

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Opinion No. 4961 (S.C. Ct. App. Filed April 4, 2012)

RECEIVED

SEP 20 2012

S.C. Supreme Court

Ex parte: Stephen E. Lipscomb, Ron Safko, and
L.K. Harrell, III, Respondents,

In Re:

Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, and Janette H.
Robinson..... Petitioners.

v.

Stonington Development,
LLC..... Respondent.

**RETURN TO PETITION FOR A WRIT OF CERTIORARI
OF RESPONDENT L.K. HARRELL, III**

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QUESTIONS PRESENTED

1. Was the Court of Appeals correct in finding the Plaintiffs did not prove the Defendants were in contempt of court?

STATEMENT OF THE CASE

Judge L. Casey Manning held L.K. Harrell, III, in contempt of court for violating an injunction issued against Stonington Development, LLC, in a case in which Mr. Harrell was not named, sued or served. The South Carolina Court of Appeals reversed that order. *Ex Parte Lipscomb*, Op. No. 4961, 2012 WL 1109344 (S.C. Ct. App. Filed Apr. 4, 2012). Re-hearing was denied, and Plaintiffs have now petitioned for Certiorari.

Stonington Development, LLC, is a real estate development company. (R. p. 42). L.K. Harrell, III, was a passive investor in Stonington Development, LLC. (R. p. 279). He owned a 12.5 percent, minority interest in the company, and had no managerial authority or control over the actions of the company. (R. p. 278).

Stonington Development, LLC, began developing a residential subdivision in Richland County. (R. p. 42). On July 29, 2005, the Hollises and Robinsons sued Stonington Development, LLC. (R. p. 41). They alleged that their property was damaged by increased runoff and siltation from the development project. (R. p. 44). Mr. Harrell was not named as a party in the lawsuit. He was not served personally as a defendant although he received service for Stonington Development, LLC. (R. pp. 41-42). The lawsuit did not seek to pierce Stonington Development, LLC's corporate veil, nor did the lawsuit contain allegations of wrongdoing on the part of Mr. Harrell. (R. pp. 41-47).

On May 2, 2006, the Plaintiffs amended their complaint to add two other corporate defendants involved with the construction of the subdivision, but not Mr.

Harrell. The amended complaint contained no allegations against him. (R. pp. 49-55). The lawsuit was not amended to pierce Stonington Development, LLC's corporate veil. (R. pp. 52-55).

The lawsuit was tried in Richland County Circuit Court in April of 2007 before Judge Manning. Mr. Harrell did not participate. He did not testify, nor was he deposed. He was not present at the trial. On April 6, 2007, the Hollises and Robinsons received a jury verdict against Stonington Development, LLC for \$400,000 in actual damages and \$3.9 million in punitive damages. (R. p. 38). Stonington Development, LLC, filed its notice of appeal on December 13, 2007. (R. p. 252). The Hollises and Robinsons then filed a separate lawsuit against Stephen Lipscomb, Stonington Development LLC's majority shareholder, to pierce Stonington Development, LLC's corporate veil. (R. p. 66).

The Hollises and Robinsons then moved to enjoin Stonington Development, LLC from further development until the problem was resolved. They also sought to enjoin the company from "discharging sediment-laden stormwater" onto their property. Mr. Harrell was not named in their motion or served. (R. pp. 297-300).

Judge Manning granted the Hollises and Robinsons' motion by form order on September 17, 2007. (R. p. 5). They then filed a restated and renewed post trial motion to obtain a detailed written order from the Court. (R. pp. 301-302). Judge Manning issued his Order enjoining Stoning Development, LLC, pursuant to Rule 65 of the South Carolina Rules of Civil Procedure, on June 26, 2009. They did not serve Mr. Harrell with this motion, and he was not named in this motion. Mr. Harrell was not individually named in this Order. (R. pp. 25-27).

On September 11, 2008, the Hollises and Robinsons filed a motion to hold Stonington Development, LLC, and its members, Stephen Lipscomb, Ron Safko and L.K. Harrell, III, in contempt of court. The Plaintiffs alleged that Stonington Development, LLC, continued to discharge sediment-laden storm water onto their property. (R. pp. 305-306). Judge Manning issued a rule to show cause. (R. p. 39).

On December 10, 2008, L.K. Harrell, III, disassociated from Stonington Development, LLC. This was reflected by an amendment filed with the South Carolina Secretary of State. (R. p. 506).

