

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Allison Renee Lee, Circuit Court Judge

Case No: 2012-CP-40-02906
Appellate Case No. 2013-000209

V.E. Amick & Associates, LLC Respondent,

v.

James L. Cooper, Jr., Pamela C. Cooper, Palmetto Environmental Group, Inc.,
and Ecological Resources, Inc., Appellants

RECORD ON APPEAL

Richard R. Gleissner
Gleissner Law Firm, LLC
1237 Gadsden Street, Suite 200A
Columbia, South Carolina 29201
(803) 787-0505
Attorneys for Appellants

Wesley D. Peel, Esquire
Bruner, Powell, Wall & Mullins, LLC
Post Office Box 61110
Columbia, South Carolina 29260
(803) 252-7693
Attorneys for Respondents

RECORDED
OCT 15 2013
SC Court of Appeals

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(803) 252-7693
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STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
 V.E. Amick & Associates, LLC,)
)
 Plaintiff,)
)
 v.)
)
 James L. Cooper, Jr.; Pamela C. Cooper;)
 Palmetto Environmental Group, Inc.;)
 Ecological Resources, Inc.,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2012-CP-40-02906

ORDER

RICHLAND COUNTY
 FILED
 2012 NOV 20 PM 3:28
 JEANETTE W. McBRIDE
 C.C.P. & G.S.

This matter came before the Court on Plaintiff V.E. Amick & Associates, LLC Motion to Strike the second, third, and fourth defenses of Defendants Palmetto Environmental Group, Inc. ("Palmetto"), James L. Cooper, Jr., Pamela C. Cooper, and Ecological Resources, Inc. (collectively the "Defendants") pursuant to Rule 12(f), SCRCF. A hearing was held on August 14, 2012. Present at the hearing were Wesley D. Peel, Esquire, counsel for Plaintiff, and Richard R. Gleissner, Esquire, counsel for Defendants. After considering the law, the briefs filed by the parties, the arguments of counsel, and all matters submitted, Plaintiff's Motion to Strike is GRANTED.

FACTS

Plaintiff is a DHEC certified company that performs remediation construction projects to rectify environmental contamination caused by petroleum products. Palmetto is also an environmental contracting company that remediates soil and ground water contamination caused by petroleum products. Defendant James L. Cooper, Palmetto's owner and principal shareholder, was formerly employed by David Jordan and David Snodgrass, the owners of a large construction enterprise including Plaintiff. After Defendant James L. Cooper was fired, he formed Palmetto and began bidding for DHEC remediation projects through Plaintiff.

Defendant James L. Cooper assembled bids for three remediation projects: the Huse site, the Cromer's Grocery site, and the Lakeside Market site (the "DHEC sites") so that Plaintiff could submit the bids to DHEC for approval. Plaintiff would mark up Palmetto's estimates by 10% and submit the bid to DHEC in exchange for furnishing Palmetto with performance bonds

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required by DHEC. DHEC awarded Plaintiff contracts for all three DHEC sites, and Plaintiff subcontracted 100% of the DHEC contracts to Palmetto by oral agreement. Palmetto was paid by Plaintiff on a percentage basis once Palmetto reached each reduction milestone set by DHEC relating to the percentage reduction of petroleum in the groundwater. Defendant James L. Cooper agreed to reach 100% of the ultimate clean-up target levels set by DHEC in exchange for 90% of the DHEC contract with Plaintiff. Once Palmetto met a certain milestone, DHEC would pay Plaintiff, and Plaintiff would remit 90% of the DHEC payment to Palmetto. Palmetto reached 75% of the target level milestone on all three of the DHEC sites before it was unable to meet its obligations arising under the subcontract and ceased work. Palmetto was paid for all invoices submitted to Plaintiff and did not submit any additional invoices after reaching the 75% milestone.

After Palmetto ceased work on the three DHEC sites, Plaintiff hired Carolina Technical Services, Inc. (CTSI) to complete the contracts. On November 14, 2005, Plaintiff filed a lawsuit against Palmetto in Richland County styled *V.E. Amick & Associates, LLC, v. Palmetto Environmental Group, Inc.*, Docket No. 2008-CP-40-2589R¹ ("the original action"). The original action was tried, and on May 14, 2009, a jury rendered a verdict in the amount of \$391,209.21 in favor of Plaintiff. The South Carolina Court of Appeals affirmed the jury verdict in Opinion No. 4860 (394 S.C. 538, 716 S.E.2d 295 (Ct.App. 2011)) on August 10, 2011. After attempts to collect on the verdict were unsuccessful, Plaintiff filed an action on April 23, 2012 styled *V.E. Amick & Associates, LLC, v. James L. Cooper, Jr.; Pamela C. Cooper; Palmetto Environmental Group, Inc.; Ecological Resources, Inc.*, Docket No. 2012-CP-40-02906 ("the present action") in an attempt to pierce Palmetto's corporate veil. Defendants filed an Answer on June 4, 2012 asserting among other defenses unclean hands, intentional interference with contractual relationships and prospective business relationship, failure to obtain condition precedent, and abuse of process. Defendants also asserted a counterclaim for intentional interference with contractual relationships and prospective business relationship. Plaintiff seeks to strike the defenses of unclean hands, failure to obtain condition precedent, and intentional interference with contractual relationships and prospective business relationship.

¹ The Original Docket No. 2005-CP-40-05995 was dismissed pursuant to Rule 40(j), SCRCF and the case was refiled as Docket No. 2008-CP-40-2589R.

STANDARD OF REVIEW

The court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Rule 12(f), SCRPC. When a court rules on a 12(f) Motion to Strike, the court determines “whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded.” *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 95, 390 S.E.2d 370, 372 (Ct.App. 1990).

DISCUSSION

In its Complaint, Plaintiff alleges that Palmetto sold substantially all of its assets to Defendant Pamela C. Cooper or Ecological Resources, Inc. in December 2008 in order to put its assets out of the reach of Palmetto’s creditors. At the time of the sale, Plaintiff claims that Palmetto knew it was likely that a substantial verdict would be entered against Palmetto at trial. Defendant Pamela C. Cooper signed the sales agreement as president of Ecological Resources, Inc., although Plaintiff claims that Ecological Resources, Inc. did not exist at the time of the alleged sale. On these facts, Plaintiff seeks to have the sale between Palmetto and Pamela C. Cooper or Ecological Resources, Inc. set aside in order for Plaintiff to execute on those assets and recover the amount of the verdict. Additionally, Plaintiff seeks to pierce Palmetto’s corporate veil to recover assets to pay outstanding debts owed by Palmetto from James L. Cooper, Jr. and Pamela C. Cooper individually as the former owners or officers of Palmetto, as well as Ecological Resources, Inc., the successor-in-interest to Palmetto.

The doctrine of “piercing the corporate veil” is one of equity. *Sturkie v. Sifly*, 280 S.C. 453, 456, 313 S.E.2d 316, 318 (Ct.App. 1984). It is a well settled principle that “a corporation is an entity, separate and distinct from its officers and stockholders, and that its debts are not the individual indebtedness of its stockholders.” *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 683 (4th Cir. 1976). However, “when the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons.” *Sturkie*, 280 S.C. at 457, 313 S.E.2d at 318. South Carolina courts have established a two-pronged test for piercing the corporate veil. *Id.* “The first part of the test, an eight-factor analysis, looks to observance of corporate formalities by the dominant shareholders.”² *Id.* “The second part requires that there be an element of injustice or

² Those eight factors include: (1) whether the corporation was grossly undercapitalized; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) insolvency of the debtor corporation at the time; (5)

and #3

fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals.” *Id.* To establish fundamental unfairness, Plaintiff must show: “(1) that the defendant was aware of the plaintiff’s claim against the corporation, and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff’s claim in the property.” *Id.* at 459, 313 S.E.2d at 319.

Plaintiff claims that Palmetto was undercapitalized from the date of its formation, continuing through the sale of its assets to Ecological Resources, Inc. Additionally, Plaintiff alleges that James L. Cooper and Pamela C. Cooper advanced their own personal interests, while failing to observe requisite corporate formalities with respect to Palmetto and Ecological Resources, Inc., which caused Palmetto to become insolvent.

1. UNCLEAN HANDS

In response to Plaintiff’s action to pierce the corporate veil, Defendants claim that Plaintiff has suffered none of the \$391,209.21 in damages awarded by the verdict and that Plaintiff has come to ask the Court for equitable relief with unclean hands. In its Motion to Strike, Plaintiff argues that the unclean hands defense is an attempt to collaterally attack the verdict in the original action.

Within their unclean hands defense, Defendants make several allegations that Plaintiff committed fraud. First, Defendants allege that when Plaintiff obtained the DHEC contracts, Plaintiff misrepresented to DHEC that it had a licensed professional engineer on staff. Second, Defendants allege that Palmetto attempted to employ other subcontractors to complete work under the DHEC contracts, but those contractors refused to work on a job with Plaintiff, in part because Plaintiff’s owner, David Jordan, had a reputation for abuse of subcontractors. Subsequently, Defendants allege that Plaintiff used this as an excuse to take over the project and failed to pay Palmetto what it was due under the subcontract. As a result of this alleged fraud, Defendants claim that Palmetto was left essentially bankrupt and unable to meet obligations under the DHEC subcontracts. Third, Defendants claim that Plaintiff represented to the Court and the jury during trial of the original action that Plaintiff would be liable for future damages in relation to the DHEC contracts, yet has performed no work under the DHEC contracts since the

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siphoning of funds of the corporation by the dominant stockholder; (6) non-functioning of the other officers or directors; (7) absence of corporate records; and (8) the fact that the corporation was merely a façade for the operations of the dominant stockholder.” *Dumas v. Infosafe Corp.*, 320 S.C. 188, 191, 463 S.E.2d 641, 644 (Ct.App. 1995). A plaintiff must show a number of the eight factors, but need not show all of them. *Id.*

trial and thus has suffered no damages under the DHEC contracts. Fourth, Defendants claim that Plaintiff maintains contractor certification through illegal or improper agreement with DHEC whereby it uses a CTSI employee who is a professional geologist, ignoring DHEC regulations that prohibit this conduct.

Plaintiff claims that Defendant's unclean hands defense is an attempt to collaterally attack the verdict in the original action. A collateral attack upon a judgment is one where the attack is "in an action other than that in which it was rendered." *Singleton v. Mullins Lumber Co.*, 234 S.C. 330, 346, 108 S.E.2d 414, 420 (1959). A judgment "is immune from attack in any action other than that in which it was rendered, except upon proof of fraud or want of jurisdiction." *Id.* at 342, 108 S.E.2d at 420. "In order to secure equitable relief on the basis of fraud, the fraud must be extrinsic." *Chewing v. Ford Motor Co.*, 354 S.C. 72, 80, 579 S.E.2d 605, 610 (2003). "Extrinsic fraud is 'fraud that induces a person not to present a case or deprives a party of the opportunity to be heard.'" *Id.* (quoting *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 is "fraud which was presented and considered in the trial." *Id.* "It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." *Chewing*, 354 S.C. at 82, 579 S.E.2d at 610. "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." *Id.*

Any fraud alleged by Defendants is intrinsic because it is based on evidence considered at trial, and thus is not grounds for equitable relief from the judgment. Defendants allege that Plaintiff misrepresented to DHEC that it had a professional engineer on staff and that Plaintiff maintains a contractor certification through illegal or improper means with DHEC. The trial court considered similar arguments and explained that DHEC could make an exception for Plaintiff to complete its contracts. In denying Palmetto's Motion for Directed Verdict, the trial court stated that "all that stuff about the regulation about having a qualified person doesn't matter. [N]o evidence that anything was ever kicked out because it was not certified. DHEC accepted those things" *V.E. Amick & Associates*, 394 S.C. at 544, 716 S.E.2d at 298. Additionally, the trial court considered allegations that Plaintiff committed fraud in taking over the project and failing to pay Palmetto what it was due under the subcontract. Defendant James L. Cooper admitted at trial that Palmetto was paid for all invoices submitted to Plaintiff under the

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subcontract. *Id.* Although Defendants claim that Palmetto completed over 95% of the services necessary under the DHEC contracts, James L. Cooper admitted that no other invoices were submitted to Plaintiff for payment after reaching the 75% milestone. *Id.*

Finally, Defendants' argument that Plaintiff committed fraud by representing to the trial court and jury that it would be liable for \$391,000 in future damages is not a basis for collateral attack because this issue has already been tried. In its appeal, Palmetto argued that the court erred in denying its Motion for a Judgment Notwithstanding the Verdict (JNOV) or, in the alternative, for a new trial *nisi remittitur* because Plaintiff will receive \$137,650 in future contract payments from DHEC and this amount should have been offset from the jury's verdict. The Court of Appeals affirmed the trial court, finding there was adequate evidence to support the jury's verdict. Therefore, any fraud alleged by Defendants is intrinsic in nature and based on evidence previously considered by the court. Such allegations are not a basis for equitable relief.

As a further basis for equitable relief, Defendants cite Rule 60(b)(5), SCRPC, which provides that "the court may relieve a party or his legal representative from a final judgment, order, or proceeding . . . if it is no longer equitable that the judgment should have prospective application." "The general authority is that a judgment of damages for past wrongs is not such a judgment as is covered or contemplated in this section." *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 120 n.3, 441 S.E.2d 835, 838 n.3. (Ct.App. 1994). Rule 60(b)(5) "is generally applicable when there has been a decree for injunctive relief." *Id.* The verdict in the original action does not have prospective application and Rule 60(b)(5), SCRPC does not provide Defendants a basis for relief. Plaintiff's Motion to Strike the defense of unclean hands is GRANTED.

2. INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONSHIPS AND BUSINESS RELATIONSHIP

Defendants' defense of intentional interference with contractual relationships and business relationship alleges that Plaintiff intentionally interfered with the employer/employee relationship between Palmetto and its professional engineer. Specifically, Defendants claim that Plaintiff's actions put Palmetto's professional engineer's license at risk and damaged the business reputation of Palmetto and Defendant James L. Cooper. As a result, Defendants allege that Palmetto lost use of its professional engineer and therefore lost its ability to perform under existing or future contracts with DHEC. Plaintiff's Motion to Strike claims that this defense

arises out of the same operative facts as the judgment in the original action and is barred by the doctrines of *res judicata* and/or collateral estoppel. Defendants argue that this cause of action was not presented in the prior litigation.

The doctrines of *res judicata* and collateral estoppel are different concepts. “*Res judicata* bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding.” *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct.App. 1997). “Collateral estoppel applies to *specific issues*, regardless of whether the [causes of action] in the first and subsequent suits are the same.” *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct.App. 2009) *aff’d*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011)(emphasis added). Because collateral estoppel applies to specific issues, it is inapplicable in this case. The specific issue of interference with the relationship between Palmetto and its professional engineer was not litigated and determined in the original lawsuit. However, the doctrine of *res judicata* is applicable.

