

The Supreme Court of South Carolina

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

The Honorable Marvin H Dukes
Beaufort County
Trial Court Case No 2007-CP-07-01547

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules,
this appeal is hereby certified for review by the South Carolina Supreme
Court Upon receipt of this order, the Court of Appeals is hereby directed to
forward the case file, all records and briefs and any exhibits on file to this
Court

IT IS SO ORDERED


CJ
FOR THE COURT

Columbia, South Carolina

July 25, 2012

cc Sean Michael Bolchoz, Esquire
James F Berl, Esquire
John W Farrell, Esquire
The Honorable Jenny Kitchings

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January 9, 2012

The Honorable Tanva A. Gee
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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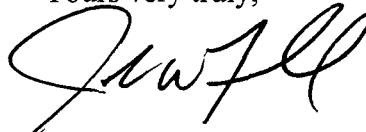
Re Jorge V. Esguerra v. Jamie V. Brown, et al
Case # 2007-CP-07-1547

Dear Ms. Gee

Enclosed for filing, please find the original and one (1) copy of the Respondents' Certificate of Counsel. Please return the file-stamped copy of the Certificate of Counsel to this office in the self-addressed stamped envelope. If there is anything additional required, or should you have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am

Yours very truly,


John W. Farrell

Enclosures

cc Sean Michael Bolchoz, Esquire
Hale and Bolchoz, PA
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Hilton Head Island, SC 29925



The South Carolina Court of Appeals

TANYA A GEE
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V CLAIRE ALLEN
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January 6, 2012

Sean Michael Bolchoz, Esquire
Hale & Bolchoz, L L C
P O Box 22561
Hilton Head Island SC 29925 2561

Re Esguerra, Jorge v Brown, Jamie
2010174706

Dear Mr Bolchoz

We have received the Record on Appeal, Appellant's Final Brief and Appellant's Final Reply Brief in the above case. However, all counsel must be included on the cover of the Record on Appeal. It will be necessary for you to add John W. Farrell as counsel for the Respondent.

Furthermore, the caption on the Appellant's Final Brief must show

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

Within ten days from the date of this letter, please arrange for a representative from your office to come to the Court of Appeals filing desk on the 1st floor of the Edgar A. Brown Building to make the required corrections. **We request that you notify this office when someone will be arriving to make the corrections so the documents will be available without delay.**

Very truly yours

A handwritten signature in black ink, appearing to read "Tanya A. Gee". Below the signature, the word "CLERK" is printed in a small, sans-serif font.

CLERK

TAG/laf

cc James F. Berl Esquire
John W. Farrell, Esquire



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

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January 6, 2012

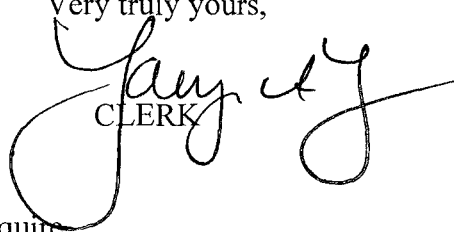
James F Berl, Esquire
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Hilton Head Island, SC 29926

Re Esguerra, Jorge v Brown, Jamie
2010174706

Dear Counsel

We have received the Respondents' Final Brief in the above matter. However, you must provide a Certificate of Counsel as required in Rule 211 of the SCACR. Please provide a Certificate of Counsel within ten days of this letter.

Very truly yours,


CLERK

TAG/laf

cc Sean Michael Bolchoz, Esquire

HALE & BOLCHOZ, L L C

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January 3, 2012

VIA OVERNIGHT DELIVERY

South Carolina Court of Appeals
The Honorable Tanya Gee
PO Box 11629
Columbia, SC 29211

RE Jorge V Esguerra v Jamie V Brown individually and d/b/a Southeastern Services, Robert Baroni, Boyd R Laughlin and Associated Construction Consultants, Inc
Case No 07-CP-07-1547
Case Tracking No 2010174706

Dear Ms Gee

Please find enclosed the original and fourteen copies of the Record on Appeal, Final Brief of Appellant and Final Reply Brief of Appellant and proof of service for the above-captioned case. I would appreciate it if you would file the aforesaid documents and return the clocked copy of the proof of service to me via the enclosed, self-addressed stamped envelope.

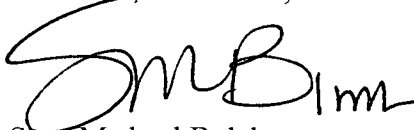
By copy of this letter, I am serving a copy of the Final Brief of Appellant and Final Reply Brief of Appellant upon all counsel of record, pursuant to the applicable South Carolina Appellate Court rules.

If you have any questions, please do not hesitate to contact me.

With kind, personal regards, I am

Sincerely,

HALE & BOLCHOZ, L L C



Sean Michael Bolchoz

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JAN 05 2012

SC Court of Appeals

SMB/ml
Enclosures

cc Dr. Jorge Esguerra (via email only to jesg@neo rr com)
James F Berl Esquire

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January 4, 2012

The Honorable Tanya A. Gee
Clerk of the South Carolina Court of Appeals
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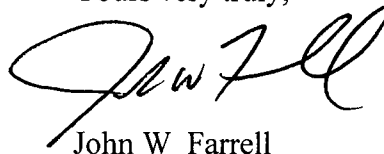
Re Jorge V. Esguerra v. Jamie V. Brown, et al
Case # 2007-CP-07-1547

Dear Ms. Gee

With reference to the above-captioned appeal matter, enclosed for filing, please find the original and fifteen (15) copies of the Respondents' Final Brief, along with an original and one (1) copy of a Certificate and Proof of Service. Please return one (1) copy of the Final Brief and the remaining copy of the Certificate and Proof of Service to this office in the self-addressed stamped envelope. If there is anything additional required, or should you have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am

Yours very truly,



John W. Farrell

Enclosures

cc Sean Michael Bolchoz, Esquire
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SC Court of Appeals

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December 16, 2011

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SC Court of Appeals

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RE *Jorge V Esguerra v Jamie V Brown individually and d/b/a Southeastern Services, Robert Baroni, Boyd R Laughlin and Associated Construction Consultants, Inc*
Case No 07-CP-07-1547
Case Tracking No 2010174706

Dear Jim

Please find enclosed a copy of the Record of Appeal and proof of service for the above-captioned case, which I hereby serve upon you as counsel for the Respondents

By copy of this letter, I am sending the original and one copy of the aforesaid proof of service to the South Carolina Court of Appeals and asking that they please file the original and return the clocked copy to my office in the enclosed self-addressed, stamped envelope

If you have any questions, please do not hesitate to contact me

With kind, personal regards, I am

Sincerely,

HALE & BOLCHOZ, L L C



Sean Michael Bolchoz
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SBOLCHOZ@HALEANDBOLCHOZ.COM

SMB/ml
Enclosures

cc Dr Jorge Esguerra (via email only to jesg@neo rr com)
The Honorable Tanya Gee (w/enc)

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The South Carolina Court of Appeals

TANYA A GEE
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V CLAIRE ALLEN
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November 30, 2011

Sean Michael Bolchoz, Esquire
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Hilton Head Island, SC 29925-2561

Re Esguerra, Jorge v Brown, Jamie
2010174706

Dear Counsel

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address 1205 Pendleton Street, Columbia, S C 29201. Thank you for your attention to this.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V Claire Allen, Deputy
CLERK

TAG/ma

cc James F Berl, Esquire
John W Farrell, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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.

Respondents

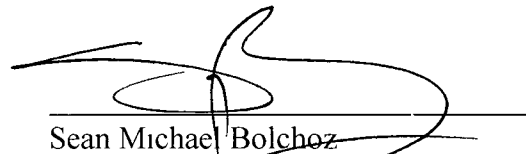
**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Pursuant to Rule 209, SCACR, Appellant proposes the following be included in the Record on Appeal:

- 1 Defendant Associated Construction Consultants, Inc.'s Answer, dated July 18, 2007,
- 2 Plaintiff's First Request for Production, dated August 10, 2007, and
- 3 Defendant Associated Construction Consultants, Inc.'s Responses to Plaintiff's First Request for Production, dated October 2, 2007

I certify that this designation contains no matter which is irrelevant to this appeal.

November 16, 2011



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Attorney for Appellant

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

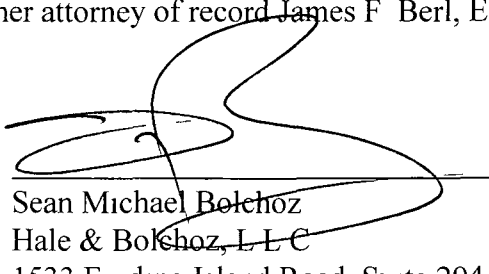
Of whom Robert Baroni, Boyd R. Laughlin and Associated
Construction Consultants, Inc. are

Respondents

PROOF OF SERVICE

I certify that I have served Appellant's Initial Reply Brief and Designation of Matter to be Included in the Record on Appeal by depositing a copy of same in the United States Mail, postage prepaid on November 16, 2011, addressed to the other attorney of record James F. Berl, Esquire

November 16, 2011



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Attorney for Appellant

Other Counsel of Record

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November 16, 2011

South Carolina Court of Appeals
The Honorable Tanya Gee
PO Box 11629
Columbia, SC 29211

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SC Court of Appeals

RE *Jorge V Esguerra v Jamie V Brown individually and d/b/a Southeastern Services, Robert Baroni, Boyd R Laughlin and Associated Construction Consultants, Inc*
Case No 07-CP-07-1547
Case Tracking No 2010174706

Dear Ms. Gee

Please find enclosed the original and one copy each of the Appellant's Initial Reply Brief, Designation of Matter to be Included in the Record on Appeal and proof of service for the above-captioned case. I would appreciate it if you would file the originals and return the clocked copies to me via the enclosed, self-addressed stamped envelope.

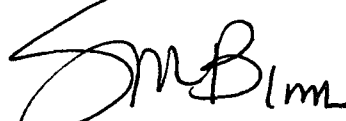
By copy of this letter, I am serving copies of the aforesaid documents upon all counsel of record, pursuant to the applicable South Carolina Appellate Court rules.

If you have any questions, please do not hesitate to contact me.

With kind, personal regards, I am

Sincerely,

HALE & BOLCHOZ, L L C



Sean Michael Bolchoz
SENDER'S E-MAIL ADDRESS
SBOLCHOZ@HALEANDBOLCHOZ.COM

SMB/ml
Enclosures

cc: Dr. Jorge Esguerra (via email only to jesg@neo rr.com)
James F. Berl Esquire

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

APPELLANT'S INITIAL REPLY BRIEF

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SC Court of Appeals

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330 S S 71, 76, 497 S E 2d 731, 733 (1998)

2

Statutes

S C Code § 40-11-240(A)

2

ARGUMENT

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") 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 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 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

¹The closest the trial court comes to identification of such conduct is found on page 23 of its Order, 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"

²See Footnote 5 below

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 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 ignores that dictates of S C Code § 40-11-240(A) ' 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,

⁹This 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

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. (Letter to The Honorable Marvin Dukes, dated December 4, 2009). 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.

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

⁴See Order, ¶4. “Even if the Court had conformed the pleadings to the evidence.”

findings of the LLR, and that with the Consent Agreement, the LLR found that they had engaged in license lending (Trial Transcript, p 316), 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 (Trial Transcript, p 317), and that he understood and had full knowledge of his right to ask for a hearing (Trial Transcript, pp 302-318), 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 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" (Original Complaint, ¶9)
- On June 19, the original complaint was served on ACCI
- On July 2, the LLR's IRC Summary Report 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 to the original complaint, wherein it asserted that "ACC [sic] agreed, preliminarily, to let Defendant

Brown use ACCI's license ” Note that this response is not inconsistent with the findings in the IRC Summary Report from two weeks prior⁵

- On August 10, the Appellant served Respondent ACCI with its First Request for Production, which sought, among other items, copies of any “statements or other correspondence” given by ACCI, and copies of any and all documents “related to the construction at issue”
- 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 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 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

⁵It 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)

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

lending among the parties (not to mention Brown's own, written admission of the same⁷), 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 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

⁷See Brown's handwritten first draft of his July 20, 2007 letter to the Appellant.

⁸It 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.

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

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

A handwritten signature in black ink, appearing to read "Sean Michael Bolchoz", is written over a horizontal line.

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Hale & Bolchoz, L L C
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P O Box 22561
Hilton Head Island, S C 29925
(843) 837-3000
Attorney for Appellant

Hilton Head Island, SC
November 16, 2011



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA SOUTH CAROLINA 29211
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COLUMBIA, SOUTH CAROLINA 9201
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November 7, 2011

Sean Michael Bolchoz, Esquire
Hale & Bolchoz, L L C
P O Box 22561
Hilton Head Island, SC 29925-2561

Re Esguerra, Jorge V Brown, Jamie
2010174706

Dear Counsel

The following Order has been endorsed on your Motion for an Extension to File Reply Brief in the above entitled case on appeal

‘ Granted

John Cannon Few C J
For the Court

By s/ Tanay A Gee
Clerk

November 07, 2011 ”

Please be advised the Appellant’s Initial Reply Brief must be served and filed no later than November 16, 2011

Very truly yours,

A handwritten signature in black ink, appearing to read "Tanya A. Gee", is written over the printed name and title. The signature is fluid and cursive.

CLERK

TAG/laf

cc James F Berl, Esquire
John W Farrell, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III

Case No. 2007-CP-07-1547

RECEIVED

OCT 24 2011

SC Court of Appeals

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

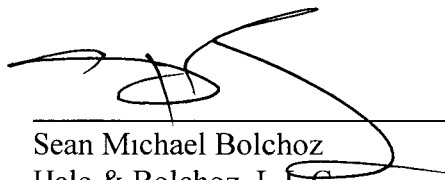
Respondents

APPELLANT'S MOTION FOR AN EXTENSION TO FILE REPLY BRIEF

The undersigned counsel for Appellant Jorge V. Esguerra hereby moves for an Order of this Court extending the deadline for filing Appellant's Reply Brief in this case. Although Respondents' Initial Brief and Designation of Matter to be Included in the Record of Appeal was served, via regular mail, on October 7, 2011, the undersigned did not receive the same until October 12, 2011. Further, the undersigned also has longstanding plans to be out of the country from October 21, 2011 to November 1, 2011. Therefore, the Appellant hereby moves for an order of this Court extending the current deadline for the Appellant's Reply Brief an additional twenty (20) days.

10/27/11
11/14/11

October 19, 2011

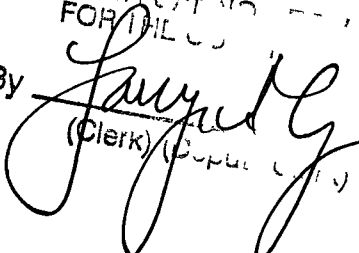


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GRANTED
JOHN CAMPBELL
FOR THE
By 
(Clerk) (Suppl. Clerk)


FILED
10/27/11

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III

Case No. 2007-CP-07-1547

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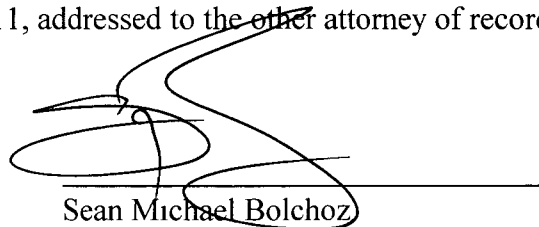
Of whom Robert Baroni, Boyd R. Laughlin and Associated
Construction Consultants, Inc. are

Respondents

PROOF OF SERVICE

I certify that I have served a Motion for Extension by depositing a copy of same in the United States Mail, postage prepaid on October 19, 2011, addressed to the other attorney of record James F. Berl, Esquire

October 19, 2011



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HALE & BOLCHOZ, L L C

ATTORNEYS AND COUNSELORS AT LAW

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JAMES O HALE*

REBECCA H HALE

SEAN MICHAEL BOLCHOZ**

* Also licensed in GA

** Certified Circuit Court Mediator

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October 19, 2011

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OCT 24 2011

SC Court of Appeals

South Carolina Court of Appeals
The Honorable Tanya Gee
PO Box 11629
Columbia, SC 29211

RE *Jorge V Esguerra v Jamie V Brown individually and d/b/a Southeastern Services, Robert Baroni, Boyd R Laughlin and Associated Construction Consultants, Inc*
Case No 07-CP-07-1547
Case Tracking No 2010174706

Dear Ms Gee

Please find enclosed the original and six copies of a Motion for Extension in which to file the Appellant's Reply Brief and Proof of Service for the above-captioned case, along with my firm's check in the amount of \$25 00 for the filing fee Please file the originals and return the clocked copies to me in the enclosed, self-addressed stamped envelope

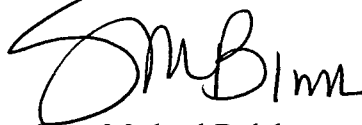
By copy of this letter, I am serving copies of the aforesaid documents upon counsel for the Respondent, pursuant to the applicable South Carolina Appellate Court rules

If you have any questions, please do not hesitate to contact me

With kind, personal regards, I am

Sincerely,

HALE & BOLCHOZ, L L C



Sean Michael Bolchoz

SENDER S E MAIL ADDRESS

SBOLCHOZ@HALEANDBOLCHOZ.COM

SMB/ml

Enclosures

cc Dr Jorge Esguerra (via email only to jesg@neo rr com)

James F Berl Esquire (w/enclosures)

\\Admin orse51adv\z drive\Client Files\D to G Clients\Esguerra Jorge 3463\Appeal\SC Court of Appeals re motion for extension2 wpd

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H Dukes, III

Case No 2007-CP-07-1547

RECEIVED
OCT 10 2011
SC Court of Appeals

Jorge V Esguerra,

Appellant,

v

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

Defendants,

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

Respondents

RESPONDENTS' DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

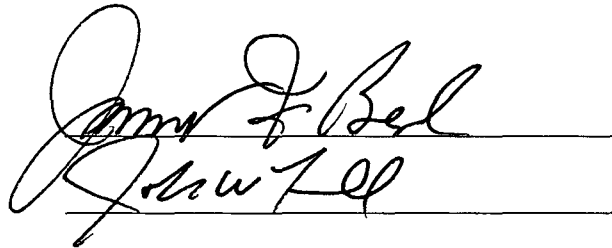
The Respondents, Robert Baroni, Boyd R Laughlin, and Associated Construction
Consultants, Inc , propose the following to be included in the Record on Appeal

- 1 Final Order of Judgment of the Honorable Marvin H Dukes, III, dated May
21, 2010,
- 2 Order of the Honorable Marvin H Dukes, III, dated August 25, 2010,
denying Plaintiff's Motion to Reconsider,
- 3 Complaint
- 4 Amended Complaint, dated January 24, 2008,
- 5 Answer to Amended Complaint
- 6 Plaintiff's Motion to Reconsider, dated June 4, 2010,
- 7 Trial Transcript of November 4th and 5th, 2009, pp 20-21, 39-41, 47-57, 61,
63-68, 88, 91-92, 98, 141, 142, 144-149, 154, 155, 161, 164, 194, 200-202,

- 204, 208, 209, 212, 215, 225, 228, 230, 261, 270, 271, 281, 318, 320, 326-328, 331, 345, 347, 407-409,
- 8 Consent Agreement, Case No 2007-118, dated August 27, 2007,
9 Proposal between Appellant Esguerra and Southeastern Services, dated
November 11, 2004
- 10 Emails from Appellant Esguerra to Defendant Brown, dated November 14,
2005 through January 29, 2006
- 11 Town of Hilton Head building permit # B0501161 pulled by Defendant
Brown
- 12 Inspection coversheet and receipt from Town of Hilton Head, dated April 19,
2005
- 13 Inspection coversheet and receipt from Town of Hilton Head, dated May 18,
2005
- 14 Email from Defendant Brown to Appellant Esguerra, dated May 9, 2005
- 15 April 2005 bank statement for Respondent ACCI
- 16 May 2005 bank statement for Respondent ACCI
- 17 Letter from Respondent Baroni to LLR dated July 12, 2006
- 18 Letter from Defendant Brown to Appellant Esguerra dated July 16, 2006
- 19 Letter from LLR to Appellant Esguerra dated July 26, 2006
- 20 Letter from LLR to Defendant Brown, dated July 26, 2006
- 21 IRC Summary Report, dated July 2, 2007
- 22 Letter from Defendant Brown to Appellant Esguerra, dated July 20, 2007

I hereby certify that this designation contains no matter which is not relevant to this
appeal

October 7, 2011

The image shows two handwritten signatures in black ink. The top signature is 'James F. Berl' and the bottom signature is 'John W. Farrell'. Both signatures are written over horizontal lines.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III

Case No. 2007-CP-07-1547

RECEIVED
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SOUTH CAROLINA
COURT OF APPEALS

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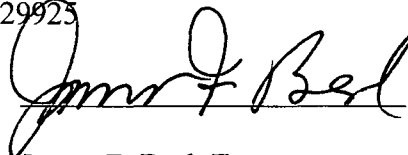
Of whom Robert Baroni, Boyd R. Laughlin, and Associated Construction
Consultants, Inc., are

Respondents

CERTIFICATE AND PROOF OF SERVICE

I certify that I have served the Designation of Matter To Be Included in the Record on Appeal on the Appellant, by depositing a copy thereof in the United States Mail, postage prepaid, this 7th day of October, 2011, addressed to his counsel of record at Post Office Box 22561, Hilton Head Island, South Carolina 29925.