Judge Manning heard oral arguments on the rule to show cause on April 14, 2009. On September 28, 2009, Judge Manning issued an order holding Stonington Development, LLC, Mr. Lipscomb, Mr. Safko and Mr. Harrell in contempt of court. (R. pp. 28-33). At the time the Order was issued, Mr. Harrell was not even a member of Stonington Development, LLC. (R. 506).

Judge Manning's Order provided for a compensatory fine of \$25,000, a supplemental hearing for further damages and the opportunity for the Plaintiffs's attorney to submit a motion for fees and costs. (R. pp. 28-33). Mr. Harrell filed his Rule 59(e) motion to alter or amend Judge Manning's Order on October 8, 2009. (R. pp. 451-457). Mr. Harrell's motion was denied without oral arguments on January 7, 2010. (R. pp. 34-35). Mr. Harrell then filed an appeal on January 26, 2010. (R. pp. 253-254).

On October 8, 2009, the Plaintiffs filed their motion for attorney's fees and costs. (R. pp. 459). Judge Manning granted the Plaintiffs' motion in his Order Denying Mr. Harrell's Rule 59(e) motion without oral arguments. The Plaintiffs were awarded \$27,695.00 in attorney's fees. (R. pp. 34-35). Mr. Harrell filed his Rule 59(e) motion to

alter or amend Judge Manning's Order on January 15, 2010. (R. pp. 471-477). Mr. Harrell's motion was denied without oral arguments on March 15, 2010. (R. pp. 36-37). Mr. Harrell then filed a second appeal March 25, 2010. (R. pp. 259-260). The two appeals were consolidated by the Court of Appeals on March 26, 2010. The Court of Appeals reversed the circuit court's decision to hold Stonington, Lipscomb, Harrell, and Safko in contempt and reversed the award of attorney's fees. *Ex Parte Lipscomb*, Op. No. 4961, 2012 WL 1109344 (S.C. Ct. App. Filed Apr. 4, 2012). Plaintiffs filed a Petition for Rehearing which was denied by the Court of Appeals in a July 26, 2012 Order. On August 24, 2012, Plaintiffs filed a Petition for a Writ of Certiorari with the South Carolina Supreme Court.

STATEMENT OF FACTS

L.K. Harrell, III, was a completely passive investor in Stonington Development, LLC. He held a 12.5 percent minority interest in the company. (R. p. 278). He invested in Stonington Development, LLC, with the hope of a return on his investment, nothing more. (R. p. 280).

Stephen Lipscomb was the company's majority shareholder and managing member. (R. p. 279). He held a 75 percent interest in the company and made all of its managerial and financial decisions. To the contrary, Mr. Harrell had no role in the operation of the company, nor did he handle the company's books. (R. p. 278). He did not have any contact with the home owners who purchased lots in the subdivision. He did not visit the subdivision or monitor its development. (R. p. 162). He did not have a role in the company's refinance of the development property. (R. pp. 210-211). As a minority

owner, he had no authority within the company and took absolutely no part in any of its managerial decisions. (R. p. 278).

Mr. Harrell is a member of the South Carolina Bar. As such, he drafted the articles of organization for the company and filed them with the South Carolina Secretary of State. After this, the only responsibility he had with the company was as its registered agent. (R. p. 278). Mr. Lipscomb managed the lawsuit, hired outside counsel and paid all of the legal fees. (R. p. 279).

Mr. Harrell took no part in the lawsuit and did not attend the trial. (R. p. 107). The Plaintiffs did not sue him. (R. p. 106). Therefore, he saw no reason to attend because he had no tangible involvement with the property, and he was not a defendant in the lawsuit. (R. p. 107).

Mr. Harrell was not involved with the physical property. (R. pp. 106-107). He was not kept informed of the extent of Stonington Development, LLC's compliance with the injunction. He has no expertise to determine how Stonington Development, LLC, could comply with the Injunction. If he had expertise, he did not have authority to devote any of the company's resources towards compliance with the injunction. (R. p. 279).

Mr. Lipsomb handled Stonington Development, LLC's compliance with the injunction. He took steps on behalf of Stonington Development, LLC, to comply with the injunction. (R. p. 167). He hired two engineering companies, Carolina Stormwater Services and Carolina Erosion Control, to install silt fences, construct a rock dam and provide weekly reports of the storm water and silt flow on the property. (R. pp. 99, 167-175). In addition, he met with DHEC, the Army Corps of Engineers and Richland County officials regarding the development site. (R. pp. 174-175). These entities had no problem

with the silt flow. Since the jury verdict in 2007, the Plaintiffs forced Stonington Development, LLC's engineers take down silt fences that were put up to protect the property from siltation. (R. pp. 96-97). In addition, they have prevented the development of the site. Consequently, this has prevented the stabilization of the soil. (R. pp. 94-96).

