

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Circuit Court Judge

Appellate Case No. 2012-211971

Bill J. Vernon, Jr. and Sandra
Vernon,

Respondents,

v.

Landmarc Constructors, Inc.,
d/b/a Landmarc Custom
Homes, Marcus Dunn, and
Yoder's Building Supply, Inc.
Defendants,

Of whom Landmarc
Constructors d/b/a
Landmarc Custom
Homes and Marcus
Dunn are Appellants,

Yoder's Building Supply, Inc.,

Third Party Plaintiff,

v.

Sandra Ann Vernon and Billie
James Vernon, Jr. Trustees, or
their successors in trust, under
the Sandra Ann Vernon
Living Trust, Dated June 12,
2000, as thereafter amended,
Gary Dunn, individually, and
Kerri Dunn, individually,

Third Party
Defendants.

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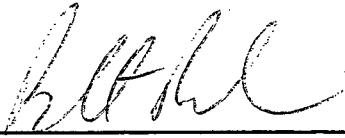
SC Court of Appeals

FINAL BRIEF OF THE APPELLANTS

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SC Court of Appeals



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STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR IN FINDING APPELLANT LANDMARC LIABLE FOR BREACH OF CONTRACT, FRAUD AND CONVERSION AND APPELLANT MARCUS DUNN PERSONALLY LIABLE FOR ACTIONS OF APPELLANT LANDMARC?

STATEMENT OF THE CASE

On January 22, 2010, Bill J. Vernon Jr. and Sandra Vernon brought this action for fraud, breach of contract, breach of contract accompanied by fraudulent act, conversion, violations of the South Carolina Unfair Trade Practices Act, accounting, contractual indemnity, equitable indemnity, and injunctive relief against Marcus Dunn, individually, and Landmarc Constructors, Incorporated. Declaratory Relief was also sought against Yoder's Building Supply pursuant to S.C. Code Ann. Sections 15-13-10, *et. seq.* Landmarc and Marcus Dunn filed an Answer and Counterclaim for \$139, 50.49 against Bill and Sandra Vernon. On February 24, 2010, Yoders Building Supply filed an Answer, Counterclaim, Cross Claim and Third party Action against Landmarc, Marcus Dunn, Gary Dunn, Kerri Dunn, Sandra Vernon, Bill Vernon and the Sandra Vernon Trust. Yoders brought a claim for foreclosure of its mechanic's lien against Landmarc and Bill and Sandra Vernon and a claim against Gary Dunn, Marcus Dunn and Kerri Dunn claiming a violation of S.C. Code Ann. Section 29-7-10. On March 11, 2010, Landmarc, Marcus Dunn, Kerri Dunn and Gary Dunn filed an Answer and Cross claims against Bill and Sandra Vernon for foreclosure of mechanic's lien, breach of contract, and unjust enrichment. Bill and Sandra Vernon replied to Yoder's on March 25, 2010 and replied against Landmarc and Marcus Dunn on May 5, 2010. On June 3, 2010 Yoder's replied to Landmarc and Marcus Dunn.

The case was referred to Master in Equity Charles B. Simmons, Jr. of Greenville County. A nonjury trial was held on November 15, 2011 and November 16, 2011. On March 23, 2012, the Master in Equity filed his ruling, finding for Bill and Sandra Vernon on their claims for breach of contract, fraud, conversion, breach of contract accompanied

March 23, 2012, the Master in Equity filed his ruling, finding for Bill and Sandra Vernon on their claims for breach of contract, fraud, conversion, breach of contract accompanied by fraudulent acts, contractual indemnity, equitable indemnity, and a violation of the South Carolina Unfair Trade Practices Act. Bill and Sandra Vernon were awarded \$154,855.74 in actual damages against Landmarc and Marcus Dunn, and punitive damages against Landmarc for \$77,427.87. On April 27, 2012, the attorney for the Appellants timely served the Notice of Appeal.