“*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of *res judicata*, “[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” *Judy*, 393 S.C. at 172, 712 S.E.2d at 414 (quoting *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). “The rule precluding relitigation of issues that might have been raised in the prior action applies only where the two actions involve the same cause of action.” *Judy*, 383 S.C. at 8, 677 S.E.2d at 217-218. Whether the original action and the present defense involves the same cause of action “is not merely a matter of aligning identical causes of action or theories of liability; rather, the subject matter of the two suits must be the same.” *Id.* The subject matter of the present action and the original action are the same in that both lawsuits are based upon the breach of contracts entered into between Palmetto and Plaintiff for work on underground storage tanks at DHEC sites. In order to determine whether the issue of interference with the relationship between Palmetto and its professional engineer should have been raised in a prior suit, three elements must be established by the Plaintiff: “(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.” *Id.*; See also *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 330 S.C. 13, 19, 496 S.E.2d 858, 861 (1998)(citing *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986)).

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First, there is identity of the parties in the original action and the present action. The present action is styled *V.E. Amick & Associates, LLC, v. James L. Cooper, Jr.; Pamela C. Cooper; Palmetto Environmental Group, Inc.; Ecological Resources, Inc.* (Docket No. 2012-CP-40-02906). The original action is styled *V.E. Amick & Associates, LLC, v. Palmetto Environmental Group, Inc.* (Docket No. 2005-CP-40-05995; 2008-CP-40-2589R). Defendants claim that James L. Cooper, Jr., Pamela C. Cooper, and Ecological Resources, Inc. are separate and distinct parties that were not a part of the original action. However, there is an identity of parties because James L. Cooper, Jr., Pamela C. Cooper, and Ecological Resources, Inc. are privies of Palmetto. "When one is not a party to the prior action, the only way he can be precluded from relitigating an issue is if he is in privity with a party to the prior action." *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct.App. 1994). In *res judicata*, the concept of privity rests not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation." *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012)(citing *Richburg v. Baughman*, 290 S.C. 431, 351 S.E.2d 164 (1986)). "The term 'privity,' when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right." *Id.*

Ecological Resources, Inc. is in privity with Palmetto because Ecological Resources, Inc., as Palmetto's successor in interest, represents the same legal rights as Palmetto in relation to the issues litigated in the original action. Defendants James L. Cooper and Pamela C. Cooper formed Palmetto in 2000. James L. Cooper was the president and owner of Palmetto and Pamela C. Cooper was an officer of Palmetto. In 2009, James L. Cooper and Pamela C. Cooper formed Ecological Resources, Inc., and both have been president of Ecological Resources, Inc. and had ownership interests in Ecological Resources, Inc. Because of the nature of James L. Cooper and Pamela C. Cooper's relationship with Ecological Resources, Inc. and Palmetto, they have the same relationship to the subject matter of the original litigation as did Palmetto. Therefore, privity exists between James L. Cooper, Pamela C. Cooper, and Palmetto.

The fact that Plaintiff now seeks to pierce the corporate veil, an equitable action, does not change privity between the parties nor alter the issues litigated in the original action. An action seeking to pierce the corporate veil is often filed post-judgment. See *Drury Development Corp. v. Foundation Ins. Co.*, 380 S.C. 97, 103, 668 S.E.2d 798, 802 (2008). However, within that

subsequent action, the law in South Carolina does not allow Defendants to “relitigate the legitimacy of the underlying corporate obligation.” *Id.* at n.2, 668 S.E.2d at 802 n.2.

Second, there is identity of subject matter because the original action and the defenses asserted in the present action involve the same facts, circumstances, and claims of damages and arise out of the same occurrence. It is well settled that “res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties.” *RIM Associates v. Blackwell*, 359 S.C. 170, 184, 597 S.E.2d 152, 160 (Ct.App. 2004)(citing *Nelson v. QHG of S.C., Inc.*, 354 S.C. 290, 304, 580 S.E.2d 171, 178 (Ct.App. 2003)). Both the defenses asserted in this action and the original action arise out of the breach of contracts entered into between Palmetto and Plaintiff for work on underground storage tanks at DHEC sites. Defendants allege that Plaintiff is trying to recover for five DHEC sites when it was established during trial of the original action that two of the five DHEC sites were not involved. The Court of Appeals, affirming the jury’s verdict of \$391,209.21, discusses the three DHEC sites. Despite the fact that Plaintiff’s Complaint in the present action alleges that there were five DHEC site contracts, Plaintiff does not seek damages in excess of the \$391,209.21 awarded.

Third, there was an adjudication of the same issues in the original action that are now the basis for the defenses in the present action, and a final judgment was entered. Defendants claim that their defenses are distinct and separate from any defense litigated in the original action. While the intentional interference with contractual relationships and business relationship defense and counterclaim was not specifically litigated in the prior action, “[i]t is a well settled rule of law that where a defendant neglects to plead a matter proper to his defense at the proper time, he may never take advantage thereafter.” *Griggs v. Griggs*, 214 S.C. 177, 189, 51 S.E.2d 622, 628 (1949). “[A] defendant in an action must plead all his defenses, whether legal or equitable. He could not allow judgment to be entered against him and then commence a separate action against the plaintiff alleging an equitable defense.” *McLeod v. Sandy Island Corp.*, 264 S.C. 463, 467, 215 S.E.2d 903, 905 (1975). By not raising this defense in the original action, Defendants lost the ability to raise this defense in the present action.

Additionally, there was a final judgment in the original action. A final judgment is one that terminates the litigation. James F. Flanagan, *South Carolina Civil Procedure* 668 (3d ed. 2010). Plaintiff obtained a verdict in the amount of \$391,209.21 on May 14, 2009. The trial

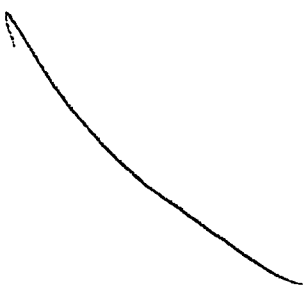
court denied Palmetto's new trial *nisi remittitur* motion. Palmetto appealed, and the Court of Appeals affirmed this verdict. Defendants did not file a Motion for Reconsideration or a writ of certiorari to the South Carolina Supreme Court, and the time to do so has expired. Therefore, there has been a final judgment in the original action.

Based on the clear case law in South Carolina, Defendants' defense and counterclaim for intentional interference with contractual relationships and prospective business relationship is barred by the principle of *res judicata*. Plaintiff's Motion to Strike this defense is GRANTED.

3. FAILURE TO OBTAIN CONDITION PRECEDENT

In their Answer, Defendants allege that Plaintiff and Palmetto entered into a partnership in agreeing to share in the profits and losses of the DHEC contracts. Defendants claim that because a partnership existed, Plaintiff must first seek a partnership accounting prior to bringing any suit against Palmetto. Generally, "copartners cannot sue each other at law for matters arising out of the partnership until there is first an accounting in equity between the partners." *Burch v. Ashburn*, 295 S.C. 274, 280, 368 S.E.2d 82, 85 (Ct.App. 1998). The court notes that Defendants have not provided evidence to support their claim that a partnership between Plaintiff and Palmetto existed.

Plaintiff argues that the defense of failure to obtain condition precedent is an attempt to collaterally attack the verdict in the original case. While the defense may be a collateral attack, it is barred by the doctrine of *res judicata*. Based on the aforementioned application of *res judicata* in this case, Defendants lost the ability to raise this defense in the present action by not raising it in the original action. Plaintiff's Motion to Strike the defense of failure to obtain condition precedent is GRANTED.




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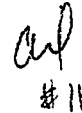
ORDER

For the reasons set forth above, it is **ORDERED** that Plaintiff's Motion to Strike the second, third, and fourth defenses of Defendants Palmetto Environmental Group, Inc., James L. Cooper, Jr., Pamela C. Cooper, and Ecological Resources, Inc. is **GRANTED**.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
November 20, 2012



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4002906

V E Amick And Associates LLC

James L Cooper Jr

Pamela C Cooper

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON)**
 - Rule 12(b), SCRPC, Rule 41(a), SCRPC (Vol. Dismissal)
 - Rule 43(k), SCRPC (Settled), Other _____
- ACTION STRICKEN (CHECK REASON)**
 - Rule 40(j), SCRPC, Bankruptcy,
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award, Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
 - Affirmed, Reversed, Remanded, Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court

ORDER INFORMATION

This order ends does not end the case

Additional Information for the Clerk _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 20 November 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Wesley Dickinson Peel

Richard R. Gleissner

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
 V.E. Amick & Associates, LLC,)
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 Plaintiff,)
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 v.)
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 Ecological Resources, Inc.,)
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 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2012-CP-40-02906

ORDER ON
 MOTION TO RECONSIDER

JEANETTE W. McBRIDE
 C.P. & G.S.
 2014 JAN -8 PM 3:25
 RICHLAND COUNTY
 FILED

This matter comes before the Court by way of a Rule 59(e), SCRCP motion filed by Defendants Palmetto Environmental Group, Inc. (“Palmetto”), James L. Cooper, Jr., Pamela C. Cooper, and Ecological Resources, Inc. (collectively the “Defendants”) to alter or amend this Court’s November 20, 2012 Order Granting Plaintiff’s Motion to Strike. The Motion for Reconsideration was filed with the Clerk of Court on December 6, 2012.

After careful consideration of the record in this case and the arguments raised by Defendants, this Court is unable to discover, with the exception of two issues addressed herein, any new material fact or any principle of law that was either overlooked or disregarded in the previous Order.

In their Motion to Reconsider, Defendants raise two issues that merit discussion. First, in relation to the defense of failure to obtain condition precedent, this Court clarifies that the defense is barred by the application of the doctrine of *res judicata*, and the existence of evidentiary support is irrelevant. Second, based upon the issues raised by Defendants in their Motion to Reconsider, this Court amends its Order dated November 20, 2012 only as it is related to Defendants’ unclean hands defense. The unclean hands ruling in the Court’s Order is withdrawn and the following is substituted in full in its place:

1. UNCLEAN HANDS

In response to Plaintiff’s action to pierce the corporate veil, Defendants claim that Plaintiff has suffered none of the \$391,209.21 in damages awarded by the verdict and that Plaintiff has come to ask the Court for equitable relief with unclean hands. In its Motion to

Strike, Plaintiff argues that the unclean hands defense is an attempt to collaterally attack the verdict in the original action.

Defendants claim that they could not have pled the defense of unclean hands in the original action because it was an action for breach of contract. “The equitable doctrine of unclean hands . . . has no application to an action at law.” *Aaron v. Mahl*, 381 S.C. 585, 594, 674 S.E.2d 482, 487 (2009). “The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.” *First Union Nat. Bank of South Carolina v. Soden*, 333 S.C. 554, 569, 511 S.E.2d 372, 380 (Ct. App. 1998). While unclean hands may have been unavailable as an equitable defense in the original action, the defense attempts to relitigate the same issues that were before the trial court. To the extent that Defendants’ unclean hands defense claims that Plaintiff is not entitled to the full amount of the verdict because it did not suffer the amount of damages awarded, the defense is a collateral attack.

Within their unclean hands defense, Defendants make several allegations that Plaintiff committed fraud. First, Defendants allege that when Plaintiff obtained the DHEC contracts, Plaintiff misrepresented to DHEC that it had a licensed professional engineer on staff. Second, Defendants allege that Palmetto attempted to employ other subcontractors to complete work under the DHEC contracts, but those contractors refused to work on a job with Plaintiff, in part because Plaintiff’s owner, David Jordan, had a reputation for abuse of subcontractors. Subsequently, Defendants allege that Plaintiff used this as an excuse to take over the project and failed to pay Palmetto what it was due under the subcontract. As a result of this alleged fraud, Defendants claim that Palmetto was left essentially bankrupt and unable to meet obligations under the DHEC subcontracts. Third, Defendants claim that Plaintiff represented to the Court and the jury during trial of the original action that Plaintiff would be liable for future damages in relation to the DHEC contracts, yet has performed no work under the DHEC contracts since the trial and thus has suffered no damages under the DHEC contracts. Fourth, Defendants claim that Plaintiff maintains contractor certification through illegal or improper agreement with DHEC whereby it uses a CTSI employee who is a professional geologist, ignoring DHEC regulations that prohibit this conduct.

A collateral attack upon a judgment is one where the attack is “in an action other than that in which it was rendered.” *Singleton v. Mullins Lumber Co.*, 234 S.C. 330, 346, 108 S.E.2d

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414, 420 (1959). A judgment “is immune from attack in any action other than that in which it was rendered, except upon proof of fraud or want of jurisdiction.” *Id.* at 342, 108 S.E.2d at 420. “In order to secure equitable relief on the basis of fraud, the fraud must be extrinsic.” *Chewning v Ford Motor Co.*, 354 S.C. 72, 80, 579 S.E.2d 605, 610 (2003). “Extrinsic fraud is ‘fraud that induces a person not to present a case or deprives a party of the opportunity to be heard.’” *Id.* (quoting *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 is “fraud which was presented and considered in the trial.” *Id.* “It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud” *Chewning*, 354 S.C. at 82, 579 S.E.2d at 610. “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.” *Id.*

Any fraud alleged by Defendants is intrinsic because it is based on evidence considered at trial, and thus is not grounds for equitable relief from the judgment. Defendants allege that Plaintiff misrepresented to DHEC that it had a professional engineer on staff and that Plaintiff maintains a contractor certification through illegal or improper means with DHEC. The trial court considered similar arguments and explained that DHEC could make an exception for Plaintiff to complete its contracts. In denying Palmetto’s Motion for Directed Verdict, the trial court stated that “all that stuff about the regulation about having a qualified person doesn’t matter [N]o evidence that anything was ever kicked out because it was not certified. DHEC accepted those things” *V.E. Amick & Associates*, 394 S.C. at 544, 716 S.E.2d at 298. Additionally, the trial court considered allegations that Plaintiff committed fraud in taking over the project and failing to pay Palmetto what it was due under the subcontract. Defendant James L. Cooper admitted at trial that Palmetto was paid for all invoices submitted to Plaintiff under the subcontract. *Id.* Although Defendants claim that Palmetto completed over 95% of the services necessary under the DHEC contracts, James L. Cooper admitted that no other invoices were submitted to Plaintiff for payment after reaching the 75% milestone. *Id.*

Finally, Defendants’ argument that Plaintiff committed fraud by representing to the trial court and jury that it would be liable for \$391,000 in future damages is not a basis for collateral attack because this issue has already been tried. In its appeal, Palmetto argued that the court erred in denying its Motion for a Judgment Notwithstanding the Verdict (JNOV) or, in the alternative, for a new trial *nisi remittitur* because Plaintiff will receive \$137,650 in future

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contract payments from DHEC and this amount should have been offset from the jury's verdict. The Court of Appeals affirmed the trial court, finding there was adequate evidence to support the jury's verdict. Therefore, any fraud alleged by Defendants is intrinsic in nature and based on evidence previously considered by the court. Such allegations are not a basis for equitable relief.

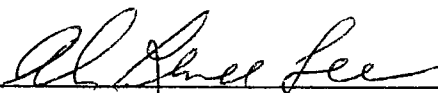
As a further basis for equitable relief, Defendants cite Rule 60(b)(5), SCRPC, which provides that "the court may relieve a party or his legal representative from a final judgment, order, or proceeding . . . if it is no longer equitable that the judgment should have prospective application." "The general authority is that a judgment of damages for past wrongs is not such a judgment as is covered or contemplated in this section." *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 120 n.3, 441 S.E.2d 835, 838 n.3. (Ct.App. 1994). Rule 60(b)(5) "is generally applicable when there has been a decree for injunctive relief." *Id.* The basis for the verdict in the original action was to compensate Plaintiff for Palmetto's breach of contract. Thus, the verdict was to rectify past wrongs by awarding Plaintiff damages. The verdict in the original action does not have prospective application and Rule 60(b)(5), SCRPC does not provide Defendants a basis for relief. Plaintiff's Motion to Strike the defense of unclean hands is **GRANTED**.

