

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2015-000574

Joel C. Greene, Jr.,

Appellant,

v.

Clarence Felder a/k/a Clarence
Edward Felder a/k/a Clarence
E. Felder, individually and
d/b/a Custom Home
Improvements, Clarence E.
Felder, LLC, Ron Powell a/k/a
Ronald Powell, individually,
England Enterprises, Inc.,
a/k/a England Enterprises is
Closed, Inc., SAFEBuilt
Carolinas, Inc. f/k/a England
Enterprises a/k/a England
Enterprises, Inc., City of
Barnwell, Larry Nipper,
individually and d/b/a
Nipper's Electric Service,
Sanders Supply Company,
Inc., Griffin Specialty
Contracting, Inc., Gregory J.
Griffin, and John Doe
representing any other
unknown inspectors,
contractors or subcontractors
on this Project, Defendants,

Of Whom Ron Powell a/k/a
Ronald Powell, John England,
and England Enterprises, Inc.
a/k/a England Enterprises is
Closed, Inc., are the

Respondents.

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AUG 07 2015

SC Court of Appeals

INITIAL BRIEF OF APPELLANT

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OTHER AUTHORITIES

Not applicable.

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR WHEN IT GRANTED SUMMARY JUDGMENT TO RESPONDENTS?
2. DID THE TRIAL COURT ERR IN HOLDING THAT RESPONDENTS WERE IMMUNE FROM LIABILITY?
3. DID THE TRIAL COURT ERR IN HOLDING THAT RESPONDENTS DID NOT OWE A SPECIAL DUTY OF CARE TO APPELLANT?
4. DID THE TRIAL COURT ERR IN HOLDING THAT APPELLANT WAS NOT A THIRD-PARTY BENEFICIARY OF RESPONDENTS' CONTRACT WITH THE CITY?
5. DID THE TRIAL COURT ERR IN FINDING THAT RESPONDENTS' SERVING AS BUILDING OFFICIAL DID NOT CONSTITUTE ENGAGING IN TRADE OR COMMERCE?

STATEMENT OF THE CASE

On August 18, 2014, Appellant Joel C. Greene, Jr. ("Appellant") filed an Amended Complaint against Respondents Ron Powell a/k/a Ronald Powell, individually, England Enterprises, Inc., a/k/a England Enterprises is Closed, Inc. ("Respondents") and others. On February 4, 2015, the trial court granted summary judgment in favor of Respondents on all causes of action. On March 13, 2015, Appellant served its *Notice of Appeal* on Respondents.

FACTS

During the time in which Respondents served as the building official, plan reviewer and inspector for the City of Barnwell ("the City"), Appellant's office building at 366 Fuldner Road, Barnwell, South Carolina 29812, Parcel Number: 072-00-00-059 ("the Office Building") was defectively constructed (Agreement p.1). During Respondents' tenure with the City, Respondents' duty was to operate the City's Building

Codes Office (Agreement p.1), and to administer the City's building codes (Agreement p. 3) in order to ensure safety to life and property (Building Code §6-23).

On August 31, 2011, Respondents issued a permit for the construction of the Office Building after making some changes to the submitted plans. On January 17, 2012 after conducting its final inspection, Respondents issued the certificate of occupancy proclaiming that the Office Building complied with the City's building codes. Two weeks later, the defective construction was identified. The cost to repair the Office Building is \$198,206.00.

ARGUMENTS

I. SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, BECAUSE A GENUINE ISSUE OF MATERIAL FACT EXISTS.

“Summary judgment is appropriate only when the pleadings, depositions, interrogatory answers, admissions, and affidavits show that there is *no* genuine issue of material fact.” (emphasis added) Bravis v. Dunbar, 316 S.C. 263, 449 S.E.2d 495 (Ct. App. 1994). In order to withstand a motion for summary judgment, the non-moving party is only required to submit a mere scintilla of evidence. Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (S.C. 2011). “Summary judgment is appropriate only when it is perfectly clear that no genuine issue of material fact is involved and further inquiry into facts is not desirable to clarify the application of the law.” Duck v. Wallace Associates, Inc., 313 S.C. 448, 438 S.E.2d 269 (Ct. App. 1993).

Appellant's February 3, 2015 Memorandum Opposing Summary Judgment (which was filed on February 4, 2015 before the motion was heard) sufficiently sets forth a genuine issue of material fact as to Respondents' involvement with the Office Building and the resulting duties which arose.