October 7, 2011



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H Dukes, III

Case No 2007-CP-07-1547

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Jorge V Esguerra,

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Defendants,

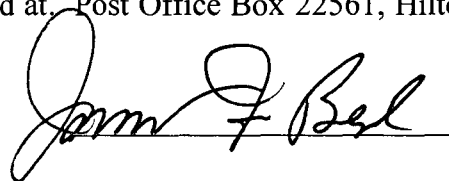
Of whom Robert Baroni, Boyd R Laughlin, and Associated Construction
Consultants, Inc , are

Respondents

CERTIFICATE AND PROOF OF SERVICE

I certify that I have served the Respondents' Initial Brief on the Appellant, by depositing a copy thereof in the United States Mail, postage prepaid, this 7th day of October, 2011, addressed to his counsel of record at, Post Office Box 22561, Hilton Head Island, South Carolina 29925

October 7, 2011



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+ Certified Family Court Mediator

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October 7, 2011

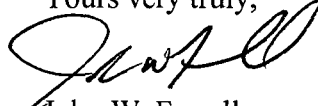
The Honorable Tanya A. Gee
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re Jorge V. Esguerra v. ACCI, Baroni
Case # 2010174706

Dear Ms. Gee:

Enclosed please find an original and one (1) copy of the Respondents' Designation of Matter and Initial Brief. Please file the same and return one clocked copy to the courier. If you have any questions, please do not hesitate to contact me.

With kind regards, I am

Yours very truly,

John W. Farrell

Enclosures

cc Sean Michael Bolchoz, Esquire (w/enclosures)
P O Box 22561
Hilton Head Island, SC 29925-2561

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OCT 10 2011

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H Dukes, III

Case No 2007-CP-07-1547

Jorge V Esguerra,

Appellant,

v

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

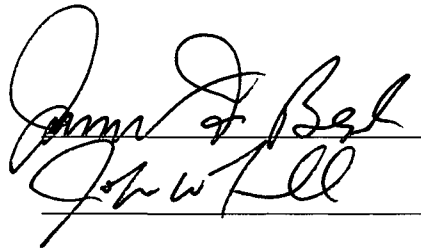
Defendants,

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

Respondents

RESPONDENTS' INITIAL BRIEF

October 7, 2011



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OCT 10 2011
SC Court of Appeals

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<u>Hurd v Williamsburg County</u> , 363 S C 421, 611 S E 2d 488 (2005)	23
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STATEMENT OF ISSUES ON APPEAL

- I THE TRIAL COURT DID NOT ERR IN ITS ORDER AS ALL FINDINGS OF FACT IN ITS FINAL ORDER WERE SUPPORTED BY EVIDENCE SUBMITTED AND/OR TESTIMONY PROVIDED DURING TRIAL 1
- II THE TRIAL COURT DID NOT ERR IN RULING THAT THE APPELLANT DID NOT SEEK JUDGMENT AGAINST THESE RESPONDENTS FOR NEGLIGENCE PER SE, WHEN THE APPELLANT FAILED TO PLEAD SAID CAUSE OF ACTION, AMONG OTHERS, AGAINST THESE RESPONDENTS 6
- III THE TRIAL COURT DID NOT ERR IN FINDING AND CONCLUDING THAT THE APPELLANT'S DAMAGES WERE NOT PROXIMATELY CAUSED BY THESE RESPONDENTS 8
- IV THE TRIAL COURT DID NOT ERR IN ITS FINAL ORDER BY FINDING THAT BROWN'S USE OF ACCI'S LICENSE WAS UNILATERAL, UNLAWFUL, AND WITHOUT THESE RESPONDENTS' KNOWLEDGE OR PERMISSION 10
- V THE TRIAL DID NOT ERR IN ITS FINAL ORDER IN HOLDING THAT THE CONSENT AGREEMENT WAS NOT BINDING BECAUSE THE PROCEEDING BEFORE THE LLR WAS NOT A FULL LITIGATION ON THE MERITS OF THE MATTER, AND THUS, COLLATERAL ESTOPPEL COULD NOT BAR BARONI AND ACCI FROM LITIGATING THE MATTER 21
- VI THE TRIAL COURT DID NOT ERR IN ITS FINAL ORDER BY HOLDING THAT LICENSE LENDING, AS ALLEGED BY THE APPELLANT, WAS NOT SUPPORTED BY EVIDENCE 21
- VII THE TRIAL COURT DID NOT ERR IN ALLOWING LAUGHLIN AND HIS COUNSEL TO CONSULT ABOUT POSSIBLE TESTIMONY THAT WOULD HAVE BEEN PROTECTED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION 21
- VIII THE TRIAL COURT DID NOT ERR IN ITS FINAL ORDER BY CONCLUDING THAT THE APPELLANT WAS COMPARATIVELY NEGLIGENT 22
- IX THE TRIAL COURT DID NOT ERR IN EXCLUDING THE LLR'S INVESTIGATIVE SUMMARY REPORT, AS IT IS PRIVILEGED 27

STATEMENT OF THE CASE

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

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

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

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

ARGUMENT

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

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

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

A review of the entire trial transcript will quickly dispose of the Appellant’s assertions that the Final Judgment Order (“Order”) is unsupported by evidence. The record is replete with evidence from the only two individuals who were there and know what happened, on which evidence the Court’s Findings of Fact are fully supported. (Trial Transcript, pp 20-21, 39-41, 47-57, 61, 63-68, 88, 98, 141, 145-149, 154, 155, 194, 200-202, 204, 208, 209, see also, Town of Hilton Head building permit # B0501161, Inspection coversheet and receipt from Town of Hilton Head, dated April 19, 2005, Inspection coversheet and receipt from Town of Hilton Head, dated May 18, 2005, Letter from Respondent Baroni to LLR dated July 12, 2006)

The Appellant has taken limited language from the Order, as well as limited evidence, to make his argument. In support of his argument that the Trial Court’s Order is unsupported by evidence, the Appellant has totally ignored the extensive testimony provided by Brown and Respondent Baroni during a two-day trial. A few brief, but insightful examples are. When asked “Now I want you to tell the court when you first went to Mr. Baroni, what was his answer about helping you with this project,” Brown answered, “He was not interested. He was too busy.” (Trial Transcript, p 141, lines 23-25). This testimony presented by Brown clearly supports the Order as it reflects Baroni’s initial refusal to assist Brown.

Further, after that portion of the Order which states that Baroni “flatly refused Brown’s initial request,” the Order goes on to state that “Baroni further indicated that if the plans were in order, he would go with Brown to the Town of Hilton Head and pull a permit under ACCI’s license, for them to do the work ” (Order, p 3) Again, Counsel for the Respondents asked, “And did he further tell you that if it was acceptable to him he would go down and pull the permit?” to which Brown responded, “I think that’s exactly what he said ” (Trial Transcript, p 145, lines 13-15, see also, lines 16-25) Trial testimony provided by Brown clearly supports the Order

The Trial Court’s Order is replete with supporting testimony from witnesses during trial When asked, “Did Bob ever give you permission to make application?” Brown responded, “No ” (Trial Transcript, p 145, line 25) Further, when asked, “Did he ever give you permission to go down and pull a permit under his company’s name without his knowledge?” Brown responded, “No, he didn’t ” (Trial Transcript, p 146, lines 1-2, see also, Trial Transcript pp 147-149, pp 154-155, lines 1-3, p 200, lines 18-25) The truthfulness of this statement is reflected in the fact that the actual permit application processed by Brown is replete with factual errors including the phone number and address for ACCI, which if Baroni had been involved would not have been the case (Town of Hilton Head building permit # B0501161 pulled by Defendant Brown) Further evidence includes when Brown testified that “Bob’s involvement was nothing other than him saying to go to Beste ” (Trial Transcript, p 194, lines 18-22, see also, Trial Transcript, pp 144, 200-202, p 204, lines 9-22, p 208, lines 17-22, p 331, lines 14-22) As stated in Fesmire, the Trial Court, in viewing all of the evidence and testimony as a whole, is in a much better position

to assess the credibility of Brown and Respondent Baroni, and ultimately, reach a decision as to the merits of the case

The Appellant's assertion that the LLR opened its investigation of Baroni earlier than the Order states is refuted by the letter from Respondent Baroni to Mr Ido of the LLR which starts out by saying, "I am in receipt of a letter from Mr Jorge Esquerro, MD, the Owner of the above referenced address " (Letter from Respondent Baroni to LLR dated July 12, 2006) The letter does not state that the Respondent Baroni is responding to an inquiry from the LLR, but merely to a letter from Appellant In fact, the case number, 2007-118, assigned by the Office of Investigation and Enforcement of the LLR to its inquiry concerning Baroni and ACCI, suggests that the matter was not opened by the LLR until 2007 Moreover, when the LLR opened its investigation against the Respondents is irrelevant to the issues at hand

Respondent Baroni testified that he was prepared to assist Brown if certain actions were taken, but those actions never were taken by Brown In his letter to Charles Ido of the LLR, Respondent Baroni candidly stated that Brown asked "me if I was interested in doing work at Harbourwood Villas ACCI declined the work " (Letter from Respondent Baroni to LLR dated July 12, 2006) In the letter, when Respondent Baroni stated that "ACCI did tell Mr Brown we could use my license number to perform a small job" (emphasis added), Baroni goes on to say that Respondent "ACCI never reviewed any drawings, specifications or scope of work" and further, that ACCI "did not (1) Submit to the Town of Hilton Head an application, (2) Pay for permit, (3) Pick up a permit, (4) Or aware [sic] of any requirement, (5) Had any contact with the Town of Hilton Head or Owner, (6) Received any money " (Letter from Respondent Baroni to LLR dated July 12, 2006) "**ACCI was not**

even aware that work was being performed until about 3-4 weeks ago when I received a voicemail from Frank Hodge ” (emphasis added) (Letter from Respondent Baroni to LLR dated July 12, 2006) The letter from Respondent Baroni to Charles Ido of the LLR, which the Appellant is erroneously relying on to challenge the Court’s Order, along with extensive trial testimony explaining the letter, do not support the Appellant’s position, but rather clearly support the findings of the Trial Court (see, Trial Transcript, p 320, lines 6-11, p 326-328)

Contrary to Appellant’s belief, testimony from Respondent Baroni clearly indicates that he felt he had done nothing wrong In fact, Respondent Baroni testified at trial, “I didn’t feel I was guilty anyway but I will pay the \$1,000 00 ” (Trial Transcript, p 318, lines 24-25, see also, Trial Transcript, p347, lines 14-19)

Respondent Baroni did in fact think that Respondent Laughlin was at one time an employee and/or shareholder of ACCI, and counsel did not stipulate that he was not, or never was In his Initial Brief, Appellant’s allegation that “[t]his is refuted by the stipulations of the parties and Baroni’s trial testimony” (Appellant Initial Brief, p 5) is not supported by the trial transcript which only indicates that counsel stipulated that Respondent Laughlin did not work for Respondent ACCI **full-time** (see, Trial Transcript, p 261, lines 21-25, p 270, lines 16-25, p 271, lines 1-7) Common sense dictates, it would be virtually impossible to work full-time for two employers in the construction field When asked, “Is it your testimony then that sometime prior to my deposition Mr Laughlin owned shares in ACCI,” Respondent Baroni testified, “I believe he did ” (Trial Transcript, p 281, lines 7-9, see also, Trial Transcript pp 381, lines 10-21) This testimony supports the Trial Court’s Order which

found that “at one time Baroni believes Laughlin was not only an employee of ACCI, but was also a shareholder ” (Order, p 8) Even if the trial court committed error on this issue, which is disputed, the issues presented by the Appellant are irrelevant, and thereby caused no harm to him

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

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

“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved in appellate review.” Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The Appellant never filed any motion to further amend his pleadings, either prior to, during, or after the trial. The first time that the Appellant raised the issue of amending the pleadings came in a letter to the Honorable Judge Dukes dated December 4, 2009, nearly a month after the close of the case and more than one week after post-trial motions and briefs were submitted, and two days after oral argument on the same had been completed. Foremost, the Respondents take exception to the Appellant’s attempt to include the letter to Judge Dukes, dated December 4, 2009, as part of the record in this appeal. In said letter, the appellant stated that he “was

not adequately able to address” certain issues during the post-trial arguments. In fact, the Appellant stated in his letter to Judge Dukes that “to the extent necessary, I would move to have the pleadings conform to the evidence presented at trial.” As set forth in Wilder Corp., counsel for the Appellant did not preserve this matter for appellate review because he never moved to amend the pleadings during trial, and, as indicated in his letter to Judge Dukes, failed to do so during the post-trial arguments. Lastly, the Judge never ruled upon the matter, as required by Wilder Corp. As such, the Appellant cannot now seek appellate review of this issue.

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

Further, the Appellant, in the first cause of action for negligence *per se*, only refers to a violation of S.C. Code of Laws §§ 40-59-30 and 40-59-240(d), both of which refer to a contractor performing work in excess of \$5,000.00 without a license. (Amended

Complaint, p 4) The alleged statutory violations cited by the Appellant do not refer to license lending by Respondents in any way, and therefore, do not apply to the Respondents

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

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

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

Although not plead, Appellant, during the trial of this matter, raised the issue that the Respondent Laughlin was in violation of § 40-11-230, on the grounds that Respondent Laughlin no longer has an ownership interest in the entity known as ACCI, as required under sub-section (c), when a qualifying party is serving as the primary qualifying party for two (2) entities, as was the case with Mr. Laughlin. While such was acknowledged by Respondent Laughlin, the absence of an ownership interest which, according to the evidence, was at one time held by the Respondent Laughlin, has no nexus to the events which took place between the Respondents Baroni and ACCI, and Brown. It is not enough for the Appellant to merely

assert that a statute has been violated, the Appellant must show that the violation had a direct causal relationship to the damages suffered by the Appellant [see, Trivelas v South Carolina Department of Transportation, 348 S C 125, 558 S E 2d 271 (Ct App 2001) Aff'd see also, Seal by Causey v Winburn, 314 S C 416, 445 S E 2d 94 (Ct App 1994)] Even if the Respondent Laughlin still owned a percentage of ownership in ACCI, such would not have had any impact on the interaction between Brown and the Respondents Baroni and ACCI Having a minority ownership interest in no way translates into having knowledge of every little event in which the majority shareholder or entity is engaged

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

As stated above, Respondent Baroni did believe that Respondent Laughlin was at one time an employee and/or shareholder of ACCI When asked, "Is it your testimony then that sometime prior to my deposition Mr Laughlin owned shares in ACCI," Respondent Baroni testified, "I believe he did " (Trial Transcript, p 281, lines 7-9, see also, Trial Transcript p 381, lines 10-21)

In support of his argument that the Respondent Laughlin is somehow liable, Appellant cites Burry & Son Homebuilders, Inc v Ford, 310 S C 529, 426 S E 2d 313

(1992) However, Burry deals with an unlicensed contractor trying to collect from a homeowner, and has nothing to do with alleged violations of S C Code of Laws § 40-11-230 or S C Code of Laws § 40-11-240 As such, it is of no precedential value as concerns the issues before this Court

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

The uncontroverted facts in evidence are that while Brown followed Respondent Baroni's suggestion to obtain plans and specifications from Greg Beste for Baroni's review, Brown never returned with the same to Respondent Baroni, but instead, of his own volition, and without the knowledge or consent of Respondent Baroni, made application to the Town of Hilton Head and pulled a permit under ACCI's name (see, Trial Transcript, p 146, lines 1-2, see also, Trial Transcript pp 147-149, pp 154-155, lines 1-3, p 194, lines 18-22, pp 200-202, p 204, lines 9-22, p 208, lines 17-22, p 331, lines 14-22) Further, the uncontroverted evidence shows that at no time during Brown's work on the project was Respondent Baroni ever aware that Brown had pulled a permit and was using ACCI's license to perform the project

Appellant attempts to rely upon the Consent Agreement entered into by Respondents Baroni and ACCI with the LLR as the basis for claiming liability on the part of Respondents Baroni and ACCI to Appellant In doing so, the Appellant relies upon the doctrine of non-mutual collateral estoppel Although not plead anywhere in Appellant's Amended Complaint, the Appellant is attempting to use Respondents Baroni and ACCI's Consent Agreement with the LLR, regarding aiding a residential contractor in obtaining permit, in

violation of S C Code of Laws § 40-11-110(A)(9), as proof that Respondents Baroni and ACCI are liable to the Appellant for damages suffered by virtue of his contracting with Brown. This ignores the undisputed fact that Respondents Baroni and ACCI entered into an agreement for an administrative sanction of a \$1,000.00 fine, a public reprimand, and ACCI's license being placed on probation for a period of one year, with the expectation that such would be their only consequences, in order to avoid the considerable expense of having to hire a lawyer to litigate the matter. Having not been properly plead, these Respondents would submit that the Appellant is barred from basing his cause of action for negligence *per se* on such matters. Should the Court find otherwise (which the Respondents would submit would be material error), said non-mutual collateral estoppel is still not a basis for finding in favor of the Appellant and against the Respondents Baroni and ACCI in this matter.

