THE STATE OF SOUTH CAROLINA
In the Supreme Court
Appellate Case No.: 2011-202946

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Rivers Lawton McIntosh, Circuit Court Judge

Alexander S. Macauley, Circuit Court and Trial Judge

Unpublished Opinion No. 2015-UP-2059 (S.C. Ct. App. Filed April 15, 2015)

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

v.

Christopher A. Pierce,.....Petitioner.

AND

Christopher A. Pierce,.....Third-Party Plaintiff/Petitioner,

v.

Jeff Gray,.....Third-Party Defendant/Respondent.

AND

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

v.

Christopher A. Pierce,.....Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 20, 2015.

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June 19, 2015

QUESTIONS PRESENTED

1. Where one circuit court judge reverses an order of another circuit court judge, can such action be considered "harmless error" where the party who obtained the default judgment on a fraud claim was thereby prohibited from presenting clear liability for fraud to the jury and, therefore, was severely prejudiced in his ability to challenge the truthfulness and reputation of the respondent?

2. Where a lower court judge has specifically ruled at summary judgment that the question of contractor licensing would be for the jury at trial, and a *pro se* party has consistently sought to have a jury charged on the issue of proper licensing of builders, is the refusal of the trial judge to charge the jury on the licensing statutes an abuse of discretion and clear error?

3. Do sufficient questions of fact exist as to whether a contract was breached when one of the parties to the contract testified that she was paid in full for services rendered, and, further, that the evidence showed evidence of a genuine dispute as to the terms and conditions of the contract such that it would be considered ambiguous under the law?

STATEMENT OF THE CASE

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

In mid-2004, Petitioner Pierce owned a vacant lot and was in the market to have a home constructed on the lot. Pierce's father met with Jeff Gray to inquire about the construction of a home on Pierce's lot. Jeff Gray testified that Mr. Pierce "wanted to I guess basically use my services to build his son a home." (R., p. 52, lines 1-2)

There are no licensing requirements for the *owner* of a tract of land when he or she is doing the work himself or contracting directly with a licensed builder to build a home on the land. See S.C. Code Ann. §40-59-260. Neither Tri-County nor Jeff Gray personally were licensed residential builders and *building a home for someone other than himself* was something that Gray - and Tri-County - *had never done*. (R. p. 269, lines 2-11). Gray's business model prior to building the Pierce home was to direct the construction activities of the Holbrooks, purchase materials as needed, pay the Holbrooks and all of the other sub-

contractors for their work, and oversee the projects. (R., p.250, l. 11 – p. 251, l. 12) Since Tri-County did not own Mr. Pierce's lot, it should have simply referred Pierce to Holbrooks. Instead, Tri-County and Jeff Gray chose to keep the proverbial "hand in the pot" and decided to become a party to the contract for the construction of Pierce's home, despite being unlicensed. Tri-County then entered into a contract to construct a home on Pierce's lot on July 24, 2004 (the "Contract"). (R. p. 440 – 450).[1]

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

When examining how Tri-County and Holbrooks interacted with each other, it is even more difficult to determine the true nature of their relationship. While Jeff Gray claimed to be only the "financier" of this project, the job was handled in the exact same way as Gray and Holbrooks handled their prior construction jobs, with Melinda Holbrooks working as a 1099 independent contractor for Gray, as he directed the project and paid her and all the other sub-contractors. (R. p. 438, l. 17 – p. 439, l. 6) (R. p. 428, l. 12 – p. 429,

[1] The South Carolina Residential Commission, by order dated July 5, 2012 (well after the trial of this matter), issued a Cease and Desist Order in the matter of Jeffrey A. Gray, Case #2011-627, related to engaging in a regulated practice under Section 40-59-30 of the South Carolina Code of Laws without being properly licensed. On November 8, 2011, the S.C. Dept. of Labor, Licensing and Regulation issued Citation #2011-78 to Melinda Holbrooks in the amount of $500.00 for aiding an unlicensed contractor to engage in residential building as it related to the construction of Petitioner's home. There is no evidence that the parties were in possession of the LLR citation at the time of trial.

