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WILLIAM H. GRIMBALL (1917-1999)  
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The Hon. Jenny Abbott Kitchings  
Clerk, S.C. Court of Appeals  
1015 Sumter Street  
Columbia, SC 29201

SC Court of Appeals

Re: Tim McGee v. David Thornton and Thornton Brothers Construction  
Dorchester County Case no. 2008-CP-18-2565  
Our file 28116

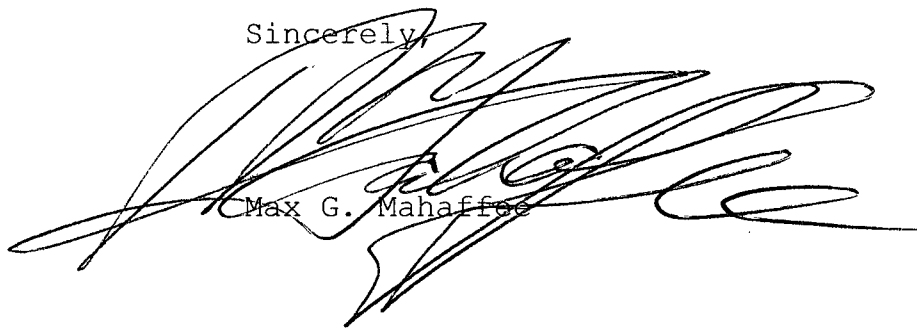
Dear Ms. Kitchings:

Enclosed for filing are the original (unbound) and fourteen (14) copies of the Final Brief of Appellant; the Certificate of Counsel; and the Proof of Service on the Respondents.

By copy of this letter, I am serving the Respondent's attorney.

With best regards, I am

Sincerely,

  
Max G. Mahaffee

MGM:slf

Enclosures (as noted)

cc: Zachary J. Closser, Esq. (w/encl)  
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Tim McGee (w/encl)

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

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Case No. 2008-CP-18-2565

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Tim McGee.....Appellant,

v.

David Thornton & Thornton Brothers Construction.....,  
Respondents.

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**FINAL BRIEF OF APPELLANT**

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**SC Court of Appeals**

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL JUDGE CORRECTLY RULE THAT S.C. CODE §40-59-30 PRECLUDED ANY RECOVERY BY THE PLAINTIFF IN THIS CASE?
- II. WAS THE TRIAL JUDGE CORRECT IN DISMISSING THIS CASE, ESPECIALLY AFTER ALL OF THE EVIDENCE HAD BEEN PRESENTED?

**STATEMENT OF THE CASE**

The Plaintiff/Appellant filed this lawsuit against the Defendants David Thornton and Thornton Brothers Construction (hereafter referred to as "Thornton Defendants") "for the repair costs of certain construction alleged to have been improperly performed." (R. pp. 1-3; Order of Judge Dickson, December 20, 2011). In the Complaint, which was filed on October 13, 2009, there were five causes of action alleged against the Defendants: breach of fiduciary duty, negligence, contract/warranties, breach of contract/fraudulent intent, and fraud. (R. pp. 5-12; Complaint)

The Defendants, Respondents in this appeal, filed a joint Answer dated December 11, 2008, asserting eleven affirmative defenses, but none of which asserted S.C. Code Ann. §40-59-30. (R. pp. 13-17; Answer) On February 8, 2011, the Defendants filed a Motion to Amend so as to add a First Affirmative Defense that the "plaintiff lacks a Residential Builders License as required by Section 40-59-30 of the South Carolina Code of Laws" and thus the "Plaintiff is barred from bringing

the Instant Action.” (R. pp. 21-28; Defendant’s Motion to Amend)

After the complete trial of this case on August 16-17, 2011, and after denying both the Plaintiff’s and the Defendants’ motions for directed verdict (R. p. 389, lines 9-12; Tr. p. 257, lines 9-12), the Honorable Edgar W. Dickson issued an Order dated December 20, 2011 stating the Plaintiff’s Complaint “shall be DISMISSED with prejudice, and judgment shall be entered in favor of Defendants David Thornton and Thornton Brothers Construction.” (R. pp. 1-3; Order) After receipt of the Order, the Plaintiff timely filed a Rule 59(e), Motion To Reconsider on January 4, 2012. (R. pp. 115-119; Motion to Reconsider). That motion of the Plaintiff was denied by the Honorable Edgar W. Dickson in an Order Denying Plaintiff’s Motion To Reconsider signed on February 2, 2012. (R. p. 4; Order Denying) This timely appeal followed.

