IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein

Case No. 2013-CP-18-1195

Appellate Case No. 2015-001750

MacMillan Wireless Diagnostics, Inc. ..... Respondent,

v.

Hypower, Inc., and W.H. English Electrical Contractors, Inc., Defendants,

Of Whom, Hypower, Inc. is the ..... Appellant.

INITIAL BRIEF OF APPELLANT

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October 28, 2015

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STATEMENT OF THE CASE

This is an action for breach of contract, fraud and negligent misrepresentation in which Respondent, MacMillan Wireless Diagnostics, Inc. (hereinafter referred to as "MacMillan"), seeks damages from Appellant, Hypower Inc. (hereinafter referred to as "Hypower"), and W.H. English Electrical Contractors, Inc. (hereinafter referred to as "English"). MacMillan initiated this action on July 2, 2013, by filing a Complaint in the Dorchester County Court of Common Pleas. Hypower timely answered and cross-claimed against W.H. English. W.H. English has not answered or made an appearance in this action[1].

This matter was tried before the Honorable Diane S. Goodstein and a jury on April 14, 2015. At the conclusion of Hypower's case, McMillan abandoned its fraud cause of action and amended its complaint to assert a cause of action for negligent misrepresentation. *Tr.* 119:24 – 121:13. Prior to submission of the case to the jury, Judge Goodstein denied Hypower's motion for directed verdict as to both causes of actions and overruled its objection to the punitive damage charge. *Tr.* 159:22-25. The jury thereafter returned a verdict in favor of McMillan against Hypower on both the breach of contract and negligent misrepresentation causes of action in the amount of ($18,350.00) actual damages and thirty-six thousand seven hundred and no one-hundredths ($36,700.00) dollars in punitive damages on the negligent misrepresentation cause of action.

Following the verdict, Judge Goodstein entered an order awarding McMillan prejudgment interest in the amount of $3,234.71 and denied Hypowers' motions for j.n.o.v., new trial, *remittur*

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[1] During the trial, the trial judge orally granted Hypower's motion for default against W.H. English, though, no formal default order has yet been entered.. *Tr.* 88:7-18. W.H. English is not a party to this appeal.

and set off. *Tr.* 164:15-25. Judgment was entered on August 4, 2015. The Notice of Intent to Appeal was filed and served on August 14, 2015.

FACTS

Hypower is a specialty electrical contractor whose area of work encompasses anything that is electrical or telecommunications related. Their scope of services include working on overhead power lines, underground power lines and telecommunications building infrastructure. *Tr.* 90:1-6. MacMillan is a wireless service company which verifies telecommunication systems and tests components such as coaxial cables, fiberoptic cables and antenna systems. *Tr.* 43:20-25; 45:1-46:19.

In 2012, Velocitel, a regional vendor for AT&T, contracted with Hypower to provide services in connection with the installation and testing of antennas on towers.(hereinafter referred to as "the Project)". *Tr.* 58:10-21; 101:7-13. The Project was comprised of multiple testing locations throughout the state of Virginia, which prompted Hypower to employ subcontractors to assist with the work. Hypower subcontracted with English, a telecommunications and electrical subcontractor, through a blanket subcontract agreement on August 17, 2012[2]. *Tr.* 90- 91:3-13; *Defendant's Ex.* 4.

On August 17, 2012, Charlie Wallace, a project manager with Hypower, emailed Todd MacMillan, president of MacMillan, stating that Hypower was "looking forward to seeing your [MacMillan's] quote" for certain project sites. *Tr.* 50; 60; *Plaintiff's Ex.* 1 (emphasis added). In response to this email, MacMillan sent three (3) price quotes for specific sites associated with the Project. *Tr.* 72, 108; Defendant's *Ex.* 2.

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[2] Hypower required all subcontractors to enter in to a blanket subcontract agreement. *Tr.* 91:14-16. Part of the reason for these agreements was to guarantee that detailed payment applications were submitted to Hypower. *Tr.* 92:20-25.

Hypower and MacMillan never entered into a contract. Because MacMillan was not one of Hypower's approved subcontractors, MacMillan chose to submit its invoices through W.H. English for payment, which it did on at least thirteen (13) separate occasions, beginning sometime in August 2012, and ending November 9, 2012. *Tr.* 64; 69:16 – 70:1; *Plaintiff's Ex.* 12. English would in turn submit its invoices to Hypower for payment, which Hypower paid upon payment by Velocitel. None of MacMillan's invoices were submitted directly to Hypower. *Tr.* 96:23 – 97:6.