ORDER

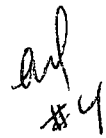
Based upon the foregoing amendment, Defendants' Motion to Reconsider is **GRANTED in part**; however, Plaintiff's Motion to Strike the defense of unclean hands is **GRANTED**.

Pursuant to Rule 59(f), oral argument is not necessary.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
January 8, 2013



STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

V.E. Amick & Associates, LLC)
)
Plaintiff(s))

CIVIL ACTION COVERSHEET

12-CP - 40- 02900

vs.)
)

James L. Cooper, Jr.; Pamela C. Cooper; Palmetto)
Environmental Group, Inc.; and Ecological)
Resources, Inc.,)

Defendant(s))

(Please Print)

Submitted By: Wesley D. Peel

Address: P. O. Box 61110, Columbia, SC 29260

SC Bar #: ~~68491~~ 9283

Telephone #: 803. 252. 7693

Fax #: 803 254 5719

Other:

E-mail: wpeel@brunerpowell.com

NOTE The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint
- NON-JURY TRIAL demanded in complaint
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules
- This case is exempt from ADR (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|--|---|
| <p>Contracts</p> <ul style="list-style-type: none"> <input type="checkbox"/> Constructions (100) <input checked="" type="checkbox"/> Debt Collection (110) <input type="checkbox"/> Employment (120) <input type="checkbox"/> General (130) <input type="checkbox"/> Breach of Contract (140) <input type="checkbox"/> Other (199) | <p>Torts - Professional Malpractice</p> <ul style="list-style-type: none"> <input type="checkbox"/> Dental Malpractice (200) <input type="checkbox"/> Legal Malpractice (210) <input type="checkbox"/> Medical Malpractice (220) Previous Notice of Intent Case #
20 -CP- _____ <input type="checkbox"/> Notice/ File Med Mal (230) <input type="checkbox"/> Other (299) | <p>Torts - Personal Injury</p> <ul style="list-style-type: none"> <input type="checkbox"/> Assault/Slander/Label (300) <input type="checkbox"/> Conversion (310) <input type="checkbox"/> Motor Vehicle Accident (320) <input type="checkbox"/> Premises Liability (330) <input type="checkbox"/> Products Liability (340) <input type="checkbox"/> Personal Injury (350) <input type="checkbox"/> Wrongful Death (360) <input checked="" type="checkbox"/> Other (399) Tortious Interference with Contractual Relations, etc | <p>Real Property</p> <ul style="list-style-type: none"> <input type="checkbox"/> Claim & Delivery (400) <input type="checkbox"/> Condemnation (410) <input type="checkbox"/> Foreclosure (420) <input type="checkbox"/> Mechanic's Lien (430) <input type="checkbox"/> Partition (440) <input type="checkbox"/> Possession (450) <input type="checkbox"/> Building Code Violation (460) <input type="checkbox"/> Other (499) |
| <p>Inmate Petitions</p> <ul style="list-style-type: none"> <input type="checkbox"/> PCR (500) <input type="checkbox"/> Mandamus (520) <input type="checkbox"/> Habeas Corpus (530) <input type="checkbox"/> Other (599) | <p>Judgments/Settlements</p> <ul style="list-style-type: none"> <input type="checkbox"/> Death Settlement (700) <input type="checkbox"/> Foreign Judgment (710) <input type="checkbox"/> Magistrate's Judgment (720) <input type="checkbox"/> Minor Settlement (730) <input type="checkbox"/> Transcript Judgment (740) <input type="checkbox"/> Lis Pendens (750) <input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760) <input type="checkbox"/> Other (799) | <p>Administrative Law/Relief</p> <ul style="list-style-type: none"> <input type="checkbox"/> Reinstate Driver's License (800) <input type="checkbox"/> Judicial Review (810) <input type="checkbox"/> Relief (820) <input type="checkbox"/> Permanent Injunction (830) <input type="checkbox"/> Forfeiture-Petition (840) <input type="checkbox"/> Forfeiture-Consent Order (850) <input type="checkbox"/> Other (899) | <p>Appeals</p> <ul style="list-style-type: none"> <input type="checkbox"/> Arbitration (900) <input type="checkbox"/> Magistrate-Civil (910) <input type="checkbox"/> Magistrate-Criminal (920) <input type="checkbox"/> Municipal (930) <input type="checkbox"/> Probate Court (940) <input type="checkbox"/> SCDOT (950) <input type="checkbox"/> Worker's Comp (960) <input type="checkbox"/> Zoning Board (970) <input type="checkbox"/> Public Service Commission (990) <input type="checkbox"/> Employment Security Comm (991) <input type="checkbox"/> Other (999) |
| <p>Special/Complex /Other</p> <ul style="list-style-type: none"> <input type="checkbox"/> Environmental (600) <input type="checkbox"/> Automobile Arb (610) <input type="checkbox"/> Medical (620) <input type="checkbox"/> Other (699) <input type="checkbox"/> Pharmaceuticals (630) <input type="checkbox"/> Unfair Trade Practices (640) <input type="checkbox"/> Out-of State Depositions (650) <input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660) <input type="checkbox"/> Sexual Predator (510) | | | |

Submitting Party Signature.

Date. April 23, 2012

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S C Code Ann §15-36-10 et seq

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville, Hampton, Horry,
Jasper, Lexington, Pickens (Family Court Only), Richland, Union and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE
DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT

You are required to take the following action(s):

- 1 The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
- 2 The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S C Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
- 4 Cases are exempt from ADR only upon the following grounds:
 - a Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition.
 - b Requests for temporary relief,
 - c Appeals
 - d Post Conviction relief matters;
 - e Contempt of Court proceedings,
 - f Forfeiture proceedings brought by governmental entities,
 - g Mortgage foreclosures, and
 - h Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute
- 5 In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
- 6 Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

Handwritten mark or stamp at the top right of the page.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

V E Amick & Associates, LLC)
)
Plaintiff,)
)
v.)
)
James L Cooper, Jr , Pamela C Cooper,)
Palmetto Environmental Group, Inc , and)
Ecological Resources, Inc)
)
Defendants)
_____)

C A No 2012-CP-40- 2906

SUMMONS

2012 APR 23 AM 4:18

COURT OF COMMON PLEAS
C.C.P.C. G.S.

TO THE DEFENDANTS ABOVE-NAMED

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to said Complaint upon the undersigned subscriber at Post Office Box 61110, Columbia, South Carolina 29260, within thirty (30) days after service upon you, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint

Wesley D. Peel
Matthew H Stabler
Bruner, Powell, Wall & Mullins, LLC
1735 St Julian Place, Suite 200
P O. Box 61110
Columbia, South Carolina 29260
(803) 252-7693
Fax (803) 254-5719
wpeel@brunerpowell.com
mstabler@brunerpowell.com
Counsel for Plaintiff

April 23, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

V E Amick & Associates, LLC)
)
Plaintiff,)
)
v)
)
James L Cooper, Jr , Pamela C Cooper,)
Palmetto Environmental Group, Inc , and)
Ecological Resources, Inc)
)
Defendants)
)

C A No 2012-CP-40-02906

COMPLAINT

2012 APR 23 AM 4:18
C.C.P. & G.S.

NOW COMES the Plaintiff, V E Amick & Associates, LLC (“V E Amick” or “Plaintiff”), which by and through counsel, allege and state as follows

PARTIES AND JURISDICTION

1 Plaintiff is a limited corporation organized and existing under the laws of the State of South Carolina

2 Defendant Ecological Resources, Inc (“Ecological”) is a corporation organized and existing under the laws of the State of South Carolina and the successor-in-interest to Palmetto Environmental Group, Inc

3 Defendant Palmetto Environmental Group, Inc (“Palmetto”) is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, South Carolina and is the predecessor-in-interest to Ecological

4 Defendant James L Cooper, Jr (“James”) is upon information and belief a resident of Kershaw County, South Carolina and the President of Ecological

5 Defendant Pamela C Cooper (“Pamela”) is upon information and belief a resident
of Kershaw County, South Carolina an officer and majority shareholder of Ecological

6 Plaintiff holds a judgment against Palmetto

7 Palmetto is named as a party to this action by virtue of its relationship with the
other named Defendants and the judgment held by Plaintiff

8 Jurisdiction and venue are proper in Richland County, South Carolina

BACKGROUND

9 This action arises out of the breach of several subcontracts between Plaintiff and
Palmetto, along with Plaintiff’s subsequent judgment obtained against Palmetto

10 Plaintiff entered into a contract with the South Carolina Department of Health and
Environmental Control (DHEC) to repair damage to soil and groundwater by the leaking of
petroleum products from certain Underground Storage Tanks in South Carolina

11 Plaintiff subcontracted this work, in its entirety, to Palmetto

12. Palmetto agreed to supply all labor, material, and equipment necessary to reduce
the chemicals found in the groundwater to Site-Specific Target Levels (SSTLs) as determined by
DHEC and set forth in the contracts between the Plaintiff and DHEC

13 Plaintiff contracted with Palmetto for work on the following sites, each site
constituting a separate and distinct contract.

- a. Lakeside Market, Summerton, SC
- b. SA Guerry & Sons
- c. Charleston County General Services
- d. Huse Property
- e. Cromer’s Store

14 Palmetto commenced performance pursuant to the subcontract and the Plaintiff regularly and properly paid Palmetto in accordance with the terms and conditions of the subcontract, pursuant to the progress payments as allowed by DHEC

15 During the course of performance of the subcontract, Palmetto became impecunious or otherwise unable to meet all of its obligations arising under the subcontract for the cost of performing the work and, thereafter ceased work on each site altogether, despite the Plaintiff's demands that Palmetto complete its work, as more fully set forth in the lawsuit and judgment attached hereto as Exhibits A & B

16 Thereafter, the Plaintiff advanced sums to Palmetto or Palmetto's suppliers and subcontractors for Palmetto's account for the payment of labor, materials, and other incidental costs associated with performing the work

17 After Palmetto abandoned the contracts, the Plaintiff had to mobilize its own forces and incur substantial costs to complete the work left undone by Palmetto

18. The Plaintiff satisfied all conditions precedent to recovery of the sums under the subcontracts and made several demands upon Palmetto, which were all unheeded by Palmetto

19 Palmetto refused to honor its obligations under the subcontract, thus breaching the terms and conditions of the subcontract, which caused the Plaintiff damages

20 As a result, the Plaintiff commenced a lawsuit seeking to recover its damages from Palmetto

21. Plaintiff obtained a verdict in the amount of \$391,209 21 in favor of Plaintiff against Palmetto as a result of Palmetto's breaches of contracts. A copy of the judgment is attached hereto as "Exhibit B" Palmetto has failed and refused to pay the judgment

22 Plaintiff has been unable to collect on its judgment due to Palmetto's alleged insolvency and inability to pay these debts and the transfer of all of its assets

23 Palmetto purportedly transferred substantially all of its assets to Ecological in December 2008.

24 James and Pamela as owners and/or officers of Palmetto acted in a self-serving and/or reckless manner with respect to the day-to-day operations of Palmetto and the management of its corporate property, which ultimately caused Palmetto to become insolvent and unable to pay the debts owed to the Plaintiffs

25 During the pendency of Plaintiff's action against Palmetto, Palmetto allegedly sold all of its assets to Ecological in December 2008

26 Ecological did not exist until June 2009

27 James allegedly owned Palmetto Pamela allegedly owns Ecological

28 The Plaintiff is informed and believes that Ecological became the successor-in-interest to Palmetto

29 Palmetto effected the "wholesale transfer" of its assets to try and put its assets out of reach of Palmetto's creditors

30 The Plaintiff has commenced this action seeking to pierce Palmetto's corporate veil to recover the outstanding debts owed by Palmetto from James and Pamela individually as the former owners and/or officers of Palmetto, as well as from Ecological as the successor-in-interest to Palmetto

FOR A FIRST CAUSE OF ACTION AS TO DEFENDANTS
ECOLOGICAL RESOURCES, INC., JAMES C. COOPER, JR. AND PAMELA C.
COOPER
(Piercing the Corporate Veil)

31 The Plaintiff re-alleges and reiterate Paragraphs 1 through 30 above as if fully repeated herein

32 Upon information and belief, James and Pamela formed Palmetto in 2000

33 James was the President and Owner of Palmetto

34 Upon information and belief, Pamela was an officer of Palmetto

35 Upon information and belief, James and Pamela formed Ecological in 2009

36 Both James and Pamela have been President of Ecological and both have ownership interests in Ecological

37 Plaintiff is informed and believes that Palmetto was undercapitalized from the date of its formation, continuing through the sale of its assets to Ecological

38 The Plaintiffs are informed and believe that James and Pamela, while simultaneously advancing their own personal interests, failed to observe requisite corporate formalities with respect to the day-to-day operations of Palmetto and Ecological and management of corporate property, which directly and proximately caused Palmetto to become insolvent and unable to satisfy its respective debts to the Plaintiff

39 James and Pamela realized a benefit from the payments made by the Plaintiff for which James and Pamela have not fully paid.

40 The Plaintiff is informed and believes that James and Pamela were aware of Palmetto's obligations under the individual subcontracts with the Plaintiff and knew that Palmetto had unsatisfied obligations to Plaintiff

41 Despite such knowledge, James and Pamela acted in a self-serving and/or reckless manner with respect to the management of the corporate property and funds of Palmetto and with a conscious disregard to the Plaintiff's claims for the amounts owed under the respective subcontracts with Palmetto, which should have been paid from said funds

42 The Plaintiff has been unable to collect the full amount of the sums owed by Palmetto and Plaintiff continues to incur damages from its loss

43 Therefore, fundamental unfairness and injustice will result unless Palmetto's and Ecological's corporate veils are pierced and liability imputed to James and Pamela for the outstanding sums owed by Palmetto to the Plaintiffs and for the benefit James and Pamela have received and continue to unjustly retain without paying for the value of the same

44 Accordingly, the Plaintiff is entitled to an order piercing the corporate veil of Palmetto and entering judgment against Ecological, James, and Pamela for the amounts owed to the Plaintiff by Palmetto plus interest, including pre-judgment interest, and costs incurred in bringing this action

FOR A SECOND CAUSE OF ACTION AS TO DEFENDANT
ECOLOGICAL RESOURCES, INC.
(Successor in Interest/Successor Liability)

45 The Plaintiff re-alleges and reiterate Paragraphs 1 through 44 above as if fully repeated herein

46 The Plaintiff is informed and believes that Palmetto was subsumed by and/or merged with Ecological and that Ecological is a mere continuation of Palmetto's operations

47 The Plaintiff is informed and believes that James was the President of Palmetto and is now the President of Ecological.

48 The Plaintiff is informed and believes that Pamela performed certain work for Palmetto, was at one time the President of Ecological in name only, and performs the same work for Ecological that she formerly performed for Palmetto.