l. 6) Jeff Gray was also the one who dealt directly with Pierce on a regular basis. (R. p. 258, l. 18-20; R. p. 438, l.17 – R. p. 439, l. 6). Melinda Holbrooks testified that she was not an employee of Tri-County and that she considered herself to be a sub-contractor and received a 1099 from Tri-County for this project. Id. This would indicate that she was not even a party to the contract, but rather acting simply as a sub-contractor. This also suggests that Tri-County was acting as the general contractor on Pierce's home (despite being unlicensed). According to Jeff Gray, Tri-County's role was "to line up subcontractors, and to pay them and to oversee to make sure the work was performed before they got paid." (R. p. 438, l. 17 – p. 439, l. 6) With Tri-County/Jeff Gray overseeing the work and paying all of the sub-contractors, including Holbrooks, it appears that Tri-County had the type of control over the project a general contractor normally would. (R. p. 296, lines 15-18; R. p. 438, l. 17 – p. 439, l. 6). Jeff Gray ordered cabinets, plumbing, and electrical supplies. (R. p. 263, l. 17 – p. 265, l. 17). With no mention of Holbrooks in the recitals, no payments from Pierce to her, and her own stature as a 1099 contractor, a real question exists as to whether or not Melinda Holbrooks was even a party to the Contract or simply a sub-contractor of Tri-County.

Since Tri-County and Holbrooks presented themselves as one entity or argued that they were a joint venture throughout this case - and the trial judge based certain rulings on this premise - is important to note that there is no mention in the Contract or the pleadings that Tri-County and Melinda Holbrooks formed a joint venture or a partnership for the construction of Pierce's home. No motion was ever made to add a joint venture or a partnership as a party plaintiff, nor did the lower court ever order that a joint venture or

partnership be added as a party plaintiff. An unlicensed contractor may not be a party to a joint venture bid for construction. S.C. Code Ann. §40-11-330.

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

With the construction of the home close to completion, Pierce took issue with some of the work and refused to pay the final two installments, totaling $33,000, until the issues were resolved. Needless to say, the issues were not resolved and Pierce eventually asked Tri-County and Holbrooks not to come on his property. Pierce completed the home with the help of other contractors, and claimed these expenses as an "offset" to any claim Tri-County or Holbrooks had against him.

Despite the fact the Melinda Holbrooks testified in her deposition that she had been fully paid for all of her work, (R. p. 430, l. 11-17), a mechanic's lien in both her name and Tri-County's name was filed September 26, 2005 and signed by Jeff Gray. (R. pp. 451-452). Tri-County and Holbrooks also filed a lawsuit on September 26, 2005, to enforce the mechanic's lien, (R. pp. 39-42), and Pierce subsequently filed a third-party Complaint against the owner of Tri-County, Jeff Gray ("Gray"). (R. pp. 51-85). It is undisputed that neither Tri-County nor Gray were licensed builders at the time the lien and lawsuit were filed. Tri-County brought the lawsuit arguing that it was owed unpaid money on the Pierce contract. At the same time, Tri-County argued that it did *not actually construct* Pierce's

home, thereby seeking to avoid the licensing requirements under S.C. Code Ann. §40-59-5 et seq.

Pierce moved to dissolve the mechanic's lien on the grounds that Jeff Gray, who signed the lien, was not a licensed builder and that Melinda Holbrooks had no right to file the mechanic's lien because she had been paid for all of her work. Petitioner knows of no authority for an unlicensed contactor to act as an agent for, or to sign a mechanic's lien on behalf of, a licensed contractor; quite simply, such a situation would violate the public policy of South Carolina.

Respondent Gray was properly served, but failed to timely answer, Petitioner's Third-Party Complaint alleging fraud, and an Order for Judgment by Default was signed by the Honorable Alexander S. Macaulay and filed on September 26, 2006. (R. pp. 1-2). The order provided that a damages hearing be set; however, it is undisputed that no such hearing was ever scheduled. Respondent Gray filed a motion to set aside the Order of Default, which was denied by the Honorable J. Cordell Maddox, Jr. (R. p. 3). Again, upon information and belief, no damages hearing was ever scheduled by the Clerk's office.[2]

On April 6, 2009, a motions hearing was held before Judge Macaulay, on Tri-County and Holbrooks's motion to compel discovery responses. Tri-County and Holbrooks were asking the court for an order compelling Pierce to produce damage supports for the offset he was claiming. These were the same damages that Petitioner would have presented at a damages hearing for his default judgment against Jeff Gray had one been scheduled. There was no pending motion to vacate the Order of Default against

[2] The Petitioner would rely upon Rule 55(b)(2), SCRCP, which provides that if it is necessary to determine the amount of damages, "the court may conduct such hearing or order such references as it deems necessary and proper....."

Gray before Judge Macaulay at this hearing – such motion for relief having already been heard and denied by order of Judge Maddox.

