) community of interest and management." Moore v. Moore, 360 S.C. 240, 599 S.E.2d 467, 477 (Ct. App. 2004) (citing Wyman v. Davis, 223 S.C. 172, 74 S.E.2d 694 (1953)).

In the instant case, there is no evidence that the parties intended to be partners; rather, the evidence is that, in prior instances, Melinda Holbrooks acted as a home builder and Tri-County acted as a developer who purchased raw land and paid Holbrooks to build "spec" houses on his land. There is no evidence that they kept joint books; that a verbal or written agreement existed; or that they shared in management or property. In fact, other than Melinda Holbrooks stating at her deposition that "I guess we would be considered partners", (R. p. 428, l. 6-7), the "evidence" before the Court is that no evidence exists to support a partnership. In fact, Ms. Holbrooks was not even present at trial, nor did she present any evidence in support of any claim she may have had.[5] (R. p.

[5] It is unknown what Ms. Holbrooks' claim could be, **as she admitted to having been paid in full on this job.** (R. p. 429, lines 20-24).

246, lines 6-9) (Opening Statement by Counsel for Respondent Tri-County and Jeff Gray telling the jury that "[y]our role today is to decide this dispute between Tri-County and Jeff Gray and Mr. Pierce").

Even if Melinda Holbrooks (or her corporation) intended to be in a partnership with Tri-County, there is simply no evidence in the record that Tri-County intended to be in a partnership with Holbrooks; Tri-County paid Holbrooks as a subcontractor and issued a 1099 to her. Furthermore, Tri-County paid Holbrooks in full on this job. See Buffkin v. Strickland, 280 S.C. 343, 312 S.E.2d 579, 581 (Ct. App. 1984) (noting that a party could not unilaterally form a partnership where one existing partner testified that he brought in a third partner, but no evidence existed that the other partner ever agreed to make - or considered - the third man a partner.) Furthermore, Jeff Gray, owner of Tri-County, was deposed and never once alleged or averred that Melinda Holbrooks was his partner and his attorney actually argued at the summary judgment hearing that they were in a joint venture. (R. p. 479-480). In fact, 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." (R. p. 438, l. 23 - p. 439, l. 1-6). Furthermore, Gray himself referred to Holbrooks' corporation – J&H Builders - as a "**vendor**" of Tri-County that was paid. (R. p. 432, l. 25 – p. 433, l. 1-6). Based on the evidence as a whole, it is clear that Tri-County and Melinda Holbrooks handled this home the same way that they had handled every other home they had built: Tri-County financed and directed the operation, lined up the subcontractors, paid them and treated Melinda Holbrooks like every other subcontractor who received a 1099. The only difference with this home was

that Tri-County was not building a "spec" home for resale purposes.[6] At minimum, it was clearly for the jury to determine what the relationship was between these people and entities.

In Terry v. Brasher, 207 S.E.2d 82, 262 S.C. 639 (1974), a father's estate sued the son-in-law, alleging that a dairy farming partnership existed where the parties had previously combined their small herds and the decedent retired shortly thereafter. The Supreme Court held that a clear preponderance of the evidence showed that no partnership existed where the record showed that, "as far as the public was concerned, the dairy business belonged to and was actively operated and developed by [the son in law] individually, in his sole name, signing all contracts, paying all bills and all new equipment being purchased in his name." Id. at 641. The Court further noted that the son-in-law testified that there was never a partnership agreement, either written or oral, and that no evidence of substance existence that the decedent exerted any day-to-day management or control over the dairy business, other than the desire that the enterprise be successful. Id. at 642-643. The instant facts are certainly analogous to those in Terry.

Neither the Contract itself nor this lawsuit was brought in the name of a partnership. If Tri-County and Holbrooks did form a partnership, there is no indication of it in the contract nor is there an allegation in the Complaint that a partnership existed. The complaint is brought in the name of two separate legal entities with no suggestion that there is a partnership between them. For the above reasons, it is Appellant's contention that Tri-County and Holbrooks must be treated as two separate legal entities when analyzing their rights and remedies under the Contract and that the legal

[6] With the benefit of hindsight, it is conceivable that Gray and Tri-County inadvertently proceeded on the Pierce contract, forgetting that they were not entitled to the "land owner" exception contained in S.C. Code 40-59-260 and could therefore not act as their own general contractor on the project.

relationship between Tri-County and Holbrooks must be that of general contractor (Tri-County) and 1099ed sub-contractor (Holbrooks).