As of November 2012, MacMillan had received payment on only three or four of the invoices it submitted to English. *Tr.* 69:16-22. Thirteen of MacMillan's invoices submitted to English for payment remained unpaid, the last of which was dated November 9, 2012. *Plaintiff's Ex.* 12. On November 28, 2012, Nichole Miller, the accounts manager for MacMillan sent an email regarding MacMillan's outstanding invoices.[3] *Tr.* 66; 69; *Plaintiff's Ex.* 13. On December 27, 2012, William English, as agent for English, sent an email that he was overnighting a check for $3,118.64. *Plaintiff's Ex.* 13. In response, Miller sent a follow-up email inquiring about the balance due on the remaining eleven (11) invoices. *Plaintiff's Ex.* 13. On December 28, 2012, MacMillan processed the payment for $3,118.63, which satisfied Invoice MWD-12-192, dated September 10, 2012, and Invoice MWD 12-273, dated November 9, 2012. *Plaintiff's Ex.* 12.

On January 16, 2013, Fred W. Woodward, III, a project manager with Hypower, emailed MacMillan, informing him that both Hypower and English needed to execute releases before his "requisition for a check." *Plaintiff's Ex.* 14. MacMillan provided a release on January 17, 2013. *Tr.* 106; 121; *Plaintiff's Ex.* 14. On January 15, 2013, W.H. English submitted an "invoice" along with the AIA approved payment application to Hypower for ten (10) of the eleven (11) outstanding

[3] The Exhibit 13 does not indicate who Miller sent the email to. The email heading lists Miller, Wallace, English, MacMillan and Turbeville as recipients of at least one (1) of the emails.

MacMillan invoices.[4] *Tr.* 72; 97:13-98:9; 108; *Defendant's Ex.* 2. English did not sign the corresponding "Waiver and Release of Lien upon Final Payment" forms and "Full & Final Release of Claims" forms associated with each of the individual invoices until May 2, 2013[5]. *Tr.* 98:10-17; *Defendant's Ex.* 3. Hypower could not issue payment to English until those forms were signed, and payment for the outstanding invoices was not issued until May 17, 2013. *Tr.* 98:21-24; *Defendant's Ex.* 3.

On May 17, 2013, Hypower issued payment to English in the amount of $16,550.00 in satisfaction of ten outstanding MacMillan invoices. *Tr.* 99:2-5; *Defendant's Ex.* 3; *Plaintiff's Ex.* 12. It was Hypower's intention that English in turn pay MacMillan usung the $16,550.00 Hypower had paid it. *Tr.* 99:6-12. However, English never issued payment to MacMillan, despite Hypower's direct payment of 16,550.00, specifically in satisfaction of the ten (10) invoices.

STANDARD OF REVIEW

An appellate court will not disturb a jury verdict based on a particular jury instruction absent an abuse of discretion. *Hughs v. W. Carolina Reg'l Sewer Auth.* 386 S.C. 641, 689 S.E.2d 638 (Ct. App. 2009). "A trial court abuses its discretion when the ruling is not supported by the evidence or is based on an error of law. However, an erroneous jury instruction is not reversible error unless it causes prejudice to the appealing party." *Id.* at 646, 689 S.E.2d at 641 (citation omitted).

> A motion for a JNOV is merely a renewal of the directed verdict motion. When reviewing the circuit court's ruling on a motion for a directed verdict or a JNOV, this court must apply the same standard as the circuit court by viewing the evidence and all reasonable inferences in the light most favorable to the

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[4] Payment for project "NF061" was not submitted to Hypower for payment from English. Instead an invoice for project "NF016" was submitted. Payment for this project was not included in Hypower's check to English. *Defendant's Ex.* 2, *Defendant's Ex.* 3 and *Plaintiff's Ex.* 12.

[5] On January 23, 2013, English signed Hypower's Final Waiver and Release of Lien, although it is unclear when Hypower received it.

> nonmoving party. The circuit court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. Moreover, '[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.' In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.

Richardson v. Piggly Wiggly Cent., Inc., 404 S.C. 231, 233, 743 S.E.2d 858, 859 (Ct. App. 2013)(citations omitted).