According to the Court's Order of June 26, 2008, Stonington Development, LLC, was enjoined as follows:

Stonington Development, LLC, is enjoined henceforth from discharging sediment-laden stormwater onto the plaintiffs' property in violation of the common law of this State and the **stormwater discharge Regulations promulgated by the South Carolina Department of Health and Environmental Control, to wit, S.C. Regs. § 72-307(C)(5)(b)**. (emphasis added).

(R. pp. 25-27). Stonington Development, LLC, was enjoined to limit the amount of sediment suspended in the stormwater it discharged onto the Plaintiffs' property. (R. pp. 25-27).

At the hearing, the only evidence the Plaintiffs presented of the alleged violation of the injunction was Janette Robinson's lay opinion. (R. pp. 285-290, 102-105). There was no testimony from an expert in water siltation. (R. pp. 107-108). There was no evidence of testing of the Plaintiffs' ponds to determine the amount of siltation flowing into them. There was no evidence showing that Stonington Development, LLC, caused siltation in excess of the DHEC standard set forth in the injunction. (R. p. 108). Aside from Ms. Robinson's testimony, the only other evidence offered consisted of photographs of various spots, ponds and waterways around the Plaintiffs' property. Ms. Robinson alleged the photographs show muddy water and other evidence of siltation caused by Stonington Development, LLC. (R. p. 120). However, the photographs are inconclusive. Ms. Robinson was uncertain if the photographs were of property owned by Stonington

Development, LLC. (R. pp. 115, 117). In fact, she testified that some was definitely owned by other parties. However, she believes that Stonington Development, LLC should still be held responsible for all of the silt on her property regardless of its origin. (R. p. 116).

The Court of Appeals reversed the trial court, finding that the Plaintiffs had not provided clear and convincing evidence that the Defendants violated the injunction. Because the award of attorney's fees was predicated on the substantive issue of contempt, the court also reversed the award of attorney's fees. *Ex Parte Lipscomb*, Op. No. 4961, 2012 WL 1109344 (S.C. Ct. App. Filed Apr. 4, 2012).

ARGUMENTS

I. THE APPELLATE COURT WAS CORRECT IN REVERSING THE CIRCUIT COURT AND HOLDING THAT L.K. HARRELL, III WAS NOT IN CONTEMPT OF COURT BECAUSE HE DID NOT WILFULLY OR INTENTIONALLY DISOBEY AN INJUNCTION.

L.K. Harrell, III was not in contempt of court because he did not violate the terms of the injunction. Mr. Harrell was a minority member of Stonington Development, LLC who had no authority or control over anything the company did or did not do. (R. p. 278). Mr. Harrell was not involved in the lawsuit against Stonington Development, LLC, or the subsequent efforts to remediate the runoff and siltation. (R. p. 280). He had no knowledge of the extent of Stonington Development, LLC's compliance with the injunction. As a minority member, he did not have the authority to devote any of Stonington Development, LLC's resources towards compliance with the injunction. (R. p. 279). The Plaintiffs offered no evidence to prove Mr. Harrell violated the terms of the injunction.

A. Mr. Harrell Did Not Have The Authority Within Stonington Development, LLC, To Violate The Injunction, Nor the Authority To Act On Behalf Of Stonington Development, LLC.

Mr. Harrell was not a controlling person within Stonington Development, LLC.

“A controlling person is one who formulates and directs corporate policy or who is deeply involved in the important business affairs of the corporation.” *State ex rel. McLeod v. C&L Corp.*, 280 S.C. 519, 531, 313 S.E.2d 341 (Ct. App. 1984) (*overruled on other grounds*). A controlling person makes “policy and management decisions for the corporation.” *State ex rel. Medlock v. Nest Egg Society Today, Inc.*, 290 S.C. 124, 132, 348 S.E.2d 381, 386 (Ct. App. 1986). Because he is in charge of the affairs of the corporation, a controlling person may be held personally liable for corporate violations of an injunction. *See Plowman v. Bagnal*, 316 S.C. 283, 287, 450 S.E.2d 36, 39 (1994) (stating that in an FTC action, a controlling officer of a corporation can be held personally liable for violations of a restraining order).