49 The Plaintiff is informed and believes that Ecological uses the same business location, equipment, and employees formerly used by Palmetto

50 The Plaintiff is informed and believes that Ecological and Palmetto share a number of common officers, directors and owners including, but not limited to, James and Pamela, creating a commonality of ownership between Palmetto and Ecological, sufficient to render Ecological liable for debts owed by Palmetto to the Plaintiff

51 Therefore, the Plaintiff is informed and believes that Ecological has become the successor-in-interest to Palmetto and, as such, should be liable for the debts and liabilities of Palmetto, including the debts owed to the Plaintiff

52 The Plaintiff is informed and believes that Palmetto and its owners through the "sale" to Ecological have attempted to avoid paying the debts owed by Palmetto to the Plaintiff

53. The Plaintiff is informed and believes that Ecological assumed the assets and property of Palmetto, but have attempted to avoid liability for Palmetto's debt to the Plaintiff

54. Fundamental unfairness and injustice will result if Palmetto and its owners are allowed to continue to operate under the guise of Ecological without paying the debt owed to the Plaintiff.

55 Accordingly, the Plaintiff is entitled to an order finding Ecological, as successor-in-interest to Palmetto, liable for the debt owed to the Plaintiff by Palmetto plus interest, including pre-judgment interest, and costs incurred in bringing this action

FOR A THIRD CAUSE OF ACTION AS TO DEFENDANTS
PALMETTO ENVIRONMENTAL GROUP, INC., ECOLOGICAL RESOURCES, INC.,
JAMES C. COOPER, JR. AND PAMELA C. COOPER
(Civil Conspiracy)

56 Plaintiff re-alleges and reiterate Paragraphs 1 through 55 as if repeated herein

57 The Plaintiff entered into contracts with Palmetto and the Plaintiff expected Palmetto to perform certain work under the contracts

58 However, upon receiving payment from Plaintiff, Defendants elected to divert the proceeds received from Plaintiff and failed to perform the work

59 The Defendants' acts were intended to injure and harm the Plaintiff so that the Defendants could divert the proceeds for their own use

60 The Defendants' actions combined and concurred to cause the Plaintiff actual, special and consequential damages for which all of the Defendants are jointly and severally liable

61 By reason of their civil conspiracy against the Plaintiff as alleged above, the Defendants are jointly and severally liable to the Plaintiffs for actual, special, consequential, and punitive damages in an amount to be determined by the jury

FOR A FOURTH CAUSE OF ACTION AS TO DEFENDANTS
PALMETTO ENVIRONMENTAL GROUP, INC., PAMELA C. COOPER, AND
ECOLOGICAL RESOURCES, INC.
(Statute of Elizabeth; S.C. Code Ann. § 27-23-10)

62 Plaintiff re-alleges and reiterate Paragraphs 1 through 61 as if repeated herein.

63 During the pendency of Plaintiff's action against Palmetto, Palmetto "sold" all of its assets to Pamela/Ecological.

64 The sale was allegedly to Ecological, but Pamela signed the sales agreement as "president" of Ecological Ecological did not exist at the time of the alleged sale

65 At the time of the "sale," Palmetto was indebted to Plaintiff and knew that it was likely that a substantial verdict would be entered against Palmetto

66 If consideration was actually exchanged, this "sale" was made by Palmetto with the actual intent of defrauding Plaintiff and such intent is imputable to Pamela and/or Ecological

67. The "sale" between Palmetto and Pamela and/or Ecological did not involve the exchange of valuable consideration

68 Money was simply transferred through various accounts owned and/or controlled by James, Pamela, Palmetto, and Ecological to give the appearance of valuable consideration being exchanged

69 The "sale" between Palmetto and Pamela and/or Ecological was voluntary

70 The "sale" between Palmetto and Pamela and/or Ecological was made with intent to defraud

71 As a result of the "sale," Palmetto failed to retain sufficient property to pay its indebtedness to Plaintiff in full, not merely at the time of transfer, but when Plaintiff sought to collect the debt

72 The alleged sale between Palmetto and Pamela and/or Ecological should thus be set aside and Plaintiff allowed to execute on those assets

FOR A FIFTH CAUSE OF ACTION AS TO DEFENDANTS
ECOLOGICAL RESOURCES, INC., JAMES C. COOPER, JR. AND PAMELA C.
COOPER
(Constructive Trust)

73 Plaintiff re-alleges and reiterates Paragraphs 1 through 74 as if repeated herein

74 Through the actions recited above, Ecological, James, and Pamela obtained a benefit that does not equitably belong to them and which they cannot in good conscience retain or withhold from Plaintiff who is beneficially entitled to it

75 Ecological, James, and Pamela obtained this benefit through fraud, bad faith, abuse of confidence, and/or a violation of a fiduciary duty which gives rise to an obligation in equity to make restitution to Plaintiff

76 As such, Plaintiff requests that the Court impose a Constructive Trust over all assets owned and/or controlled by Ecological, James, and/or Pamela for the benefit of Plaintiff

FOR A SIXTH CAUSE OF ACTION AS TO DEFENDANTS
ECOLOGICAL RESOURCES, INC., JAMES C. COOPER, JR. AND PAMELA C.
COOPER
(Quantum Meruit)

77 Plaintiff re-alleges and reiterate Paragraphs 1 through 76 as if repeated herein

78 Plaintiff, at the request of the Defendants, provided to the Defendants valuable services and payments in connection with the various subcontracts

79 Through the provision of said services and payments, the Plaintiff conferred a benefit upon the Defendants with the reasonable expectation and belief that payment for the same would be received from the Defendants.

80 The Defendants have used and otherwise enjoyed the benefit of said materials and payments thereby realizing a benefit for which they have not fully paid

81. It would be unjust for the Defendants to retain the benefit conferred by the Plaintiff without paying for the full value of the same

82 Therefore, the Plaintiff is entitled to judgment against the Defendants for the reasonable value of the benefit conferred plus applicable costs and interest, including pre-judgment interest

WHEREFORE, the Plaintiffs pray unto the Court as follows

- 1 For judgment pursuant to Plaintiff's First Cause of Action and an order piercing the corporate veil of Palmetto and imputing liability to the Defendants for debts owed by Palmetto plus interest and costs, including pre-judgment interest;
- 2 For judgment pursuant to the Plaintiff's Second Cause of Action and an order imputing liability to Ecological for the debts owed by Palmetto plus interest and costs, including pre-judgment interest,
- 3 For judgment pursuant to the Plaintiff's Third Cause of Action, in an amount of Plaintiff's actual, special, consequential and punitive damages, all in an amount to be determined by the trier of fact,
- 4 For judgment pursuant to the Plaintiff's Fourth Cause of Action setting aside the transfer of Palmetto's assets to Pamela and/or Ecological so that Plaintiff may execute on those assets,
- 5 For judgment pursuant to the Plaintiff's Fifth Cause of Action, imposing a Constructive Trust over all assets owned and/or controlled by Ecological, James, and/or Pamela for the benefit of Plaintiff; and
- 6 For judgment pursuant to the Plaintiff's Sixth Cause of Action plus interest and costs, including pre-judgment interest; and
7. For such additional relief as the Court deems just and proper

[Signature page to follow]

Respectfully Submitted,



Wesley D. Peel
Matthew H. Stabler
Bruner, Powell, Wall & Mullins, LLC
1735 St. Julian Place, Suite 200
P.O. Box 61110
Columbia, South Carolina 29260
(803) 252-7693
Fax (803) 254-5719
wpeel@brunerpowell.com
mstabler@brunerpowell.com

Attorneys for Plaintiff

EXHIBIT A

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

) FOR THE FIFTH JUDICIAL CIRCUIT

V.E. Amuck & Associates, Inc.,

) Case No

Plaintiff,

2005 CP4 005995

vs.

SUMMONS

1. Breach of Contract

2. Recoupment

(Non-Jury Trial)

Palmetto Environmental Group, Inc

Defendant.

TO THE DEFENDANTS ABOVE-NAMED

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to said Complaint upon the undersigned subscriber at his offices at 1735 St Julian Place, Suite 200, Columbia, South Carolina 29204, within thirty (30) days after service upon you, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

BY

Wesley D. Peel

BRUNER, POWELL, ROBBINS,

WALL & MULLINS, LLC

1735 St. Julian Place, Suite 200

P.O. Box 61110

Columbia, S.C 29260

(803) 252-7693

Counsel for Plaintiff.

Columbia, South Carolina

November 10, 2005

6 The Defendant agreed to supply all labor, material, and equipment necessary to reduce the chemicals found in the ground water to Site-Specific Target Levels (SSTLs) as determined by DHEC and set forth in the contracts between the Plaintiff and DHEC.

7. Plaintiff contracted with the Defendant for work on the following sites, each site constituting a separate and distinct contract:

- a. Lakeside Market, Summerton, SC
- b. SA Guerry & Sons
- c. Charleston County General Services
- d. Huse Property
- e. Cromer's Store

8. The Defendant commenced performance pursuant to the subcontract and the Plaintiff regularly and properly paid the Defendant in accordance with the terms and conditions of the subcontract, pursuant to the progress payments as allowed by DHEC. However, during the course of performance of the subcontract, the Defendant became impecunious or otherwise unable to meet all of its obligations arising under the subcontract for the cost of performing the work and, thereafter ceased work on each site altogether, despite the Plaintiff's demands that the Defendant complete its work.

9. Thereafter, the Plaintiff advanced sums to the Defendant or the Defendant's suppliers and subcontractors for Defendant's account for the payment of labor, materials, and other incidental costs associated with performing the work.

10. After the Defendant abandoned the project, the Plaintiff had to mobilize its own forces to complete the work left undone by the Defendant.

11 The Plaintiff has satisfied all conditions precedent to recovery of the sums under the subcontract and has made several demands upon the Defendant, which have gone unheeded

12 Despite these lawful demands, the Defendant has refused and ignored its obligations under the subcontract, thus breaching the terms and conditions of the subcontract, which has caused the Plaintiff damages.

**FOR A FIRST CAUSE OF ACTION
(Breach of Contract)
(Lakeside Market Site)**

13 The Plaintiff repeats and realleges the foregoing allegations to the extent required by, but not inconsistent with, the following allegations.

14. As to the Lakeside Market Site, the Defendant breached the subcontract by failing to properly pay its debts arising from the work, failing to properly pay its subcontractors, laborers, material suppliers, and the other incidental costs of the work, failing to complete the work in a workmanlike manner to the standard required by the industry, failing to complete the work, failing to reimburse or pay back to the Plaintiff advances or loans Plaintiff made to the Defendant during the course of the subcontract, and by abandoning the project.

15 Due to the Defendant's abandonment of the project, the Plaintiff was forced to mobilize and complete the work on this contract.

16. As approximate result of the Defendant's breach of contract the Plaintiff is damaged in an amount to be proven at trial, including but not limited to cover costs, increased overhead, and costs of labor and equipment. Additionally, the Plaintiff incurred attorneys' fees and costs associated with this litigation for which the Defendant is liable.

**FOR A SECOND CAUSE OF ACTION
(Breach of Contract)
(S.A. Guerry & Sons Site)**

17 The Plaintiff repeats and realleges the foregoing allegations to the extent required by, but not inconsistent with, the following allegations

18. As to the S.A. Guerry & Sons Site, the Defendant breached the subcontract by failing to properly pay its debts arising from the work, failing to properly pay its subcontractors, laborers, material suppliers, and the other incidental costs of the work, failing to complete the work in a workmanlike manner to the standard required by the industry, failing to complete the work, failing to reimburse or pay back to the Plaintiff advances or loans Plaintiff made to the Defendant during the course of the subcontract, and by abandoning the project

19 Due to the Defendant's abandonment of the project, the Plaintiff was forced to mobilize and complete the work on this contract.

20 As approximate result of the Defendant's breach of contract the Plaintiff is damaged in an amount to be proven at trial, including but not limited to cover costs, increased overhead, and costs of labor and equipment. Additionally, the Plaintiff incurred attorneys' fees and costs associated with this litigation for which the Defendant is liable.

**FOR A THIRD CAUSE OF ACTION
(Breach of Contract)
(Charleston County General Services Site)**

21. The Plaintiff repeats and realleges the foregoing allegations to the extent required by, but not inconsistent with, the following allegations

22. As to the Charleston County General Services Site, the Defendant breached the subcontract by failing to properly pay its debts arising from the work, failing to properly pay its subcontractors, laborers, material suppliers, and the other incidental costs of the work, failing to

complete the work in a workmanlike manner to the standard required by the industry, failing to complete the work, failing to reimburse or pay back to the Plaintiff advances or loans Plaintiff made to the Defendant during the course of the subcontract, and by abandoning the project.

23. Due to the Defendant's abandonment of the project, the Plaintiff was forced to mobilize and complete the work on this contract.

24. As approximate result of the Defendant's breach of contract the Plaintiff is damaged in an amount to be proven at trial, including but not limited to cover costs, increased overhead, and costs of labor and equipment. Additionally, the Plaintiff incurred attorneys' fees and costs associated with this litigation for which the Defendant is liable.

**FOR A FOURTH CAUSE OF ACTION
(Breach of Contract)
(Huse Site)**

25. The Plaintiff repeats and realleges the foregoing allegations to the extent required by, but not inconsistent with, the following allegations

26. As to the Huse Site, the Defendant breached the subcontract by failing to properly pay its debts arising from the work, failing to properly pay its subcontractors, laborers, material suppliers, and the other incidental costs of the work, failing to complete the work in a workmanlike manner to the standard required by the industry, failing to complete the work, failing to reimburse or pay back to the Plaintiff advances or loans Plaintiff made to the Defendant during the course of the subcontract, and by abandoning the project.

27. Due to the Defendant's abandonment of the project, the Plaintiff was forced to mobilize and complete the work on this contract.

28. As approximate result of the Defendant's breach of contract the Plaintiff is damaged in an amount to be proven at trial, including but not limited to cover costs, increased overhead, and

costs of labor and equipment. Additionally, the Plaintiff incurred attorneys' fees and costs associated with this litigation for which the Defendant is liable.

**FOR A FIFTH CAUSE OF ACTION
(Breach of Contract)
(Cromer's Store Site)**

29. The Plaintiff repeats and realleges the foregoing allegations to the extent required by, but not inconsistent with, the following allegations

30. As to the Cromer's Store Site, the Defendant breached the subcontract by failing to properly pay its debts arising from the work, failing to properly pay its subcontractors, laborers, material suppliers, and the other incidental costs of the work, failing to complete the work in a workmanlike manner to the standard required by the industry, failing to complete the work, failing to reimburse or pay back to the Plaintiff advances or loans Plaintiff made to the Defendant during the course of the subcontract, and by abandoning the project.

31. Due to the Defendant's abandonment of the project, the Plaintiff was forced to mobilize and complete the work on this contract.

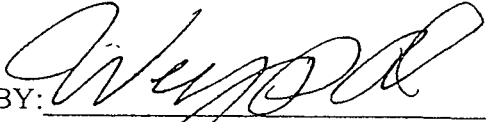
32. As approximate result of the Defendant's breach of contract the Plaintiff is damaged in an amount to be proven at trial, including but not limited to cover costs, increased overhead, and costs of labor and equipment. Additionally, the Plaintiff incurred attorneys' fees and costs associated with this litigation for which the Defendant is liable

**FOR A SIXTH CAUSE OF ACTION
(Recoupment)**

33. During the course of the referenced projects, the Plaintiff advanced and/or overpaid the Defendant based upon review of the work actually completed.