The trial judge uses different terminology when he initially denied Plaintiff's motion for a directed verdict. The trial judge states:

> So, again, I find as a matter of law that there's no genuine issue of material fact as to whether or not the builder in this case – excuse me – the contractor in this case was Melinda Holbrooks on July 24th, 2004, was a residential home, residential home builder under Section 40-59-30(B). And because the plaintiff, Mr. Gray, is not a residential home builder, he wouldn't have been subject to the sanctions under 40-59-105, I believe it is.
>
> (R. p. 302, lines 3-11).

The court essentially finds that since Tri-County is not a 'residential home builder' as defined by S.C. Code §40-59-20(6) that the provisions of Chapter 59 of Title 40 do not apply to him. The judge appears to have reasoned that since Tri-County didn't actually do the construction work on Pierce's home (Melinda Holbrooks did) that it did not engage in "residential building" or was not a "firm" as defined in S.C. Code §40-59-20.

In looking at this the issue of how one becomes a "residential builder", S.C. Code §40-59-20(6) indicates that one can become classified as a "residential builder" in one of two ways. Any entity that 1) "constructs or superintends" the construction of a residential building, or 2) "**offers to** construct or superintend" a residential building is defined as a "residential builder" (emphasis added). If Tri-County did either of these, it is required to be licensed to avoid the prohibitions of bringing an action to enforce the Contract set forth in S.C. Code §40-59-30(B).

Tri-County's business model had been to purchase land and then direct Melinda Holbrooks in the construction of the houses on its land. This project was no different except that Tri-County **didn't** own the land but still directed Melinda Holbrooks in the construction of the home. However, this scenario required Tri-County to be a licensed contractor. In fact, the classic definition of "superintend" certainly applies to Jeff Gray and Tri-County as it relates to this job: "Superintend. To have charge and direction of; to direct the course and oversee the details; to regulate with authority; to manage; to oversee with the power of direction; to take care of with authority." Black's Law Dictionary 1437 (6th ed. 1990). In addition, Jeff Gray testified that he lined up the sub-contractors, oversaw the work and made sure they were paid – classic general contracting duties. (R. p. 438, l. 17 – p. 439, l. 6).

In considering whether Tri-County offered to construct or superintend a residential building, it is essential to look at the Contract itself and the pre-contract negotiations. How the parties behaved during the actual construction of the home is not relevant to whether or not an offer to build Pierce's home was made by Tri-County.

As stated above, Pierce or his agent (his father), made initial contact regarding the construction of the home with Jeff Gray, the owner of Tri-County. Jeff Gray handled all of the negotiations with the Pierce's prior to entering into the Contract. (R. pp. 251-252). The Contract specifically identifies Tri-County as the "Contractor" and sets forth all of the duties and responsibilities of the Contractor. Since Pierce and/or his father drafted the Contract, it is clear that they believed Tri-County was the actual contractor at that time. (R. p. 252, lines 21-22). It is common knowledge in the construction business that general contractors often do very little if any actual construction on a home. They simply

direct the construction, make sure the work is performed, and pay the sub-contractors, meaning that even if Pierce knew that Tri-County was going to engage the assistance of Melinda Holbrooks on the project, Tri-County could still act the general contractor or Tri-County and Melinda Holbrooks could be working together as general contractors. This is further supported by the fact that the Contract does not make any distinction between Tri-County's role as "Developer" and Melinda Holbrooks' role as "Contractor" leading a rational customer to believe that both were offering to and were going to be responsible for building the home. Tri-County and Holbrooks are both asking in this suit to be awarded the amounts Pierce owes on the Contract which can only mean that they both are claiming that each of them offered to and actually constructed the home pursuant to the terms set forth in the Contract. While Appellate has shown that Tri-County did act in a general contractor's capacity during the construction of the home, even if it did not, it cannot be credibly argued that Tri-County did not offer to construct Pierce's home thereby making it a 'firm' and a 'residential builder' pursuant to section 40-59-20 and subject to the provisions of section 40-59-30(B).

In considering whether Jeff Gray/Tri-County acted as the contractor on the job, there is ample evidence that he did. A pure financier would have provided the money to the person he was calling the general contractor and let them perform these duties and not have issued a 1099. Jeff Gray chose to finance the deal and assume the risk that Pierce would not pay. Jeff Gray chose to line up the subcontractors, make sure they performed the work and to pay the subcontractors. (R. p. 438, l. 17 – p. 439 l. 6). Jeff Gray chose to manage the job, including punch list items and allowances. Jeff Gray, in short, chose to act as a general contractor – albeit an unlicensed one.