A member of a corporate entity who does not have any control or authority in the corporation cannot be held personally liable for corporate violations. *See* 10A Fletcher Cyc. Corp. § 5073 (2009). If the member lacks the authority or opportunity to compel the entity to comply with the injunction, he cannot be found guilty of contempt. *Id.*

Mr. Harrell did not make any policy or management decisions for Stonington Development, LLC. He was not a controlling person within the company. He had no knowledge of the lawsuit or the terms of the injunction. (R. p. 278). He had no way of compelling Stonington Development, LLC, to comply with the injunction. (R. p. 279).

Mr. Lipscomb managed the lawsuit and the company’s compliance with the injunction. There is no evidence proving that Mr. Harrell had any involvement with

Stonington Development, LLC's compliance with the injunction. "If, through no fault of his own, the contemnor is unable to obey a court order, the contemnor cannot be held in contempt." *Ex Parte Cannon*, 385 S.C. 643, 661, 685 S.E.2d 814, 824 (Ct. App. 2009) (citing *Miller v. Miller*, 375 S.C. 443, 454, 652 S.E.2d 754, 760 (Ct. App. 2007)). Even if Stonington Development, LLC had violated the injunction, Mr. Harrell should not be held responsible for the violation which was out of his control. Because Mr. Harrell did not have authority within Stonington Development, LLC to violate the injunction, the Court of Appeals was correct in holding that he was not in contempt of court.

B. Mr. Harrell Cannot Be Held In Contempt Simply Because Of His Minority Interest In Stonington Development, LLC.

Mr. Harrell cannot be held personally liable for Stonington Development, LLC's contempt simply because he owns a minority interest in the company.

. . . [T]he court cannot punish for contempt an officer of a corporation who was not a party to the contumacious conduct. **Simply because a corporation has failed to comply with a court order, it does not necessarily follow that all corporate agents or officers are in contempt because of their agent status**; there must be evidence in the record that the corporate agent charged with contempt was somehow personally connected with defying the authority of the court or disobeying its lawful decrees. (emphasis added).

17 C.J.S. Contempt § 36 (2009). There is no evidence establishing that Mr. Harrell was personally involved in any of Stonington Development, LLC's alleged violations of the injunction. Thus, Mr. Harrell cannot be held in contempt based only on his minority shareholder status.

In *Moseley v. All Things Possible*, the plaintiff sued a corporation and its president for fraud in connection with a real estate transaction. *Moseley v. All Things Possible*, 395 S.C. 492, 719 S.E.2d 656 (Ct. App. 2010). The trial court determined that

an employee of the corporation fraudulently concealed a drainage easement when selling a lot to the plaintiff. In addition to finding the corporation vicariously liable for the employee's actions, the trial court found the president of the corporation liable. The Court of Appeals upheld the trial court's finding with respect to the corporation. However, the Court of Appeals overturned the trial court's finding with respect to the corporate president. The Court of Appeals found that the lot was owned by the corporation, and the employee who handled the transaction handled it exclusively from start to finish with no help from the president. The Court of Appeals found that there was no evidence the corporate president had anything to do with the fraud. Accordingly, the Court of Appeals reversed the trial court's finding that the president had committed fraud. *Id.* Similarly, in this case, there is no evidence Mr. Harrell had anything to do with the contempt. He is only connected to the case by virtue of owning a minority share in a limited liability company.

In addition, even if Mr. Harrell was involved in Stonington Development, LLC's compliance, "[a]n injunction issued against a corporation or association binds the agents of that organization to the extent they are acting on behalf of the organization." 42 Am. Jur. 2d Injunctions § 299 (2010). There is no basis, or evidence, to hold Mr. Harrell personally liable. He would only be liable to the extent he was acting on behalf of Stonington Development, LLC. Therefore, the Court of Appeals was correct in holding that Mr. Harrell was not in contempt.

C. There Is No Evidence That Mr. Harrell Willfully Violated The Terms Of The Injunction.

"[C]ontempt results from willful disobedience of a court order; and before a person may be held in contempt, the record must be clear and specific as to acts or

conduct upon which the contempt is based.” *Cheap-O’s Truck Stop, Inc., v. Cloyd*, 350 S.C. 596, 608, 567 S.E.2d 514, 519 (Ct. App. 2002) (quoting *State v. Bevilacqua*, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994)). “A willful act is defined as one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law.” *Id.* at 608-609, 521.