ARGUMENT

I. THE TRIAL COURT ERRED IN SUBMITTING MACMILLAN'S NEGLIGENT MISREPRESENTATION CAUSE OF ACTION TO THE JURY.

The evidence and arguments presented at trial were insufficient to a negligent misrepresentation cause of action. To prove a negligent misrepresentation, MacMillan was required to prove the following elements by a preponderance of the evidence: (1) Hypower made a false representation to MacMillan; (2) Hypower had a pecuniary interest in making the statement; (3) Hypower owed a duty of care to see that it communicated truthful information to MacMillan; (4) Hypower breached that duty by failing to exercise due care; (5) MacMillan justifiably relied on the representation; and (6) MacMillan suffered a pecuniary loss as the proximate result of its reliance on the representation. *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 692 S.E.2d 499 (2010); *West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000).

MacMillan completely failed to establish that Hypower made a false statement. Accordingly, MacMillan has failed to sustain its cause of action for negligent misrepresentation. *Austin v. Stokes–Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 13 (2010) (failure to prove any element of fraud or misrepresentation is fatal to the claim).

The understood arrangement throughout the Project was for Hypower to issue payment to English who in turn was supposed to pay MacMillan, as MacMillan did not have a blanket

subcontractor agreement in place with Hypower. *Tr.* 70:10 -16; 70:20-24; 91: 8-23. MacMillan clearly understood this to be the arrangement as it submitted all of its invoices to English, not Hypower. Hypower issued payment to English on May 17, 2013, with the clear expectation that English would use the proceeds of the May 17th payment to pay MacMillan for its services. *Tr.* 99:9-12; *Defendant's Ex.* 3. Even though English failed to pay MacMillan, English's failure in this regard does not constitute a false representation by Hypower.

According to MacMillan, Hypower's requiring it sign a "Final Waiver and Release of Lien" before receiving payment on the outstanding invoices constituted negligent misrepresentation as they were never paid by Hypower. *Tr.* 84:8-85:6. However, Hypower's reason for having MacMillan sign the release was due to the fact "that . . . [Hypower] could not move forward with any type of check unless . . . [MacMillan] signed a release of lien." *Tr.* 67:19-23. As the release was for issuance of a joint check, Hypower also needed English to execute its individual release of lien and "Full and Final Releases of Claims" before moving forward with payment. *Plaintiff's Ex.* 12. Hypower did not receive all of English's executed releases until May 2, 2013. *Defendant's Ex.* 3. Once it received the executed releases, Hypower tendered payment to English. *Defendant's Ex.* 3.

In *Winburn v. Ins. Co. of N. Am.*, 872 S.C. 435, 339 S.E.2d 142 (Ct. App. 1985), the plaintiff sued his insurance company, INA and independent adjuster, Darby, after the mechanic that Darby recommended failed to repair his trawler. Winburn alleged negligent misrepresentation based on Darby's assurance that if Winburn endorsed the insurance company's repair check, Darby would see to it that the mechanic fixed the boat[6]. *Id.* The Court of Appeals upheld the trial court's directed verdict in favor of the Defendants on the negligent misrepresentation claim because

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[6] Winburn also claimed Darby negligently misrepresented the competency of the mechanic, which was likewise held to not constitute a negligent misrepresentation.

although Darby and INA had a duty to exercise reasonable care in giving information since they had a pecuniary interest in the transaction, there was no evidence Darby negligently made a false statement in telling Winborn he would make sure the mechanic fixed the boat. *Id.* The Court held that the fact that neither INA nor Darby honored Darby's commitment did not constitute proof of negligent misrepresentation and that evidence of a mere broken promise is not sufficient to prove negligent misrepresentation. *Id.*; *see also Shropshire v. Jones,* 277 S.C. 468, 289 S.E.2d 410 (1982) (promise given by hospital administrator to hospital employee that he would assist employee in connection with the employee's worker's compensation claim and necessary to support a the administrator negligent failure to keep his promise resulting in denial of employee's claim held to afford no basis for a cause of action). In this matter there is, likewise, no evidence in the record to support a finding that Hypower did not intend for MacMillan to receive payment following its execution of the Release.

