

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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OCT 15 2015

SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity

Appeal No. 2015-001820

Case No. 2013-CP-23-01715

Michael Stehney, Jr.,.....Respondent,

v.

Ronald E. Ferguson, Susan M. Ferguson, and Ronald J. Ferguson, Defendants,

Of whom Ronald J. Ferguson is the .....Appellant.

Case No. 2013-CP-23-03179

Ronald E. Ferguson and Susan M. Ferguson, .....Plaintiffs,

v.

Christopher Todd Usher, Addison Corporation, and Addison Homes, LLC,.....Defendants.

**APPELLANT'S OPPOSITION TO  
SECOND MOTION TO DISMISS APPEAL  
AND SUPPLEMENT RECORD**

Ronald J. Ferguson, Appellant, is in receipt of a second Motion to Dismiss in the above styled action. In support thereof the record should more accurately reflect the following facts:

A Motion to Dismiss was originally filed by counsel representing the insurer for Addison Homes, LLC, and Christopher Todd Usher. Though Addison Corporation is a party to the action they were not part of the motion.

The South Carolina Court of Appeals directed the parties to submit Memorandum on an issue to be addressed in the appeal. Appellant timely submitted a brief showing the lower court was in violation of United States Code, South Carolina Rules of Civil Procedure, South Carolina Rules of Appellate Procedure, and United States Court precedent in U.S. v. Miller. Upon information and belief no other parties have submitted a memorandum of law.

Subsequent to these actions counsel for Michael Stehney, Junior, has filed a Motion to Dismiss Appeal.

#### **1715 Motion to Quash**

The lower court was moved to act, in part, as a result of two motions filed by Counselors Boyd in '3179' and Campbell in '1715' and sought a third party subpoena to Greer State Bank related to their records obtained in the course of business with Christopher Todd Usher, Addison Homes, LLC and Addison Corporation:

Quoting the movant's Motion to Quash in 3179 “Specifically, counsel for Addison Homes, LLC received information from counsel for Michael Stehney, Jr., in the case of *Michael Stehney, Jr., v. Ronald E. Ferguson and Susan M. Ferguson*, Civil Action No. 2013-CP-23-01715. Counsel for Stehney advised that he had received information the Fergusons issued a subpoena commanding Greer State Bank to produce names of all deposits and withdrawals for any accounts related to Addison Homes, LLC for the period of October 15, 2012 through June 28, 2013. The Fergusons failed to provide a copy of this subpoena to counsel for Addison Homes, LLC...”

Ronald J. Ferguson was added as an intervenor in Civil Action No. 2013-CP-23-01715 by Order of Judge Robin B. Stilwell on December 6, 2013.

The underlying matters of 1715 involves an assertion by Stehney that he suffered damages to property as a result of construction at the Fergusons. Counsel for Stehney argues that the Fergusons are responsible for damages under the doctrine of respondeat superior.

The Fergusons have asserted they were party to contract with state licensed builder Christopher Todd Usher, Addison Homes, LLC and Addison Corporation, for construction of a residential dwelling and seek to show that Usher was responsible for hiring of parties and materials, as well as the specific parties, timelines, and materials utilized by same.

SC Code §15-38-15(D) provides “A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party”. SC Code §15-38-15(A) further provides: “In an action to recover damages resulting from personal injury, wrongful death, or damage to property or to recover damages for economic loss or for noneconomic loss such as mental distress, loss of enjoyment, pain, suffering, loss of reputation, or loss of companionship resulting from tortious conduct, *if indivisible damages are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the indivisible damages* as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of plaintiff. *A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact.*”

Thus, lower court's actions affect the defendants rights to pursue a defense in 1715 along with stripping away a lawful means of propounding discovery which any member of the BAR would be granted.

Interlocutory orders which affect a substantial right, such as a defense, are immediately appealable.

“Orders affecting a substantial right “discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.” *Id.* at 335 n.4, 426 S.E.2d at 780 n.4. .