II. It was clear error for the trial judge to refuse to charge the jury on the licensing provisions contained in S.C. Code §40-59-30(B)

In denying Pierce's request to charge the jury on the S.C. Code §40-59-30(B) issue, the trial court reasoned that he was not going to give the charge to the jury because "the contractor, Melinda Holbrooks, was registered and licensed throughout the conduct of this contract." (R. p. 331, lines 2-5). This implies that the trial judge was treating Tri-County and Melinda Holbrooks as one entity in this case and that Holbrooks' builder's license somehow covered Tri-County. This is further evidenced by examining the the verdict form that the trial court itself drafted (R. p. 326, lines 2-5). The verdict form did not give the jury the option of finding for one Plaintiff or the other, but rather offered only one option of finding "For Plaintiff Tri-County Development, Inc. and Melinda Holbrooks, damages in the amount of _______________ Dollars." The fact that the trial judge used the singular form of " Plaintiff" in the verdict wording ("For *Plaintiff*" and not "For *Plaintiffs*") reinforces the interpretation that he was himself treating - and instructing the jury to treat - both Plaintiffs as one entity for the purposes of the trial and any award.

While the fact that Melinda Holbrooks was a licensed contractor would undisputedly allow Melinda Holbrooks to bring suit against Pierce, it should not have any effect on Tri-County's ability to bring this action to enforce the Contract. Tri-County would be subject to 40-59-30(B) unless Tri-County was not required to be a licensed contractor or if it could argue that it could be covered by Melinda Holbrooks contractor's license. This could arguably be the case only if Melinda Holbrooks was an employee of Tri-County, an upstream contractor of Tri-County, or had a joint venture or partnership with Tri-County. Whether Tri-County was required to be licensed is addressed below,

but as shown above, none of these other scenarios are the case and as a result, it was reversible error by the trial judge to deny Plaintiff's jury charge request on this issue on this basis. This was clearly prejudicial to Pierce since even if the jury intended to find that Tri-County was barred from recovery, it had no such choice on the verdict form.

It is a complete contradiction by Tri-County to argue on one hand that it is owed money under a contract to construct a home while on the other hand argue that it did *not* construct the home when confronted with the licensing requirements for home builders. Essentially what Tri-County wants is to be able to collect damages for unpaid balances for a contract for the construction of a home but not have any of the responsibilities of actually constructing the home. While Pierce did not raise it at trial, he could have made a credible judicial estoppel argument to prevent Tri-County from taking inconsistent positions in the same litigation. See Quinn v. The Sharon Corp., supra.

Tri-County can't have it both ways. Tri-County is either a party to a contract to construct a residential home and has the responsibility of constructing the home to the Contract's specifications, as well as the benefit of receiving the money that is promised to be paid, or it is not responsible for constructing the home and not owed the money. It can't be owed the money, but have no responsibilities to construct the home. There are not any "non-construction" tasks identified in the Contract that Tri-County can claim it is attempting to collect on.

If Tri-County is allowed to successfully enforce a contract for the construction of the home as an unlicensed builder, the ruling in this case would create a blueprint for any unlicensed builder to circumvent the licensing requirements of section 40-59-5 et. seq. This can be shown by considering the situation if Melinda Holbrooks was not in fact a

licensed builder. Assuming Tri-County did none of the work and is allowed to enforce the Contract, it would not matter if Melinda Holbrooks was licensed or not. All the unlicensed builder would have to do is to have a friendly unlicensed entity sign every contract to build a home as "Developer", make sure the other entity performs no work, and allow this entity to bring suit if there is a breach. It would be legislating a new exception to the licensing requirements for home builders.

If the trial judge granted Pierce's directed verdict motion with respect to the licensing issue in 40-59-30(B) dismissing Tri-County from the case or the issue is submitted to the jury and the jury finds Tri-County is not able to make a recovery due to the licensing issue, the entire complexion of the case changes. First, the verdict form lumped Tri-County and Melinda Holbrooks together and it would be speculative as to whether the jury would have awarded Melinda Holbrooks anything without Tri-County being associated with her especially in light of the fact that she did not appear at trial and testify that she was owed anything.