Furthermore, requiring MacMillan to sign a "Final Waiver and Release of Lien" before receiving payment on its outstanding invoices in no way constitutes a "representation of material fact" sufficient to support a cause of action for negligent misrepresentation. *See Jimenez* v. *DaimlerChrysler Corp.*, 269 F.3d 439 4th Cir. 2001)(applying South Carolina law). A representation, even if negligently made (or in failing to make a disclosure where required[7]) is not

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[7] In this case, no allegation has been made that Hypower failed to disclose a material fact to MacMillan sufficient to support a claim for negligent misrepresentation. Moreover, even if such an allegation had been made, in the instant case, no failure to disclose on the part of Hypower would support a cause of action for negligent misrepresentation. Under South Carolina law, one has a duty to disclose under any one of the following three situations:

> 1) where ... [there exists] a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

actionable if there is no falsity or if there is no factual statement. *See, e.g., Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 581 S.E.2d 161 (2003). "To be actionable, 'the representation must relate to a present or pre-existing fact and be false when made.' Representations based on statements as to future events or unfulfilled promises are not usually actionable." *Id.* at 408, 581 S.E.2d at 168 (*quoting Koontz v. Thomas,* 333 S.C. 702, 713, 511 S.E.2d 407, 413 (Ct.App.1999)). Nonobservance of a promise may support an inference of a lack of intent to perform only when it is coupled with other evidence. 37 C.J.S. *Fraud* § 116 at 441 (1943).

Requiring MacMillan to sign a "Final Waiver and Release of Lien" before receiving payment on its outstanding invoices is neither a statement nor did it "relate to a present or pre-existing fact." Nor was there anything false about it. It was simply a condition precedent to issuing the check. To the extent MacMillan somehow construed Hypower's requiring it to sign a "Final Waiver and Release of Lien" before receiving payment on its outstanding invoices to be a representation that Hypower would pay it directly, such is clearly not actionable as "representations based on statements as to future events or unfulfilled promises are not usually actionable." *See Id.* There simply is no evidence of a lack of intent on the part of Hypower to perform.

Further, the "Final Waiver and Release of Lien" did not extinguish MacMillan's right to receive payment of $18,350.00. As noted on the Release, MacMillan, in consideration of the final payment...waive[d] and release[d] its lien and right to claim a lien. . . ." In other words, the "Final Waiver and Release of Lien" was only enforceable when MacMillan received final payment of

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Jacobson v. Yaschik, 249 S.C. 577, 585, 155 S.E.2d 601, 600 (1967); *accord Jimenez v. DaimlerChrysler Corp., supra* at 447; *Ardis v. Cox*, 314 S.C. 512, 431 S.E.2d 267 (Ct. App. 1993). MacMillan has neither claimed nor proven that any of these circumstances have ever existed and with good reason: because they do not and never have.

$18,350.00. Hypower's requirement that MacMillan sign the Release prior to receiving payment was not an attempt to deceive MacMillan or discharge Hypower from its obligations, but rather a part of its established protocol for paying subcontractors.

It was an error of law for the trial court to charge the jury on negligent misrepresentation. *See Winburn v. Ins. Co. of N. Am., supra* (while it is true Darby failed to keep his promise, evidence of mere nonperformance of a promise is not sufficient to establish either fraud or a lack of intent to perform); 37 AM.JUR.2d *Fraud and Deceit* § 60 at 92-93 (1968); 37 C.J.S. *Fraud* § 116 at 440-41 (1943). Accordingly, the jury's verdict on the negligent misrepresentation cause of action and the award of punitive damages which it supports, must be reversed.

II. THE TRIAL COURT ERRED IN CHARGING THE JURY ON PUNITIVE DAMAGES.

Assuming *arguendo* that submitting MacMillan's negligent misrepresentation cause of action to the jury was warranted, it was nonetheless improper for the trial court to allow the jury to consider punitive damages as they are not recoverable in actions based on negligent conduct. *Harold Tyner Dev. Builders, Inc. v. Firstmark Dev. Corp.*, 311 S.C. 447, 429 S.E.2d 819 (Ct. App. 1993); *Hicks v. McCandlish,* 221 S.C. 410, 415, 70 S.E.2d 629, 631 (1952) ("Gross negligence is a relative term, and means the absence of care that is necessary under the circumstances, but the absence of this care alone, whether called 'gross' or 'ordinary' negligence, does not authorize the jury to give exemplary damages."). Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. Section 15-33-135 CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended; *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008). The terms "willful" and "wanton" when pled in a negligence action are synonymous with "reckless" and import a greater degree of culpability than mere negligence, and evidence that the defendant's

conduct breached this higher standard entitles the plaintiff to a charge on punitive damages. *Fairchild v. South Carolina Dept. of Transp.* 398 S.C. 90, 727 S.E.2d 407 (2012).