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

must prove that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment ” Carrigg v Cannon, 347 S C 75, 552 S E 2d 767 (Ct App 2001) (emphasis added)

The Respondent has not provided any proof that the issue of license lending was **“actually litigated ”** Conversely, rather than expending large amounts of money defending the issue, Respondent Baroni entered into a Consent Agreement with the State Contractors’ Licensing Board (“Board”), and agreed to pay a minimal fine and be on probation for one (1) year The Board never actually adjudicated whether Baroni and ACCI lent their license to Brown The Consent Agreement lacks any factual findings to support its conclusion that Baroni and ACCI violated SC Code of Laws § 40-11-110(a)(9), other than “Respondent aided a residential contractor in obtaining permits and documents to perform commercial work ” The Consent Agreement further states that the “Respondent admits that the Respondent’s action in this matter is in violation of SC Code of Laws § 40-11-110(a)(9)(1976, as amended) and that the conduct in this matter constitutes sufficient grounds **for disciplinary or corrective action ”** (emphasis added) Respondent Baroni never admitted that he lent his license to Brown, or which portion of the statute he violated, **he merely admitted that his conduct constituted sufficient grounds for disciplinary action** It would be unfair and prejudicial to hold that Respondent Baroni’s agreement constituted actual litigation of the matter

Even if the issue of whether Baroni and ACCI lent their license to Brown was litigated, “[t]here are numerous exceptions to the application of collateral estoppel ”

Nelson v. QHG of South Carolina, Inc., 354 S.C. 290, 306, 580 S.E.2d 171 (Ct. App. 2003)(Aff'd in part and rev'd in part on a different issue). Adopting Restatement (Second) of Judgments § 28, the Court of Appeals stated that "[a]lthough an issue is litigated and determined by a valid and final judgment, , relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts (clearly such is the case here where one compares an informal administrative proceeding versus a trial in Circuit Court) (5) There is a clear and convincing need for a new determination of the issue (b) **because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in a subsequent action**, or (c) **because the party sought to be precluded, , did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action** " (emphasis added) Id. at 307

No evidence was submitted to the Court indicating that there was a relation between what Baroni had agreed to do for Brown, and what Brown actually did without his consent, and, further, there could be no nexus between what Baroni had done and the damages suffered by the Respondent. Moreover, it should be noted that the original Complaint which had been served upon the Defendant ACCI, prior to Baroni entering into his agreement with the LLR, specifically limited its negligence *per se* action against the Defendant Brown only, as the statutes referenced therein could not have been violated by ACCI, which possesses the requisite licenses to do the work for which Defendant Brown did not have a license to perform. Further, the only other cause of action in which the issue of licensure is even

touched upon as concerns the corporate Defendant, ACCI, was the Fifth Cause of Action alleging unfair trade practices in which the Plaintiff alleged “the corporate Defendant using its general contractor’s license to acquire the residential construction projects (sic) while using unlicensed workers that had failed to supervise, have occurred with other parties in the past and/or are subject to repetition in the future ” Such allegation could in no way render it foreseeable to Baroni that his subsequent entering into an agreement with the LLR for an administrative sanction and monetary fine, would thereafter be used against him under an amended complaint in which the exact same language was utilized Specifically, neither Respondent ACCI nor Respondent Baroni used ACCI’s general contractor’s license for any aspect of the subject project Also, the subject project was not a residential construction, but rather a commercial construction, hence the need for a general contractor’s license Further, the Respondent, ACCI, uses only fully licensed workers on its projects, or, if using a laborer such as an unlicensed carpenter, that laborer is under the specific supervision of a licensed carpenter The Respondent, ACCI, had not, in relation to the subject project, used any workers, period, as the corporation was not involved in any way in the subject project As for the allegation that the Respondent, ACCI, had used unlicensed workers, or failed to supervise the workers on any project in the past, such was not true, for as stated above, the corporation only uses licensed tradesmen for all of their projects and to the extent any laborers are hired in any craft, such laborers are supervised by licensed tradesmen Finally, as testified to by Respondent Baroni, his incentive for signing that agreement with the LLR was that he was going to receive a minimal administrative reprimand in the form of a \$1,000 00 fine and a year’s probation, as opposed to spending thousands of dollars to have

a full blown hearing in which he would be represented by an attorney before the LLR (see, Trial Transcript, p 318, lines 1-25, p 345, lines 21-25, p 347, lines 18-25) Based on all three (3) factors, the offensive use of collateral estoppel to impose an action for negligence *per se* upon the Respondents Baroni and ACCI is inappropriate

In addition to the above factors, the Court of Appeals has adopted Restatement (Second) of Judgments § 29, which provides for additional circumstances that should be taken into consideration. Those circumstances, along with those identified in Restatement § 28, include “ (2) The forum in the second action affords a party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined, (8) Other compelling circumstances make it appropriate that the party be permitted to re-litigate the issue ” **“Even when the elements of res judicata and collateral estoppel have been met, they will not be rigidly or mechanically applied, and the application of the doctrines may be precluded where unfairness or injustice results ”** Nelson at 314

When Respondents Baroni and ACCI entered into the Consent Agreement with the State Contractors’ Licensing Board, Respondent Baroni could not have logically thought that the issue of whether he lent his license to Brown would arise in the existing action for damages related to defective work performed by Brown. Because he was unaware that the issue of license lending would arise, as it was not alleged against ACCI in the original Complaint which had been served on him, Respondent Baroni did not have an incentive to defend the issue during the LLR proceeding, for, as testified by him, it would have cost him

an exorbitant amount of money to defend the matter in the LLR action. Further, he believed that neither ACCI, nor him acting as the President of ACCI, had done anything wrong insofar as ACCI's involvement on the Esquerra project, and he was fully confident that the facts, when they came out in his defense of the lawsuit, would fully vindicate ACCI. Knowing what was alleged in the original Complaint and what the evidence would be when said matter came to trial, Baroni, as a lay person, could not have in any way anticipated that his administrative agreement with the LLR would somehow be used against ACCI, or especially himself, since he wasn't even a party to the original lawsuit, in this matter. Had Respondent Baroni known that the Appellant would amend his pleadings and then try to bootstrap the administrative agreement as evidence to be used against ACCI and him when the lawsuit came to be heard, he would have vigorously defended the issue. It would be unfair and unjust to preclude Respondents Baroni and ACCI from re-litigating (**actually litigating for the first time**), the issue of license lending. As such, the exceptions in Restatement (Second) of Judgments §§ 28 and 29 were properly applied by the Court to allow Respondents Baroni and ACCI to fully defend the issue raised by the Plaintiff.

But for the Appellant's misplaced attempt to use non-mutual collateral estoppel from an administrative proceeding that so vastly differed from the case at hand, in terms of its consequences and ramifications, the Appellant has no case whatsoever. The evidence clearly showed, when fully litigated, that Respondents Baroni and ACCI did not actually lend their license to Brown, but rather agreed to cooperate with Brown, provided he performed certain tasks and came back with appropriate plans and specifications for **Respondent Baroni's review**. Brown having failed to do so, and further, having undeniably illegally made

application to the Town and pulled the permit under Respondent ACCI's name, without any knowledge or consent on the part of Respondents Baroni and ACCI, it would be manifestly unjust to in any way hold Respondents Baroni and ACCI liable for the Appellant's decision not only to hire an unlicensed contractor to perform the work, but to allow him to continue to perform the same in the face of overwhelming evidence that he was unqualified to so perform, which the Appellant either knew or had reason to know

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

In our case, Respondents Baroni and ACCI did not agree or conspire to let the Brown use their license. Initially, Brown approached Respondent Baroni not once, but twice, about using Respondent Baroni's and ACCI's license for the project. Respondent Baroni flatly refused Brown's first inquiry and then, when requested by the Regime Manager to see if he could assist Brown in the matter, Respondent Baroni informed Brown that he first needed to go get appropriate plans and specifications from an architect, Greg Beste, for Respondent Baroni to review, **and then, if everything was in order,** Respondent Baroni would pull a permit under ACCI for the project. The uncontroverted facts in evidence are that while Brown did follow Respondent Baroni's suggestion and did obtain plans and specifications from Greg Beste, he never returned with the same to Respondent Baroni, but instead, of his own volition, and without the knowledge or consent of Respondent Baroni, made application

to the Town of Hilton Head and pulled a permit under ACCI's name (see, Town of Hilton Head building permit # B0501161 pulled by Defendant Brown, see also, Inspection coversheet and receipt from Town of Hilton Head, dated April 19, 2005, and Inspection coversheet and receipt from Town of Hilton Head, dated May 18, 2005) The uncontroverted evidence further shows that at no time during Brown's work on the project was Respondent Baroni ever aware that Brown had pulled a permit and was using ACCI's license to perform the project, and that the first Respondent Baroni learned of this was when Town agent Frank Hodge contacted him, in response to a complaint from the Appellant, in the spring of 2006, more than two (2) months after the Appellant had terminated Brown's services

The Appellant admitted that at no time was he aware that the permit had been pulled under ACCI's name, nor did he ever have any contact with Respondent, Baroni (Trial Transcript, pp 20-21, 39-41, 88) There is no evidence that showed that Respondents Baroni or ACCI were involved in any way in the project, and, in fact, the evidence shows exactly the opposite (see, Trial Transcript p 161, lines 15-24) One need only to look at the permit to see that it is full of inaccurate information related to ACCI, which corroborates the admission of Brown that he pulled the permit in ACCI's name without Respondent Baroni's knowledge Had Respondent Baroni been involved in actually lending his license to Brown on this project, then logically the permit would have been properly filled out and a check would have been issued from ACCI for the fee The evidence clearly shows such was not the case

It is significant that only Brown signed the permit because it, along with all of the testimony and evidence, clearly showed that Brown was in no way associated with ACCI

Further, the information on the permit is totally inconsistent with the allegations that Baroni and ACCI lent their license to Brown or were involved in the project, as the permit contains (1) a random toll-free telephone number not associated with Baroni or ACCI, and (2) Baroni's personal address, not ACCI's business address (see, Town of Hilton Head building permit # B0501161 pulled by Defendant Brown) Another factor indicating Baroni's and ACCI's lack of participation is that Brown made the payments for the permit to the Town of Hilton Head Island with checks from Southeastern Services (see, Inspection coversheet and receipt from Town of Hilton Head, dated April 19, 2005, and Inspection coversheet and receipt from Town of Hilton Head, dated May 18, 2005)

In accepting those checks, the Town violated its own rules and policies, as testified to by Nancy Heath from the Town's Building and Plans Department (Trial Transcript, pp 407-409) The Town is only supposed to accept a check for a permit drawn by the property owner themselves or **an account on the name of the company shown on the permit**, as a safeguard to prevent permits from being pulled by unlicensed contractors But for the Town's failure to perform its duties in this regard, Brown should not have been able to pull a permit under ACCI's license Neither the Town of Hilton Head nor the Appellant verified that Respondents Baroni and ACCI were managing or supervising the project, nor did the Town or the Appellant verify that Brown and/or Southeastern Services was a licensed contractor The foregoing facts have all been confirmed by testimony and/or evidence presented at trial, and nothing was presented contradicting the same (Trial Transcript, pp 41, 48-51, 91-92, 141, 407-409)

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

Respondent Laughlin, much less allege that he did anything wrong

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

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

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

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

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

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

As set forth in Wilder Corp., “It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved in appellate review.” The Appellant did not preserve this issue during trial, in that counsel for the Appellant failed to object at the time the Trial Court halted the proceedings (see, Trial Transcript, p. 225, lines 1-25). Further, testifying about such issues could have

had criminal implications, and counsel merely consulted with Laughlin about his Fifth (5th) Amendment rights

The Appellant cites “a change in Laughlin’s testimony after the break ” (Appellant’s Brief, p 17) However, a review of the trial transcript indicates that the substance of Respondent Laughlin’s testimony did not change **Prior to** consulting with counsel, Laughlin testified that “[l]ast I knew I was Secretary-Treasurer” of ACCI (see, Trial Transcript, p 212, line 7) Further, when asked if he was “just a party that allows ACCI to get a general contractor’s license,” Laughlin testified that “I still share the office, I am still there everyday I may still be the Secretary-Treasurer ” (see, Trial Transcript, p 215, lines 1-5) **After consulting with his attorney**, Respondent Laughlin testified that “we meet every morning, we would meet in the afternoon We discuss I mean we start off there every morning and go over projects We go over what we are doing, what’s going on ” (Trial Transcript, p 228, lines 1-8) Further, Respondent Laughlin testified that “We set this up eight years ago and we renew our license every two years I believe, you know as Secretary-Treasurer I believe I had an ownership in the corporation ” (Trial Transcript p 230, lines 4-9) As shown by the testimony above, after consulting with counsel about criminal implications, nothing substantially changed in Respondent Laughlin’s testimony, as alleged by the Appellant

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

“Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause **only when without such negligence the injury would not have occurred or could have been avoided** (emphasis added) Hanselmann v McCardle,

275 S C 46, 48, 267 S E 2d 531, 533 (1980) “Proximate cause is the efficient or direct cause, the thing that brings about the complained of injuries ” Platt v CSX Transportation, Inc, 665 S E 2d 631, 640 (Ct App 2008) Furthermore, even if the other tests for proximate cause have been met, which Respondent Baroni and ACCI submit they have not, the **negligence of the Appellant must not exceed that of the Respondents** see, Estate of Haley Ex Rel Haley v Brown, 370 S C 240, 634 S E 2d 62 (Ct App 2006), noting Nelson v Concrete Supply Co., 303 S C 243, 399 S E 2d 783 (1991)(a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant), Ott v Pittman, 320 S C 72, 463 S E 2d 101 (Ct App 1995)(under the doctrine of comparative negligence, negligence by the plaintiff does not automatically bar recovery by the plaintiff unless his negligence is greater than that of the defendant), Hopson v Clary, 321 S C 312, 468 S E 2d 305 (Ct App 1996)(stating plaintiff’s claim was barred under comparative negligence doctrine because plaintiff’s own negligence was, as a matter of law, greater than any negligence attributable to defendant and the more determinative factor in causing the accident), Hurd v Williamsburg County, 363 S C 421, 611 S E 2d 488 (2005)(under the comparative negligence doctrine, a plaintiff may only recover damages if his own negligence is not greater than that of the defendant)

Appellant’s argument that it is inconsistent for the Court to find for Appellant against Defendant, Brown, and find Appellant’s negligence exceeded that of the Respondents, is misplaced Appellant was awarded a **default judgment** against Brown thereby precluding Brown from litigating any issue other than damages The Respondents, on the other hand, were not so barred and the evidence overwhelmingly shows that if for some reason the Court

were to determine the Respondents' actions were tangentially related to Appellant's damages, then clearly the Appellant was far more negligent in his actions and omissions than were the Respondents. Thus, the Appellant is barred from recovering from Respondents under the doctrine of comparative negligence.

The Appellant, Dr. Jorge Esguerra, is, by virtue of his being a radiologist, obviously a very intelligent individual. The Appellant failed to act as a reasonable man of far less intelligence, much less acting as a reasonable man for someone with his intelligence. The Appellant had every opportunity, before contracting with Brown, to investigate his credentials, ascertain what licenses he possessed, what insurance coverages he carried, as well as his capability of performing the contracted for work in a timely manner. The Appellant did none of this, as would a reasonable person, but instead found Brown by virtue of the fact that Brown was installing **a sliding door** in a neighboring unit. At no time did the Appellant request any details regarding Brown's license or insurance, nor did the Appellant engage in any kind of detailed review of Brown's references. Instead, he spoke briefly with a woman who said Brown's work was okay, and accompanied Brown to a unit where the ceiling and other areas had been damaged by a water leak, which was documented by pictures in Brown's possession. At no time did the Appellant ever inquire of references regarding Brown's licensure, his timeliness in completing the work he was contracted to perform, or his capabilities to perform extensive tiling of floor and new construction/additions to existing rooms (see, Trial Transcript, pp. 41, 47-52). Had the Appellant inquired into any of these matters, especially Brown's licensure, he would have discovered that Brown did not possess the requisite skills and licenses, nor the manpower to

timely complete the requested project. As the Appellant admitted during cross-examination, had he checked Brown's license and discovered he did not have the proper license, he would not have hired Brown to do the job. Thus, but for that act of gross negligence on the part of Dr. Esguerra, none of the damages as suffered by him could have occurred (see, Trial Transcript, p. 50, lines 13-25, p. 51, lines 1-6).

As if that is not enough, the evidence clearly showed that the Appellant was on notice, for a period of several months, that Brown was having trouble pulling a permit, which should have been a red flag, especially in light of the fact that the Appellant admitted that his close friend, George Bombadier, a neighbor in the same condominium complex, had advised him there should be no problems pulling a permit (see, Trial Transcript, pp. 52-57, see also, p. 142, lines 17-25). This red flag was ignored by the Appellant. Likewise, when Brown admitted to the Appellant that someone else was helping him try to get the permit (arguably Respondent Baroni), the Appellant failed to inquire as to who Respondent Baroni was, what his role was in the matter, and why there continued to be a problem. Had the Appellant made any of those inquiries, he would have discovered that Brown did not possess the requisite license and, as stated by the Appellant in open Court, had he known Brown did not have the proper license, he would not have hired him to do the job (see, Trial Transcript, p. 98, lines 9-14).