Furthermore, Appellant's February 3, 2015 Motion to Amend Pleading (which was filed on February 4, 2015 before the motion was heard) attempted to allow Appellant's *Complaint (2nd Amended)* which clarified its claims and requests for relief. The revisions include, but are not limited to, the following: i) Paragraph 4 (Respondents' classification as independent contractors and the requirement to have \$1,000,000.00 in general liability insurance coverage); ii) Paragraph 8 (Respondents' functions); iii) Paragraph 9 (Respondents' general liability insurance coverage); iv) Paragraph 11 (Respondents approved the work); v) Paragraph 12 (Respondents issued the certificate of occupancy); vi) Paragraph 25(h) (Office Building did not meet the minimum requirements); vii) Paragraph 26 (Respondents failed to safeguard life and property); viii) Paragraph 31 (Respondents' special duty owed to Appellant); ix) Paragraph 47 (Respondents' functions); and x) Paragraph 50(h) (Respondents' breach).

Because these filings were made before the hearing, the trial court should have considered them in its ruling. By themselves, these filings provide a sufficient basis to deny summary judgment.

II. AS INDEPENDENT CONTRACTORS, RESPONDENTS ARE NOT IMMUNE FROM LIABILITY.

Respondents are neither employees nor officers of the City. They were not "appointed" by the City (Building Code, §6-89). Instead, they were hired as an "independent contractor" without employee status according to the July 22, 2010 Professional Service Agreement ("the Agreement"). As such, they do not enjoy the benefits of officers or employees of the City, and they are not entitled to participate in any "similar benefits available to the City's regular employees" (Agreement, Para. 5).

As independent contractors, Respondents were required to maintain “not less than \$1,000,000.00 in insurance coverage against all risks of conducting building inspections and accompanying duties and responsibilities....” (Agreement, Para. 9). A government employee would not need his own insurance coverage, because he would be covered by the State of South Carolina’s Insurance Reserve Fund. By requiring Respondents to have their own insurance coverage, the City was shifting the risk for inspections, duties and responsibilities to Respondents.

The City promises to defend its officers and employees against any lawsuit brought against them arising from the discharge of their duties (Building Code, §6-116). However, because Respondents are independent contractors with their own insurance coverage, the City has not defended them in this lawsuit.

Because Respondents are neither employees nor officers of the City, they are not immune from liability under §6-116 of the City’s building codes (Building Code, §6-116).

III. RESPONDENTS OWED A SPECIAL DUTY OF CARE TO APPELLANT.

Respondents are not protected by the “public duty” rule, because the City’s building codes create a special duty for Respondents by having the essential purpose of protecting identifiable individuals from a particular kind of harm. Rayfield v. SCDC, 297 S.C. 97, 106, 374 S.E.2d 910, 916 (Ct. App. 1988). Respondents’ special duty gives rise to the negligence action for Respondents’ failure to perform its duties properly. Id. at 916.

While enforcing the City’s building codes, Respondents owed a special duty of care to Appellant. A special duty exists if: 1) an essential purpose of the statute is to protect against a particular kind of harm; 2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not to

cause that harm; 3) the class of persons the statute intends to protect is identifiable before the fact; 4) the plaintiff is a person within the protected class; 5) the public officer knows or has reason to know of the likelihood of harm to members of the class if he fails to do his duty; and 6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office. Id. at 916.

The intent of the City's building codes is, "to safeguard the public health, safety and general welfare through structural strength, means of egress facilities, stability, sanitation, adequate light and ventilation, energy conservation and safety to life and property from fire and other hazards attributed to the built environment..." (Building Code, §6-23). The safety of the Office Building, and of all those who enter it, is contemplated by the City's building codes.

The class of persons to be protected by the City's building codes includes Appellant as the property owner, as well as all those who enter the Office Building to work and/or to seek treatment. As the owner of the Office Building, Appellant is a member of this protected class. Respondents have reason to know that Appellant and/or his employees and/or his patients and/or the Office Building itself could likely become injured from exposure to mold arising from water intrusion or from injury or death if the Office Building collapses from being structurally deficient because it is not built according to the City's building codes.

The City's building codes contemplate an action against the building inspector by anyone, including the owner of the Office Building (Building Code, §6-480). Because Respondents served as building official, plan reviewer and inspector for the City (Agreement p. 2), the Office Building was constructed as Respondents directed.