In addition, if Tri-County had been dismissed on Pierce's directed verdict motion, many motions would have been available to Pierce to defeat the claims of the remaining defendant, Melinda Holbrooks. Pierce would have been in a position to argue that since Holbrooks was paid in full, she has no standing to bring the suit since she is not the real party in interest. With Tri-County dismissed or with the licensing 40-59-30(B) issue before the jury, Pierce could have argued that Melinda Holbrooks could prove no damages or that no evidence was presented showing that Holbrooks actually sustained any damages. With Tri-County left in the case, the 40-59-30(B) issue not before the jury

and both Plaintiffs being offered to the jury on the verdict form as one plaintiff, these motions and arguments would have been moot and pointless for Pierce to make.

For these reasons, failing to grant Pierce's motion for directed verdict dismiss Tri-County or to at least allow the jury to decide whether or not to dismiss Tri-County pursuant to 40-59-30(B) created substantial prejudice and harm to Pierce's case creating reversible error(s).

III. Judge Macaulay Did Not Have the Power to Vacate the Default Judgment Against Appellee Jeff Gray, Or, In the Alternative, Abused His Discretion

On September 26, 2006, an Order for Judgment by Default (R. pp. 1-2) was entered in the Oconee County Court of Common Pleas on Appellant's Third Party Complaint against Appellee Jeff Gray. The Order was signed by Judge Macaulay. The Order provided by that a hearing to ascertain damages under South Carolina Rules of Civil Procedure, Rule 55 should be held.

At the time the default was entered, Appellee Jeff Gray was represented by Robert K. Whitney, Esquire. On March 27, 2007, an Order granting Attorney Whitney's Motion to be Relieved as Counsel was filed. In that Order, Judge Nicholson found that Attorney Whitney "is experiencing significant difficulties contacting the Plaintiffs. It further appears that the Plaintiffs have failed to cooperate fully with Mr. Whitney's efforts to prepare this matter for trial."

On April 19, 2007, counsel for Jeff Gray filed a Motion to Set Aside the Entry of Default on the Third Party Complaint, supported by an affidavit from Jeff Gray. The Honorable J. Cordell Maddox, Jr. denied Gray's Motion "after careful consideration and review of the evidence." (R. p. 3).

On May 5, 2009, Judge Macaulay filed an Order vacating the entry of default judgment pursuant to Rule 55, SCRCP, "based primarily upon Third Party Plaintiff's refusal to provide documentation of his alleged damages, as these would be the same documents for Third Party Defendant to prepare for a damages hearing and also for Plaintiffs' to defend against counterclaim." (R. pp. 5-10).

It is settled that one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge. 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). In Love Shop, a circuit court judge entered an order of default against the defendants based upon their failure to answer. A hearing was scheduled to determine appropriate relief, with a Special Circuit Court Judge, James C. Harrison, Jr., presiding. At the hearing, Judge Harrison proceeded to order the dismissal of the actions against the Defendants, finding the plaintiff had failed to effect service, among others. 334 S.E.2d at 529.

On appeal, the Court of Appeals reversed and remanded the case, holding that the original circuit court judge had already "entered findings" on the service issue, and therefore Judge Harrison's subsequent ruling reversed the original judge's finding and was error. The Court remanded the case for a determination of appropriate damages. Id. at 529-530.

Similarly, Judge Maddox had already found that the entry of default was proper, and should not be set aside, "after careful consideration and review of the evidence."

Accordingly, it was clear error for Judge Macaulay to enter an order which reversed the findings of Judge Maddox.

In Cook v. Taylor, the defendant's counsel obtained an order of reference to the Master in Equity from Judge Robinson, without giving notice to plaintiff's counsel. The plaintiff's counsel thereafter filed a motion to set aside the order of reference, on the grounds that there were jury issues present in the case. The motion was heard by Judge Moore, who vacated the original order of Judge Robinson. 252 S.E.2d at 924. On appeal, the Supreme Court held that "Judge Moore did not have the power to set aside the order of his predecessor, and his order must be set aside", noting that "[t]he order of Judge Moore amounted to a review by him of the order of another circuit judge (Judge Robinson) and reversal of the order of Judge Robinson because Judge Moore disagreed as to the proper mode trial." Id. Similarly, Judge Macaulay's vacating of the entry of default against Jeff Gray amounted to an improper review of Judge Maddox's order denying the motion to set aside the entry of default.