**FACTS**

Brent Shirts is the current owner of 149 Inspiration Drive in Round-0, S.C. where his modular house was to be installed. Mr. Shirts knows that the Thornton Defendants were charging the Plaintiff for things or services which had not been done, and that the Defendants had caused damage to his modular house, which he had observed. (R. pp. 139-147; Tr.,

p.7, line 1 through p. 15, line 20) The damage caused by the Defendant David Thornton was "around Thirty thousand dollars," with Mr. Thornton walking off the job and leaving Mike Robbins and the Plaintiff to see to it that the Shirts home was finished. (R. p. 147, lines 9-12; Tr., p.15, lines 9-12). The Plaintiff himself testified that the actions and inactions of the Defendants caused him damages of "Twenty-nine thousand nine hundred twenty-eight Dollars and Ninety-five Cents," and testified as to the basis for this \$29,928.95 in damages. (R. p. 131 & pp. 242-244; Exhibit 12; Tr., p. 110, line 15 through p. 112, line 8)

This home is a modular home, which is built in a factory in sections and then lifted by a crane onto the foundation, an event for which Mr. Shirts was present at times and took photographs, which were admitted into evidence showing the damage caused by the Thornton Defendants. (R. p. 140, lines 7-24; Tr., p 8, lines 7-24) Mr. Shirts testified that the Plaintiff "hired his own general contractor which I understand to be Mr. Thornton." (R. p. 162, lines 19-23; Tr., p 30, lines 19-23). The Defendant David Thornton testified that Mike Robbins was the "GC" (general contractor) for whom he worked on this job setting the Shirts' modular home and the other work. (R. pp. 335-336; Tr., p 203, line 15 through p. 204, line 7). As to a contract with the Plaintiff, in his

deposition which was utilized at trial, David Thornton did not remember if he had entered into a contract regarding the Shirts modular home, which apparently per Mr. Thornton was a fixed price contract and not a cost plus contract. (R. pp. 325-326; Tr., p 193, line 19 through p. 194, line 24) The Plaintiff further testified that the Defendant David Thornton and Mike Robbins were the main ones hired to do the work on the home, although there were other trades hired also. (R. pp. 259-261; Tr., p 127, line 5 through p. 129, line 25) It was admitted that the Plaintiff was not a licensed contractor or an engineer but someone who had experience in selling modular homes, but had never "set" one. (R. p. 233, lines 3-13; Tr., p 101, lines 3-13)

Mr. Robbins also testified that he (and thus not the Plaintiff) was the contractor on this job. (R. p. 228, lines 4-10; Tr., p 96, lines 4-10), and that he was licensed as a residential home builder when Mr. Shirts' home was installed and completed on Mr. Shirts' real estate. (R. p. 186, lines 10-15; Tr., p 54, lines 10-15). He had used the Defendant David Thornton previously on other houses, but quit using him when Mr. Thornton submitted inflated bills. (R. pp. 188-90; Tr., p. 56, line 22 through p. 58, line 17) The homeowner Mr. Shirts testified that the Plaintiff was a "coordinator....he coordinated everything." (R. p. 180, lines 3-7; Tr., p 48,

lines 3-7) with the Plaintiff representing himself "like a developer" to him, with the Plaintiff "having [the home] built". (R. p. 181, lines 4-14; Tr., p 49, lines 4-14) The Plaintiff, per Mr. Shirts, would hire and coordinate "different contractors that he hired, that he would hire to do the job." (R. p. 159, lines 1-8; Tr., p 27, lines 1-8)