The Appellant's negligent actions and omissions continued long after the permitting issue was resolved, as Appellant admitted he received messages from his neighbor, George Bombadier, informing him that Brown was on the job site very sparingly, one or two days per month, and then only for a few hours. When the Appellant inquired of Brown regarding

completing the project in accordance with their amended contract, Brown basically blew him off with the statement that he had other jobs with which he was involved (see, Emails from Appellant Esguerra to Defendant Brown, dated November 14, 2005 through January 29, 2006, see also, Trial Transcript p 164) This was another huge red flag for the Appellant that Brown was not set up and had inadequate resources to perform the contracted for work in a timely manner Notwithstanding Brown's extensive delays, and the Appellant's own discovery that the addition to his premises was not being constructed in accordance with the conceptual plan which he believed he had communicated to Brown, (he never reviewed the actual plans with Brown) as well as countless other problems with Brown's work, all of which were known to the Appellant, the Appellant allowed Brown to continue to work (see, Trial Transcript, pp 61, 63-68) Further, as the project dragged on month after month, Appellant continued to pay Brown without notifying Brown that he considered the work defective (see, Emails from Appellant Esguerra to Defendant Brown, dated November 14, 2005 through January 29, 2006) This went on to the point where the Appellant had paid Brown basically ninety percent (90%) of the contracted for price, and the evidence shows that the Appellant clearly had innumerable opportunities during this time to terminate Brown's services and complete the project in a timely and proper fashion, but failed to exercise the degree of care that a reasonable man would have exercised under the facts and circumstances then existing

The acts of Respondents Baroni and ACCI, having consisted solely in offering to help Brown get a permit **if he obtained proper plans and specs and came back with such information for Baroni to review**, and having occurred at the very inception of this matter,

after the Appellant had contracted with Brown, pale in comparison to the negligence of the Appellant in not adequately investigating Brown's credentials, and then once problems arose, first with the obtaining of a permit, and then with the actual performance by Brown not terminating his services. The Appellant, without question, had countless opportunities to avoid the damages suffered in this matter, or to significantly mitigate the same, had he only exercised reasonable care and prudence once problems began to occur (see, Emails from Appellant Esguerra to Defendant Brown, dated November 14, 2005 through January 29, 2006). These problems not occurring all at one time, but over an extended period of time, the Appellant had multiple opportunities to either totally avoid, or certainly mitigate his damages in this matter, and failed to do the same. As such, the Appellant's negligence clearly outweighs any negligence on the part of Respondents Baroni and ACCI, and thus, under the comparative negligence rule, the Appellant is barred from collecting from the Respondents.

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

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

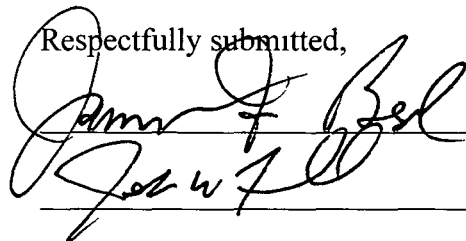
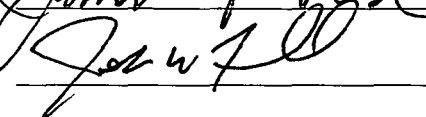
to investigate or hear matters relating to discipline of a licensee, , is privileged and no action or proceeding, civil or criminal, may be brought against the person, by or on whose behalf the communication is made ” While Respondents turned over the summary report pursuant to discovery requests, such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

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

CONCLUSION

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

October 7, 2011

Respectfully submitted,



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John W. Farrell, Esquire
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Attorneys for Respondents, Robert Baroni,
Boyd R. Laughlin, and Associated
Construction Consultants, Inc



The South Carolina Court of Appeals

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September 8, 2011

James F. Berl, Esquire
John W. Farrell, Esquire
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Hilton Head Island, SC 29926

Re Esguerra, Jorge V. Brown, Jamie
2010174706

Dear Counsel,

Enclosed is a copy of an Order of the Court regarding your Motion in the above case.

Please be advised the Respondents' Initial Brief and Designation of Matter must be served and filed no later than October 10, 2011.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc Sean Michael Bolchoz, Esquire

The South Carolina Court of Appeals

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

The Honorable Marvin H Dukes
Beaufort County
Trial Court Case No 2007-CP-07-01547

ORDER

Respondent filed a motion requesting a forty-five day extension to serve and file Respondent's Initial Brief Appellant did not file a return After careful consideration, Respondent's Initial Brief and Designation of Matter shall be served and filed within thirty days, exclusive of the filing date of this order No further extensions will be granted absent extraordinary circumstances

IT IS SO ORDERED



Columbia, South Carolina

cc Sean Michael Bolchoz, Esquire
James F Berl, Esquire
John W Farrell, Esquire

9/8/11 FILED

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III

Case No. 2007-CP-07-1547

RECEIVED

JUL 25 2011

SC Court of Appeals

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

MOTION FOR EXTENSION OF TIME
IN WHICH TO FILE RESPONDENTS' INITIAL
BRIEF AND DESIGNATION OF MATTER

Counsel for the Respondents hereby moves for a forty-five (45) day extension of time in which to file the Respondents' Initial Brief and Designation of Matter. The Respondents base this Motion on the following: (1) in his Initial Brief, the Appellant has made references to the Trial Transcript and other exhibits to which Respondents cannot locate or do not have in their possession, and Respondents need additional time to locate and review same. Further, the Respondents' copy of the Trial Transcript does not include any trial exhibits, and Respondents have contacted the Court Reporter to obtain the same, and (2) during the scheduling conference, counsel for Respondents were unaware that Respondent, Robert Baroni, would be out of the country from July 4, 2011 through August 9, 2011, and unavailable to review and finalize the Respondents' Initial Brief. Respondents' counsel asserts that forty-five (45) days should be sufficient time to allow the Respondents to address the above-referenced issues.

7-25-11
9-8-11

1st

July 22, 2011

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "J. Farrell", is written over a horizontal line.

John W Farrell, Esquire

James F Berl, Esquire

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H Dukes, III

Case No 2007-CP-07-1547

RECEIVED

JUL 25 2011

SC Court of Appeals

Jorge V Esguerra,

Appellant,

v

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

Defendants,

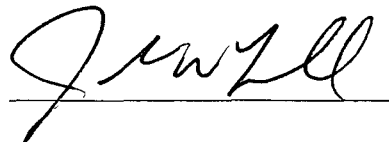
Of whom Robert Baroni, Boyd R Laughlin, and Associated Construction
Consultants, Inc , are

Respondents

CERTIFICATE AND PROOF OF SERVICE

I certify that I have served on the Appellant the Motion For Extension of Time In Which To File Respondents' Initial Brief and Designation of Matter by depositing a copy of it in the United States Mail, postage prepaid, on July 22, 2011, addressed to his counsel of record at Post Office Box 22561, Hilton Head Island, South Carolina 29925

July 22, 2011



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July 22, 2011

The Honorable Tanya A. Gee
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

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JUL 25 2011

SC Court of Appeals

Re Jorge V. Esguerra v. ACCI, Baroni
Case # 2010174706

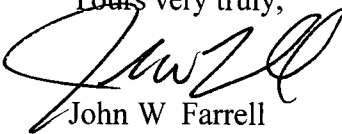
Dear Ms. Gee:

Please accept the enclosed Motion for Extension of Time on behalf of the Respondents in the above-referenced matter. As such, I have enclosed the following:

- 1) the original Motion for Extension of Time,
- 2) six copies of the Motion,
- 3) my firm's check in the amount of \$25.00, to cover the filing fee, and
- 4) Certificate of Service on the Appellant.

Please file the same and return one clocked copy to me in the enclosed self-addressed stamped envelope. If you have any questions, please do not hesitate to contact me.

With kind regards, I am

Yours very truly,

John W. Farrell

Enclosures

cc Sean Michael Bolchoz, Esquire (w/enclosures)
P O Box 22561
Hilton Head Island, SC 29925-2561



The South Carolina Court of Appeals

TANYA A GEE
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June 7, 2011

Sean Michael Bolchoz, Esquire
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Re Esguerra, Jorge V Brown, Jamie
Case Tracking # 2010174706

Dear Counsel

We have received the Appellant's Initial Brief and Designation of Matter in the above case on appeal

All parties are advised that the correct case caption for this matter is

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

All parties are reminded that the correct case caption must be used on all future filings in this matter

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec
cc James Frederick Berl, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

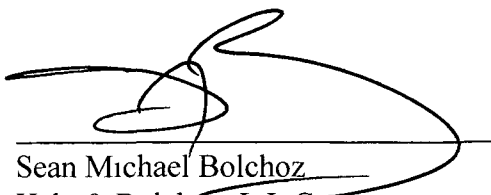
Of whom Robert Baroni, Boyd R Laughlin and Associated
Construction Consultants, Inc are

Respondents

AMENDED NOTICE OF APPEAL

Appellant Jorge V Esguerra appeals the Order of The Honorable Marvin H Dukes, III, dated August 25, 2010 Appellant received written notice of this order on August 25, 2010

May 23, 2011



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MAY 26 2011
SC Court of Appeals

Other Counsel of Record

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May 23, 2011

South Carolina Court of Appeals

The Honorable Tanya Gee

PO Box 11629

Columbia, SC 29211

RE *Jorge V Esguerra v Jamie V Brown individually and d/b/a Southeastern Services, Robert Baroni, Boyd R Laughlin and Associated Construction Consultants, Inc*
Case No 07-CP-07-1547
Case Tracking No 2010174706

Dear Ms Gee

Please find enclosed the original and one copy each of an Amended Notice of Appeal for the above-captioned case. I would appreciate it if you would file the original and return the clocked copy to me via the enclosed, self-addressed stamped envelope.

By copy of this letter, I am serving copies of the aforesaid notice upon all counsel of record, pursuant to the applicable South Carolina Appellate Court rules.

If you have any questions, please do not hesitate to contact me.

With kind, personal regards, I am

Sincerely,

HALE & BOLCHOZ, L L C



Sean Michael Bolchoz

SENDER'S MAIL ADDRESS

SBOI CHOZ@HALEANDBOLCHOZ.COM

SMB/ml

Enclosures

cc Dr Jorge Esguerra (via email only to jesg@neo rr com)

James F Berl Esquire

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MAY 26 2011

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III

Case No. 2007-CP-07-1547

RECEIVED

MAY 25 2011

SC Court of Appeals

Jorge V. Esguerra

Appellant,

v

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

Respondents

APPELLANT'S INITIAL BRIEF

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Attorney for Appellant

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STATEMENT OF ISSUES ON APPEAL

- I DID THE TRIAL COURT ERR IN ITS ORDER BY INCLUDING FINDINGS OF FACT UNSUPPORTED BY THE EVIDENCE SUBMITTED AT TRIAL?**
- II DID THE TRIAL COURT ERR IN ITS ORDER BY RULING THAT THE APPELLANT DID NOT SEEK JUDGMENT AGAINST THE RESPONDENTS FOR NEGLIGENCE PER SE, WHEN THE APPELLANT'S COMPLAINT SHOWS THE CONTRARY, THE STATUTORY VIOLATIONS WERE ADDRESSED AT TRIAL AND THE APPELLANT MOVED TO CONFORM THE PLEADINGS TO THE EVIDENCE?**
- III DID THE TRIAL COURT ERR IN ITS ORDER BY FINDING AND CONCLUDING THAT THE PLAINTIFF'S DAMAGES WERE NOT PROXIMATELY CAUSED BY THE ACTS AND OMISSIONS OF BARONI, ACCI AND LAUGHLIN, WHEN THE TESTIMONY AND THE EVIDENCE PRESENTED AT TRIAL REFLECTED THAT THE RESPONDENTS' ACTS AND OMISSIONS WERE IN VIOLATION OF STATUTES MEANT TO PROTECT THE APPELLANT?**
- IV DID THE TRIAL COURT ERR IN ITS ORDER BY DISREGARDING THE PRIOR POSITION TAKEN BY BARONI AND ACCI, AND THE RESULTING DECISION OF THE LLR, TO FIND THAT BROWN'S USE OF ACCI'S LICENSE WAS UNILATERAL, UNLAWFUL AND WITHOUT BARONI'S KNOWLEDGE OR PERMISSION?**
- V DID THE TRIAL COURT ERR IN ITS ORDER BY HOLDING THAT THE CONSENT AGREEMENT WAS NOT BINDING BECAUSE IT DID NOT PUT BARONI ON NOTICE THAT THE AGREEMENT COULD BE USED AGAINST HIM, WHEN BARONI ADMITTED AT TRIAL THAT HE KNEW HIS RIGHTS BEFORE THE LLR AND HAD WAIVED THE SAME?**
- VI DID THE TRIAL COURT ERR IN ITS ORDER BY HOLDING THAT THE "ALLEGED" LICENSE LENDING BY BARONI AND ACCI WAS NOT SUPPORTED BY THE EVIDENCE, WHEN THE EVIDENCE SHOWED THAT BROWN AND BARONI HAD EACH PREVIOUSLY ADMITTED TO LICENSE LENDING?**
- VII DID THE TRIAL COURT ERR AT TRIAL BY HALTING APPELLANT'S CROSS-EXAMINATION OF LAUGHLIN AND ALLOWING HIM AND HIS COUNSEL TO DISCUSS LAUGHLIN'S TESTIMONY OUTSIDE OF THE PRESENCE OF THE APPELLANT AND THE TRIAL COURT?**

- VIII DID THE TRIAL COURT ERR IN ITS ORDER BY CONCLUDING THAT THE APPELLANT'S COMPARATIVE NEGLIGENCE EXCEEDED ANY NEGLIGENCE ON THE PART OF THE RESPONDENTS, EVEN THOUGH THE TRIAL COURT AWARDED THE APPELLANT DAMAGES AS AGAINST BROWN, AND BARONI HAD PREVIOUSLY ADMITTED TO LICENSE LENDING?**
- IX DID THE TRIAL COURT ERR AT TRIAL BY EXCLUDING THE LLR'S INVESTIGATIVE REVIEW COMMITTEE SUMMARY REPORT FROM THE EVIDENCE, WHEN THE SAME REPORT HAD PREVIOUSLY BEEN PROVIDED BY THE RESPONDENTS DIRECTLY TO THE APPELLANT?**

STATEMENT OF THE CASE

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

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

The LLR also contacted Respondents Baroni and ACCI about the matter, and Baroni also responded by letter in July of 2006. The LLR's investigation apparently stalled for a time, but, when the investigation was completed, the LLR concluded, based upon, among

other things, its interviews with Baroni and Baroni's letter of July, 2006, that Baroni and ACCI had engaged in "license lending" with Brown. Eventually, Baroni/ACCI entered into a Consent Agreement in September of 2007, wherein Baroni admitted to lending ACCI's license to Brown, and was penalized.¹

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

After filing the lawsuit, the Appellant determined that he also had a cause of action against the primary qualifying party for ACCI's general contractor's license, Boyd Laughlin ("Laughlin"), and amended his complaint to include Laughlin. Afterward, new counsel for ACCI, Baroni and Laughlin answered the Appellant's amended pleadings.

¹Initially, this information was not produced by Baroni and ACCI in their responses, dated October 2, 2007, to the Appellant's First Request for Production. However, through their new counsel, Baroni, ACCI and Laughlin later supplemented such responses and provided their previously non-disclosed LLR file.

²Two affidavits of default were actually filed as to Brown: one for his failure to answer the initial complaint, and one for his failure to answer the amended complaint.

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

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

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

The Appellant received the order denying reconsideration on August 25, 2010 and thereafter filed and served his notice of appeal, dated September 21, 2010, from the Final

ARGUMENT

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

The trial court’s findings of fact, beginning on page two of the Order, contain numerous findings that are not supported by the evidence submitted at trial and are therefore erroneous, to wit

- The trial court found as a fact that Baroni flatly refused Brown’s initial request for assistance in getting a permit, according to both Baroni and Brown’s testimony (Order, p 3) This is not supported by Brown’s testimony (Trial Transcript, pp 124-125, 128, 130, 131, 207-209)
- The trial court found a fact that Brown admitted that he improperly obtained a permit under ACCI’s name without any knowledge on the part of Baroni (Order, p 3) This is refuted by Brown’s testimony, Brown’s letters, the letter from Baroni to the LLR and the Consent Agreement (Trial Transcript, pp 124-125, 128, 130, 131, 207-209)
- The trial court found as a fact that, according to both Brown and Baroni’s testimony, Brown’s actions were unilateral and without Baroni’s permission

³The Appellant’s Brief hereinafter refers to Baroni, ACCI and Laughlin – when used collectively – as the “Respondents”, to distinguish them from Brown, as the Appellant is only appealing from the Order’s holding as to the Respondents, not as to Brown

(Order, p 4) This is refuted by Brown's testimony, Brown's letters, the letter from Baroni to the LLR and the Consent Agreement (Trial Transcript, pp 124-125, 128, 130, 131, 207-209)

- The trial court found as a fact that the Appellant, after firing Brown, never had any conversation with the Respondents, but "[i]nstead, filed a complaint against Brown" with the LLR, and "[n]early a year later, pursuant to further complaints" from the Appellant, the LLR opened an investigation as to Baroni and ACCI (Order, pp 5-6) This is unsupported by the letter from Baroni to the LLR, dated July 12, 2006, which clearly reflects that Baroni was aware of the Appellant's claims before the LLR, in July of 2006, around the same time the Appellant made his claims against Brown
- The trial court found as a fact that Baroni wrote a letter to Charles Ido at the LLR indicating that he was merely "prepared" to assist Brown with pulling a permit (Order, p 6) This is not supported by either the letter from Baroni to the LLR or the Consent Agreement
- The trial court found as a fact that Baroni felt that he hadn't done anything wrong (Order, p 7) This is not supported by either the letter from Baroni to the LLR or the Consent Agreement
- The trial court found as a fact that Baroni at one time believed Laughlin was an employee of ACCI and was also a shareholder This is refuted by the stipulations of the parties at trial and Baroni's trial testimony (Trial Transcript, pp 211, 214, 215 261, 270, 285)

- The trial court found as a fact that Brown “totally corroborated the facts” as to Brown’s involvement with Baroni and that Baroni knew nothing about the pulling of the permit (Order, p 9) This is refuted by Brown’s testimony, Brown’s letters, the letter from Baroni to the LLR and the Consent Agreement (Trial Transcript, pp 124-125, 128, 130, 131, 207-209)⁴

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

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

Not only does the Appellant’s amended complaint explicitly seek relief as against the Respondents and Brown, the Respondents’ violation of numerous statutes was addressed in great detail at trial and the Appellant moved to conform the pleadings to the evidence

Under the SCRCP, a party may amend his pleading by leave of court and leave shall be freely given when justice so requires and does not prejudice any other party Rule 15(a), SCRCP The prejudice envisioned by Rule 15 is a lack of notice that a new issue is going to

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

be tried, and a lack of opportunity to refute it *Pool v Pool* 329 S C 324, 494 S E 2d 820, 823 (1998)