The fact the movants lacked jurisdiction pursuant to *U.S. v. Miller* for the frivolous filing, the second example of an unlawful order by Simmons<sup>1</sup> and the South Carolina Supreme Court's ruling penned by Chief Justice Toal that judiciary should not prematurely interfere with discovery matters which may ferret out fraud leading to a SCRP, Rule 60, pleading or appeal of denial of such, finds that a dismissal would only result in the matter going to the South Carolina Court of Appeals pursuant to S.C. Code §14-3-330- The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

#### Respondeat Superior

This matter is still early in the discovery process and there has been no judicial determination on the topic of respondeat superior. The doctrine of *respondeat superior* rests upon the relation of master and servant. Lane v. Modern Music, Inc., 244 S.C. 299, 136 S.E.2d 713 (1964). A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope

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<sup>1</sup> The Master-in-Equity's order of November 6, 2014, was the culmination of hearings on September , 2014 and October , 2014. That order supposedly joined 2013-CP-23-01715, 2013-CP-23-01810 and 2013-CP-23-03179 for purposes of discovery and states within that part of the cases are before the Federal Court. 28 USC 1446(d): “Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.” Thus, the trial court's assertion movants are entitled to relief based on this order is without merit and we have yet to discern the parties from 1810 missing from the proceedings related to the latest Order despite a motion pending which involved such.

Since filing the Notice of Appeal, on or about September 1, 2015 Judge Simmons issued a second order altering the one on appeal.

of his employment. *Id.* An act is within the scope of a servant's employment where reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business.

*Id.* These general principles govern in determining whether an employer is liable for the acts of his servant. *Id.*

The act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefor. Lane, *supra*. Under these circumstances the servant alone is liable for the injuries inflicted. *Id.* If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; this is so no matter how short the time, and the master is not liable for his acts during such time. *Id.*

As one court put it: "To have an employment relationship, the 'employer' must have some ability, should he care to exercise it, to tell the 'employee' what to do and how and when to do it. If there is not this minimal power of control – if the worker's agreement is to perform the work 'according to his own means and methods free from control of his employer in all details connected with the performance of the work except as to its product or result' – the worker is deemed to be an independent contractor and not an employee/servant."

It is well settled law that when a party enters into a contract with a licensed homebuilder, the homebuilder is responsible for the compliance with applicable laws and building codes as well as the employees, materialmen and subcontractors he or she employees to the furtherance of the contract completion.

### South Carolina Rules of Professional Conduct, Rule 3.3

#### *(a) A lawyer shall not knowingly:*

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a

witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply when the lawyer is representing a client before a tribunal as well as in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. These duties continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

### **Fraud**

There is no statute of limitations when a party seeks to set aside a judgment due to fraud upon the court. Rule 60(b), SCRPC; see Hagy v. Pruitt, *supra* (court has the inherent authority to set aside a judgment on the ground of extrinsic fraud in spite of any facially applicable statute of limitations). In order to secure equitable relief on the basis of fraud, the fraud must be extrinsic. Bryan v. Bryan, 220 S.C. 164, 66 S.E.2d 609 (1951). (extrinsic fraud is necessary in order to secure equitable relief vacating a prior judgment).

Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." Hilton Head Ctr. of South Carolina v. Public Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987).

Intrinsic fraud, on the other hand, is fraud which was presented and considered in the trial. Hagy v. Pruitt, 339 S.C. 425, 529 S.E.2d 714 (2000). It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud. Hilton Head Ctr. v. South Carolina Pub. Serv. Comm'n, *supra*.

Perjury by a party or a witness is intrinsic fraud. Rycroft v. Tanguay, 279 S.C. 76, 302 S.E.2d 327

(1983). “[O]rdinarily there is no ground for equitable interference with a judgment in the fact that perjury or false swearing was committed by such party or his witnesses at trial, at least where the perjurious or false evidence was not accompanied by any extrinsic or collateral fraud, and related to issues or matters which were or could have been considered in the original cause.” Bryan v. Bryan, supra 220 S.C. at 168, 66 S.E.2d at 610. In addition, the failure to disclose to an adversary or court matters which would defeat one's own claim is intrinsic fraud. Hilton Head Ctr. of South Carolina, Inc. v. Pub. Serv. Comm'n, supra.