In *Cheap-O’s Truck Stop, Inc.*, the plaintiff entered into various business arrangements with the individual defendant, Chris Cloyd, and the other corporate defendants. *Cheap-O’s Truck Stop, Inc.*, 350 S.C. at 600-601, 567 S.E.2d at 516. When a dispute arose between the parties, the plaintiff filed suit against all of the defendants. Cloyd was named as a party in the lawsuit. *Id.*

Before trial, the parties, including Cloyd, entered into a settlement agreement. The agreement was placed on the record before the court. The defendants did not honor the agreement and were brought back before the court on a rule to show cause. The Defendants, including Cloyd, were held in contempt. *Id.* The trial court stated that “Cloyd acknowledged on the record the validity of the settlement amount. He simply ha[d] made no legitimate efforts to comply even though he admittedly had the power to comply at least in part.” *Id.* at 608, 520.

This case is factually distinct from *Cheap-O’s Truck Stop, Inc.* In that case, Cloyd admitted to the court that he had the power to comply with the settlement agreement. *Id.* Cloyd willfully decided that he would not comply with the settlement agreement. *Id.* Here, no evidence has been presented demonstrating that Mr. Harrell had any power whatsoever to comply with the terms of the injunction. Mr. Harrell did not

willfully violate the injunction. Unlike Cloyd who voluntarily entered into the agreement as a party to it, Mr. Harrell took no part in the proceedings leading up to the injunction or the Plaintiffs' motion for a post trial injunction. (R. p. 279). Furthermore, Cloyd was a named party in the action leading to the contempt. *Cheap-O's Truck Stop, Inc.*, 350 S.C. 596, 567 S.E.2d 514. Mr. Harrell was never named as a defendant in the Plaintiffs' action or named in their motion. There is no evidence that Mr. Harrell willfully, or intentionally, decided not to comply with the injunction.

“A party seeking a contempt finding for a violation of a court order must show the order's existence and facts establishing the other party did not comply with the order.” *Browder v. Browder*, 382 S.C. 512, 521, 675 S.E.2d 820, 825 (Ct. App. 2009) (citing *Abate v. Abate*, 377 S.C. 548, 553, 660 S.E.2d 515, 518 (Ct. App. 2008)).

In *Browder*, the court issued a temporary order requiring the husband defendant to account for the sale of a piece of marital property. 382 S.C. at 517, 675 S.E. 2d at 822. After the sale, the wife filed a contempt complaint and rule to show cause against the husband. *Id.* She alleged the husband was in willful contempt of court because he did not provide her with any documentation of how the proceeds from the sale were used. *Id.* at 522, 825. However, the wife could not meet her burden of proof for willful contempt simply by showing a lack of documentation. At trial, the husband established that the documentation in question was out of his control. The court did not find the husband in contempt. *Id.*

Similarly, in this case, there is no evidence in the record establishing that Mr. Harrell willfully failed to comply with anything the court ordered. The Plaintiffs did not establish that Mr. Harrell had any authority within Stonington Development, LLC, to

comply with the terms of the injunction. The only thing the Plaintiffs alleged is that Stonington Development, LLC, did not comply with the injunction. They did not establish that Mr. Harrell willfully or intentionally caused Stonington Development, LLC's noncompliance.

A trial court's finding of contempt of court should be overturned when there is no evidence supporting the finding. *Floyd v. Floyd*, 365 S.C. 56, 72, 615 S.E.2d 465, 72-73 (Ct. App. 2005). There is no evidence supporting the contempt finding against Mr. Harrell. The injunction did not specifically order Mr. Harrell to do anything. There is no evidence establishing that Mr. Harrell willfully and intentionally caused Stonington Development, LLC, to violate the injunction. There is no evidence whatsoever that he even had the power within Stonington Development to cause a violation of the injunction. Therefore, the Court of Appeals was correct in holding that Mr. Harrell was not in contempt.

D. The Plaintiffs Did Not Prove That The Terms Of The Injunction Were Violated By Clear And Convincing Evidence.

"Civil contempt must be proved by clear and convincing evidence." *Miller v. Miller*, 375 S.C. 443, 457, 652 S.E.2d 754, 762 (Ct. App. 2007) (citing *Durlach v. Durlach*, 359 S.C. 64, 71, 596 S.E.2d 908, 912 (2004)). "[T]he record must be clear and specific as to the acts or conduct upon which such finding is based." *Floyd*, 365 S.C. at 75-76, 615 S.E.2d at 475 (citing *Spartanburg County Dept. of Soc. Servs. v. Padgett*, 296 S.C. 79, 83, 370 S.E.2d 872, 874 (1988)).