Judge Macaulay, in his order filed May 5, 2009, *as amended*, granted the motion to compel and vacated the order of default against Jeff Gray, *sua sponte*, as a sanction against Pierce for perceived discovery abuse. (R. pp. 5-7). Pierce filed an appeal to the Court of Appeals on this ruling and it was rejected as interlocutory in an order dated July 8, 2009. (R. pp. 11-12).

On November 1, 2010, the Honorable R. Lawton McIntosh heard Pierce's motions to dissolve the mechanic's lien and for summary judgment, along with Tri-County and Holbrooks's motions for summary judgment. In his order filed August 31, 2011, Judge McIntosh denied Pierce's motion to dissolve the mechanic's lien and summary judgment motion, but ruled that the issue of the proper licensing (or lack thereof) of Tri-County and its ability to enforce the construction contract would be for the jury. Judge McIntosh did, however, find in the Respondents' favor for breach of contract as to liability only. (R. pp. 21-32) (finding that "issues of fact exists (*sic)* as to whether the Plaintiffs were properly licensed" and therefore denying Defendant's motion for Summary Judgment "on that ground" and holding that "Plaintiffs are entitled to Judgment as a matter of law as to liability only with the following caveat: the question of whether Defendant Holbrook and Tri-County Development, Inc. were properly licensed to enforce the contract . . . Defendant shall be allowed to attempt to establish a right to a set-off and the issue as to whether Plaintiff's (*sic)* were properly licensed.") Prior to the filing of the Order, Judge McIntosh wrote to the parties in December 2010 to reiterate his ruling on this issue, writing that "I am granting the Plaintiff's motion as to Defendant's liability only, with the following

caveat: the question whether Defendant Holbrook and Tri-County Development are in a joint venture with regard to this project and whether Defendant Holbrook as properly licensed with the LLC may be properly challenged at trial as well as to the monies owed to the Plaintiff. Therefore, the Plaintiff will have to establish the amount of his damages at trial and the Defendant shall be allowed to establish the right to a set-off, if any, to challenge the existence of a joint venture and licensure." (R. p. 454).

The case was tried before a jury in Oconee County on November 28-29, 2011 and Judge Macaulay permitted the case to go forward on the question of damages alone. Pierce, proceeding *pro se,* raised the issue of the licensing statutes and the applicability of S.C. Code Ann. §40-59-30 multiple times during the trial and while Judge Macaulay ruled that Tri-County was not a licensed builder, he declined to find that Tri-County was therefore prohibited from enforcing the contract pursuant to §40-59-30, and refused to allow the issue to go to the jury.[3] The jury returned a verdict of $23,591.07. (R. p. 36). Pierce filed a motion to reconsider which was denied. Respondents thereafter made a motion for attorneys' fees pursuant to S.C. Code Ann. §29-5-10, seeking their fees plus pre-judgment interest. On March 26, 2013, Judge Macaulay entered an order awarding Respondents attorneys' fees and costs in the amount of $34,000, plus pre-judgment interest in the amount of $12,751.12. Petitioner's motion for reconsideration was denied. Following the trial of this case, Pierce retained the undersigned attorney and this appeal followed.[4]

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

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

ARGUMENT

I. The Reversal of One Circuit Court Judge's Order by Another Is Not Harmless Error.

On September 26, 2006, an Order for Judgment by Default (R. pp. 1-2) was entered in the Oconee County Court of Common Pleas on Appellant's Third Party Complaint for fraud against Respondent Jeff Gray. The Order was signed by the Honorable Alexander S. Macaulay. The Order provided by that a hearing to ascertain damages under South Carolina Rules of Civil Procedure, Rule 55 should be held. It is undisputed that no hearing was ever scheduled or held. On April 19, 2007, counsel for Jeff Gray filed a Motion to Set Aside the Entry of Default on the Third Party Complaint, supported by an affidavit from Jeff Gray. The Honorable J. Cordell Maddox, Jr. denied Gray's Motion "after careful consideration and review of the evidence." (R. p. 3).