Equitable relief from a judgment is denied in cases of intrinsic fraud, on the theory that an issue which has been tried and passed upon in the original action should not be retried in an action for equitable relief against the judgment, and that otherwise litigation would be interminable; relief is granted for extrinsic fraud on the theory that by reason of the fraud preventing a party from fully exhibiting and trying his case, there never has been a real contest before the court of the subject matter of the action.

Bryan v. Bryan, supra S.C. at 168, S.E.2d at 610.

“Relief is granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments.” Mr. G. v. Mrs. G., 320 S.C. 305, 308, 465 S.E.2d 101, 103 (Ct. App. 1995).

The subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud. Contrary to perjury by a witness or a party's failure to disclose requested materials, conduct which constitutes intrinsic fraud, where an attorney - an officer of the court - suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court. These actions by an attorney constitute extrinsic fraud.

Looking to the lower court's Order on appeal, it clearly states that discovery has been consolidated in 2013-CP-23-01715 and 2013-CP-23-03179. Among the documents in the lower court's files from multiple other motions, hearings and other pending actions, includes a Construction Agreement dated October 16, 2012 between Ronald E. Ferguson, Susan M. Ferguson, Christopher Todd Usher and Addison Homes, LLC. Additional documents in the record include the Residential

Building Permit along with Acknowledgment of Soil and Erosion Responsibilities obtained by Christopher Todd Usher on behalf of Addison Homes, LLC in October 2012. Further, there exists multiple requests for discovery to the defendants in 3179 and Order compelling production of, among other things, the names of person(s) who supplied materials and or performed any labor on behalf of the defendants.

SCRCF, Rule 26(b)(1) provides: Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

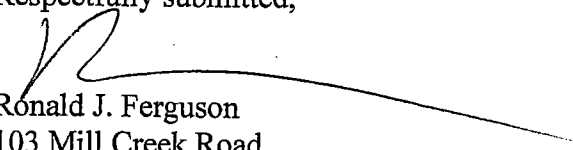
The developed record clearly reflects that the Ferguson's engaged Usher/Addison in a contractual relationship to build a dwelling in October 2012. Counselor Campbell's complaint in 1715 alleges that his client suffered property damage as a result of activities on the Ferguson's property sometime after November 2012 and they seek to hold the Ferguson's liable. Clearly the Ferguson's are responsible to perform due diligence through discovery and presentation of facts. This would require not being limited to obtaining records or statements of a party, such as Usher, who may subject to judgment for their actions. Records in possession of Greer State Bank, limited to the specific time frame of the construction contract, would clearly reveal the names of persons who performed labor and or supplied materials during the events in question.

The movant clearly filed his motion seeking to limit the Fergusons presentation of two defenses which affect the ability to secure a judgment: 1) Determination of their liability under the doctrine of respondeat superior and B) that Christopher Todd Usher, or those in his employment or

supervision are subject to liability under SC Code §15-38-15 in Civil Action No. 1715.

Movants actions in contravention of rules and established precedent were a direct and proximate cause of the lower court's misapplication of law in the order on appeal and this Court is duty bound to examine such conduct.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify, that on this date, I served a copy of the Appellant's Opposition to Motion to Dismiss Appeal, dated 10/08/2015 on Plaintiff's Attorney of record by

\_\_\_\_\_ delivering it to him/her personally; or,

\_\_\_\_\_ mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows; or,

X   mailing it to the address indicted by their counsel of record as follows:

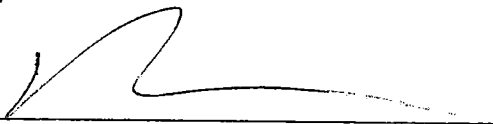
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This the 8th day of October, 2015.

  
\_\_\_\_\_  
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