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

In the instant case, the Appellant's Amended Complaint reflects that he is seeking damages as against "the Defendants' – Brown and the Respondents – for the Appellant's First Cause of Action, negligence per se (Amended Complaint, ¶¶26-27)⁵ Moreover, Baroni and Laughlin were examined and cross-examined at length about all of the statutory violations, and the Respondents' counsel informed the trial court that his client desired to testify fully about them (Trial Transcript, p 225)⁶ Obviously, the Respondents had notice of the statutes claimed to be violated and, indeed, took the opportunity to refute them Lastly, after the trial court indicated to counsel that it would like to see post-trial briefs on

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

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

the issues (Trial Transcript, p 445), the Appellant moved to conform the pleadings to the evidence (Letter to The Honorable Marvin Dukes, dated December 4, 2009) The trial court's ruling to the contrary is in error

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

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

South Carolina Code Ann Section 40-11-110(A) allows the LLR Contractor's Board to impose disciplinary action upon a licensee, certificate holder, or other entity or individual if the board finds any of these conditions “ (9) aiding or abetting an unlicensed entity to evade the provisions of this chapter, combining or conspiring with an unlicensed entity, allowing one's license to be used by an unlicensed entity, or acting as agent, partner, or associate, or an unlicensed entity” S C Code Ann Section 40-11-230 sets forth that an individual must do the following to become designated by an entity as a primary qualifying party “ (3) submit proof of full-time employment in a responsible management position by the entity for whom the applicant will be the primary qualifying party ” This section goes on to state that a “*primary qualifying party may not take other employment that would*

conflict with the duties as primary qualifying party or diminish the ability to adequately supervise work performed by the licensee” (Emphasis supplied)

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

The testimony at trial reflected the following

- Laughlin is not and was not a full-time employee of ACCI (Trial Transcript, pp 211, 226, 232, 236)
- Laughlin has not submitted proof of full-time employment with ACCI (Trial Transcript, p 231)
- Laughlin is not an officer of ACCI (Trial Transcript, p 214)
- Laughlin has no ownership of ACCI (Trial Transcript, pp 247, 270)
- Laughlin is the primary qualifying party for Task Services, and is President of the same (Trial Transcript, p 215)
- Laughlin and Baroni/ACCI have their own, separate projects, which consist of different types of work (Trial Transcript, p 215)⁷

⁷Although Laughlin initially testified prior to trial as follows ***“I am not part of the corporation*** You know, ***I am the license holder for them, but that is not my corporation*** and I am not an officer on the board ***I am nothing to the corporation, except I am the qualifier for the***

- Laughlin does not believe that Section 40-11-230(B)(3) applies to him (Trial Transcript, p 232)
- ACCI is not in compliance with Section 40-11-230 (Trial Transcript, p 285)

The case of *Burry & Son Homebuilders Inc v Ford*, 310 S C 529, 426 S E 2d 313 (1992) is instructive here. In that case, Burry sued to recover amounts he believed he was due under a contract with the defendants, who, in turn, defended on the grounds that Burry was an unlicensed builder. Burry argued that his use of licensed employees constituted substantial compliance with (former) S C Code Section 40-59-130. The facts showed that one hourly employee of Burry was actually licensed, but worked on the house for only two days and did not use his license to do the work. The Supreme Court noted that such would not constitute substantial compliance with the statute and, in upholding the award of summary judgment to the defendant, the Court further held that **“to allow recovery under these facts would fail to provide any protection to the homeowners and, therefore, undermine the purpose of the statute”** requiring a builder to have the requisite licensure. *Burry* at 315 (Emphasis supplied.)

As reflected in the aforesaid Code sections (qualifying party may not take other employment that would conflict with his duties or diminish his ability to supervise work performed by the licensee) and elaborated upon in *Burry*, the obvious intent and import of the statutory scheme at issue here is to insure that the homeowner/consumer is protected by requiring a qualifying party to oversee its license and licensee, and insure that the licensee

license” (See Transcript of Deposition of Boyd Laughlin, 33 3-7) (Emphasis supplied), his subsequent trial testimony seemed to hedge as to these and other strong declarations, especially after his cross-examination was interrupted (See Argument VII below.)

does not allow the license to be used improperly – such as lending the license out to an unlicensed builder ⁸

In the instant case, the overwhelming evidence presented at trial showed clearly that the Respondents were in violation of numerous sections of the S C Code under Title 40, Chapter 11 (“Contractors”), which led directly to the Appellant’s damages. If Laughlin had complied with the Code and had supervised his licensee (ACCI), and had been actually involved in its operations and business, instead of abdicating the license to Baroni,⁹ Baroni would have been unable to lend ACCI’s license to Brown, who, in turn, would have been unable to pull the permit and perform the negligent work on the Appellant’s property. The trial judge erred in holding otherwise ¹⁰

IV BARONI UNEQUIVOCALLY ADMITTED TO LICENSE LENDING BEFORE A S C ADMINISTRATIVE TRIBUNAL, WHICH RULED

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

⁹Note the following exchange at trial between Laughlin and his counsel: “Q: If you didn’t have confidence in Mr. Baroni’s abilities and experience in this field, **would you allow your license to be with ACCI?** A: Absolutely not.” (Trial Transcript, p. 239) (Emphasis supplied.)

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

ACCORDINGLY, AND IT WAS ERROR FOR THE TRIAL COURT TO IGNORE SUCH RULING TO HOLD THAT BROWN'S ACTIONS WERE UNILATERAL, UNLAWFUL AND/OR WITHOUT THE KNOWLEDGE AND PERMISSION OF THE RESPONDENTS

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

Collateral estoppel, also known as issue preclusion, prohibits a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same *Carolina Renewal Inc v South Carolina Dept of Transp* 2009 WL 3246817, 2 (Ct App ,2009), *quoting Judy v Judy* 383 S C 1, 677 S E 2d 213 (Ct App 2009) While the traditional use of collateral estoppel required mutuality of parties to prevent relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues *Carolina Renewal quoting Snavelly v AMISUB of S C Inc* 379 S C 386, 665 S E 2d 222 (Ct App 2008)

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

The Consent Agreement entered into by Baroni and ACCI and the LLR – wherein Baroni and ACCI acknowledged that they had engaged in license lending with Brown so as to allow Brown to pull the permit for the Appellant's project – constitutes and constituted

a decision of the LLR, an administrative tribunal. Not only was it the LLR's decision, but Baroni and ACCI concurred with it and joined in the decision, by virtue of the Consent Agreement. Baroni and ACCI should have been prohibited by the trial court from relitigating this issue, and testifying in direct conflict with their position before the LLR (i.e., that Baroni lent ACCI's license to Brown), thereby allowing Baroni and ACCI to maintain a contrary position before the circuit court. In turn, it was error for the trial court to rule in favor of Baroni and ACCI, based upon such contrary position.¹¹

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

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

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

Lastly, Defendant Baroni has been disciplined by the State Contractor's Licensing Board *for his minimal discussions* with Brown in this matter. Such disciplinary action is more than sufficient *as a deterrent against future misconduct* (Order, p. 23) (Emphasis supplied.)

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

proceeding

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

At trial, Baroni made no secret of the fact that he consented to the disciplinary findings of the LLR, and he acknowledged that, with the Consent Agreement, the LLR found that he and ACCI had engaged in license lending (Trial Transcript, p 316) Moreover, he knew he was admitting to the violation, he understood he was consenting to the LLR's punishment, he knew he was waiving any further Conclusions of Law from the LLR (Trial Transcript, p 317) and he understood and had full knowledge of his right to ask for a hearing (Trial Transcript, pp 302, 318) The trial court's finding and holding to the contrary is not supported by the evidence, and is erroneous ¹²

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

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

¹²In this regard, the trial court is also in error for holding that the Consent Agreement and Baroni's admission is not binding on him because Baroni's rationale for executing the Consent Agreement was merely to avoid the expense of litigation and attorney's fees (Order, p 18) and that Baroni had no "incentive" to defend himself in the LLR proceeding (Order, p 20)

- The Appellant testified that, prior to construction on his project, Brown called the Appellant and said that Baroni was “helping (Brown) obtain the permit” (Trial Transcript, pp 19-20), Brown, in turn, corroborated this testimony (Trial Transcript, pp 133, 192)
- Brown testified that Baroni obliged to help him by allowing him to use ACCI’s license (Trial Transcript, p 125)
- Brown’s letter of July 16, 2006 to Charles Ido at the LLR states that Baroni obliged to help him by allowing him to use ACCI’s license
- Brown’s letter of July 20, 2007 to the Appellant confesses Brown’s “regret” at “[g]etting Mr Baroni involved” and asking for “that favor”, he further testified at trial that the “favor” was Baroni allowing him to use ACCI’s license (Trial Transcript, p 128)
- With the July 20, 2007 letter to the Appellant, Brown apologized for everything, including, but not limited to, engaging in license lending with Baroni (Trial Transcript, p 130)
- Brown testified that he pulled down the permit for the Appellant’s project with Baroni’s knowledge and authorization (Trial Transcript, pp 136, 204)
- Brown testified that, after the litigation had commenced, Baroni told him that Baroni was going to give Brown a job to allow Brown to pay Baroni back for what Baroni had lost in the litigation (Trial Transcript, p 139)
- Brown’s handwritten first draft of his July 20, 2007 letter to the Appellant includes the line “I know that by law it is illegal to practice license lending,

but it happens ”

- Baroni and ACCI’s letter to Charles Ido of the LLR dated July 12, 2006 states that “*ACCI did tell Mr Brown we could use my license to perform what was described by Mr Brown on [sic] a small job* ” (Emphasis supplied)
- Baroni testified that his letter was “exactly the sequence of what took place” (Trial Transcript, p 325), and that the letter constituted the “facts of what happened” (Trial Transcript, p 346), he further acknowledged that the LLR, based on the letter Baroni sent them, determined he had engaged in license lending (Trial Transcript, p 347)¹³

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

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

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

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

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

In the middle of the Appellant's cross-examination of Laughlin, after Laughlin's counsel informed the trial court he would not allow his client to answer further questions about Laughlin's violations of the statutes (Trial Transcript, p 224), the trial court went off the record and allowed Laughlin to leave the witness chair and discuss the matter with counsel outside of the room and outside of the presence of the Appellant's counsel (Trial Transcript, p 225)¹⁵ A review of the trial transcript in this matter reflects a change in Laughlin's testimony after the break. For example, when challenged as to whether he was involved with ACCI on a daily basis, Laughlin asserted, "Sure I am", and gave a litany of ways in which he was supposedly involved on a day-to-day basis with ACCI (Trial Transcript, pp 227-228). When confronted with his previous, contradictory testimony (*see* Footnote 6), Laughlin answered "Maybe I answered that question wrong" (Trial Transcript, p 228).

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

VIII THE APPELLANT WAS OWED A DUTY BY THE RESPONDENTS AND BROWN, AS EVIDENCED BY THE TRIAL COURT'S AWARDING OF SIGNIFICANT DAMAGES AS AGAINST BROWN,

¹⁵Although the recess of Laughlin's testimony is not reflected at this portion of the trial transcript, the Appellant's counsel recalls the event on the second day of trial (Trial Transcript, pp 267-268), and his concerns regarding the same.

WHICH DUTY WAS BREACHED BY BARON'S ADMITTED LICENSE LENDING TO BROWN

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

An unlicensed contractor may not recover on a contract. *W & N Const Co Inc v Williams*, 322 S C 448, 472 S E 2d 622 (1996). The law of estoppel, even if a homeowner was at the time of the contract aware that the contractor did not have a license, will not apply to benefit the unlicensed contractor, as the statutory scheme requiring homebuilders to have the proper licensure are in place for the benefit of the public. See *Wagner v Graham*, 296 S C 1, 370 S E 2d 95 (Ct App 1988).

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

In the case of *Goheen v DiLaura*, 2008 WL 1991621, 3 (Ky App) (Ky App, 2008), the Kentucky Court of Appeals is even more explicit regarding the duties of a homeowner

In that case, the homeowner (DiLaura) sued Goheen for construction defects and Goheen, arguing that DiLaura had prepared the parties' contract, requested a comparative fault jury instruction, which was denied by the circuit court. In upholding the circuit court, the Court of Appeals specifically held

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

In the instant case, the Appellant, a doctor who resides full time in Ohio, testified that Brown indicated that he had the proper licensure for the job and that he would be working with Baroni to pull down the permit (a fact Baroni subsequently admitted). The Appellant had no further duty, and did everything he could to protect himself while his vacation home was being renovated. The South Carolina statutory scheme is clear that the legislative intent is to protect the homeowner.

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

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

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

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

The trial court nevertheless ruled that the IRC Summary Report is confidential, and thereby excluded it from evidence despite the Appellant's proffer of same. The court indicated that only the LLR can waive its own internal confidentiality with regard to use of the document (Trial Transcript, pp. 310-313). However, it was the Respondents who demanded at trial the exclusion of the Summary Report, thereby asserting a privilege to a document which they had willingly produced to the Appellant.

The Summary Report states that the "facts reveal by means of documents and telephone interviews that [Baroni and ACCI] had allowed a non-licensed contractor to obtain a permit without being properly licensed (**Licensed Lending**)" [sic]. Moreover, the Report goes on to state that "[Baroni and ACCI's] letter of explanation admits to license

lending as did investigators [sic] phone interview with [Baroni]” This was crucial evidence for the Appellant’s case, it was given by the LLR to the Respondents who, in turn, produced it during discovery – with no reference to a privilege log – and it should not have been excluded by the trial court

CONCLUSION

The trial court in the instant case committed reversible error by including unsupported findings of fact in its Final Judgment Order, by ruling in favor of the Respondents on all of the Appellant’s causes of action, by disregarding the Respondents’ prior admissions and findings of the S C LLR Contractor’s Board, by allowing a Respondent to confer with counsel during his cross-examination, by finding the Appellant comparatively negligent, by excluding relevant evidence, and by misstating and misapplying applicable South Carolina law, and the trial court’s Final Judgment Order should be reversed

A handwritten signature in dark ink, appearing to read 'Sean Michael Bolchoz', written over a horizontal line.

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Hilton Head Island, SC
May 23, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III

Case No. 2007-CP-07-1547

RECEIVED

MAY 25 2011

SC Court of Appeals

Jorge V. Esguerra

Appellant,

v

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

Respondents

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Pursuant to Rule 209, SCACR, Appellant proposes the following be included in the Record on Appeal

- 1 Order of The Honorable Marvin H. Dukes, III denying Plaintiff's Motion to Reconsider, dated August 25, 2010
- 2 Final Order of Judgment of The Honorable Marvin H. Dukes, III dated May 21, 2010
- 3 Plaintiff's Motion to Reconsider dated June 4, 2010
- 4 Amended Complaint dated January 24, 2008
- 5 Second Supplemental Responses of Defendants Robert Baroni, Boyd R. Laughlin and Associated Construction Consultants, Inc. to Plaintiff's First Request for Production dated May 13, 2008
- 6 Transcript of November 4 and 5, 2009 Trial, pp. 19-20, 124-125, 128, 130-131, 133, 136, 139, 192, 204, 207-209, 211, 214-215, 224-228, 231-232, 236, 239, 247, 261, 267-268, 270, 285, 302, 310-313, 316-318, 325, 346-347, 445, with exhibits
Exhibit 2 Brown letter to Ido dated July 16, 2006

- Exhibit 3 Messervy letter to Brown dated July 26, 2006
- Exhibit 4 Messervy letter to Brown dated July 26, 2006 with citation
- Exhibit 5 Brown letter to Esguerra dated July 20, 2007
- Exhibit 6 Rough draft of Brown letter to Esguerra dated July 20, 2007
- Exhibit 11 Baroni letter to Ido dated July 12, 2006
- Exhibit 12ID Investigative Review Committee (IRC) Summary Report
- Exhibit 13 Consent Agreement
- 5 Deposition Transcript of Boyd Laughlin dated January 9, 2008, p 33
- 6 Letter to The Honorable Marvin Dukes, dated December 4, 2009
- 7 Letter to Sean Michael Bolchoz dated April 18, 2008
- 8 Letter to James F Berl, Esquire dated April 15, 2008

I certify that this designation contains no matter which is irrelevant to this appeal

May 23, 2011



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Court of Common Pleas

The Honorable Marvin H. Dukes, III

Case No. 2007-CP-07-1547

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Appellant,

v

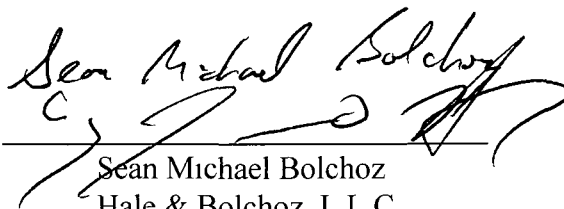
Jamie V. Brown, individually and d/b/a Southeastern Services,
Robert Baroni, Boyd R. Laughlin and Associated Construction
Consultants, Inc.

Respondents

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal by depositing a copy of same in the United States Mail, postage prepaid on May 23, 2011, addressed to the other attorney of record James F. Berl, Esquire

May 23, 2011



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May 23, 2011

South Carolina Court of Appeals
The Honorable Tanya Gee
PO Box 11629
Columbia, SC 29211

RECEIVED

MAY 25 2011

SC Court of Appeals

RE Jorge V Esguerra v Jamie V Brown individually and d/b/a Southeastern Services, Robert Baroni, Boyd R Laughlin and Associated Construction Consultants, Inc
Case No 07-CP-07-1547
Case Tracking No 2010174706

Dear Ms. Gee

Please find enclosed the original and one copy each of the Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal and proof of service for the above-captioned case. I would appreciate it if you would file the originals and return the clocked copies to me via the enclosed, self-addressed stamped envelope.

By copy of this letter, I am serving copies of the aforesaid documents upon all counsel of record, pursuant to the applicable South Carolina Appellate Court rules.

If you have any questions, please do not hesitate to contact me.