The evidence offered in this case does not meet the clear and convincing standard. The injunction states that Stonington Development, LLC, could not discharge siltation in violation of the DHEC standard for siltation. (R. pp. 25-27). However, there was no

testing done to determine if the stormwater discharged into the Plaintiffs' ponds contained excessive siltation. (R. p. 108). The Plaintiffs did not hire any experts to determine if Stonington Development, LLC, was in compliance. (R. pp. 107-108).

Aside from Ms. Robinson's lay opinion, the only other evidence offered in support was photographs. According to Ms. Robinson, the photographs prove there was excessive siltation running onto the property. She pointed out that the water in the photographs would have been darker if there was not excessive siltation flowing through it. (R. p. 120). Ms. Robinson has no expertise in water siltation. (R. pp. 107-108). A lay opinion of the color of water in a photograph is inadequate to support a contempt finding.

The basis for the Plaintiffs' position is that Stonington Development, LLC, was found liable for excessive siltation at the original trial. (R. p. 108). However, since the trial, Stonington Development, LLC, has put up silt fences, constructed a rock dam and hired two engineering companies to prevent further siltation. (R. pp. 111-112, 167-175). In addition, Stonington Development, LLC, has sold off a significant portion of its property which has been clear cut and developed by others. (R. p. 110). This land could be causing a significant amount of the siltation. (R. pp. 111). In fact, with regard to the photographs in evidence, Ms. Robinson did know which of the photographs actually showed property owned by Stonington Development, LLC. (R. pp. 115-117). There was no clear evidence that Stonington Development, LLC, was causing any of the siltation onto the Plaintiffs' property. Therefore, the Plaintiffs did not meet their burden of proof and the Court of Appeals was correct in holding that Mr. Harrell was not in contempt.

II. ALTHOUGH NOT ADDRESSED BY THE APPELLATE COURT'S OPINION, L.K. HARRELL, III WAS NOT IN CONTEMPT OF COURT BECAUSE THE COURT DID NOT HAVE JURISDICTION TO SUBJECT HIM TO THE COURT'S CONTEMPT POWERS.

When the determination of an issue is dispositive, an Appellate Court does not need to review remaining issues. *See Futch v. McAllister Towing, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591,598 (1999). However, L.K. Harrell, III, should not have been held in contempt of court initially because the Court did not have jurisdiction over Mr. Harrell to bind him individually to the injunction and subject him to the Court's contempt powers.

The Plaintiffs' lawsuit did not include Mr. Harrell as an individual defendant. (R. pp. 41-42). Ms. Robinson stated that the Plaintiffs did not sue Mr. Harrell. (R. pp. 106-107). He was not served with a summons. He was not added as a party under Rule 19 of the South Carolina Rules of Civil Procedure. The Plaintiffs did not bring an action to pierce Stonington Development, LLC's corporate veil. (R. pp. 44-46). Furthermore, Mr. Harrell had nothing to do with the development project. He did nothing in concert with Stonington Development, LLC, to form the basis of the contempt finding. He was not an officer or agent of the company or in any kind of position with authority. His only connection with the lawsuit, and subsequent alleged contempt, was as a passive investor and minority member in the limited liability company. (R. pp. 278-280).

The Court did not have jurisdiction over Mr. Harrell. Therefore, he was not subject to its contempt powers and cannot be found liable for contempt. *See Thornton v. Alford*, 247 S.C. 1, 3, 260 S.E.2d 179, 181 (1979) (holding that disobedience of an order issued without jurisdiction is not contempt).

A. Mr. Harrell Was Not Served A Summons In The Action Against Stonington Development, LLC.

A civil action is commenced when a summons and complaint are filed with the clerk of court and served on the defendant. S.C. R. Civ. Pro. 3(a). "Service of the summons brings the defendant within the court's jurisdiction and gives the court the power to render a personal judgment against the person served." *Louden v. Moragne*, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (Ct. App. 1997) (citing James F. Flanagan, *South Carolina Civil Procedure* 7 (2d ed. 1996)). Otherwise, the court does not have personal jurisdiction over the defendant. *See Brown v. Evatt*, 322 S.C. 189, 194, 470 S.E.2d 848, 850-851 (1996). "A court may not enter a valid judgment against an individual over whom the court lacks personal jurisdiction." *Louden*, 327 S.C. at 468, 486 S.E.2d at 526.