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

In its unpublished opinion, the Court of Appeals correctly noted that "one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge." Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979); Sheppard v. Kimbrough, 282 S.C. 348, 318 S.E.2d 573 (Ct. App. 1984); State ex. rel. Medlock v. Love Shop Ltd., 286 S.C. 487, 334 S.E.2d 528 (Ct. App. 1985). However, the Petitioner submits that the ruling by the Court of Appeals that such reversal was harmless is in error. At trial,

had the default judgment been in place, Petitioner would have been able to submit evidence of Gray's liability on the cause of action for fraudulent inducement contained in the third party complaint. "A defendant in default admits liability but not the damages as set forth in the prayer for relief. . . By defaulting, a defendant forfeits his right to answer or otherwise plead to the complaint. In essence, the defaulting defendant has conceded liability." Solley v. Navy Fed. Credit Union, 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012) (internal citations omitted). By taking away Petitioner's right to have Respondent Gray's liability before the jury on the fraud cause of action, Petitioner was severely prejudiced. The jury may well have considered Jeff Gray to be a less compelling or credible witness in the event they knew he had admitted liability for fraud in his dealings with Petitioner.[5]

II. The Court of Appeals Erred in Finding that Petitioner Failed to Preserve His Argument That He Was Entitled to Charge on Statutory Licensing Requirements for Builders.

Pierce raised the issue of the prohibition set forth in S.C. Code §40-59-30(B) of an unlicensed residential builder from bringing this type of action in his directed verdict motion at the close of the Respondents' case. (R. p. 299, l. 16 – p. 308). He also requested that the licensing issue and statutes be charged to the jury. (R. pp. 330, l. 18 – p. 332, l. 3). The trial judge denied both the motion for directed verdict and denied the jury charge request. (R. pp. 302-308, R. pp. 330-332).

In denying the motion for directed verdict, the trial judge reasoned that since Tri-County was not a 'residential builder', section 40-59-5 et. seq. didn't apply to it. (R. p. 302, lines 3-15). He summarized his rationale when he denied Pierce's request to include a jury

[5] Melinda Holbrooks never appeared at trial.

charge on the licensing issue and S.C. Code §40-59-30(B) by stating that this code section "does not apply because there was a finding that the contractor, Melinda Holbrooks, was registered and licensed throughout the conduct of this contract." (R. p. 331, lines 2-5).

The trial judge used different terminology when he initially denied the motion for a directed verdict. The trial judge states:

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

This implies that the trial judge was treating Tri-County and Melinda Holbrooks as one entity in this case and that Holbrooks' builder's license somehow covered Tri-County. This is further evidenced by examining the verdict form that the trial court itself drafted (R. p. 326, lines 2-5). The verdict form did not give the jury the option of finding for one Plaintiff or the other, but rather offered only one option of finding "For Plaintiff Tri-County Development, Inc. and Melinda Holbrooks, damages in the amount of _____ Dollars." The fact that the trial judge used the singular form of " Plaintiff" in the verdict wording ("For *Plaintiff*" and not "For *Plaintiffs*") reinforces the interpretation that he was himself treating - and instructing the jury to treat - both Plaintiffs as one entity for the purposes of the trial and any award.

These rulings are also in direct contradiction to Judge McIntosh's August 16, 2011 Order (and letter of December 21, 2010) whereupon he ruled that the licensure issue was a question of fact for the jury, thereby creating the "law of the case" since the ruling was

unappealed by the Plaintiffs (now Respondents) at that time. See Williamsburg Rural Water v. Williamsburg County, supra.

South Carolina courts have strictly construed the provision currently codified in South Carolina code section 40-59-30[6] against the unlicensed builder. The court in Wagner v. Graham, 296 S.C. 1, 370 S.E.2d 95 (S.C. App. 1988) summarized the case law on this issue holding as follows:

> **The intent of the Legislature to protect the public by requiring home builders to be licensed is emphasized by that portion of the statute quoted above which makes a violation of the act a criminal offense.** Construction of this statute has been before our appellate courts on several occasions. See, *Henderson v. Evans,* 268 S.C. 127, 232 S.E.2d 331 (1977); *Watson v. Harmon,* [280 S.C. 214, 312 S.E.2d 8 (1984)]; *Roberts, Inc. v. Trust,* 274 S.C. 53, 260 S.E.2d 818 (1979); *Columbia Pools, Inc. v. Moon,* 284 S.C. 145, 325 S.E.2d 540 (1985); and *Duckworth v. Cameron,* 270 S.C. 647, 244 S.E.2d 217 (1978). The Court has consistently honored the statute even though the result in some of the cases appears to be drastic.
>
> *Wagner* at 96 (emphasis added).

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

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

Carolina law; having consistently raised the issue at trial, the *pro se* Petitioner properly sought to put the issue to the jury.

III. Because Melinda Holbrooks Was Paid in Full and Evidence Showed a Genuine Dispute Between the Parties As to Its Terms, Summary Judgment as to Liability on the Contract Was Clear Error.