With kind, personal regards, I am

Sincerely,

HALE & BOLCHOZ, L L C



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SMB/ml
Enclosures

cc Dr. Jorge Esguerra (via email only to jesg@neo rr.com)
James F. Berl Esquire

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STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
JORGE V ESGUERRA,)
Plaintiff,)
v)
JAMIE V BROWN, individually)
and d/b/a SOUTHEASTERN)
SERVICES, ROBERT BARONI,)
BOYD R LAUGHLIN and)
ASSOCIATED CONSTRUCTION)
CONSULTANTS, INC ,)
Defendants)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO 2007-CP-07-1347

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APR 22 2011

SC Court of Appeals

FINAL JUDGMENT ORDER

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CLERK OF COURT
J. J. HARRIS
CLERK OF COURT

THIS MATTER came before the Court pursuant to a Complaint filed by the Plaintiff, Jorge V Esguerra, against Jamie V Brown (hereinafter "Brown"), individually, and d/b/a Southeastern Services, and Associated Construction Consultants, Inc filed on June 11, 2007. The Defendant, Associated Construction Consultants, Inc (hereinafter "ACCI"), filed its Answer, on or about July 18, 2007. The Defendant, Brown, did not file any pleadings in response to the Complaint. Subsequently, pursuant to the Plaintiff's motion, the Plaintiff filed an Amended Complaint, on January 25, 2008, in which he added Robert Baroni (hereinafter "Baroni") and Boyd R Laughlin (hereinafter "Laughlin") as additional Defendants. Thereafter, the Defendants, Baroni, Laughlin and ACCI, filed their Answer to the Plaintiff's Amended Complaint, on March 26, 2008. Again, the Defendant, Brown, failed to file any pleadings in response to Plaintiff's Amended Complaint. Pursuant to motion by the Plaintiff, and based upon the Plaintiff's Affidavit of Default, a Default Judgment was entered against the Defendant,

Brown, individually, and d/b/a Southeastern Services, on February 5, 2009. Finally, pursuant to motion of the Defendants, Baroni, Laughlin and ACCI, said Defendants filed an Amended Answer to Plaintiff's Amended Complaint, on August 27, 2009, adding an additional defense of Comparative Negligence.

THIS MATTER was set for a Bench Trial before this Court on November 4 and 5, 2009. All parties were fully noticed and all parties were present at the hearing of this matter. All parties were given the opportunity to present evidence at the hearing of this matter over the course of a two (2) day trial, and each was given the opportunity to argue the same both at the conclusion of the trial and by Post-Trial Memorandums/Brief. The parties were also given the opportunity to make such Motions as they desired both during the trial and at the conclusion thereof. Defendants, Baroni and Laughlin and ACCI made various Post-Trial Motions at the conclusion of the evidence, which Motions were taken under advisement pending receipt of the parties' Post-Trial Memorandum/Brief. The Plaintiff, by and through his counsel, made no motions to the Court at the conclusion of the case.

BASED UPON the evidence presented to the Court, I make the following Findings of Fact:

1. The Plaintiff is the owner of a condominium villa on Hilton Head Island known as Unit 147 Harborwood Villas, Hilton Head Island, South Carolina. Plaintiff, after observing Brown performing the replacement of a sliding glass door in an adjoining villa, entered into a conversation with Brown regarding renovations to be performed on Plaintiff's unit. After discussing the scope of renovations desired with Brown, observing work Brown had done on one (1) other property which had been damaged by water, and speaking by telephone, briefly, to a

woman for whom Brown had done some work, who indicated that Brown had performed "okay," Plaintiff then entered into a contract with Brown for the performance of the renovations and additions to the Plaintiff's villa. Plaintiff did not inquire of Brown as to whether he had a proper license to perform the work or insurance relating to the same, and Brown did not divulge that he did not possess the requisite license.

As a result of Brown not having the requisite license, he approached Baroni, the principal shareholder of ACCI, to request his assistance in getting a permit to do the work. According to Baroni and Brown's testimony, Baroni flatly refused Brown's initial request. Subsequently, after Brown spoke with the regime manager for Harborwood Villas and that individual called Baroni, Brown again met with Baroni, at which time, according to both parties' testimony, Baroni told Brown to contact Greg Beste, a licensed architect, and obtain from him proper plans and specifications for the work to be performed at Plaintiff's property, and to return with the same to Baroni for his review. Baroni further indicated that if the plans were in order, he would go with Brown to the Town of Hilton Head and pull a permit under ACCI's license, for them to do the work.

While Brown admitted getting the plans and specifications from Beste, he further admitted, and Baroni confirmed, that Brown never returned to Baroni with the plans and specifications for Baroni's review. Instead, Brown admitted that, without any knowledge on the part of Baroni, Brown, alone, went to the Town of Hilton Head and improperly obtained a permit under ACCI's name, which permit he paid for with a check from Brown's company, Southeastern Services, in violation of Town policy. The Town records admitted into evidence confirmed that the permit was paid for by a check drawn on Southeastern Services' account and

Nancy Heath, from the Town, testified that the Town policy is that a check being used to pull a permit must be drawn on the account of the legal owner of the property, or on the account of the company whose name actually appears on the permit. She also confirmed that the Town should not have accepted a check from Southeastern Services, and could not explain why that happened. Further, upon a review of the permit actually pulled, a copy of which was entered into evidence, it was evident from the testimony of Baroni, as well as other admitted evidence, that said permit contained multiple inaccuracies with regard to the address, phone number and other pertinent data relating to ACCI, as Brown was not privy to such information. According to both Brown and Baroni's testimony, Brown's actions were unilateral and without Baroni's permission.

According to the Plaintiff's testimony, the process of pulling a permit took nearly five (5) months between the date Plaintiff signed his Contract with Brown and the date the permit was issued. Plaintiff testified that, having learned from his Hilton Head friend, Son Hing, that the obtaining of a permit was a routine function and should not take long, the Plaintiff inquired of Brown as the reason for the hold up. Plaintiff testified in response to this inquiry Brown said something to the effect that Baroni was helping with the matter, but the Plaintiff did not inquire as to who Baroni was, or why Brown needed help in getting a permit. Ultimately, Brown informed the Plaintiff, in late April or early May, that a permit had been obtained and he was ready to commence work in May.

The Plaintiff testified that almost immediately after work was supposed to have commenced, he began receiving reports from his friend and neighbor, George Bombardiere, that Brown was only showing up a few days a month for work, and then only for a few hours at a time. Plaintiff testified that when he inquired of Brown regarding this, Brown indicated he had

other work that he had to be doing Plaintiff testified that because he lived in Ohio, he could only visit the project periodically and that he was relying on his friend, George Bombardiere, to keep him informed as to the progress on the job When Plaintiff finally was able to visit the site, he discovered that the addition was not being constructed to the dimensions which he desired When he communicated this to Brown, he was shown the plans which Brown had obtained from Greg Beste, which plans he had never reviewed with Brown prior to the onset of construction Although such plans and drawings did not reflect his desires, Plaintiff allowed the construction to proceed rather than having to re-permit the project Plaintiff testified that despite Brown's assurances to him that Brown would proceed at a reasonable construction pace until completion of the project, he continued to experience problems with Brown's timeliness, such that he ultimately had to amend the Contract to specify a date of completion Unfortunately, Brown did not adhere to the agreed upon amended completion date and the project dragged on and on till finally in March of 2006, Plaintiff terminated Brown's Contract Plaintiff testified he visited the project from time to time over the course of construction/renovation, and that by the time he finally terminated Brown he had paid Brown Seventy-Nine Thousand Dollars (\$79,000 00), which represented more than ninety percent (90%) of the original contract price

Subsequent to firing Brown, the Plaintiff hired Carl Partelow (hereinafter "Partelow") to complete the unfinished work and to repair some of Brown's defective work Also subsequent to firing Brown, but prior to hiring Partelow, Plaintiff acknowledged that he learned that Brown had pulled the permit in the name of ACCI, an entity he had never heard of before He further admitted that at no time did he have any conversations with Mr Baroni or any other individual associated with ACCI in response to discovering ACCI's name on the permit Instead, he filed a

complaint against Brown with the South Carolina Department of Labor, Licensing and Regulation (LLR) In response to said complaint, the LLR by letter dated July 26, 2006 subsequently sanctioned Brown for violations of South Carolina Code Annotated Sections 40-59-240(a) and 40-59-240(d)

Nearly a year later, pursuant to further complaints from the Plaintiff, the LLR opened an investigation as to the role of Baroni and ACCI in the matter of Brown's work for the Plaintiff Baroni testified that pursuant to that investigation, he received a phone call from Frank Hodge, at the Town of Hilton Head's Building Department, regarding ACCI's license having been used on a job worked by Brown Baroni further testified that this was the first he knew anything about Brown having used ACCI's license in conjunction with the renovations for the Plaintiff, since Brown had not returned to him with any plans to review in relation to the proposed project Baroni testified that he assumed that Brown had not gone forward with the project since he had not returned to Baroni with a request for Baroni to pull a permit

Upon being contacted by the LLR, Baroni wrote a letter to Charles Ido attempting to explain what has transpired, i e , that he was prepared to assist Brown with pulling a permit provided he saw appropriate plans and specifications, but that he never reviewed any plans, never pulled the permit, never supervised the project or had anything to do with the matter Baroni testified that subsequent to sending his letter to Mr Ido, he discussed the matter with Mr Ido and was given the option of entering into a Consent Agreement whereby ACCI would pay a One Thousand Dollar (\$1,000 00) fine and be placed on probation for one (1) year or he could hire an attorney and request a hearing before the Board in Columbia to contest the matter (Both

Baroni's letter to Ido and the Consent Agreement, as well as the statute referenced in the Agreement, § 40-11-110(A)(9), were admitted into evidence)

Baroni testified that having been informed by his previous attorney prior to Baroni writing the letter to Ido, that his attorney would charge him Five Hundred Dollars (\$500 00) to Six Hundred Dollars (\$600 00) just to write the letter of explanation, he knew that it would cost him many thousands of dollars to have his attorney travel from Hilton Head Island to Columbia for a contested hearing. Therefore, even though he felt he hadn't done anything wrong, Baroni chose to accept the proposed administrative resolution as opposed to incurring thousands of dollars of expense to contest the issue of any liability on the part of him or ACCI at a full hearing before the Board. Baroni testified he therefore signed the agreement with the LLR which was entered into evidence. Baroni further testified that with that, he felt the matter had been fully resolved by that administrative agreement and never imagined that the Plaintiff would subsequently sue him, ACCI or Laughlin.

Baroni also testified with regard to the role of himself as primary shareholder and employee of ACCI and the role of Laughlin as the qualifier for ACCI's general contractor's license. Baroni testified that he holds a residential builders license as well as several other smaller licenses and that most of the jobs which ACCI performs can be performed under the licenses which he holds. He acknowledged that there are projects from time to time which require a general contractor's license and that ACCI possesses a general contractor's license pursuant to its qualifier, Laughlin. Baroni testified that he met Laughlin when Laughlin was working for another company, doing some fire repair work at a condominium complex where Baroni was acting as a consultant for the regime. He further testified that sometime subsequent

to that initial encounter, Laughlin took up residence on Hilton Head Island and opened a company known as Task Services, which company sublet space from ACCI. Baroni testified this was the beginning of a longstanding relationship in which the parties have shared the same facility, have assisted one another on various projects and have referred work to one another on a regular basis. He further indicated that at one time he believes Laughlin was not only an employee of ACCI, but was also a shareholder.

Laughlin testified and basically corroborated the facts as testified to by Baroni. He indicated that while today he no longer owns an interest in ACCI, is not an everyday employee, and does not receive direct compensation therefrom, he considers the many contracts which are referred to him by ACCI to be a form of compensation for his role as the primary qualifier for ACCI's general contractor's license. In response to cross-examination by Plaintiff's counsel regarding his compliance with §§ 40-11-230 and 40-11-240, South Carolina Code of Laws, 1976, as amended, Laughlin, upon reviewing said statutes relating to primary qualifiers and licensure, testified that he believes he is in compliance with the same. He further testified that on projects in which the general contractor's license is being utilized, he and Baroni regularly communicate regarding matters requiring his expertise. Under similar questioning by Plaintiff's counsel, Baroni likewise testified that, as far as he knew, both he and ACCI were in compliance with the requirements for Laughlin to be the primary qualifier for ACCI's general contractor's license. (Copies of these statutes were admitted into evidence.)

Laughlin further testified that he had absolutely no knowledge of the two (2) meetings between Baroni and Brown. He believes the reason Baroni did not discuss the same with him is that nothing evolved therefrom, since Brown never came back to Baroni for the purpose of

pulling a permit. He knew nothing whatsoever with regard to the project at the Plaintiff's villa, the LLR proceedings with ACCI, or anything at all about the Plaintiff, until he was joined in this lawsuit pursuant to the Plaintiff's Amended Complaint. Laughlin confirmed the Plaintiff's testimony that they had never spoken to one another and knew nothing of one another prior to this lawsuit.

Laughlin also testified, *albeit* not as an expert witness, that the vast majority of the work performed by his company, Task Services, is of the exact same nature as the work performed at Plaintiff's villa. He further testified that, although he has not personally observed the condition of the villa, the repair costs to which Plaintiff's expert testified relating to the repair work needing to be performed at Plaintiff's villa were extremely inflated by at least two (2) to three (3) times the actual amount it should take to perform the described work.

The Defendant Brown testified and totally corroborated the facts as to his involvement with Baroni and that Baroni knew nothing about the fact that Brown unilaterally, after obtaining plans from Greg Beste, pulled a permit under the name of ACCI. Brown further testified that while he would admit that some of his work was not done as timely as it could have been, it was in no way done as badly as testified to by Plaintiff's expert, Michael Lacombe (Lacombe). Brown further noted that over Thirty-Seven Thousand Dollars (\$37,000.00) of what he was paid pertained to work in the Plaintiff's kitchen, for which approximately only \$400.00 was claimed to be defective by Lacombe. He also noted that over 80% of what he was paid was for material such that he cannot believe that Plaintiff is claiming damages basically equal to the entire amount of the parties' original Contract.

The Plaintiff offered evidence regarding the extent of his damages in the form of

testimony from Lacombe, a licensed general contractor. The Plaintiff offered Lacombe as an expert witness in the field of construction and renovation of residential and commercial buildings, and sought to have this Court qualify Lacombe for such expert testimony. After conducting *voir dire*, counsel for the Defendants consented to Lacombe's qualification as an expert witness in this matter, and this Court qualified Lacombe as an expert in the field of construction and renovation of residential and commercial buildings, as well as standards and practices of the said industry, and his expert testimony was accepted accordingly.

Lacombe testified that he had personally inspected the Plaintiff's residence in early 2009 and, consequently, had generated an inspection report/damage assessment dated March 4, 2009¹

Lacombe testified at length about the defective construction work performed by Defendant Brown on the Plaintiff's residence, utilizing a copy of his inspection report/damage assessment to refresh his recollections of his findings. Lacombe opined that he believed the bulk of the defects noted by him arose as a result of the work performed by him. However, he acknowledged that since he had not viewed the property at the time Brown was terminated, but instead only after Partelow had performed intervening work, he could not testify definitely as to whether any of the defective work observed by him had in fact been performed by Partelow as opposed to Brown. Lacombe testified as follows regarding the defects and the estimated cost of repair/replacement/remediation²

A Repair of the heating/AC grille in the ceiling of the sun room \$200.00,

¹Earlier in the trial, Defendants' counsel had Lacombe's report marked for identification purposes so that counsel could examine Defendant Brown concerning the report, it was subsequently offered into evidence during Lacombe's testimony without objection.

²According to Plaintiff's expert witness, these estimated amounts include both labor and materials.

- B Removal and replacement of the wood baseboards in the sun room
\$1,100 00,
- C Repair of window sill trim moldings in the sun room \$1,700 00,
- D Extensive repair and remediation of the roof system over the sun room,
which has leaked into the residence and caused damage to the
walls, beams and crown moldings \$6,000 00,
- E Total replacement of porcelain tile and grout in the dining, living, halls
and sun rooms, removal of the flooring, bedding and mastic, cleaning,
grinding and "floating" smooth the concrete slab surface, and removal of
shoe and base moldings \$27,800 00,
- F Removal of the carpet and pad and grinding of concrete floor in the
transition floor between the master bedroom and sitting room \$1,400 00,
- G Re-skimming, re-sanding and retexturing of all walls \$7,200 00,
- H Removal of the tile floor, cabinets and sinks and replace vanities in both
the master bathroom and guest bathroom \$3,500 00,
- I Obtaining matching cove pieces and grout and installation of new
transitions between the ceramic tile-lined showers in both bathrooms
\$1,700 00,
- J Attachment of necessary "filler strip" abutting the kitchen cabinets
properly with blind screws and blocking \$200 00,
- K Replacement of missing dead-bolt and installation of security strike plate
at kitchen door to match lockset and repaint jamb \$200 00,

- L Repair and renovation of transition flooring between the existing screened-in porch slab and the new slab \$500 00,
- M Removal and reinstallation of downspouts on the roof \$200 00,
- N Removal and replacement of interior door between the guest bedroom and bathroom was very poorly done \$700 00, and
- O Bringing the entry door wall even with the line of the wall of the adjacent sun room, which will require slab and foundation, framing, sheathing and siding, roof framing and finishing, insulation, drywall and door installation \$27,000 00

Lacombe further testified that it is standard practice in the industry for a contractor to charge eighteen (18%) percent of the total repair and remediation dollar amount for the contractor's overhead and profit, he also estimated that design, drawings, specifications, permitting and observation costs would be about \$7,000 00

On cross-examination, Lacombe admitted that he could not state with certainty that the heating/AC grille (Item A) was the responsibility of Defendant Brown, nor that the baseboards in the sunroom (Item B) were necessarily the result of Brown's defective workmanship, however, Lacombe testified that it was his opinion that Defendant Brown was liable for the remaining defects, that such work was performed in a grossly negligent fashion, and that, as a direct and proximate result of Brown's construction work the Plaintiff suffered the damages as set forth by Lacombe in his report and testimony at trial I find Lacombe's testimony to be credible in this regard, and I hereby adopt the foregoing as findings of fact Therefore, the Plaintiff's actual damages are Eighty Six Thousand Four Hundred and 00/100 (\$86,400 00) Dollars

BASED UPON my Findings of Fact I conclude as a matter of law

1 That this Court has jurisdiction over the parties hereto and the subject matter hereof Also, venue is proper in the Court of Common Pleas for Beaufort County

2 Plaintiff in his Amended Complaint states six (6) causes of action, all of which have been brought against the Defendant Brown individually and d/b/a Southeastern Services As noted above, Brown failed to file any pleadings in response to either Plaintiff's Complaint or Amended Complaint and therefore is in default Default judgment having been entered by this Court against Brown on February 5, 2009, all that remains is for the Court to determine the damages to which Plaintiff is entitled to against Defendant Brown in relation to said judgment and to order the same, which matters are addressed more fully hereinbelow

3 Plaintiff in his pleadings did not seek judgment against the Defendant, ACCI, Baroni or Laughlin, in relation to the First, Third and Sixth Causes of Action Although Plaintiff did elicit evidence as to certain statutes which may have been breached by the Defendant, ACCI, Baroni and Laughlin, such statutes were totally separate and apart from the ones contained in Plaintiff's pleadings and had to do with working relationship between Baroni, ACCI and Laughlin as the primary qualifier of ACCI's license and did not in any way relate to the statutes identified in Plaintiff's pleadings under the First Cause of Action Likewise, Plaintiff's submission of the Consent Agreement between the LLR and ACCI/Baroni, pertaining to a violation of § 40-11-110(A)(9), was not contained within the statutes identified in Plaintiff's pleadings under the First Cause of Action

4 Even if the Court had conformed the pleadings to the evidence and concluded that there were statutory violations by Baroni, Laughlin and ACCI, as concerns their

relationship with Laughlin being the primary qualifier for ACCI, any such violation would not have been the proximate cause of Plaintiff's damages, as more fully addressed hereinbelow

5 It is not enough for the Plaintiff to merely assert that a statute has been violated. The Plaintiff must show that the violation had a direct causal relationship to the damages suffered by the Plaintiff. "The finding of a statutory violation does not automatically lead to the recovery of damages." *Trivelas v South Carolina Department of Transportation*, 348 S C 125, 134, 558 S E 2d 271 (Ct App 2001). "The plaintiff must prove the violation proximately caused the injury complained of by the injured party." *Id*. Citing *Rayfield v South Carolina Department of Corrections*, 297 S C 95, 374 S E 2d 910 (Ct App 1988), the Court in *Trivelas* stated "[n]egligence *per se* simply means the jury need not decide if the defendant acted as would a reasonable man in the circumstances. The only issue then left for the jury to determine is the third element of negligence, viz., whether the defendant's conduct proximately caused damage to the plaintiff." Further, "[w]hile the violation of a statute is negligence *per se*, such violation is not actionable unless the specific violation is a proximate cause of the injury." *Id*.