Mr. Harrell was not served with a summons in this action. The Plaintiffs did not name him as a party in their action against Stonington Development, LLC. (R. pp. 49-50). Nor was any other action filed against him. Thus, the Court did not have jurisdiction over Mr. Harrell to render a judgment of contempt against him.

In addition, the statute of limitations for bringing an action against Mr. Harrell individually has expired. *See* S.C. Code Ann. § 13-5-530 (1976). The Plaintiffs did not commence any action against Mr. Harrell within the statute of limitations period. Therefore, the Plaintiffs waived any claim they could have had against Mr. Harrell individually by failing to serve him with a summons and complaint inside of the statute of limitations.

B. Mr. Harrell Was Not Joined As A Party In The Action Against Stonington Development, LLC.

Rule 19 of the South Carolina Rules of Civil Procedure provides for the joinder of indispensable parties. *See* Rule 19, SCRCP. “The principle behind this Rule is that whenever possible persons materially interested in the action should be joined so that they may be heard and complete determination had.” Reporter’s Comments, Rule 19, SCRCP.

The Plaintiffs had the opportunity to join Mr. Harrell as a party pursuant to Rule 19. (R. pp. 40-55). Joining Mr. Harrell would not have deprived the court of subject matter jurisdiction over the action. *See* Rule 19, SCRCP. However, the Plaintiffs chose not to join Mr. Harrell in the action. (R. pp. 40-55). Thus, Mr. Harrell was not brought within the court’s jurisdiction over the matter. Further, the Plaintiffs waived any claim they had against Mr. Harrell by failing to join him within the statute of limitations period. *See Gillman v. City of Beaufort*, 368 S.C. 24, 627 S.E.2d 746 (Ct. App. 2006) (holding that parties joined under SCRCP 19 are not prohibited from raising affirmative defenses such as statute of limitations).

C. The Plaintiffs Did Not Pierce Stonington Development, LLC’s Veil To Subject Mr. Harrell To Individual Liability.

Mr. Harrell was a minority member of Stonington Development, LLC. (R. p. 278). Stonington Development, LLC, is a limited liability company. A limited liability company is an entity separate and distinct from its members. *See* S.C. Code Ann. § 33-44-303 (1976). South Carolina Code § 33-44-303 states, in part:

[T]he debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. **A member or manager is not personally liable for a debt, obligation or liability of the**

company solely by reason of being or acting as a member or manager. (emphasis added).

S.C. Code Ann. 33-44-303(a) (1976).

The proper way to hold a member personally liable for the acts of a limited liability company is to pierce the company's veil. *See e.g. State ex. Rel. Cooper v. Ridgeway Brands Mfg., LLC*, 666 S.E.2d 107 (N.C. 2008) (holding that a limited liability company is subject to piercing under the same circumstances as a corporation). The burden is on the party seeking to hold the member personally liable to pierce the veil. *See Mid-South Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597, 649 S.E.2d 135, 140 (Ct. App. 2007). The Plaintiffs did not attempt to pierce the company's veil in their action against Stonington Development, LLC. (R. pp. 44-46). The Plaintiffs did nothing to establish that Mr. Harrell should have been held individually liable for any actions of Stonington Development, LLC. Thus, the Court did not have any basis to hold Mr. Harrell in contempt for the company's actions.

Even if the Plaintiffs did attempt to pierce Stonington Development, LLC's veil, they failed to present evidence to prove Mr. Harrell should be held personally liable for Stonington Development, LLC's actions. South Carolina applies a two prong test to pierce a corporate veil. *Drury Dev. Corp. v. Foundation Ins. Co.*, 380 S.C. 97, 102, 668 S.E.2d 798, 800 (2008). The first prong analyzes the shareholder's relationship to the entity. The second prong requires the party seeking to pierce the veil prove that a "fundamental unfairness" or injustice will occur if the court does not hold the shareholder personally liable. *Id.* This is shown by proving the shareholder was aware of the party's claim and acted in a self serving manner to avoid its consequences. *Sturkie v. Sifly*, 280 S.C. 453, 459, 313 S.E.2d 316, 320 (Ct. App. 1984).