The Defendant David Thornton approached Mike Robbins, saying "I've got a job for us" and talked about Mr. Robbins pulling the permit on this job, with them dividing the work so that they both would make money (R. pp. 190-93; Tr., p 58, lines 18 through p. 61, line 15). At that time, Mr. Robbins was not aware that the Defendant was not licensed in any portion of the construction trade. (R. p. 191, lines 7-10; Tr., p 59, lines 7-10)

As a result of actions and inactions of the Thornton Defendants (the Respondents here), the Plaintiff testified that there was double charging by them to him, unsubstantiated billing, and damage to the house caused by the Thornton Defendants for which they billed the Plaintiff. (R. pp. 242-256; Tr., pp. 110-124). This testimony was confirmed by Mr. Shirts, as noted above.

#### **ARGUMENTS**

- I. THE TRIAL JUDGE ERRED IN RULING THAT S.C. CODE ANN. §40-59-30 PRECLUDED ANY RECOVERY BY THE PLAINTIFF IN THIS CASE.

In S.C. Code Ann §40-59-30(B), it states as follows:

Notwithstanding Section 29-5-10, or another provision of law, a person or firm who first has not procured a license or registered with the commission and is required to do so by law may not file a mechanics' lien or bring an action at law or in equity to enforce the provisions of a contract for residential building or residential specialty contracting which the person or firm entered into in violation of this chapter.

Even if the above Code section was applicable to this case, it would not block and bar the Plaintiff from bringing this lawsuit against the Defendants under either a contract theory or under a separate negligence theory for recovery. Whether the Thornton Defendants could assert this Code section as a defense, as they were not licensed at all, could be the first (and perhaps the only) examination of the incorrect rulings in this case. This Code section precludes the enforcement of a contract entered into when the builder is not licensed. Duckworth v. Cameron, 270 S.C. 647, 244 S.E.2d 217 (1978) (action to enforce a mechanic's lien). Specifically, the Duckworth case states "[a]ny builder who violates the chapter by entering into a contract for home construction without obtaining the required license simply cannot enforce the contract." Id., 270 S.C. at 649, 244 S.E.2d at 217. Here, the Plaintiff admitted that he was not licensed, but stated that Mike Robbins was the licensed person

who was hired. At trial, Mr. Robbins testified that he was licensed, that he did pull the permit, but was unaware that David Thornton did not hold any licenses in construction.

Most importantly, "[t]he purpose of the statute is to protect homeowners." Lenz v. Walsh, 362 S.C. 603 608 S.E.2d 471, 473 (Ct. App. 2005) (unlicensed builder brings mechanics' lien foreclosure action against homeowners), citing Burry & Son Homebuilders, Inc. v. Ford, 310 S.C. 529 426 S.E.2d 313 (S.C. 1992). Even so, it should not be forgotten that the Thornton Defendants were not licensed, and should be estopped from asserting this statute as a defense to the damage done to the Shirts home and thus to the Plaintiff. Judge Dickson still "DISMISSED with prejudice" the Plaintiff's Complaint. (ROA 1-3; Order of December 20, 2011) Further, Judge Dickson based this upon the Plaintiff being the "de facto general contractor on the Shirts residence" and "that an unlicensed contractor may not bring any suit arising from his unlicensed construction" Id. (emphasis supplied). Judge Dickson had noted in his Order that "[t]he Court has not found, and the parties have not cited, any case law interpreting the effect of S.C. Code §40-50-30 on contractor-contractor disputes, as all of the cases involve contractor-owner litigation." Id. Judge Dickson did not address at all how the Plaintiff's Complaint on the non-contract causes of action, such as negligence,

could be dismissed. The reason is plain, as the case law shows that the protection is for homeowners and not for "contractor-contractor disputes" as is involved in this case. The inability of the Court to find any law regarding this still lead to the absolute dismissal of the Plaintiff's case after the entire case had been tried.

Further, Judge Dickson had no basis, and thus his Order should be reversed, for finding that the Plaintiff was "general contractor on this project" even though "Mike Robbins...actually pulled the building permit" as the "Plaintiff hired, supervised and paid all of the subcontractors." Id. Those who pull the permit must be licensed contractors, which Mike Robbins was in this case, and thus Mike Robbins was the contractor on this job.