6 "Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause **only when without such negligence the injury would not have occurred or could have been avoided** (Emphasis added) *Hanselmann v McCardle*, 275 S C 46, 48, 267 S E 2d 531, 533 (1980). "Proximate cause is the efficient or direct cause, the thing that brings about the complained of injuries." *Platt v CSX Transportation Inc*, 665 S E 2d 631, 640 (Ct App 2008).

7 In this case, the proximate cause of the Plaintiff's damages was the negligent work performed by the Defendant Brown. The alleged statutory violation by Baroni/ACCI and Laughlin, insofar as Laughlin not being a proper qualifier for ACCI's general contractor's license, had nothing to do with Brown's work on behalf of the Plaintiff, nor Brown's decision to unlawfully utilize ACCI's license information to pull a permit for the subject job without the knowledge or consent of ACCI/Baroni. As for Baroni/ACCI's alleged lending of ACCI's license to Brown, said allegation is not supported by the evidence, nor is non-mutual collateral estoppel appropriate, for the reasons set forth below.

8 The Third and Sixth Causes of Action pertaining to a breach of contract by Brown and negligent misrepresentation by Brown to the Plaintiff have nothing to do with Defendants, ACCI, Baroni or Laughlin such that they are entitled to a judgment as a matter of law on said causes of action. While counsel for the Plaintiff attempted to characterize Brown as an agent for ACCI, nothing contained within the evidence submitted in any way supports that Brown ever had anything to do with ACCI, other than being a competitor bidding on certain small projects. There being no agent/principal relationship, nothing contained within the First, Third or Sixth Causes of Action can be held applicable to the Defendants, ACCI, Baroni and Laughlin.

9 As for the remaining Causes of Action, in order to find for the Plaintiff as against the Defendant, ACCI, Baroni and Laughlin the elements for each must be proven by a preponderance of the evidence. As concerns the Second Cause of Action, negligence, the elements are a duty, the breach of that duty and the fact that the breach of said duty proximately caused the damages complained of by the Plaintiff. In this case neither ACCI, Baroni nor Laughlin were a party to the contract between the Plaintiff and Brown. Although not a party to

the contract, had ACCI/Baroni actually pulled the permit pertaining to this project, then arguably a duty would have arisen for ACCI/Baroni to supervise the project. See *Kennedy v Columbia Lumber & Mfg Co Inc*, 299 S C 335, 334, 384 S E 2d, 736 (1989). However, the facts in this case unequivocally show that while ACCI/Baroni was prepared to pull a permit if Brown returned to Baroni with appropriate plans and specifications for Baroni to review, such never occurred and Brown unilaterally and unlawfully pulled a permit in ACCI's name without any knowledge on the part of ACCI/Baroni.

10 Even if the Plaintiff had produced sufficient evidence proving that some negligence on the part of the Defendants, Baroni, Laughlin and/or ACCI was the proximate cause of his damages, the negligence of the Plaintiff must not exceed that of said Defendants. See, *Estate of Haley Ex Rel Haley v Brown*, 370 S.C. 240, 634 S E 2d 62 (Ct App 2006), noting *Nelson v Concrete Supply Co*, 303 S C 243, 399 S E 2d 783 (1991) (a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant), *Ott v Pittman*, 320 S C 72, 463 S E 2d 101 (Ct App 1995) (under the doctrine of comparative negligence, negligence by the plaintiff does not automatically bar recovery by the plaintiff unless his negligence is greater than that of the defendant), *Hopson v Clary*, 321 S C 312, 468 S E 2d 305 (Ct App 1996) (stating plaintiff's claim was barred under comparative negligence doctrine because plaintiff's own negligence was, as a matter of law, greater than any negligence attributable to defendant and the more determinative factor in causing the accident), *Hurd v Williamsburg County*, 363 S C 421, 611 S E 2d 488 (2005) (under the comparative negligence doctrine, a plaintiff may only recover damages if his own negligence is not greater than that of the defendant).

11 The evidence overwhelmingly indicates that the Plaintiff's damages do not stem from the pulling of the permit, but rather from the defective work of the individual performing that work. That individual, Brown, was hired solely by the Plaintiff without basically any inquiry into his qualifications and licensure. The Plaintiff candidly admitted on cross examination that had he checked on Brown's license and learned that he did not have the appropriate license, he would not have hired Brown to do the job. The Plaintiff did nothing to check on Brown's license even when Brown was having trouble pulling a permit for many months prior to the start of the project. Further, once the project started, it is plainly evident that the Plaintiff knew that there were problems with Brown's work (lack of showing up, plans not in accordance with what Plaintiff wanted constructed, and work not being completed in a timely fashion). Plaintiff allowed Brown to continue working and paid Brown over Ninety percent (90%) of the contract price before finally terminating him more than a year after the project was supposed to have been completed. Plaintiff had countless warnings which he ignored regarding Brown's ability to do the work, which warnings began prior to the commencement of work with Brown's inability to pull a permit and continued throughout the duration of Brown's employment, none of which warnings Plaintiff heeded. Plaintiff's negligence in proceeding with Brown far exceeded any negligence on the part of ACCI/Baroni/Laughlin who had no knowledge that Brown was proceeding to work on this project. Therefore, the Court must find for the Defendants, ACCI/Baroni/Laughlin, on the Plaintiff's Second Cause of Action.

12 Plaintiff's contention that the LLR agreement between ACCI/Baroni and the LLR is conclusive on the issue of ACCI/Baroni having loaned their license to Brown insofar as this matter is concerned is without merit. While non-mutual collateral estoppel can, under certain

circumstances, be conclusive as to an issue, such is not the case here. While the agreement states under its findings of fact that respondent "aided" a residential contractor in obtaining permits and documents to perform commercial work, there is absolutely no detail with regard to what actions ACCI/Baroni did in relation to such "aid."

13 In addition, while the agreement subsequently states that respondent admits that respondent's actions in this matter is in violation of South Carolina Code of Laws 40-11-110 (A)(9) and that the conduct in this matter constitutes sufficient grounds for disciplinary corrective action, the evidence is unequivocal that that disciplinary or corrective action was, by agreement, a one (1) year probationary period for ACCI's license and a One Thousand Dollar (\$1,000.00) fine. There is absolutely nothing in said agreement to suggest that the findings of that proceeding would in any way be utilized to attempt to hold ACCI/Baroni accountable for more than Eighty-Five Thousand Dollars (\$85,000.00) in damages sustained by the Plaintiff herein, who was not a party to that action. Further, no evidence was admitted which even remotely suggests that ACCI/Baroni had an incentive to obtain a full and fair adjudication in the initial action. Instead, the evidence suggests the exact opposite where Baroni testified his whole reason in agreeing to the proposed agreement from the LLR was to not have to incur the expenses which a full and fair adjudication in that initial action would have cost him in the form of attorney's fees.

14 While ACCI/Baroni may have had an opportunity to fully litigate the matter in the first hearing, there are circumstances here which justify providing them the opportunity to re-litigate this issue in full in this proceeding, as contemplated by the Court in *Wade v Berkeley County*, 330 SC 311, 317, 498 SC 2d 684 (Ct App 1998). Further, the case of *Carrigg v*

Cannon, 347 S C 75, 552 S E 2d 767 (Ct App 2001) notes that the party asserting collateral estoppel must prove that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment. The evidence unequivocally shows the matter was never actually litigated, but rather than an administrative agreement was entered into between ACCI/Baroni and the LLR in return for an administrative sanction only.

15 Even were this Court determine that, based upon the fact that ACCI/Baroni had the "opportunity" to fully litigate the issue of license lending such that non-mutual collateral estoppel should apply herein, which the Court does not so decide, this State has adopted the restatement (second) of judgments, which provides for various exceptions to the applications of the non-mutual collateral estoppel doctrine, which exceptions are applicable in this case. As noted by the Court of Appeals, in *Nelson v OHG of South Carolina, Inc*, 354 S C 290, 306, 580 S E 2d 171 (Ct App 2003), (Aff'd in part and rev'd in part of a different issue), Section 28 of the Restatement (Second) of Judgments provides "[a]lthough an issue is litigated and determined by a valid and final judgment, , relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts (clearly such is the case here where one compares an informal administrative proceeding versus a trial in Circuit Court) (5) There is a clear and convincing need for a new determination of the issue (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in a subsequent action, or (c) because the party sought to be precluded, , did not have an adequate opportunity or incentive to

obtain a full and fair adjudication in the initial action ” (Emphasis added) *Id* at 307

16 No evidence was submitted to the Court indicating that Defendant Baroni expected to be sued when there was no relation between what he had agreed to do and what Defendant Brown actually did without his consent, and, further, there could be no nexus between what he had done and the damages suffered by the Plaintiff. Furthermore, as testified to by Defendant Baroni, his incentive for signing that agreement was that ACCI/Baroni was going to receive a minimal administrative reprimand in the form of a \$1,000.00 fine and a year's probation, as opposed to spending thousands of dollars to have a full blown hearing in which he would be represented by an attorney before the LLR. Based on both factors, the offensive use of non-mutual collateral estoppel to impose liability based on a cause of action for negligence *per se* upon the Defendants Baroni and ACCI would be ~~un~~supportable at law.

17 Further, as was also noted in *Nelson*, Section 29 of the Restatement (Second) of Judgments, provides for additional circumstances that should be taken into consideration before applying non-mutual collateral estoppel. Those circumstances, along with those identified in Restatement § 28, include “(2) The forum in the second action affords a party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined, (8) Other compelling circumstances make it appropriate that the party be permitted to re-litigate the issue ” “Even when the elements of res judicata and collateral estoppel have been met, they will not be rigidly or mechanically applied, and the application of the doctrines may be precluded where unfairness or injustice results ” *Nelson* at 314

18 Such is the case here, where Defendants Baroni, Laughlin and ACCI had the

ability to compel Defendant Brown to appear in Court, under oath, pursuant to Subpoena, and to cross-examine him in the presence of the judge regarding his unlawful use of ACCI's license. At the same time, they were able to Subpoena the records from the Town of Hilton Head and compel the testimony from the Town's business department regarding the Town's permitting procedures and how Defendant Brown got around the same.

19 Moreover, even if this Court were convinced by Plaintiff's argument that Defendants should be collaterally estopped in this matter, the determination of "license lending" would only give rise to a duty and a breach of that duty. It would still be incumbent upon the Plaintiff to prove that the breach of said duty was the proximate cause of his damages, and further, that, as asserted by the Defendants, the Plaintiff's negligence in this matter was not greater than that of the Defendants. *Estate of Haley, supra*. As more fully set out above, the evidence conclusively shows that the actions of the Plaintiff, or the lack thereof, had everything to do with the damages sustained by the Plaintiff, while the actions of Baroni, Laughlin and ACCI had nothing to do with said damages.

20 As to Plaintiff's Fourth Cause of Action (Breach of Express and Implied Warranties) such warranties must derive either from Contracts or from involvement in the project. While the Court in *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 344, 384 S.E.2d 630, 736 (1989), noted that the Courts have been "steadfast in holding that privity of contract as a defense to an implied warranty action is abolished in this State," it went on to state that if there is not a contract, there has to be actual involvement between the parties giving rise to the implied warranty. The evidence herein from all parties was that the Plaintiff never, ever had any communications whatsoever with ACCI, Baroni or Laughlin. The contract only being

between Brown and the Plaintiff, then absent some interaction on the project between the Plaintiff and the other Defendants, there can be no cause of action for a breach of warranty. No such interaction having occurred, the Fourth Cause of Action cannot apply to the Defendants, ACCI, Baroni or Laughlin.

21 The Plaintiff asserted a Fifth Cause of Action, asserting a violation of the Unfair Trade Practices Act (UTPA). "To establish a cause of action under the UTPA, the Plaintiff must prove unfair or deceptive acts or practices in the conduct of any trade or commerce." *Hollman v Woolfson*, S C Supreme Court No. 26725 (2009). "The unfair or deceptive act or practice must affect the public interest." *Singleton v Stokes Motors Inc.*, 358 S C 369, 595 S E 2d 461 (2004). "An impact on the public interest may be shown if the acts or practices have the potential for repetition." *Id.* "The potential for repetition may be proven by showing (1) the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or (2) the defendant's procedures created a potential for repetition of the unfair and deceptive acts." (Emphasis added) *Id.*

22 The Plaintiff has not provided any evidence that Defendants Baroni's or ACCI's actions were unfair or deceptive, or that Defendants Baroni and ACCI intended to deceive the Plaintiff. Neither Defendants Baroni nor ACCI benefitted from Defendant Brown's contract with the Plaintiff, and they had no incentive to deceive the Plaintiff. Nor has the Plaintiff shown that the Defendants' actions impacted the public interest. The Plaintiff has failed to prove that the allegations of license lending have occurred in the past, nor has he shown that the Defendants' actions have a potential for repetition. The mere act of possessing a contractor's license cannot possibly lead to the conclusion that some act of deception or unfairness will occur.

in the future. Otherwise, every contractor holding a license would be subject to such punishment under UTPA. Lastly, Defendant Baroni has been disciplined by the State Contractors' Licensing Board by way of a fine and one year probation for his minimal discussions with Brown in this matter. Such disciplinary action is more than sufficient as a deterrent against future misconduct.

23 Turning to Plaintiff's claim for damages as to the Defendant Brown, to receive an award of punitive damages, the Plaintiff has the burden of proving by clear and convincing evidence that the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. *Scott v Porter*, 340 S C 158, 530 S E 2d 389 (Ct App 2000), *Lister v NationsBank of Delaware, N A*, 329 S C 133, 149, 494 S E 2d 449, 458 (Ct App 1997). Considering that Defendant Brown admitted to unlawfully using ACCI's license, without the knowledge or consent of ACCI or Baroni, to pull down the permit associated with renovating Plaintiff's residence, and that Brown might not have been able to perform the negligent work at all, but for his unlawful use of ACCI's license, I find that the Plaintiff has carried the burden of proof in this regard and that punitive damages are appropriate in this matter.

24 The Plaintiff also sued Defendant Brown for violation of the South Carolina unfair Trade Practices Act (the "UTPA")⁴. The Plaintiff has previously been granted judgment by default against Defendant Brown, and it is well settled that by defaulting, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability. *Roche v Young Bros Inc, of Florence*, 332 S C 75, 504 S E 2d 311 (1998). Thus, I find that Defendant Brown's actions in using another's (ACCI's) license, without the knowledge or consent of ACCI or Baroni, are in violation of the UTPA, as well.⁵

⁴S C Code Ann Section 39-5-10, *et seq*

⁵Of course, even though Defendant Brown's default in this matter results in an admission

25 As the Trial Judge, I am vested with considerable discretion over the amount of a punitive damage award *Kuznick v Bees Ferry Assocs* , 342 S C 579 (Ct App 2000) Under the UTPA, if the use or employment of unfair or deceptive acts is a wilful or knowing violation, a Court shall award three (3) times the actual damages sustained, upon a finding that the Act has been violated *at all*, the Court shall award to the person bringing such action reasonable attorney's fees and costs S C Code Ann Section 39-5-140

26 I find that an appropriate award of punitive damages in this case to be three (3) times the Plaintiff's actual damages, for a total damages award of Two Hundred Fifty Nine Thousand Two Hundred and 00/100 (\$259,200 00) Dollars This ratio of punitive to actual damages (a single-digit ratio) is, I find, reasonable and proportionate to the amount of actual harm to the Plaintiff caused by the Defendant Jamie V Brown's actions Moreover, the Plaintiff submitted evidence at trial of attorney's fees and costs in the amount of Forty Eight Thousand Three Hundred Twenty and 73/100 (\$48,320 73) Dollars, an amount I find to be reasonable, given the parties and issues at play in this case. Therefore, such amount shall be added to the total damages amount referenced above, for a total judgment for the Plaintiff of Three Hundred Seven Thousand Five Hundred Twenty and 73/100 (\$307,520 73) Dollars

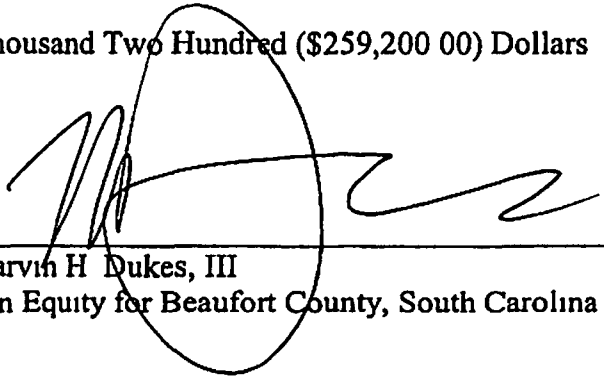
BASED UPON my Findings of Fact and Conclusions of Law, IT IS ORDERED, ADJUDGED AND DECREED that as to the Defendants, ACCI/Baroni/Laughlin, I find for said Defendants on all causes of action and, therefore, dismiss this action, with prejudice, as to them

As to the Defendant, Jamie V Brown, individually, and d/b/a Southeastern Services, I find for the Plaintiff on all causes of action and award judgment as follows

of liability for both negligence and violation of the UTPA, given the overwhelming evidence offered at trial in this regard, this Court would likely have reached the same conclusion in the absence of such default