The Plaintiffs did not present evidence proving Mr. Harrell had an improper relationship with Stonington Development, LLC. The evidence presented shows that Mr. Harrell was nothing more than a passive investor. He was not involved in the company's operations. (R. pp. 211-212). He had no real knowledge of the claims or Stonington Development, LLC's compliance. (R. pp. 106-107). He has not seen a return on any of the money he invested in the company. (R. p. 279). There is no evidence that any fundamental unfairness or injustice would result if Mr. Harrell was not held personally liable for Stonington Development, LLC's acts.

D. Mr. Harrell Is Not Individually Liable For Stonington Development, LLC's Actions Under Rule 65(d) Of The South Carolina Rules Of Civil Procedure.

The injunction against Stonington Development, LLC, cites and applies Rule 65(d) of the South Carolina Rules of Civil Procedure. Rule 65(d) states, in pertinent part, as follows:

Every order granting an injunction . . . is binding only upon the parties to the action, **their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them.** . . . (emphasis added).

Rule 65(d), SCRCP. Mr. Harrell was not a party to the Plaintiffs' action. (R. pp. 41-42). He was not an officer, agent or employee of Stonington Development, LLC. (R. pp. 278-280). He had no authority in the company or control over its compliance. (R. p. 279). He did nothing on behalf of, or in concert with, Stonington Development, LLC, to form the basis of a contempt finding. The Plaintiffs have offered no evidence to the contrary.

Mr. Harrell cannot be held liable under Rule 65(d) simply because he holds an interest in the company. Rule 65(d) does not bind shareholders without authority or control over corporate compliance. Rule 65(d), SCRCP. It binds officers, agents, servants

and others who act on behalf of the organization and whose actions may be imputed to the organization. Without some level of control or participation, a person cannot actually violate the court order. *See e.g.* 17 C.J.S. Contempt §36 (2009) (stating corporate associates are only liable for corporate contempt when they are personally connected with defying the court's order). Thus, the Court did not have a basis for jurisdiction under Rule 65(d) to hold Mr. Harrell individually liable for Stonington Development, LLC's contempt.

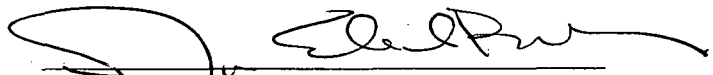
CONCLUSION

L.K. Harrell, III, respectfully asks this Court to affirm the Court of Appeals in holding that L.K. Harrell, III was not in contempt of court for the following reasons:

- L.K. Harrell, III did not willfully or intentionally violate an injunction.
- The Plaintiffs did not prove L.K. Harrell, III, violated the terms of the injunction.
- The Court did not have jurisdiction to subject L.K. Harrell, III, to the Court's contempt powers.

Respectfully submitted,

September 18, 2012



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Attorneys for Appellant L.K. Harrell, III

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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SEP 20 19 2012

Opinion No. 4961 (S.C. Ct. App. Filed April 4, 2012) **S.C. Supreme Court**

Ex parte: Stephen E. Lipscomb, Ron Safko, and
L.K. Harrell, III, Respondents,

In Re:

Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, and Janette H.
Robinson.....Petitioner.

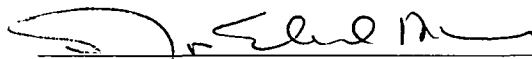
v.

Stonington Development,
LLC.....Respondent.

CERTIFICATE OF COUNSEL

I certify that this Return to Petition of Respondent L.K. Harrell, III complies with Rule 211(b), SCACR.

September 20, 2012



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v.

Stonington Development,
LLC.....Respondent.

PROOF OF SERVICE

I certify that I have served the **RETURN TO PETITION FOR A WRIT OF CERTIORARI OF RESPONDENT L.K. HARRELL, III** on the parties to the appeal by depositing a copy of it in the United States Mail, postage prepaid on September 19, 2012, addressed to their attorneys of record as follows:

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S.C. Supreme Court

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A handwritten signature in cursive script that reads "Meg Hazel". The signature is written in black ink and is positioned above a horizontal line.

Meg Hazel
Law Clerk for James Edward Bradley

IN THE STATE OF SOUTH CAROLINA
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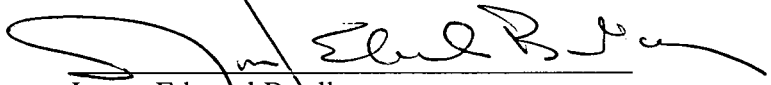
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CERTIFICATE OF COUNSEL

I certify that this Return to Petition of Appellant L.K. Harrell, III complies with Rule
211(b), SCACR.

September 18, 2012



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