34 The Defendant remains liable in contract and equity for the reimbursement of an amount to be proven at trial to the Plaintiff, and the Plaintiff is therefore entitled to recoupment of those sums

WHEREFORE, the Plaintiff prays for judgment against the Defendant in each of the contract claims and other causes of action set forth above, plus pre-judgment interest, costs of this action, attorneys' fees, and such other relief as is deemed just and proper.

BY: 
Wesley D. Peel
BRUNER, POWELL, ROBBINS, WALL
& MULLINS, LLC
1735 St. Julian Place, Suite 200
P O Box 61110
Columbia, S.C. 29260
(803) 252-7693
Counsel for Plaintiff

Columbia, South Carolina

November 12 2005

EXHIBIT B

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO 2008 -CP-40- 2589 (R)

V. E. Amick + Assoc, LLC

Palmetto Environmental Group, Inc.

PLAINTIFF(S)

DEFENDANT(S)

RICHLAND COUNTY
FILED
09 MAY 14 AM 11:34
JEANETTE W. MORRIS
C.C.P. & G.S.

CHECK ONE:

JURY VERDICT This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

DECISION BY THE COURT This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ACTION DISMISSED (CHECK REASON) Rule 12(b), SCRPC, Rule 41(a), SCRPC (Vol. Nonsuit), Rule 43(k), SCRPC (Settled), Other _____

ACTION STRICKEN (CHECK REASON) Rule 40(j) SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award. Other _____

RECEIVED
MAY 18 2009

IT IS ORDERED AND ADJUDGED: See attached order. Statement of Judgment by the Court

FOR PLAINTIFF \$391,209.21. POST TRIAL MOTIONS to be heard 9:15 AM 5/20/09

Dated at Columbia, South Carolina, this 13 day of MAY, 2009

[Signature]
PRESIDING JUDGE

This judgment was entered on the 14 day of May, 2009, and a copy mailed first class this day of _____, 2009 to attorneys of record or to parties (when appearing pro se) as follows

Wesley D. Peel

Edward M. Woodward, Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

[Signature]
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 V E Amick & Associates, LLC)
)
 Plaintiff,)
)
 v)
)
 James L Cooper, Jr , Pamela C. Cooper;)
 Palmetto Environmental Group, Inc.; and)
 Ecological Resources, Inc)
)
 Defendants)

IN THE COURT OF COMMON PLEAS

C A No 2012-CP-40-02906

REPLY TO COUNTERCLAIMS

2012 JUN 15 PM 4:09
 OFFICE OF THE CLERK
 C.C.P. & G.S.

NOW COMES the Plaintiff, V E. Amick & Associates, LLC (“V E Amick” or “Plaintiff”), responding to Defendants’ Counterclaims as follows:

For a First Defense
 (General Denial)

1 Each and every allegation of Defendants’ Counterclaims not hereinafter expressly admitted, denied or otherwise explained by Plaintiff is denied and strict proof demanded thereof

2 Plaintiff denies the allegations of Paragraphs 47, 48, 49, 50, 51, 52, 53, and 54 of Defendants’ Counterclaims

3 Plaintiff admits the allegations of Paragraph 55 of Defendants’ Counterclaims.

4 Plaintiff denies the allegations of Paragraphs 56, 57, 58, 59, 60, 61, 62, 63, 64, and 65 of Defendants’ Counterclaims

For a Second Defense
 (Rule 12(b)(6), SCRCPP)

5 The Plaintiff reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations.

6 Plaintiff would show the Court that the Counterclaims should be dismissed pursuant to Rule 12(b)(6), SCRPC, because Defendants have failed to state a claim upon which relief may be granted on any of its causes of action

For a Third Defense
(Equitable Defenses)

7 The Plaintiff reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations

8 Plaintiff asserts and alleges Defendants may not recover on one or more of its causes of action based on equitable defenses including, but not limited to, the doctrines of laches, unclean hands, and estoppel

For a Fourth Defense
(Failure to Mitigate Damages)

9 The Plaintiff reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations

10. Defendants have failed to mitigate their damages and are therefore barred from recovering any monies from Plaintiff.

For a Fifth Defense
(Waiver)

11. The Plaintiff reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations

12 Defendants' recovery is barred because they have waived any right to recover for the causes of action asserted in the Counterclaims

For a Sixth Defense
(Res Judicata)

13. The Plaintiff reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations

14 Defendants' Counterclaims are barred by the doctrine of res judicata

For an Seventh Defense
(Collateral Estoppel)

15 The Plaintiff reiterates and realleges all of the allegations contained herein above as if set forth verbatim to the extent required by, but not inconsistent with, the following allegations

16 Defendants' Counterclaims are barred by the doctrine of collateral estoppel

WHEREFORE, the Plaintiffs pray unto the Court as follows

- 1 That Defendants' Counterclaims be dismissed with prejudice,
2. For an award of costs and attorneys' fees in defending against Defendants' Counterclaims; and
- 3 For such additional relief as the Court deems just and proper



Wesley D Peel
Matthew H. Stabler
Bruner, Powell, Wall & Mullins, LLC
1735 St Julian Place, Suite 200
P.O Box 61110
Columbia, South Carolina 29260
(803) 252-7693
Fax (803) 254-5719
wpeel@brunerpowell.com
mstabler@brunerpowell.com
Attorneys for Plaintiff

June 15, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 V E Amick & Associates, LLC)
)
 Plaintiff,)
)
 v.)
)
 James L Cooper, Jr , Pamela C Cooper,)
 Palmetto Environmental Group, Inc , and)
 Ecological Resources, Inc)
)
 Defendants)

IN THE COURT OF COMMON PLEAS

C A No. 2012-CP-40-02906

CERTIFICATE OF SERVICE

2012 JUN 15 PM 4:09
 DEANETTE W. BOWEN
 C.C.P. & G.S.

I, Rita D. DeCarlis, a legal assistant with Bruner, Powell, Wall & Mullins, LLC, attorneys for the Plaintiff, do hereby certify that I have caused the attached documents to be served upon all counsel of record via US Mail and addressed as follows

Date Mailed: June 15, 2012
Documents: Reply to Counterclaim
Mailed To: Richard R. Gleissner, Esquire
 Gleissner Law Firm, LLC
 3610 Landmark rive, Suite G
 Columbia, SC 29204
Attorney for the Defendants

Rita D DeCarlis
 Rita D DeCarlis

Columbia, South Carolina
 June 15, 2012

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS)

V.E. Amick & Associates, LLC,)
)
Plaintiff,)

Civil Action No.: 2012-CP-40-02906)

vs.)

**FIRST AMENDED ANSWER AND)
COUNTERCLAIM)
(JURY TRIAL DEMANDED)**)

James L. Cooper, Jr.; Pamela C. Cooper;)
Palmetto Environmental Group, Inc.;)
Ecological Resources, Inc.;)
)
Defendants.)

2012
FEB 11
11:10 AM
RICHLAND COUNTY

NOW COMES James L. Cooper, Jr. ("Mr. Cooper"); Pamela C. Cooper ("Mrs. Cooper"); Palmetto Environmental Group, Inc. ("PEG") and Ecological Resources, Inc. ("Ecological") (Collectively the "Defendants"), and amends his response to the complaint against them by V.E. Amick & Associates, LLC ("Amick" or the "Plaintiff"), as follows:

FOR A FIRST DEFENSE
(General Denial)

1. All allegations of the Complaint are denied unless otherwise admitted herein.
2. Upon information and belief, the allegation of Paragraph 1 is admitted.
3. The Defendants deny the allegations of paragraph 2 and 3.
4. The Defendants admit the allegations of paragraph 4 and 5.
5. The Defendants deny the allegations of paragraph 6 and 7.
6. The Defendants admit the allegations of paragraph 8.
7. The Defendants deny the allegations of paragraph 9.
8. The Defendants admit the allegations of paragraph 10.

9. The Defendants deny the allegations of 11 of the Complaint and would show that the DHEC regulations prohibit the subcontracting of all work from Amick to PEG. Specifically, Amick was do perform project administration, bonding, Class 1 certification and a Professional Engineer to oversee the work.

10. The Defendants admit paragraph 12 of the complaint.

11. The Defendants deny the allegations of paragraph 13 and would show that PEG never contracted for work with Charleston County General Services or SA Guerry & Sons. At the time Amick entered into those contracts, Mr. Cooper was an employee of Amick.

12. The Defendants admit the allegations of paragraph 14 of the complaint and would further show that the reason why Amick subcontracted the work on some of these contracts was because Amick did not have the knowledge, skill, expertise or the capability of performing the work on the subcontracts without PEG.

13. The Defendants deny the allegations of paragraph 15, 16, 17, 18, 19, and 20.

14. The Defendants would admit so much of paragraph 21 as alleges that the Plaintiff received a verdict but would show that the verdict was the result of a fraud perpetrated upon the court by the Plaintiff and that the Plaintiff, in fact, suffered no damages as a result of any action of the PEG. The Defendants would deny the remaining allegations of the paragraph.

15. The Defendants would deny the allegations of paragraph 22, 23, and 24.

16. As alleged in paragraph 25, the Defendants admit that many of the assets of PEG were sold to Ecological for good and valuable consideration.

17. The Defendants deny the allegations of paragraph 26.

18. The Defendants admit the allegations of paragraph 27.

19. The Defendants deny the allegations of paragraph 28, 29, and 30 of the Complaint.

20. The allegations of paragraph 31, 45, 56, 62, 73, and 77 incorporate other allegations of the complaint and to the extent necessary, the Defendants incorporate their responses to these other allegations in responding to these paragraphs.

21. The Defendants deny the allegations of paragraph 32.

22. The Defendants admit the allegations of paragraph 33 and would show that Mr. Cooper is still the president and owner of PEG.

23. The Defendants deny the allegations of paragraph 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 76, 78, 79, 80, 81, 82, and all of the allegations contained in the Plaintiff's prayer for relief.

FOR A SECOND DEFENSE
(Dismissal for Failure to Obtain Condition Precedent)

The Defendant reasserts the prior allegations of this pleading as if included herein verbatim.

24. The Plaintiff entered into a series of contracts with the South Carolina Department of Health and Environmental Control ("DHEC") to repair damage to soil and groundwater by the leaking of petroleum products from certain Underground Storage Tanks in South Carolina (the "USTs"). The USTs were located at (a) Lakeside Market, Summerton, SC, (b) SA Guerry & Sons, (c) Charleston County General Services, (d) Huse Property, and (e) Cromer's Store (the "DHEC Contracts").

25. At the time of the SA Guerry & Sons and Charleston County General Services contracts, Mr. Cooper was an employee of Amick and PEG did not subcontract to provide any services under these contract.

26. Each of the DHEC Contracts requires that the entity to perform the work must have a professional engineer (“PE”) or professional geologist (“PG”) on staff to assist in fulfilling the contractual obligations.

27. At the time Amick entered into the DHEC Contracts, Amick had a PE on staff. In 2001, Amick’s PE became ill and retired leaving Amick with no professional engineer on staff.

28. When Amick subcontracted with PEG, PEG did not have a PE on staff. This failure to have a PD or PG on staff left PEG unable to complete its subcontract of the DHEC Contracts.

29. Thus, in order to fulfill its obligations under the DHEC Contracts, Amick entered into a joint venture with PEG.

30. In this partnership, PEG and Amick agreed to share in the profits and losses of the DHEC Contracts.

31. Thus, prior to bringing any suit against PEG, Amick must first seek a partnership accounting and until such partnership accounting can be completed, no action lies against PEG or any other party based upon the alleged liability between the partners of the joint venture.

FOR A THIRD DEFENSE
(Unclean Hands)

The Defendant reasserts the prior allegations of this pleading as if included herein verbatim.

32. The Plaintiff seeks equitable relief. In order to be entitled to equitable relief, one must come to court with clean hands. The Plaintiff comes to court with unclean hands.

33. In violation of the DHEC Contracts, state law and DHEC Regulations, and in the perpetration of a fraud upon DHEC, when Amick obtained the DHEC Contracts, Amick represented to DHEC that it had a licensed PE on staff. In 2001, Amick’s professional engineer retired and Amick’s owner (David Jordan) would not hire a replacement. As a result, PEG was unable to

complete its obligations under the purported subcontract.

34. In an effort to fulfill its obligations under a general contract with the City of Goose Creek, Amick's owner and through another of his entities, L-J, Inc., subcontracted with PEG to perform certain activities.

35. PEG began the work necessary to fulfill its obligations under the subcontract, but needed to employ other subcontractors in an effort to complete the work.

36. In soliciting work from other contractors, time and time again, PEG was informed that these other contractors would not work on a job with Amick, David Jordan or L-J, Inc..

37. It was only then that PEG discovered that Amick and David Jordan had a reputation for harsh dealing, abuse of subcontractors, refusal to timely pay subcontractors, and the use of the legal process to extort, harass and pressure other contractors. Jordan used this as an excuse to take over the project and failed to pay PEG approximately \$90,000 it was owed under the subcontract agreement. On a \$194,000 subcontract, PEG was paid approximately \$23,000. PEG was left essentially bankrupt because of the actions of David Jordan and unable to meet its obligations under the DHEC subcontracts even if there was a PE on staff. Amick and Jordan purposely manufactured this situation in order to coerce PEG to keep working for Amick and Jordan.

38. When PEG discovered the fraud perpetrated by Amick and when Amick's actions continued to threaten PEG's business reputation and financial stability, PEG's PE's license, PEG's PE informed PEG that he would no longer be able to work with PEG on the Amick subcontracts.

39. At the time PEG had completed over 95% of the services necessary under the DHEC Contracts. The only remaining work to be performed was the monitoring of the sites and possible future work.

40. Because of the actions of Amick and Jordan, PEG's reputation was ruined and it was left financially insolvent. Further, PEG had lost its PE.

41. Therefore, PEG stopped working on the DHEC Contracts.

42. When Amick sued PEG, Amick represented to the Court and to the jury that it would perform all future services and be liable for all future services under the DHEC Contracts. Thus, Amick represented to the Court and to the jury that it would be liable for over \$391,000 in future damages and was awarded this sum by the jury.

43. In fact, because Amick had no licensed PE or PG, still does not employ a PE or PR on staff as required to maintain a Class I contractors certification, and it legally did not have the ability to perform any work under the DHEC Contracts. Amick maintains its contractor certification through some illegal or improper agreement with DHEC whereby it hires an outside firm called CTSI and uses a CTSI employee who is a PG, ignoring the DHEC regulations that prohibit this conduct.

44. In fact, since the trial of the case, Amick has performed no work under the DHEC Contracts and suffered no damages as a result of the DHEC Contracts. The only activity done by Amick was the monitoring which costs Amick little, if anything.

45. In fact, if requested, DHEC would offer to Amick to release Amick from any obligation under the DHEC Contracts for no consideration.

46. Thus, Amick has not been damaged at all, has suffered none of the \$391,000 of alleged damages awarded under the verdict and comes to the Court with unclean hands.

FOR A FOURTH DEFENSE AND FIRST COUNTERCLAIM
(Intentional Interference with Contractual Relationships
and Prospective Business Relationship)

The Defendant reasserts the prior allegations of this pleading as if included herein verbatim.