It Was an Abuse of Discretion for Judge Macaulay to Vacate the Entry of Default

In his Amended Order vacating the entry of default judgment entered against Jeff Gray on Chris Pierce's Third Party Complaint, filed May 29, 2009, Judge Macaulay vacated the entry of default judgment "for good cause shown" pursuant to Rule 55(c), SCRCP. (R. pp. 5-10).

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge . . . An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon **factual**, as distinguished from legal conclusions, is without evidentiary

support. Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885, 888 (2009) (internal citations omitted). "The standard for granting relief from an entry of default under rule 55(c) is mere good cause. The standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for default and give reasons why vacation of the default entry would also serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." Id. (citing Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989)).

In the underlying case, Appellant brought a third party complaint against Jeff Gray, who failed to respond to the third party complaint, thus resulting in an entry of default. Jeff Gray moved to set aside the entry of default, which was denied by Judge Maddox, as outlined above. Appellant never sought a damages hearing, and the underlying case continued over the course of several years. It is undisputed that there were various disputes among the parties, necessitating the lower court's time and attention, which caused frustration among the participants. On April 6, 2009, the Respondent's Motion for Summary Judgment and Motion to Compel Discovery Responses. Judge Macaulay, in considering Respondent's Motions, noted that discovery had not been had and the Respondent was "denied access to the damages", (R. p. 385, lines 14-15). The Judge thereafter vacated the entry of default. (R. p. 387, lines 2-3).

It was an abuse of discretion for Judge Macaulay to vacate the entry of default when he did so merely as a sanction against Petitioner for perceived discovery deficits.

Furthermore, there was no motion pending before the Court because Judge Maddox had already ruled on the Motion to Set Aside the Entry of Default – and denied it. See Discussion, supra. Furthermore, there is nothing in the record to suggest that there was "good cause" to set aside the entry of default – Respondent's counsel did not present any evidence of "good cause"; in fact, Judge Maddox had previously reviewed Respondent's evidence and testimony in support of its Motion to Set Aside, and had found that no good cause existed to set aside the entry of default under Rule 55.[7] Where no good cause exists to set aside an entry of default under Rule 55, there is no basis for setting aside the entry of default. See Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009) (affirming the entry of default and finding "no good cause" where both insurance agent and insured failed to answer complaint despite having knowledge and receipt of same). Similarly, Jeff Gray testified that he "received many copies of pleadings related to this lawsuit. I understood that [my attorney] would respond to all of them." (R. pp. 87-88). Mr. Gray failed to respond to the third party complaint, as did his attorney. Judge Maddox found that there was no good cause to set aside the entry of default. Accordingly, Judge Macaulay abused his discretion in finding "good cause" existed.

IV. It was Error for the Court to Grant Summary Judgment to the Plaintiffs on the Issue of Liability

The Plaintiffs and Respondents herein, Tri-County Development, Inc. and Melinda Holbrooks, filed a motion for summary judgment against Appellant Chris Pierce on their breach of contract claim relating to the construction of Pierce's home.

[7] Jeff Gray had submitted an affidavit in support of his Motion to Set Aside the entry of default, which outlined the circumstances he attributed to the third party complaint not being answered. A copy is submitted as part of the record.

Respondents alleged that Pierce failed to pay the final two installment payments on the contract, and filed a mechanic's lien along with the underlying action. Appellant denied the claim, alleging that the Respondents failed to complete construction on the home and filing a third party complaint against Jeff Gray, the owner/principal of Tri-County. Because there was sufficient evidence for a jury to find that Appellant Pierce had rightfully withheld payment under the terms of the construction contract, the Court erroneously granted summary judgment on the issue of liability.

The testimony of the parties and evidence before the Court demonstrated unequivocally that all parties had a different view of **whether** the contract was breached, **and by whom** – thereby creating a question of fact for the jury. Melinda Holbrooks testified that she was paid in full for the work she performed at the job. (R. p. 429, lines 20-24; R. p. 430, lines 15-17).

The evidence before the court was that the parties were having a dispute about whether the work on the home would continue; what the payment terms would be; and whether the construction requirements had been satisfied. (R. p. 140-147). The evidence before the lower court was that, at the very least, Pierce believed that the parties were at a standstill and work had stopped, and there was no payment required.