II. THE TRIAL JUDGE ERRED IN DISMISSING THIS CASE, ESPECIALLY AFTER ALL OF THE EVIDENCE HAD BEEN PRESENTED.

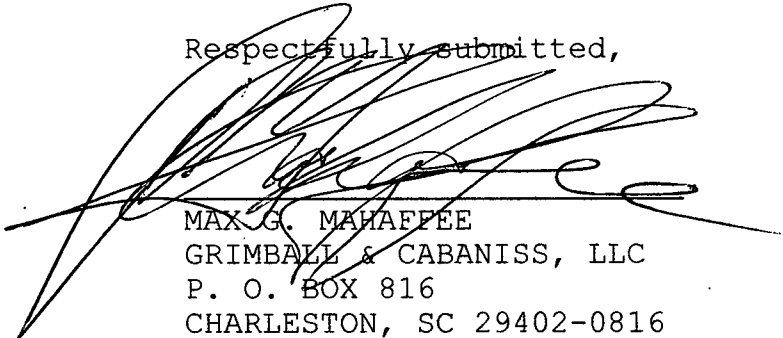
The Thornton Defendants, through their attorney, made a "directed verdict motion on the same motions [sic] that were raised in my motion for summary judgment" after which Judge Dickson ruled that he was "denying the directed verdict motions for both" sides. (R. pp. 388-89; Tr., pp. 256-257) Even though he had denied the directed verdict motions of the Defendants, which were based on the same grounds as Defendants' motion for summary judgment, he later entered an

Order on these bases. As noted, Judge Dickson had denied the directed verdict motions, which the Defendants had made on the same grounds as the earlier summary judgment motions. Denying the motions would be consistent with denying the summary judgment motions, which are pretrial motions. Still, the dismissal was made. That dismissal should be reversed with judgment being entered in favor of the Plaintiff.

**CONCLUSION**

For the reasons stated, this Court should reverse the Order of the trial judge, Edgar W. Dickson and enter judgment in favor of the Plaintiff for the \$29,928.95 in total damages about which both the Plaintiff and Mr. Shirts testified.

Respectfully submitted,



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November 27, 2012

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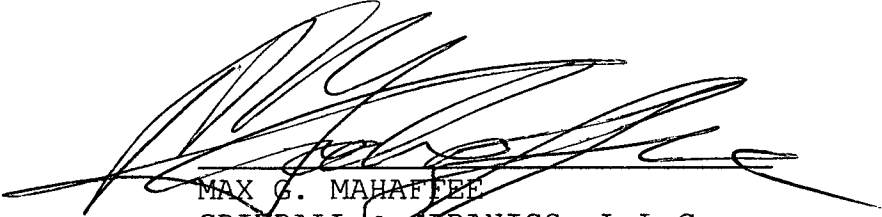
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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief complies  
with Rule 211(b), SCACR.

November 27, 2012



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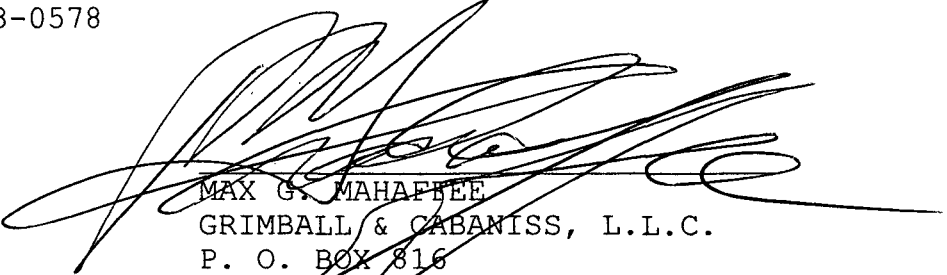
**PROOF OF SERVICE**

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I certify that I have served the Respondents David Thornton & Thornton Brothers Construction with the Final Brief of Appellant & Certificate of Counsel by depositing a copy of it in the United States Mail, postage prepaid on November 27, 2012 to Respondents' counsel of record, whose name and address appear below:

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