- (a) As to the First Cause of Action, granting Plaintiff judgment in the amount of Two Hundred Fifty-Nine Thousand Two Hundred (\$259,200 00) Dollars
- (b) As to the Second Cause of Action, granting judgment to the Plaintiff in the amount of Two Hundred Fifty-Nine Thousand Two Hundred (\$259,200 00) Dollars
- (c) As to the Third Cause of Action, granting judgment to the Plaintiff in the amount of Eighty-Six Thousand Four Hundred (\$86,400 00) Dollars
- (d) As to the Fourth Cause of Action, granting judgment to the Plaintiff in the amount of Eighty-Six Thousand Four Hundred (\$86,400 00) Dollars
- (e) As to the Fifth Cause of Action, granting judgment to the Plaintiff in the amount of Eighty-Six Thousand Four Hundred (\$86,400 00) Dollars, which amount, according to statute, shall be tripled to Two Hundred Fifty-Nine Thousand Two Hundred (\$259,200 00) Dollars, together with costs and attorney's fees in the amount of Forty-Eight Thousand Three Hundred Twenty and 73/100 (\$48,320 73) Dollars, for a total judgment in the amount of Three Hundred Seven Thousand Five Hundred Twenty and 73/100 (\$307,520 73) Dollars
- (f) As to the Sixth Cause of Action, granting judgment to the Plaintiff in the amount of Two Hundred Fifty-Nine Thousand Two Hundred (\$259,200 00) Dollars

AND IT IS SO ORDERED



Hon Marvin H Dukes, III
Master in Equity for Beaufort County, South Carolina

Beaufort County, South Carolina
May 21, 2010

The South Carolina Court of Appeals

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

The Honorable Marvin H Dukes
Beaufort County
Trial Court Case No 2007-CP-07-01547

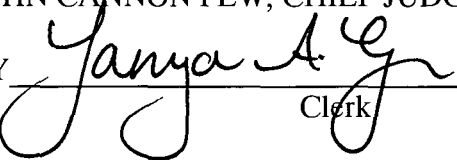
ORDER

Pursuant to a telephone conference with the parties, the Appellant's Initial Brief and Designation of Matter are due on May 23, 2011 The Respondents' Initial Brief and Designation of Matter are due July 25, 2011, and the Appellant's Initial Reply Brief is due twenty days thereafter

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE

BY


Clerk

Columbia, South Carolina

cc Sean Michael Bolchoz, Esquire
James Frederick Berl, Esquire

FILED
4/22/11 



The South Carolina Court of Appeals

JOHN CANNON FEW
CHIEF JUDGE

JOHN C. CALHOUN BUILDING
POST OFFICE BOX 11679
COLUMBIA SOUTH CAROLINA 29211
TELEPHONE (803) 734 1890
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E MAIL jfew@scca-its.org

April 4, 2011

Sean Michael Bolchoz, Esquire
Hale & Bolchoz, L L C
P O Box 22561
Hilton Head Island, SC 29925-2561

James Frederick Berl, Esquire
Law Offices of James F Berl, PC
P O Box 22626
Hilton Head Island, SC 29925-2626

Re Esguerra, Jorge V Brown, Jamie
Case #2010174706

Dear Counsel

This letter serves as an Order granting Appellant's request for an extension of time in which to file the Appellant's Initial Brief and Designation of Matter. I have extended the due date until May 2, 2011. I realize that this extension may not give you all the time you need to complete the Appellant's Initial Brief and Designation of Matter. I have set a conference call for 9:30 a.m. on Tuesday, April 19, 2011 to discuss an overall approach to setting due dates for all filings in this appeal. **The Appellant is responsible for initiating the conference call by getting all parties on the phone at the allotted time.** The call should last less than ten minutes. The participants in the call will include counsel for all parties and me. In preparation for the call, please consider the other time commitments you have in the near future so we can discuss a suitable timeframe for all parties to complete their briefs. If the time scheduled for the conference call creates a conflict, please contact the Clerk's Office at 734-1890 with all counsel on the phone. We will reschedule the call to suit you.

I look forward to talking to you on Tuesday April 19, 2011.

Sincerely yours,

John Cannon Few, by Jany L. G.
John Cannon Few
Clerk

JCF/jt

FILED

4/5/11

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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.

Respondents

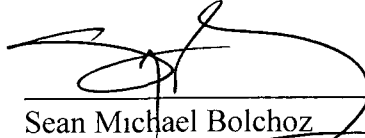
**APPELLANT'S MOTION FOR AN EXTENSION TO FILE INITIAL BRIEF
AND DESIGNATION OF MATTER**

The undersigned, counsel for Appellant Jorge V. Esguerra, hereby moves for an Order of this Court extending the deadline for filing Appellant's Initial Brief and Designation of Matter to be Included in the Record of Appeal in this case. The lower court's trial transcript was received on March 2, 2011. The undersigned hereby moves for an order of this Court extending the deadline by thirty (30) days from the current deadline of April 1, 2011, for the Appellant to file his Initial Brief and Designation of Matter to be Included in the Record of Appeal.

RECEIVED
MAR 24 2011
SC Court of Appeals

4/1/11
5/2/11

March 21, 2011



Sean Michael Bolchoz
Hale & Bolchoz, L L C
1533 Fording Island Road, Suite 294
P O Box 22561
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(843) 837-3000
Attorney for Appellant

Other Counsel of Record

James F Berl, Esquire
Law Offices of James F Berl, P C
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

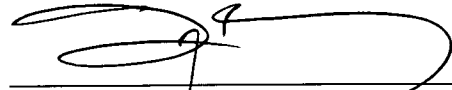
Jamie V. Brown, individually and d/b/a Southeastern Services,
Robert Baroni, Boyd R. Laughlin and Associated Construction
Consultants, Inc.

Respondents

PROOF OF SERVICE

I certify that I have served a Motion for Extension by depositing a copy of same in the United States Mail, postage prepaid on March 21, 2011, addressed to the other attorney of record James F. Berl, Esquire

March 21, 2011


Sean Michael Bolchoz
Hale & Bolchoz, LLC
1533 Fording Island Road, Suite 294
P O Box 22561
Hilton Head Island, S C 29925
(843) 837-3000
Attorney for Appellant

RECEIVED
MAR 24 2011
SC Court of Appeals

ther Counsel of Record

James F Berl, Esquire
Law Offices of James F Berl, P C
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Hilton Head Island, SC 29925

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HALE & BOLCHOZ, L L C

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JAMES O HALE*

REBFCCA H HALE

SEAN MICHAEL BOLCHOZ**

* Also licensed in GA

** Certified Circuit Court Mediator

WWW.HALEANDBOLCHOZ.COM

March 21, 2011

South Carolina Court of Appeals

The Honorable Tanya Gee

PO Box 11629

Columbia, SC 29211

RE Jorge V Esguerra v Jamie V Brown individually and d/b/a Southeastern Services, Robert Baroni, Boyd R Laughlin and Associated Construction Consultants, Inc
Case No 07-CP-07-1547
Case Tracking No 2010174706

Dear Ms Gee

Please find enclosed the original and six copies of a Motion for Extension in which to file the Appellant's Initial Brief and Designation of Matter to be included in the Record on Appeal and Proof of Service for the above-captioned case, along with my firm's check in the amount of \$25 00 for the motion fee Please file the originals and return a clocked copy to me in the enclosed, self-addressed stamped envelope

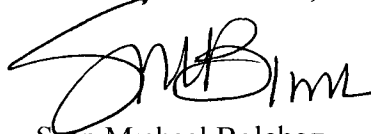
By copy of this letter, I am serving copies of the aforesaid documents upon all counsel of record, pursuant to the applicable South Carolina Appellate Court rules

If you have any questions, please do not hesitate to contact me

With kind, personal regards, I am

Sincerely,

HALE & BOLCHOZ, L L C



Sean Michael Bolchoz

SENDER'S E MAIL ADDRESS

SBOLCHOZ@HALEANDBOLCHOZ.COM

RECEIVED

MAR 24 2011

SC Court of Appeals

SMB/ml

Enclosures

cc

Dr Jorge Esguerra (via email only to jesg@neo rr com)

James F Berl Esquire (w/enclosures)

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South Carolina Supreme Court

(Jorge Esquerra,

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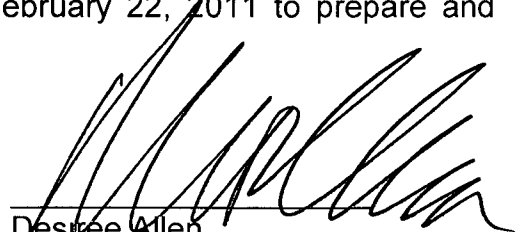
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V 2007CP0701547

Jamie V Brown,

Notice

Upon request and for good cause shown, Joanne McDonald, Court Reporter is hereby granted an extension up to and including February 22, 2011 to prepare and deliver the transcript of Record in the above case



Desiree Allen
Court Reporter Manager
S C Court Administration

Columbia, South Carolina
1/26/11

CC Sean Bolchoz, Esq
James Berl Esq
Joanne McDonald

RECEIVED

JAN 28 2011

SC Court of Appeals



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

October 21, 2010

Sean Michael Bolchoz, Esquire
Hale & Bolchoz, L L C
P O Box 22561
Hilton Head Island, SC 29925-2561

Re Esguerra, Jorge V Brown, Jamie
2010174706

Dear Counsel

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address 1015 Sumter Street, Columbia, S C 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S C Code Ann Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases.

- 1) any final judgment from the circuit court which includes a sentence of death,
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58,
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance,
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state,
- 5) any final judgment from the circuit court pertaining to elections and election procedure,
- 6) any order limiting an investigation by a State Grand Jury under S C Code Ann Section 14-7-1630,
- 7) any order of the family court relating to an abortion by a minor under S C Code Ann Section 44-41-33 ,

Very truly yours,

V. Claus Allen, Deputy

Tanya A Gee
CLERK

TAG/laf

cc James Frederick Berl, Esquire



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

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October 21, 2010

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Hilton Head Island, SC 29925-2561

Re Esguerra, Jorge V Brown, Jamie

Dear Counsel

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc James Frederick Berl, Esquire

The Supreme Court of South Carolina

RE Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings

' ORDER

Under the Federal Constitution, our State Constitution, and our common law court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness. Ex parte Capital U-Drive-It, Inc. 369 S C 1, 630 S E 2d 464 (2006), Davis v. Jennings, 304 S C 502 405 S E 2d 601 (1991). Therefore, with some few exceptions,¹ documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts.

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court ²

1 Social Security Numbers If a social security number must be included only the last four digits of that number should be used.

2 Names of Minor Children If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e. John S.) should be used.

3 Financial Account Numbers If financial account numbers are relevant, only the last four digits of these numbers should be used.

4 Home Addresses If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file. The sealed unredacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall be the same as that required for the brief, record on appeal, motion or other filing that includes the redacted documents.

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e. In the Interest of John S. a Juvenile).

A party seeking to seal material beyond those personal identifiers listed above must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings, *supra*, must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED

s/Jean H. Toal C.J.
s/James E. Moore J.
s/John H. Waller, Jr. J.
s/E. C. Burnett, III J.
s/Costa M. Pleicones J.

Columbia, South Carolina

August 13, 2007

¹ See, e.g., Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 SCACR, Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502, SCACR Rule 402(n) SCACR, and Rule 403(l) SCACR.

² This restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402, SCACR, requires many of these personal identifiers to be disclosed.

JAMES O HALE*
REBECCA H HALE
SEAN MICHAEL BOLCHOZ

* Also licensed in GA

HALE & BOLCHOZ, L L C
ATTORNEYS AND COUNSELORS AT LAW
1533 FORDING ISLAND ROAD SUITE 294
MOSS CREEK VILLAGE
P O BOX 22561
HILTON HEAD ISLAND SOUTH CAROLINA
29925 2561

TELEPHONE (843) 837 3000
FACSIMILE (843) 837 3001

WWW.HALEANDBOLCHOZ.COM

September 17, 2010

RECEIVED
SEP 21 2010
SC Court of Appeals

Ms Joanne McDonald
PO Box 2196
Ridgeland, SC 29936

RE *Jorge V Esguerra v Jamie V Brown individually and d/b/a Southeastern Services, Robert Baroni, Boyd R Laughlin and Associated Construction Consultants, Inc*
Case No 07-CP-07-1547

Dear Joanne

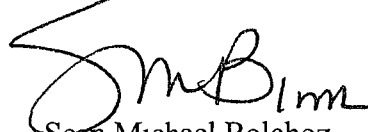
This letter is being sent to request a transcript for a hearing in the above-captioned case held on November 4, 2009 and November 5, 2009 before The Honorable Marvin H Dukes, III. This request is being made pursuant to Rule 207 of the South Carolina Appellate Court Rules. Also, pursuant to South Carolina Appellate Court Rule 607, I agree to pay the applicable fees for such transcript. Thank you for your assistance with this matter.

If you have any questions, please do not hesitate to contact me.

With kind, personal regards, I am

Sincerely,

HALE & BOLCHOZ, L L C



Sean Michael Bolchoz
SENDER S E MAIL ADDRESS
SBOLCHOZ@HALEANDBOLCHOZ.COM

SMB/ml

cc Dr Jorge Esguerra (via email only to jesg@neo rr com)
James F Berl Esquire
South Carolina Court of Appeals

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01\Appeal\McDonald ltr re transcript wpd

PM NO DATE
POS 9/17/10

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

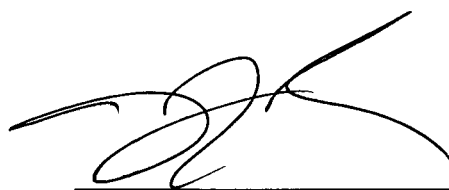
Jamie V Brown, individually and d/b/a Southeastern Services,
Robert Baroni, Boyd R Laughlin and Associated Construction
Consultants, Inc

Respondents

NOTICE OF APPEAL

Appellant Jorge V Esguerra appeals the Order of The Honorable Marvin H Dukes, III, dated August 25, 2010 Appellant received written notice of this order on August 25, 2010

September 17, 2010



Sean Michael Bolchoz
Hale & Bolchoz, L L C
1533 Fording Island Road, Suite 294
P O Box 22561
Hilton Head Island, S C 29925
(843) 837-3000
Attorney for Appellant

Other Counsel of Record

James F. Berl, Esquire
Law Offices of James F. Berl, P.C.
PO Box 22626
Hilton Head Island, SC 29925

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01\Appeal\note of appeal.wpd

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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.

Respondents

PROOF OF SERVICE

I certify that I have served the Notice of Appeal by depositing a copy of same in the United States Mail, postage prepaid on September 17, 2010, addressed to the other attorney of record James F. Berl, Esquire

September 17, 2010



Sean Michael Bolchoz
Hale & Bolchoz, L.L.C.
1533 Fording Island Road, Suite 294
P.O. Box 22561
Hilton Head Island, S.C. 29925
(843) 837-3000
Attorney for Appellant

RECEIVED
SEP 21 2010
SC Court of Appeals

Other Counsel of Record

James F. Berl, Esquire
Law Offices of James F. Berl, P.C.
PO Box 22626
Hilton Head Island, SC 29925

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September 17, 2010

South Carolina Court of Appeals
The Honorable Kenneth A Richstad
PO Box 11629
Columbia, SC 29211

RECEIVED
SEP 21 2010
SC Court of Appeals

RE *Jorge V Esguerra v Jamie V Brown individually and d/b/a Southeastern Services, Robert Baroni, Boyd R Laughlin and Associated Construction Consultants, Inc*
Case No 07-CP-07-1547

Dear Mr Richstad

Please find enclosed the original and one copy each of a Notice of Appeal and Proof of Service for the above-captioned case. I have also enclosed a copy of the Order being appealed and my firm's check in the amount of \$100.00 for the filing fee. I would appreciate it if you would file the originals and return the clocked copies to me via the enclosed, self-addressed stamped envelope.

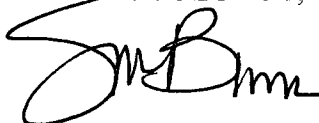
By copy of this letter, I am serving copies of the aforesaid documents upon all other counsel of record, pursuant to the applicable South Carolina Appellate Court rules.

In the event you have any questions, please do not hesitate to contact me.

With kind, personal regards, I am

Sincerely,

HALE & BOLCHOZ, L L C



Sean Michael Bolchoz
SENDER S E MAIL ADDRESS
SBOLCHOZ@HALEANDBOLCHOZ.COM

SMB/ml
Enclosures

cc Dr Jorge Esguerra (via email only to jesg@neo rr com)
James F Berl Esquire (w/enclosures)
The Honorable Marvin H Dukes III (w/enclosures)

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01\Appeal\SC Court of Appeals re notice proof of service wpd

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
JORGE V ESGUERRA)
Plaintiff,)
v)
JAMIE V BROWN individually)
and d/b/a SOUTHEASTERN)
SERVICES, ROBERT BARONI)
BOYD R LAUGHLIN and)
ASSOCIATED CONSTRUCTION)
CONSULTANTS INC)
Defendants)
_____)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO 2007-CP-07-1547

ORDER DENYING PLAINTIFF S
MOTION FOR RECONSIDERATION

10/11/25 A. 9 52

THIS MATTER came before the Court pursuant to the Plaintiff's Motion for Reconsideration dated June 4, 2010. In conjunction with said motion both parties filed written briefs on the issues raised in Plaintiff's motion and submitted the same to the Court. Thereafter, this matter came before the Court for a hearing on July 20, 2010.

Present at the hearing was Sean M. Bolchoz Esquire, attorney for the Plaintiff and James F. Berl, Esquire, attorney for the Defendants Robert Baroni, Boyd R. Laughlin and Associated Construction Consultants, Inc. The Defendant, Jamie V. Brown, was not

served with the Motion for Reconsideration, since the Plaintiff was not requesting the Court to alter or amend any portion of the Court's ruling applicable to Defendant Jamie V. Brown.

As such, the Defendant, Jamie V. Brown did not participate in the hearing on Plaintiff's Motion for Reconsideration, nor did he submit any written matters for the Court's consideration.

Counsel for both the Plaintiff and Defendants, Robert Baroni, Boyd R Laughlin and Associated Construction Consultants, Inc , presented oral arguments to the Court on the subject of Plaintiff's Motion for Reconsideration, in addition to the written briefs previously submitted

BASED UPON the matters presented to the Court, the Court is of the opinion that its original ruling was correct in all respects and, therefore, denies the Plaintiff's Motion for Reconsideration

AND IT IS SO ORDERED



Hon Marvin H. Dukas, III
Beaufort County Master in Equity

Beaufort County, South Carolina
this 27 day of August, 2010

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Hilton Head Island SC 29925

South Carolina Court of Appeals
The Honorable Kenneth A. Richstad
PO Box 11629
Columbia SC 29211