ARGUMENT

The Master in Equity committed error in finding Marcus Dunn personally liable because there was insufficient evidence to find Landmarc or Marcus Dunn liable for fraud or conversion. The Master found Landmarc liable for fraud and conversion, and consequently Marcus Dunn personally liable, based on his view that “Landmarc misrepresented the actual costs to be greater than they were. As set forth on the mechanic’s lien waivers themselves, Plaintiff’s Exhibit 3, the mechanic’s lien waivers were representations made to the Plaintiff by these (sic) Defendant’s that suppliers and subcontractors who had submitted invoices had been paid in full and the amounts were correct.” (R.p. 14). “Although the overbillings were carried out by Landmarc, Marcus Dunn is not insulated from his personal liability for his tortuous conduct because his signature appears on each of the mechanic’s lien waivers.” (R.p. 14, Footnote 5).

Additionally, the Master found both Landmarc and Marcus Dunn liable for Breach of Contract Accompanied by Fraudulent Act, based on the view, unsupported by the record, that Landmarc converted funds out of a specific account for the Vernons, that Marcus Dunn submitted false partial lien waivers, and that Landmarc, through Marcus Dunn, forged signatures.

Bill and Sandra Vernon and Appellant Landmarc entered into a construction agreement on August 18, 2008 for the construction of a home in Greenville County. (R.p. 1095). Landmarc and Marcus Dunn contended that the construction agreement was created by an attorney for the Vernons. (R.p. 253, Lines 18-19). The content of the partial lien waivers are not specified in the contract. (R.p. 1095). Marcus Dunn testified that his role as general contractor in this agreement was to insure that the work was being properly done. (R.p. 266, Lines 7-9). It is uncontested that

the lien waivers were drafted by Landmarc. (R.p. 265, Lines 16-17). The point of the lien waivers was not simply to issue a bill for work that had been done. The language of the waivers make clear that Landmarc is to insure that the work is being done properly, and that Landmarc, as understood by the drafter of the document, is to pay subcontractors and suppliers when they are entitled. (R.p. 265, Lines 18-25). It is clear throughout the transcript that there had been problems with various vendors and subcontractors for both the Vernons and Landmarc.

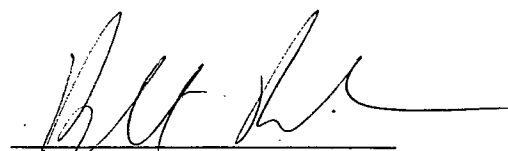
As cited in the order, the Respondents were required to prove the following elements by clear and convincing evidence to successfully prove fraud: 1.) A representation, 2.) its falsity, 3.) Its materiality, 4.) Either knowledge of its falsity or a reckless disregard of its truth or falsity, 5.) Intent that the representation must be acted upon, 6.) The hearer's ignorance of its falsity, 7.) the hearer's reliance on its truth, 8.) the hearer's right to rely thereon, 9.) the hearer's consequent and proximate injury. *Khan Construction Company v. S.C. National Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414 (1980). The Respondents evidence is insufficient to meet this heavy burden. Bryan Johnson, son in law of Bill Vernon, Jr., was called to testify as to alleged overbillings and as to his background in general contracting. He assisted Mr. Vernon in monitoring the project, and was involved at least as early as the third billing cycle. Mr. Johnson testified that the Dunns were aware of his involvement and had no problem with it. (R.p. 173, Lines 1-25). Mr. Johnson testified that for the first six months of the contract, based on the back up information, he believed that everything was going as it should. (R.p. 217, Lines 3-5).

The Respondents must show that a corporate officer had direct action and culpability in order to hold him liable personally. *Rowe v. Hyatt*, 321 S.C. 366, 468 S.E.2d 649 (1996). The

Vernon's and Bryan Johnson were actively monitoring the actions of the Landmarc and Marcus Dunn. Marcus Dunn signed the partial lien waivers to facilitate funding for the Vernons, and did not misrepresent the progress of the house in any way.

CONCLUSION

For the reason stated, this Court should reverse the decision of the Master in Equity.



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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Circuit Court Judge

Case No. 2010-CP-23-564

Landmarc Constructors, Inc.
d/b/a Landmarc Custom
Homes, Marcus Dunn

Appellants,

v.

Bill J. Vernon, Jr. and Sandra
Vernon and Yoder's Building
Supply, Inc.,

Respondents.

Certificate of Counsel

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

February 25, 2013



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PROOF OF SERVICE

I certify that I have served the Final Brief of the Appellants, by personally serving

attorney Beth Wright, at her office at 211 Pettigru Street, Greenville, South Carolina 29601.

February 25, 2013

A handwritten signature in black ink, appearing to read "Brandt Rucker", written over a horizontal line.

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