47. Amick's actions put PEG's PE's license at risk.

48. Amick's actions damaged the business reputation of PEG and its owner, Mr. Cooper.

49. Amick's action intentionally interfered with the employer/employee relationship between PEG and its PE.

50. As a direct and proximate result of Amick's actions, PEG lost the use of its PE.

51. As a direct and proximate result of Amick's actions, PEG was no longer able to perform work necessary to reduce the chemicals found in the groundwater to Site-Specific Target Levels ("SSTLs") and has therefore not performed any work in cleaning up USTs.

52. Wherefore, as a direct and proximate result of Amick's actions, PEG lost the ability to perform under its then existing contracts with DHEC and lost the ability to perform future contracts with DHEC.

53. Amick's actions were intentional and were designed to harm PEG.

54. Wherefore, as a direct and proximate result of Amick's intentional interference with the contracts of PEG and with the prospective business relationship, PEG has been damaged in an amount to be shown at trial.

FOR A FOURTH DEFENSE
(Abuse of Process)

The Defendant reasserts the prior allegations of this pleading as if included herein verbatim.

55. The filing of this action is the institution of a judicial proceeding. The failure to dismiss this action is the continuation of a judicial proceeding.

56. This Court will find in the Defendants' favor as it relates to the filing of this Action.

57. The filing of this action was done with malice against the Defendants.

58. The filing and continuation of this Action was done without probable cause.
59. The filing and continuation of this Action has caused injury and damage to the Defendants.
60. The filing and continuation of this Action is a perversion of the legal process for a purpose not intended by the statutory provisions relating to the filing of Complaint.
61. The filing and continuation of this action is for the sole purpose of attempting to cause economic harm to the Defendants, when in fact, the Plaintiff knew that it had not been damaged by any action on the part of the Defendants.
62. The filing and continuation of this action is a willful act and not a proper proceeding.
63. The filing and continuation of this action is a form of coercion to obtain a collateral advantage and not properly involving the Defendants.
64. The actions by the Plaintiff have damaged the Defendants in an amount to be shown at trial.
65. Wherefore, because of the Plaintiffs abuse of process and malicious prosecution, the Defendants pray that this Court grant them judgment against Amick in an amount to be shown at trial.

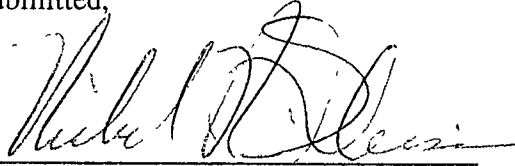
WHEREFORE, the Defendants, having fully responded to the Complaint of the Plaintiff would respectfully pray that this Court issue its order:

- a. Dismissing this Complaint;
- b. Awarding the Defendants the damages for the Plaintiff's intentional interference with contract and prospective business relationships;
- c. Awarding the Defendants the damages for the Plaintiff's abuse of process and

malicious prosecution;

- d. Awarding the Defendant the costs of defending this action including reasonable attorney fees; and
- e. Award such other and further relief as the court deems just and proper

Respectfully submitted,



Richard R. Gleissner, Esquire
S.C. Bar Number 15139
Gleissner Law Firm, L.L.C.
3610 Landmark Drive, Suite G
Columbia, South Carolina 29204
(803) 603-2229
Attorneys for the Defendants,
James L. Cooper, Jr.; Pamela C. Cooper;
Palmetto Environmental Group, Inc. and
Ecological Resources, Inc.

June 14, 2012

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

V.E Amick & Associates, LLC,)

Civil Action No.: 2012-CP-40-02906)

Plaintiff,)

vs)

CERTIFICATE OF SERVICE)

James L. Cooper, Jr.; Pamela C. Cooper;)
Palmetto Environmental Group, Inc.; and)
Ecological Resources, Inc.,)

Defendants.)

RICHLAND COUNTY
FILED
JUN 19 AM 10:11
COMPTON W. MCBRIDE
CLERK

I, the undersigned employee of the Gleissner Law Firm, LLC, hereby certifies that I have served Defendants' Amended Answer and Counterclaim to the Complaint in the above captioned matter by placing a copy in the first class mail with sufficient postage prepaid addressed to:

Wesley D. Peel, Esquire
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260

Anissa Terpstra
Anissa Terpstra, Paralegal to
Richard R. Gleissner
Gleissner Law Firm, L.L.C.
3610 Landmark Drive, Suite G
Columbia, South Carolina 29204
(803) 787-0505

Dated: June 14, 2012

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 V E Amick & Associates, LLC)
)
 Plaintiff,)
)
 v)
)
 James L Cooper, Jr ; Pamela C Cooper;)
 Palmetto Environmental Group, Inc., and)
 Ecological Resources, Inc)
)
 Defendants)

IN THE COURT OF COMMON PLEAS

C A No 2012-CP-40-02906

**NOTICE OF MOTION &
 MOTION TO STRIKE**
 (Rule 12(f), SCRPC)

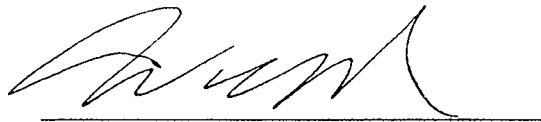
2012 JUN 15 PM 4:08
 C.C.P. & G.S.

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, V E Amick & Associates, LLC (“V E Amick” or “Plaintiff”), by and through its undersigned counsel, will move before the Presiding Judge for Fifth Judicial Circuit on the 10th day following service hereof or as soon thereafter as Counsel can be heard, at the Richland County Judicial Center, 1701 Main Street, Columbia, South Carolina, for an Order striking Defendants’ second, third, and fourth defenses in this action pursuant to Rule 12(f), SCRPC. The grounds for this Motion are as follows:

- 1 This action is a collection action on a judgment against Defendant Palmetto Environmental Group, Inc.
- 2 The judgment was obtained in Civil Action No 05-CP-40-5995
- 3 The judgment was appealed to the South Carolina Court of Appeals
4. The Court of Appeals affirmed the judgment in Opinion No 4860 on August 10, 2011
- 5 The time for filing a Motion for Reconsideration or a writ of certiorari to the Supreme Court of South Carolina has expired
- 6 The Defendants’ second and third defenses relate to the validity of the underlying judgment and are an attempted collateral attack on the judgment

- 7 Further, the grounds for Defendants' second and third defenses were decided in Plaintiff's favor by the South Carolina Court of Appeals
- 8 Defendants' fourth defense arises out of the same core of operative facts as the judgment against Defendant Palmetto Environmental Group, Inc
- 9 As such, Defendants' fourth defense is barred by the doctrine of res judicata and/or collateral estoppel

This Motion may be further supported by a Memorandum of Law to be filed with the Court prior to a hearing



Wesley D Peel
Matthew H Stabler
Bruner, Powell, Wall & Mullins, LLC
1735 St Julian Place, Suite 200
P O Box 61110
Columbia, South Carolina 29260
(803) 252-7693
Fax. (803) 254-5719
wpeel@brunerpowell.com
mstabler@brunerpowell.com
Attorneys for Plaintiff

June 14, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

V E Amick & Associates, LLC)

Plaintiff)

v)

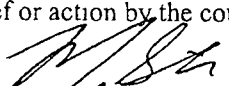
James L Cooper, Jr, Pamela C Cooper, Palmetto
Environmental Group, Inc, and Ecological
Resources, Inc)

Defendants)

IN THE COURT OF COMMON PLEAS

CASE NO 2012-CP-40-02906

MOTION INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney Matthew H Stabler Address P O Box 61110 Columbia SC 29260 phone 803-252-7693 fax e-mail mstabler@brunerpowell.com	Defendant's Attorney Address phone e-mail fax
X MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion Notice of Motion & Motion to Strike Estimated Time Needed 20 Minutes Court Reporter Needed Yes	
SECTION II: Motion Type <input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion -- I hereby move for relief or action by the court as set forth in the attached proposed order <div style="text-align: center;">  _____ Signature of Attorney for X Plaintiff / Defendant </div> <div style="text-align: right;"> June 15, 2012 Date submitted </div>	
SECTION III: Motion Fee <input checked="" type="checkbox"/> PAID - AMOUNT 25 00 <input type="checkbox"/> EXEMPT (check reason) <ul style="list-style-type: none"> <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter. <input type="checkbox"/> Other:	
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order <input type="checkbox"/> Other	_____ JUDGE CODE _____ Date _____
CLERK'S VERIFICATION Collected by _____ Date Filed _____ <input type="checkbox"/> MOTION FEE COLLECTED _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	

2012 JUN 15 PM 4:08
 JAMES L COOPER, JR
 C O P 40 02906

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

V.E. Amick & Associates, LLC,)

Civil Action No · 2012-CP-40-02906

Plaintiff,)

vs.)

**BRIEF IN RESPONSE TO
PLAINTIFF'S MOTION TO STRIKE**

James L. Cooper, Jr.; Pamela C. Cooper;)

Palmetto Environmental Group, Inc.;)

Ecological Resources, Inc ;)

Defendants)

RICHLAND COUNTY
CLERK OF COURT
2012 AUG 13 PM 3:39
JEANETTE W. HUBBARD
C.C.P. & G.S.

NOW COMES, the Defendants, Palmetto Environmental Group, Inc. (“Palmetto” and/or “Prior Litigant”), James L. Cooper, Jr., Pamela C. Cooper and Ecological Resources, Inc (The “Not Involved Litigants”) (hereinafter jointly referred to as “Defendants”), by and through their undersigned counsel, which files this brief in response to Plaintiff’s Motion to Strike and shows the following to the court:

I. BACKGROUND

The Plaintiff entered into a series of contracts with the South Carolina Department of Health and Environmental Control (“DHEC”) to repair damage to soil and groundwater by the leaking of petroleum products from certain Underground Storage Tanks in South Carolina (the “USTs”). The five (5) USTs were located at projects commonly referred to as Lakeside Market, Summerton, SC, SA Guerry & Sons, Charleston County General Services, Huse Property, and Cromer’s Store (the “DHEC sites”)

Several of the DHEC sites were contracted while James Cooper was an employee of Amick.

During their completion and prior to entering into contracts for the other DHEC sites, Amick lost its professional engineer. At that time Jimmy Cooper formed Palmetto, the Prior Litigant, in order to enter into joint ventures with Amick to continue contracting for DHEC sites. For several reasons, Palmetto, the Prior Litigant, and Amick were unable to finish the DHEC sites.

Amick filed a lawsuit in the Court of Common Pleas for Richland County on November 14, 2005 against Palmetto ("Amick I"). In Amick I, Amick sought recovery against Palmetto relative to an alleged breach of contracts for work to be performed on the DHEC sites. During the trial, Amick admitted that two of the five sites were not involved in the suit. Nevertheless, in this suit, Amick has included all five in its complaint. Amick I was tried on May 11-12, 2009 in Richland County before a jury, who found for Amick in the amount of \$391,209.21 in actual damages. Judge J.E. Kinard issued a written Judgment on May 14, 2009. The judgment was appealed to the South Carolina Court of Appeals and affirmed in Opinion No. 4860 on August 10, 2011.

Amick then filed this action against the Defendants alleging facts, some of which are different than the facts determined in the previous action. For example, the Plaintiff makes claim to damages for five UST sites, instead of three UST sites. Further, the three Not Involved Litigants from whom Plaintiff seeks relief were not parties to any previous litigation.

In this litigation, the relief sought by the Plaintiff rests solely in the court's equitable powers and are in no way based upon the previous contracts litigated. The Defendants affirmative defenses were not litigated in the prior suit, nor could they be litigated in the prior suit. For example, unclean hands, while a defense to the equitable causes of action now brought by the Plaintiff, is not a defense to a legal cause of action, breach of contract, as previously brought by the Plaintiff.

II. STANDARD OF REVIEW

The court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter. See S.C.R.C.P. § 12(f). Similarly, a motion to strike is addressed to the sound discretion of the Judge. J.M.S., Inc v. Theo, 241 S.C 394, 128 S.E.2d 697 (1962) If a motion to strike “raises merely a doubtful question or the case is such that justice may be promoted by trial on the merits, however, the court should exercise a fair, judicial discretion to that end.” Springfield v. Williams Plumbing Supply Co., 249 S.C 130, 138, 153 S.E.2d 184, 188 (1967). Similarly, to establish res judicata or estoppel, the burden is on the moving party to show that all elements of res judicata and estoppel have been met. See RIM Associates v. Blackwell, 597 S.E.2d 152 (S.C. Ct. App. 2004).

III. LEGAL ARGUMENT

Under South Carolina law, Defendants’ counterclaims and defenses are distinct and separate from the claims raised in the prior action brought by Amick, and thus are not barred by res judicata or collateral estoppel. Contrary to Plaintiff’s motion, none of Defendants’ defenses relate to the validity of any judgment, but rather to the equity of the present action. Similarly, the equity of the alleged actions taken by Plaintiff in relation to the Defendants was in no way adjudged in a prior proceeding regarding a claim for breach of contract. Thus, Plaintiff’s motion should be denied.

In order to establish a plea of res judicata, three elements must be established by the Plaintiff. (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.” Renaissance Enterprises, Inc. vs. Ocean Resorts, Inc., 496 S.E. 2d 858, 330 S.C. 13 (S.C. 1998). Citing Sealy v Dodge, 289 S.C.543, 347 S.C. 2d 504 (S.C. 1986). Stated differently, “the doctrine requires three (3) essential elements. (1) the judgment must be final, valid and on the merits, (2) the parties in the subsequent action must be identical to those in the first; and (3) the

second action must involve matter properly included in the first action.” Town of Sullivan’s Island v. Felger, 457 S.E. 2d 626, 318 S.C. 340 (S.C. App. 1995). Simply because there was subsequent litigation between Amick and the Prior Litigant, this fact alone does not mean that the claims of the Prior Litigant are barred by res judicata or estoppel. See Renaissance, at 858, 13 (Court held that res judicata did not apply to subsequent litigation between the same parties when the cause of action dealt with separate and distinct breaches of the same contract.)

Defendants’ defenses and counterclaims are distinct and separate than those litigated in any prior action and do not meet the elements required for res judicata or estoppel. Thus, the motion to strike should be denied.

A. Identity of the Parties

The first element of res judicata has not been met as the parties to Amick I are not identical to those in this action. “The naming of additional parties does not eliminate the res judicata effect of a prior judgment so long as the judgment was rendered on the merits, the cause of action was the same and *the party against whom the doctrine is asserted* was a party to the former litigation.” Bedrock Servs. V. IBEW Local Union Nos. 238, 324 & 495, 285 F.Supp.2d 693, 700 (W.D.N.C. 2003)(emphasis added). The Plaintiff’s claims asserted in this action include claims against the Not Involved Litigants. These claims are against three separate and distinct new parties that were not a part of the prior action. Similarly, the Plaintiff’s claims for damages in the current action go directly against the Not Involved Litigants. Thus, Plaintiff improperly asserts the doctrine of res judicata against parties that were not party to the former litigation and are entitled to plead their defenses.