The Court of Appeals has specifically held that punitive damages are not recoverable for a negligent misrepresentation cause of action. *Lengel v. Tom Jenkins Realty, Inc.*, 286 S.C. 515, 334 S.E.2d 834 (Ct. App. 1985); *Harold Tyner Dev. Builders, Inc. v. Firstmark Dev. Corp., supra* (specifically noting that the jury was instructed that damages are not recoverable in an action based on negligent conduct). In *Lengel v. Tom Jenkins Realty, Inc., supra*, the court upheld the jury's award of actual damages for negligent misrepresentation where the broker failed to disclose all material facts to the buyers in a real estate action, but reversed an award of punitive damages because there was no evidence of reprehensible conduct, only "mere errors of judgment." *Id.*

Here, there is not only a lack of evidence to support a finding of negligent misrepresentation, but the purported misrepresentation could only be construed as an error in judgment. It is undisputed that Hypower intended for MacMillan to receive payment on the outstanding invoices. Its process for remitting payment was through its customary practice of issuing payment first to English because MacMillan did not have a blanket subcontractor agreement in place with Hypower. *Tr.* 94:12 – 95:23. MacMillan was familiar with blanket subcontractor agreements and their purpose in the contractor-subcontract relationship. *Tr.* 70:20-24. It was, therefore, improper for the lower court to charge the jury on punitive damages as there was no legal basis or evidence to warrant such an award.

III. THE TRIAL COURT ERRED IN DENYING HYPOWER'S MOTION FOR J.N.O.V. AS TO THE NEGLIGENT MISREPRESENTATION CAUSE OF ACTION AND AS TO THE PUNITIVE DAMAGE AWARD.

For the same reasons the trial court should not have charged the jury on negligent misrepresentation or punitive damages, it, likewise, should have entered a judgment

notwithstanding the verdict as to the negligent misrepresentation cause of action and as to the jury's award of punitive damages against Hypower. MacMillan failed to establish all of the elements of negligent misrepresentation, specifically that Hypower made a false statement. Thus, the jury should have only been charged with determining whether Hypower breached its "contract" with MacMillan, which would have entitled MacMillan to an award of actual damages only. *Williams v. Riedman*, 339 S.C. 251, 529 S.E. 2d 28 (Ct. App. 2000).

While the trial court correctly instructed the jury that there cannot be a punitive damages award for breach of contract, it misstated the law when it said that punitive damages could only be awarded if there was a finding of negligent misrepresentation.[8] *Tr.* 150:8-13.

Further, the testimony and exhibits presented to the jury did not establish willful, wanton or reckless conduct on the part of Hypower. In conducting a review of the factors on punitive damages, the trial court mischaracterized the testimony and contents of the emails submitted in to evidence finding that there was an undercurrent of nefarious conduct on the part of Hypower in requiring MacMillan to be paid by English. *Tr.* 174:6-15. The trial court also relied on the contents of the Release, finding the Release was reprehensible based on the fact that "in order to be paid money, that this corporation [MacMillan] had to misrepresent whether or not it had been paid and its intent to be paid." *Tr.* 178:1-6. However, the Release was never entered in to evidence and the jury could not have reached that conclusion from the testimony offered at trial. *Tr.* 86:8-16.

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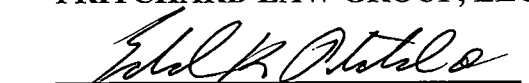
[8] Based on the record, the court meant to say that punitive damages – not actual damages - can only be awarded if there is a finding of negligent misrepresentation. However, it is possible that the jury took this to mean that no damages could be awarded solely for breach of contract, and both the actual damages and punitive damages awarded were predicated solely on the negligent misrepresentation cause of action.

CONCLUSION

For the reasons set forth herein, Appellant, Hypower, Inc., prays this Court reverse the judgment as to the negligent misrepresentation cause of action and as to the award of punitive damages.

Respectfully Submitted,
PRITCHARD LAW GROUP, LLC



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PROOF OF SERVICE

I certify that I have served *Appellant's Initial Brief* on Respondent, MacMillan Wireless Diagnostics, Inc., by depositing a copy of it in the United States Mail, postage prepaid on October 28, 2015, to its attorney of record, P. Brandt Shelbourne, Esquire, at his office at 131 E Richardson, Avenue, Summerville, South Carolina 29483, on October 28, 2015.

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