Finally, counsel for Jeff Gray and Tri-County and Holbrooks stated to Judge McIntosh at the summary judgment hearing on November 1, 2010 that ". . . in April 4, 2005, Mr. Pierce's father wrote a letter to my client saying, 'Hey, we reached this agreement and you are not going to pay the balance of the contract until everything is done.' So, we contented an anticipatory repudiation in April. In June, my client, he continued to work. He didn't agree with that and he continued to work." And then in

June 28, 2005 . . . Mr. Pierce writes an email to my client and says, "You will not be, you will not paid until all work is completed in the house regardless of the one year warranty you mentioned. And that is when my client pulled off that project and stopped working." (R. pp. 423-426).

The four parties to this lawsuit all offered Judge McIntosh different evidence in support of their motions for summary judgment – evidence that showed a genuine dispute over what the agreed- upon contract terms were; what the agreed-upon payment terms were; and whether the contract had been breached, either anticipatorily by the Appellant herein or by walking off the job as the Respondents admitted to doing. Adding to the mix, Melinda Holbrooks testified she had been paid in full for the job. In short, a veritable mélange of evidence as to the issue of Pierce's liability was before the Court, making the entry of summary judgment on liability as to Respondents' breach of contract claim improper.

"The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment. **However, if a contract is ambiguous, or capable of more than one construction, the question of what the parties intended becomes one of fact, and should therefore be decided by the jury**. " Middleborough Horizontal Property Regime v. Montedison, S.p.A., 465 S.E.2d 765, 320 S.C. 470 (Ct. App. 1995) (internal citations omitted).

Here, it was clear that the parties did not know what the "contract" was or the terms therein – there was evidence of a "gentlemen's agreement" outlined in an April 4, 2005 letter to Respondents and that Appellant believed that the April 4, 2005 letter memorialized a new agreement, while Respondents believed that the April 4th letter was

an anticipatory repudiation (even though they continued to work on the job). Finally, there was evidence from Respondent Melinda Holbrooks that, as far as she was concerned, she was paid in full for the job and no breach of contract therefore could have occurred. In short, there was a significant amount of testimony as to what the contract was and whether there had been a breach, such that the terms of the contract (and any breaches thereof) were for the jury to determine.

V. In the event the underlying judgments are vacated, then the award of attorneys' fees and costs, plus the award of pre-judgment interest, must be vacated as well.

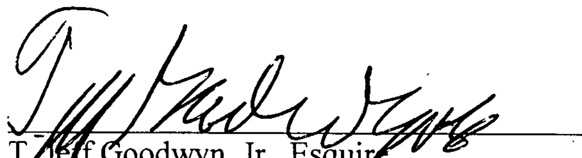
The foundation for Judge Macaulay's order awarding attorney's fees, plus pre-judgment interest, is the entry of the jury verdict and judgment against the Petitioner under S.C. Code Ann. §29-5-10. Petitioner asserts, and counsel for the Respondents agrees, that in the event the underlying judgments are vacated, then the order awarding attorneys' fees under the mechanic's lien statute must be likewise vacated, as the very foundation for the award would no longer be in effect.[8] In short, the Respondents would no longer be the "prevailing party" under the Mechanic's lien statute, and therefore Respondents would not be entitled to recover under the statute. See S.C. Code Ann. §29-5-10 (a) ("the costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered **by the prevailing party**") (emphasis added).

[8] The undersigned counsel submits to the Court that he and Mr. Dudley, counsel for the Respondents, have discussed this issue and agreed that the attorneys' fees award is only challenged to the extent the underlying judgments are vacated by the Court. Petitioner does not otherwise contest the award.

CONCLUSION

There is no manner in which Tri-County can be viewed as anything but the general contractor of the construction of the residence of this home. As a result, it cannot bring suit to recover from Pierce and it was reversible error for the trial court to rule otherwise or to not at least charge the jury on this issue. The trial court had no right to vacate the summary judgment against Jeff Gray and erred in granting summary judgment in favor of Respondents on the issue of liability when a genuine issue of material fact on this issue clearly existed.

Respectfully Submitted,



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

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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

CERTIFICATE OF COUNSEL

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

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September ___, 2014

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PROOF OF SERVICE

I certify that I have served the **Final Amended 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 September 2, 2014.

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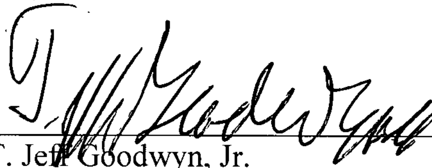

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September 2, 2014