B. Adjudication of the Issue in the Former Suit

Similarly, while the Defendants agree that Amick I was a final, valid judgment on the merits,

they dispute whether the present equitable issues are the same as the issues raised in the former suit “A final judgment for purposes of res judicata must finally dispose of some matter which under the substantive law to be applied and the procedural law of the forum can be, and has been, finally disposed of.” McNaughton-McKay Elec Co. V. Andrich, 482 S.E.2d 564, 567 (S.C. Ct. App 1997)(citations omitted). The trial of Palmetto ended with the Judge entering a final judgment against Palmetto and in favor of Amick on May 13, 2009 regarding a cause action based in breach of a contract. Specifically, the jury found in favor of Amick in the amount of \$391,209.21. This amount was based upon estimates on what there projects would cost Amick to complete. The Defendants attach hereto as Exhibit 1 a copy of Pages 140, 141 and 142 of the Trial Transcript, in which these damages are presented into evidence. Similarly, the Court of Appeals affirmed the judgment in Opinion No. 4860 on August 10, 2011 and stated “Wilson’s testimony concerning damages appears to account for future payments from DHEC to Amick.” The Defendants attach hereto as Exhibit 2 a copy of the decision of the Court of Appeals. Since 2009 and since 2011, these then “future damages” would have or should have become actual damages. In reality, the Plaintiff was not damaged and has not expended anywhere near the \$391,000 in damages awarded by the jury.

Thus, the Defendants’ present defenses relate to issues of equity not in dispute in the former suit. Simply, the Court now has the benefit of time. The Defendants could not have raised these issues in the prior suit because the time had not lapsed. Thus, there has been no adjudication and Defendants are entitled to bring their defenses.

C. Identity of the Subject Matter

Finally, the Plaintiffs motion should be dismissed for failing to show that the subject matter of the defenses raised by the Defendants are same. Under South Carolina law, it is well settled that

“res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties ” RIM Assocs. V. Blackwell, 597 S E 2d 152, 160 (S C. Ct App. 2004). South Carolina courts use various tests in determining whether a claim should have been raised in a prior suit for purposes of res judicata and estoppel: “(1) when there is identity of the subject matter in both cases; (2) where the cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; (3) when there is the same evidence in both cases; and recently (4) when the claims arise out of the same transaction or occurrence.” Eldeco Inc. v. Skanska USA Bldg., Inc., 412 F.Supp.2d 556 (D.S.C. 2005). “For purposes of res judicata, ‘cause of action’ is not the form of action in which a claim is asserted but, rather, the ‘cause of action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon.’” Plum Creek Dev. Co V. City of Conway, 512 S.E.2d 106, 110 (1999)(quoting 50 C.J.S. Judgment § 749(1997)) Similarly, South Carolina Courts have held that in order to strike a defense through res judicata or estoppel, “the former judgment must be directly in point and involve the identical matter presented in the new action ” Griggs v. Griggs, 214 S.C. 177, 188, 51 S E.2d 622, 628 (1949).

One critical issue for purposes of Amick’s res judicata argument is whether Palmetto’s counterclaims and defenses in the present action could, or should, have been raised in Amick I. In the context of a construction dispute, South Carolina’s appellate courts have held that if a cause of action accrues before the entry of a final judgment in an earlier action, and the claim could have been litigated in the prior action, then res judicata bars any subsequent litigation. In Eldeco, a U.S. District court in South Carolina held that two actions arising from the same contract could be separate and distinct for purposes of res judicata and therefore could be brought in two separate actions In

Eldeco, a subcontractor hired to perform electrical work on construction project brought an action against general contractor and contractor's sureties, seeking damages arising from contractor's failure to pay contract balance or to complete construction project on scheduled completion date. The court held that the subcontract's claim was distinct and separate from claims raised in its prior action against contractor for lost profits, and thus was not barred by res judicata. Similarly, in this case, the Defendants defenses are separate and distinct though some of the same facts were also involved in the dispute in Amick I. In Eldeco, the Court relied upon the fact that the damages in the second action had not yet accrued prior to the bringing of the first action. In Eldeco, both the first action and second action were actions for breach of contract - actions at law. In this case, the Defendants believe that it is inequitable for the Plaintiff to be allowed to claim and recover for damages that they never suffered. See Rule 60(b)(6), S.C.R.C.P. ("the court may relieve a party or a party's legal representative from a final judgment ... for (6) any other reason justifying relief from the operation of the judgment"); Rule 60(b)(5), S.C.R.C.P. ("the court may relief a party or a party's legal representative from a final judgment ... for (5) it is no longer equitable that the judgment should have prospective application"). These are equitable defenses not presented in the first action. Further, the Defendants have brought a counterclaim for intentional interference with contractual relations. The Plaintiff cannot even argue that this cause of action was presented in the prior litigation. Thus, none of the Defendants equitable defenses or legal defenses to Plaintiff's equitable claims can be said to have been previously litigated in a dispute regarding the performance of a contract.

IV. CONCLUSION

While both Amick I and the present case allege actions based upon the same business dealings, the facts and evidence needed to prove the alleged counterclaims and defenses are different.

The court should therefore find that the subject matter of the two cases are distinct and the final judgment in the previous case is no bar to the present action

WHEREFORE the Plaintiff, based on the foregoing, respectfully requests that the court deny Plaintiff's motion to strike, and grant Defendant's such other and further relief as the court deems just and appropriate.

Respectfully Submitted,



Richard R. Gleissner, Esquire
S.C. Bar Number 15139
Gleissner Law Firm, L.L.C.
3610 Landmark Drive, Suite G
Columbia, South Carolina 29204
(803) 787-0505

Attorneys for the Defendants, James L. Cooper, Jr.,
Pamela C. Cooper, Palmetto Environmental Group,
Inc.; Ecological Resources, Inc

Dated: August 13, 2012

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

V.E. Amick & Associates, LLC,)

Civil Action No.. 2012-CP-40-02906)

Plaintiff,)

vs)

CERTIFICATE OF SERVICE)

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Ecological Resources, Inc.,)

Defendants.)
_____)

JEANETTE W McBRIDE
C.C.P. & G.S.

2012 AUG 13 PM 3:30

RICHLAND COUNTY
FILED

I, the undersigned employee of the Gleissner Law Firm, LLC, hereby certifies that I have served Defendants' Brief in Response to Plaintiff's Motion to Strike in the above captioned matter by placing a copy in the first class mail with sufficient postage prepaid addressed to:

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Dated: August 13, 2012

EXHIBIT 1

1 THE COURT: Then you can argue that to the
2 jury. But he's entitled to read the whole thing
3 once it is in evidence. Hopefully he won't. Go
4 ahead.

5 Q How much? I just need the figure.

6 A The cost of completion?

7 THE COURT: Now, jurors, not to belabor
8 things, they agreed to admit all this in evidence.
9 I didn't make any rulings on it. If he had
10 objected before it came in I might have said let
11 that person testify and that is end of it. But
12 anything that is in that book is going to come back
13 and y'all can flip through it, and so forth, so he
14 can read it now.

15 Q How much was that figure, please?

16 A The cost to complete from CTSI, Cromer's Store was
17 a little over \$78,000.

18 Q Okay. And what does it look like it is going to
19 cost V.E. Amick to finish this job?

20 A Again, based on the same scenario from the prior
21 project, a total amount would be \$73,557.76.

22 Q Quickly turn to Exhibit 55, which I believe will be
23 your printout from Huse.

24 A It is. It is a printout for the Huse property.

25 Q Can you tell me, what is the total you paid to

1 Palmetto on that project?

2 A Two payments. One in July of 2001 for \$52,812.
3 Another payment the same year, December 2001,
4 \$46,210.50. For a total paid to Palmetto on this
5 project, \$99,022.50.

6 Q And can you tell how much you spent on this project
7 to date?

8 A To date?

9 Q Yes. Including --

10 A Including payments to Palmetto? \$202,648.51.

11 Q Okay. How much does Mr. Wood say it is going to
12 take to finish it out?

13 A CTSI estimated cost of completion is a little over
14 \$121,000.

15 Q What does it look like it will cost V.E. Amick to
16 get this job to 100 percent?

17 A \$191,677.51.

18 Q Okay. About how much based on those three
19 estimates has Palmetto paid -- has V.E. Amick paid
20 Palmetto?

21 A Approximately \$371,000.

22 Q And how much total is it going to cost V.E. Amick
23 to complete these jobs?

24 A Above and beyond what we would have paid Palmetto
25 Environmental Group, it is going to be a little

1 over \$391,000.

2 Q Are these jobs still ongoing?

3 A Yes, they are.

4 Q Have you been meeting with DHEC about these jobs?

5 A Have we been meeting with DHEC about the jobs?

6 Q Yes.

7 A We have been communicating with them about the
8 jobs, yes.

9 Q Is CTSI assisting you with that?

10 A Absolutely.

11 Q I don't have any more questions. Please answer any
12 questions Mr. Woodward has for you.

13 A Okay.

14 THE COURT: How long do you think it will be?
15 I'm not putting any time limits on you.

16 MR. WOODWARD: Ten minutes.

17 THE COURT: That's fine. The jury is good for
18 at least 18.

19 MR. WOODWARD: Maybe it'll be less.

20 CROSS-EXAMINATION

21 BY MR. WOODWARD:

22 Q Who is "we"?

23 A Excuse me?

24 Q Who is "we"?

25 A "We"?

EXHIBIT 2

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

V E Amick & Associates, LLC, Respondent,

v

Palmetto Environmental Group, Inc Appellant

Appeal From Richland County
J Ernest Kinard, Jr, Circuit Court Judge

Opinion No 4860
Heard May 4, 2011 – Filed August 10, 2011

AFFIRMED

Charles E Carpenter, Jr, Carmen V Ganjehsani, and Edward M Woodward, Jr, all of Columbia, for Appellant

Wesley D Peel, of Columbia, for Respondent

GEATHERS, J In this breach of contract action, Palmetto Environmental Group, Inc (Palmetto) argues (1) the trial court erred in denying Palmetto's motion for a directed verdict because Palmetto's performance was excused due to V E Amick & Associates, LLC's (Amick's) failure to hire a Department of Health and Environmental Control (DHEC) qualified engineer to certify Palmetto's work and (2) the trial court erred in denying Palmetto's motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial nisi remittitur because Amick will receive \$137,650 in future contract payments from DHEC, and this amount should have been offset from the jury's verdict We affirm on both points

FACTS/PROCEDURAL HISTORY

Amick is a DHEC certified company that performs remediation construction projects to rectify environmental contamination caused by petroleum products Palmetto is also an environmental contracting company that remediates soil and groundwater contamination caused by petroleum products Jimmy Cooper, Palmetto's owner and principal shareholder, was formerly employed by David Jordan and David Snodgrass, the owners of a large construction enterprise including Amick, L-J Incorporated, and Environmental Engineering After Cooper was fired, he formed Palmetto and began bidding for DHEC remediation projects through Amick

Cooper assembled bids for three remediation projects (the Huse site, the Cromer's Grocery site, and the Lakeside Market site) so that Amick could submit the bids to DHEC for approval Amick would mark up Palmetto's estimates by 10% and submit the bid to DHEC in exchange for furnishing Palmetto with performance bonds[1] required by DHEC DHEC awarded Amick all three contracts, and Amick subcontracted 100% of the DHEC contracts to Palmetto All of the contracts between Amick and Palmetto were oral

During trial, Cooper testified Palmetto submitted invoices and was paid by Amick on a percentage basis once the company reached each reduction milestone set by DHEC Cooper explained DHEC set four separate target level milestones of 25%, 50%, 75%, and 100% relating to the percentage of reduction of petroleum in the groundwater Cooper agreed to reach 100% of the ultimate clean-up target levels set by DHEC in exchange for 90% of the DHEC contract with Amick Once Palmetto met a certain milestone, DHEC would pay Amick, and Amick would in turn remit 90% of the DHEC payment to Palmetto

Palmetto reached the 75% target level milestone on all three contracts at issue before the company ceased working Cooper claimed Palmetto actually completed each project to between 95% and 98% of the ultimate target levels, but he admitted that he submitted no more invoices to Amick after reaching the 75% milestone Cooper conceded the biggest reason he failed to meet the ultimate target levels for the reduction of petroleum was that his company ran out of money and could no longer operate Cooper also admitted Palmetto was paid for all the invoices it submitted to Amick

After Palmetto ceased working on the three sites, Amick hired Carolina Technical Services, Inc (CTSI) to complete the groundwater remediation contracts Bill Wood, a CTSI employee, testified at trial on Amick's behalf and was qualified as an expert in groundwater assessment and remediation Wood testified the estimated cost to complete the Lakeside Market contract would be \$88,297 Wood further testified it would cost an estimated \$121,059 to complete remediation on the Huse site Finally, Wood noted it would cost an estimated \$78,037 to complete remediation on the Cromer's Grocery site

Wood testified Amick was paying CTSI on a "time and materials" basis, unlike the Amick contract with Palmetto Specifically, Wood explained CTSI was receiving progress payments on a rolling basis, and the company did not have a contract with Amick to complete the projects to 100% of DHEC's ultimate target levels

Hugh Wilson, an employee of L-J Incorporated, testified DHEC was aware Amick had hired CTSI to complete the three projects after Palmetto failed to do so Wilson also testified regarding Amick's damages and explained "the way we look at it is what we spent today on the project plus the estimated cost of completion furnished by CTSI and crediting back the amount of the Palmetto subcontract " Wilson testified the total amount needed to complete all three jobs and make Amick whole, after subtracting payments from DHEC intended for Palmetto, would be "a little over \$391,000 "

Wilson noted this amount represented the total payments to Palmetto and CTSI to date, plus the estimated cost for CTSI to complete remediation, less 90% of the amount of the original contract between Amick and DHEC (for specific damages amounts, see charts in Section II of this opinion) In other words, Wilson took the total amount Amick would end up paying both subcontractors on the three contracts with DHEC and subtracted the total amount Amick would have paid to Palmetto had Palmetto fully performed its contract with Amick Palmetto's counsel did not question the accuracy of any of the stated figures during Wilson's cross-examination

At the close of Amick's case, Palmetto moved for a directed verdict on multiple grounds, including the contention that it "would have been illegal until

Amick hired another [professional licensed engineer] as an employee to continue to certify completion to DHEC " The trial court denied Palmetto's directed verdict motion, noting

[A]ll that stuff about the regulation about having a qualified person doesn't matter DHEC accepted those things, correspondence, all that stuff in there They can hire somebody to certify it [Cooper] tried to get his brother one time But anyway, no evidence that anything was ever kicked out because it was not certified [Cooper] admittedly got paid 75 percent And in the light most favorable to him, he had done 95 percent of the work and they've got 25 percent of the money The fact that DHEC now wants a pristine situation, which it probably can't do, indicates that the job was underbid to start with

Palmetto did not present any evidence in its own defense

The trial court charged the jury as follows regarding the law of damages

In the event of a failure to complete performance of a contract according to its terms, including a construction contract or subcontract, the injured party is entitled to such compensation which would leave it as well off as it would have been had the contract been fully performed Measure of damages ordinarily is the reasonable cost of completion of the same work if completion is possible and does not involve unreasonable economic wait

The jury returned with a verdict for Amick in the amount of \$391,209.21 Palmetto's counsel moved for a judgment notwithstanding the verdict, or in the alternative, a new trial nisi remittitur The trial court noted, "It is actually too much money, isn't it?" The trial court further stated, "I don't think they could have, in fairness, issued that whole amount against him when he was deducting the 25 percent But I didn't see the figures Maybe they did " Finally, the trial court suggested "\$391,000 is too high, but it can stand if it was there It should be something less than that If he had completed the job he would have only gotten much less "

The trial court encouraged the parties attempt to settle the case, and gave them a week to do so The trial court also denied all post-trial motions except the motion for a new trial nisi remittitur During the post-trial hearing, Palmetto's attorney argued frustration of purpose because Amick's only engineer left the company in 2001, leaving no one to certify Palmetto's work to DHEC Palmetto also argued the amount of damages presented during trial was speculative because it included future payments to CTSI The trial court noted, "Unfortunately, sufficient evidence presented during the trial sustains the verdict It's pretty high considering what he was paid and what's left to be done, but I have no way of cutting it down to a figure that anybody can live with " The trial court denied Palmetto's new trial nisi remittitur motion and entered a judgment for the full amount of the jury's verdict This appeal followed

ISSUES ON APPEAL

1. Did the trial court err in denying Palmetto's motion for a directed verdict because Palmetto's performance was excused due to Amick's failure to hire a DHEC-qualified engineer to certify Palmetto's work?
2. Did the trial court err in denying Palmetto's motion for a judgment notwithstanding the verdict or a new trial nisi remittitur because Amick will receive \$137,650 in future contract payments from DHEC, and this amount should have been offset from the jury's verdict?