Respondents were the *only* party who had sufficient authority to act, because they were the *only* party authorized to enforce the City's building codes (Building Code, §6-

109), to receive applications and issued permits (Building Code, §6-110), to issue all necessary notices or orders (Building Code, §6-111), to make all required inspections (Building Code, §6-112), and to issue stop work orders (Building Code, §6-383).

Respondents owed Appellant a special duty to safeguard Appellant's life and property (and the life and property of all who worked in and/or visited the Office Building) from fire and other hazards attributed to the Office Building and to its construction by performing the duties required by the City's building codes.

IV. APPELLANT WAS A THIRD-PARTY BENEFICIARY OF RESPONDENTS' CONTRACT WITH THE CITY.

A contract between two parties for the benefit of a third party can be enforced by the third party, even if the third party is not named in the contract. Svenningsen v. Knight, 286 S.C. 299, 333 S.E.2d 78 (Ct. App. 1985). The presumption that a public contract is not enforceable by an individual may be overcome by a showing that the individual was intended to be a direct beneficiary of the contract. Touchberry v. City of Florence, 295 S.C. 47, 367 S.E.2d 149 (1988).

The intent of the City's building codes is "to establish the minimum requirements to safeguard the public health, safety and general welfare through structural strength, ...stability...and safety to life and property from fire and other hazards attributed to the built environment...." (Building Code, §6-23). The City's building codes contemplate an action against the building inspector by anyone, including the owner of the Office Building (Building Code, §6-480). Because Appellant owned the Office Building, the construction of which was regulated by the City's building codes, he was intended to be a direct beneficiary of the Agreement between Respondents and the City.

V. RESPONDENTS' ACTIVITIES PERFORMED WHILE SERVING AS BUILDING OFFICIAL CONSTITUTES ENGAGING IN TRADE OR COMMERCE.

A. Respondents' deceptive acts were identified.

"...[U]nfair or deceptive acts or practices in the conduct of any trade or commerce" are unlawful, S.C. Code Ann. §39-5-20, and provide a private cause of action for such violations. S.C. Code Ann. §39-5-140. Respondents' deceptive act is alleged to be its falsely certifying that the Office Building had been constructed to the standards required by the City's building codes while being aware of the defects and deficiencies in the Office Building when the Certificate of Occupancy was issued (Complaint (2nd Amended) Para. 12).

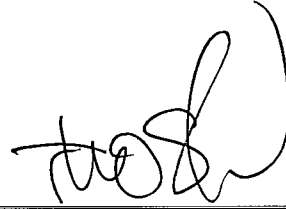
B. Respondents engaged in trade and commerce.

Under the South Carolina Unfair Trade Practices Act, "Trade" and "commerce" shall include...any services...directly or indirectly affecting the people of this State. S.C. Code Ann. §39-5-10(b). The trial court erroneously ruled that Respondents' activities as the City's building official, plan reviewer and inspector does not constitute engaging in trade or commerce with residents of the City (including Appellant). The very nature of Respondents' activities was the provision of services such as administering the City's building codes, operating the building codes office, and making all of the required inspections. The very nature of Respondents' activities was such that it affected the public.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the trial court and remand for trial.

August 5, 2015



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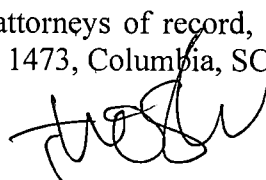
Of Whom Ron Powell a/k/a
Ronald Powell, John England,
and England Enterprises, Inc.
a/k/a England Enterprises is
Closed, Inc., are the

Respondents.

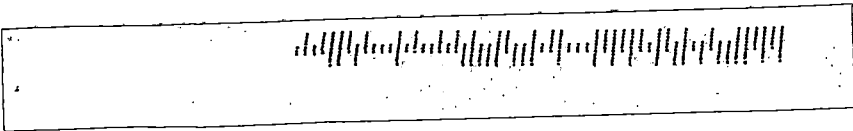
PROOF OF SERVICE

I certify that I have served the *Initial Brief of Appellant* and the *Designation of Matter to be Included in the Record on Appeal* on Respondents Ron Powell a/k/a Ronald Powell, John England, and England Enterprises, Inc. a/k/a England Enterprises is Closed Inc. by depositing a copy of it in the United States Mail, postage prepaid, on July 13, 2015, addressed to their attorneys of record, Joshua D. Shaw, Esquire and J. Kenneth Carter, Esquire, PO Box 1473, Columbia, SC 29202.

August 5, 2015



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The Honorable Jenny Abbott Kitchings
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