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

The testimony of the parties and evidence before the Court demonstrated unequivocally that all parties had a different view of **whether** the contract was breached, **and by whom** – thereby creating a question of fact for the jury. Melinda Holbrooks testified that she was paid in full for the work she performed at the job. (R. p. 429, lines 20-24; R. p. 430, lines 15-17). Accordingly, it would surely be difficult for her to credibly argue that she had suffered from <u>any</u> breach of contract on the part of Petitioner.[7]

The evidence before the court was that the parties were having a dispute about whether the work on the home would continue; what the payment terms would be; and

[7] As previously noted, Ms. Holbrooks did not even appear at the trial of this matter.

whether the construction requirements had been satisfied. (R. p. 140-147). The evidence before the lower court was that, at the very least, Pierce believed that the parties were at a standstill and work had stopped, and there was no payment required.

Finally, counsel for Jeff Gray and Tri-County and Holbrooks stated to Judge McIntosh at the summary judgment hearing on November 1, 2010 that ". . . in April 4, 2005, Mr. Pierce's father wrote a letter to my client saying, 'Hey, we reached this agreement and you are not going to pay the balance of the contract until everything is done.' So, we contented an anticipatory repudiation in April. In June, my client, he continued to work. He didn't agree with that and he continued to work." And then in June 28, 2005 . . . Mr. Pierce writes an email to my client and says, "You will not be, you will not paid until all work is completed in the house regardless of the one year warranty you mentioned. And that is when my client pulled off that project and stopped working." (R. pp. 423-426).

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

"The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment. However, if a

contract is ambiguous, or capable of more than one construction, the question of what the parties intended becomes one of fact, and should therefore be decided by the jury." Middleborough Horizontal Property Regime v. Montedison, S.p.A., 465 S.E.2d 765, 320 S.C. 470 (Ct. App. 1995) (internal citations omitted).

Here, it was clear that the parties did not know what the "contract" was or the terms therein – there was evidence of a "gentlemen's agreement", outlined in an April 4, 2005 letter to Respondents and that Petitioner believed that the April 4, 2005 letter memorialized a new agreement, while Respondents believed that the April 4th letter was an anticipatory repudiation (even though they continued to work on the job). Finally, there was evidence from Respondent Melinda Holbrooks that, as far as she was concerned, she was paid in full for the job and no breach of contract therefore could have occurred. In short, there was a significant amount of testimony as to what the contract was and whether there had been a breach, such that the terms of the contract (and any breaches thereof) were for the jury to determine.

CONCLUSION

The Court of Appeals erred in finding that the reversal of the order of default judgment was harmless error and further erred in finding that Petitioner, proceeding *pro se*, had failed to properly preserve the issue of statutory licensing. Finally, the Petitioner submits that the issue of liability on the contract was properly for the jury. In the event the underlying judgment against Petitioner is vacated, Petitioner submits that the award of attorney's fees and costs, plus the award of pre-judgment interest, must be vacated as well.

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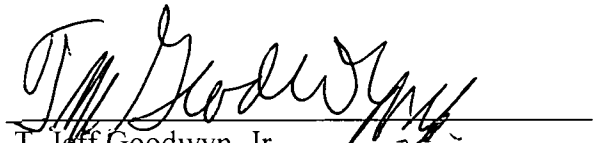

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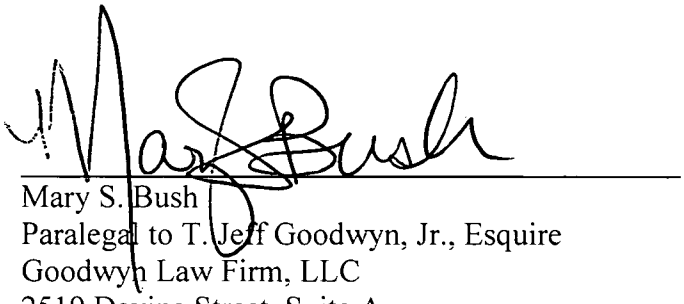
PROOF OF SERVICE

I certify that I have served the **Petition for a Writ of Certiorari** and **Appendix**, by depositing a copy of same in the United States Mail, postage prepaid, on **June 19, 2015**, addressed to counsel for Respondents, Thomas E. Dudley, III, Esquire, at the Law Firm of

Kenison, Dudley & Crawford, LLC to 704 East McBee Avenue, Greenville, SC 29601 and by filing a copy of same Via Hand Delivery to South Carolina Court of Appeals, to 1015 Sumter Street, Columbia, SC 29201.



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