LAW/ANALYSIS

I Directed Verdict

Palmetto argues the trial court erred in denying its directed verdict motion on the grounds of frustration of purpose and impossibility Palmetto contends its performance was excused because Amick failed to employ another registered engineer as required by DHEC regulations after Eugene Amick retired due to illness We disagree

"In ruling on directed verdict or [judgment notwithstanding the verdict] motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions " Sabb v S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002) "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt " Id. "This Court will reverse the trial court only when there is no evidence to support the ruling below " Id. "Further, a trial court's decision granting or denying a new trial will not be disturbed unless the decision is wholly unsupported by the evidence or the court's conclusions of law have been controlled by an error of law " Id.

"A party to a contract must perform its obligations under the contract unless its performance is rendered impossible by an act of God, the law, or by a third party " Hawkins v Greenwood Dev. Corp., 328 S.C. 585, 593, 493 S.E.2d 875, 879 (Ct. App. 1997) "Impossibility must be real and not a mere inconvenience " Id. "A party to a contract cannot be excused from performance on the theory of impossibility of performance unless it is made to appear that the thing to be done cannot by any means be accomplished, for if it is only improbable or out of the power of the obligor, it is not deemed in law impossible " Id. (internal quotation marks and citation omitted) "A party claiming impossibility of performance has the burden of proving the defense " Id.

Palmetto argues performance was impossible because after Eugene Amick retired from Amick, Amick did not employ a full-time engineer or geologist to sign and certify Palmetto's submissions In support of its argument, Palmetto cites a DHEC regulation relating to the qualifications for certified site rehabilitation contractors and contends Amick did not comply with this regulation See 25A S.C. Code Ann. Regs. § 61-98 (Supp. 2010) (listing the qualifications for an applicant to become certified as a site rehabilitation contractor and noting one method of becoming certified is for a company to employ a full-time permanent employee who is registered as a professional engineer or geologist in the State of South Carolina and who has at least three years of applicable experience)

The DHEC regulation Palmetto relies upon did not make performance of the contracts impossible as a matter of law At best, the evidence yields more than one inference or its inference is in doubt See Sabb, 350 S.C. at 427, 567 S.E.2d at 236 (noting a trial court must deny a directed verdict motion when the evidence yields more than one inference or its inference is in doubt) Section IV(A)(4) of regulation 61-98 relates to the requirements for a site rehabilitation contractor to become certified Section V(A)(3) of the same regulation lists actions that permit DHEC to decertify a previously certified contractor Finally, section V(A)(10) allows DHEC to make exceptions for a decertified or suspended contractor to continue working on a particular site on a case-by-case basis Therefore, DHEC had the responsibility to decertify or suspend Amick's certification if the company failed to maintain proper qualifications pursuant to section IV(A)(4) or to make an exception for Amick to complete its contracts pursuant to section V(A)(10) Until DHEC determined decertification or suspension was necessary, performance of these contracts remained possible Hawkins, 328 S.C. at 593, 493 S.E.2d at 879 ("A party to a contract cannot be excused from performance on the theory of impossibility of performance unless it is made to appear that the thing to be done cannot by any means be accomplished, for if it is only improbable or out of the power of the obligor, it is not deemed in law impossible ")

Even viewing the evidence in the light most favorable to Palmetto, it was merely an inconvenience, and not an impossibility, for Palmetto to continue to work and be paid after Eugene Amick retired from the company See Hawkins, 328 S.C. at 593, 493 S.E.2d at 879 ("Impossibility must be real and not a mere inconvenience ") Bill Wood, CTSI's employee, testified none of the reports submitted by CTSI on behalf of Amick to DHEC had been rejected, even though the geologist who submitted the reports was not an Amick employee Furthermore, Amick presented evidence that DHEC continued to certify CTSI's submissions and make progress payments after Eugene Amick retired Amick entered one of CTSI's reports into evidence without objection [2]

The record reflects that a CTSI employee signed the report and submitted it to DHEC on Amick's letterhead. Finally, Cooper admitted that the reason Palmetto ceased working on these projects and failed to reach the 100% milestone was because his company ran out of money, not because of impossibility of performance.

Evidence in the record supports the trial court's ruling because the evidence yields more than one inference or its inference is in doubt. See Sabb, 350 S C at 427, 567 S E 2d at 236 (noting a trial court must deny a directed verdict motion when the evidence yields more than one inference or its inference is in doubt), id. (stating an appellate court will reverse the trial court's decision to deny a directed verdict motion only when no evidence supports the ruling below). Accordingly, we affirm the trial court's denial of Palmetto's directed verdict motion.

II Judgment Notwithstanding the Verdict/New Trial Nisi Remittitur

Palmetto argues it is entitled to a judgment notwithstanding the verdict (JNOV) or a new trial nisi remittitur because the jury's award of damages in the amount of \$391,209.21 did not take into account \$137,650 in future contract payments from DHEC to Amick. We disagree.

"[A] motion for JNOV under Rule 50(b), SCRCP[,] is a renewal of a directed verdict motion." Wright v. Craft, 372 S C 1, 20, 640 S E 2d 486, 496 (Ct App 2006). "In ruling on a motion for [JNOV], the trial court must view the evidence and its inferences in the light most favorable to the nonmoving party." Hawkins, 328 S C at 592, 493 S E 2d at 879. "The court must deny the motion if either the evidence yields more than one reasonable inference or its inferences are in doubt." id. "The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict." id. at 592-93, 493 S E 2d at 879 (emphasis added).

"When the jury's verdict is inadequate or excessive, the trial judge has the discretionary power to grant a new trial nisi." id. at 600, 493 S E 2d at 883. "The denial of a motion for a new trial nisi is within the trial judge's discretion and will not be reversed on appeal absent an abuse of discretion." id. at 600-01, 493 S E 2d at 883. However, the trial court must provide compelling reasons for invading the province of the jury. Green v. Fritz, 356 S C 566, 570, 590 S E 2d 39, 41 (Ct App 2003). "The consideration of a motion for a new trial nisi requires the trial judge to consider the adequacy of the verdict in light of the evidence presented." Hawkins, 328 S C at 600, 493 S E 2d at 883. "The trial judge, who heard the evidence and is more familiar with the evidentiary atmosphere at trial, possesses a better informed view of the damages than [an appellate] court." id. "Accordingly, great deference will be given to the trial judge." id.

We first address Palmetto's JNOV motion. The record contained evidence to sustain the factual findings implicit in the jury's verdict. See Hawkins, 328 S C at 592-93, 493 S E 2d at 879 ("The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict.") (emphasis added). Specifically, Wilson's testimony concerning damages appears to account for future payments from DHEC to Amick. Wilson noted he subtracted 90% of the entire original contract amount on all three contracts to offset payments issued by DHEC when he calculated the total amount needed to make Amick whole on these projects. This calculation was proper as Palmetto was only entitled to 90% of the original contract price. "Above and beyond what we would have paid [Palmetto]," Wilson estimated the total cost to make Amick whole on all three contracts would be a little over \$391,000. The actual jury verdict was \$391,209.21, which is slightly over \$391,000. Therefore, we affirm the trial court's decision to deny Palmetto's JNOV motion.

We next address Palmetto's new trial nisi remittitur motion. The following chart lists all of the damages figures presented during trial.

	Lakeside Market Site	Cromer's Grocery Site	Huse Site	Total for all three contracts
Amick's Past Payments to CTSI	73,001.94	51,073.11	103,626.01	227,701.06
Amick's Estimated Future Payments to CTSI	88,297	78,037	121,059	287,393
Amick's Past Payments to Palmetto	105,975	166,657.50	99,022.50	371,655
Amount of the DHEC Contract Apportioned to Palmetto[3]	(141,300)	(222,210)	(132,030)	(495,540)
TOTAL DAMAGES	126,273.94	73,557.76	191,677.51	391,509.21

In the alternative, the jury could likewise have calculated the verdict of \$391,209.21 by tallying Amick's total payments to CTSI (\$515,094.06), and then subtracting 90% of \$137,650, representing the future payments from DHEC to Amick (\$515,094.06 - \$123,885 = \$391,209.06). This figure reflects the difference in the total amount Amick will pay to CTSI as a result of Palmetto's breach and the amount Amick would have paid to Palmetto on the remaining milestone had the original contract been fulfilled. This verdict also takes into account the remaining 25% that DHEC will pay to Amick on the unfinished portion of all three contracts (\$137,650 = 25% of \$550,600). Therefore, the verdict was a reasonable measure of the cost to complete the contracts after Palmetto failed to do so.

The following chart of damages reflects this second possible method by which the jury could have reached its verdict given the evidence presented at trial.

	Lakeside Market Site	Cromer's Grocery Site	Huse Site	Total for all three contracts
Amick's Past Payments to CTSI	73,001.94	51,073.11	103,626.01	227,701.06
Amick's Estimated Future Payments to CTSI	88,297	78,037	121,059	287,393
Remaining Unpaid Portion of original DHEC Contract Apportioned to	(35,325)	(55,552.50)	(33,007.50)	(123,885)

Palmetto				
TOTAL DAMAGES.	125,973.94	73,557.61	191,677.51	391,209.06

The actual jury verdict was \$391,209.21, which is virtually identical to the figure generated by this second feasible calculation method [4]

Because the record contains adequate evidence to support the jury's verdict, we conclude the trial court did not abuse its discretion in denying Palmetto's motion for a new trial nisi remittitur. See Hawkins, 328 S.C. at 600, 493 S.E.2d at 883 ("The consideration of a motion for a new trial nisi requires the trial judge to consider the adequacy of the verdict in light of the evidence presented"), id. at 600-01, 493 S.E.2d at 883 ("The denial of a motion for a new trial nisi is within the trial judge's discretion and will not be reversed on appeal absent an abuse of discretion.")

CONCLUSION

We affirm the trial court's decision to deny Palmetto's directed verdict motion, JNOV motion, and motion for a new trial nisi remittitur.

AFFIRMED

SHORT and KONDUROS, JJ, concur

[1] DHEC required a performance bond for each contract to guarantee Amick would be completing the work. If for any reason Amick failed to complete the work, DHEC could collect the entire amount of the bond.

[2] The portion of the trial in which this evidence was actually entered is not included in the record on appeal. However, the trial court noted on the record that Palmetto made no objection when Amick entered into evidence three notebooks full of invoices and reports relating to the three disputed contracts. Furthermore, these materials were included in the record on appeal.

[3] This row represents 90% of the original contract amount between Amick and DHEC, which would have been apportioned to Palmetto. These amounts were subtracted from the damages figures in reaching the final damages estimation.

[4] We recognize the fifteen-cent discrepancy in these two figures, but we find this minor error in calculation was harmless as it was a nominal sum.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND)

V E Amick & Associates, LLC,)
 Plaintiff)

CASE NO.

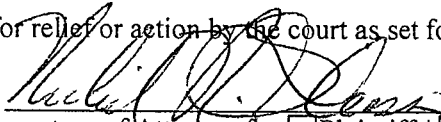
~~2010~~-CP-40-02906

2012

v.)

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

James L. Cooper, Jr, Pamela C Cooper; Et Al,)
 Defendant.)

Plaintiff's Attorney: Wesley D. Peel, Esquire, Bar No. Address Post Office Box 61110 Columbia, SC 29260 phone: 803-603-2228 fax: e-mail. Rick@Gleissnerlaw.com other:	Defendant's Attorney: Richard R. Gleissner, Bar No. 15139 Address: 1237 Gadsden Street, Suite 200A Columbia, SC 29201 phone. 803-787-0505 fax 803-712-4283 e-mail. rick@gleissnerlaw.com other:
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type <input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	
Date submitted: 12/4/12	
SECTION III: Motion Fee <input checked="" type="checkbox"/> PAID - AMOUNT. 25.00 <input type="checkbox"/> EXEMPT:	
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other	_____ JUDGE CODE. _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE. _____	Date Filed: _____

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IN THE STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

V.E. Amick & Associates, LLC,)

Civil Action No.: 2012-CP-40-02906

Plaintiff,)

vs.)

**MOTION TO RECONSIDER
ORDER ON PLAINTIFFS
MOTION TO STRIKE**

James L. Cooper, Jr.; Pamela C. Cooper;)
Palmetto Environmental Group, Inc.;)
Ecological Resources, Inc.;)

Defendants.)
_____)

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NOW COMES, the Defendants, Palmetto Environmental Group, Inc. (“Palmetto” and/or “Prior Litigant”), James L. Cooper, Jr., Pamela C. Cooper and Ecological Resources, Inc. (The “Not Involved Litigants”) (hereinafter jointly referred to as “Defendants”), by and through their undersigned counsel, which files this motion pursuant to Rule 59(e) for the Court to reconsider its Order on the Plaintiff’s motion to strike.

The Defendants request the court to reconsider its Order because (a) the Court used the incorrect standard of review in granting a motion to strike, (b) the Court correctly found that the Plaintiff acted with unclean hands but then incorrectly held that the defense of unclean hands is a collateral attack on a prior judgment when no prior judgment has been rendered against three of the four defendants, (c) the Court incorrectly and implicitly finds that the intentional interference of contract between Palmetto and its engineer is a compulsory counterclaim to a breach of contract cause of action between Palmetto and the Plaintiff; and (d) the Court uses the incorrect standard for dismissing the Plaintiff’s failure to obtain a condition precedent defense.

I. STANDARD FOR MOTION TO STRIKE

The proper standard to apply to a motion to strike is the same as the standard for a motion to dismiss under Rule 12(b)(6), of the South Carolina Rules of Civil Procedure. See *Robinson v. Code*, 384 S.C. 582, 682 S.E.2d 495 (2009); *McCormick v. England*, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct.App.1997). Where a pleading is attacked, “the pleading must be liberally construed in favor of the pleader and sustained if the facts and reasonable inferences to be drawn therefrom entitle the pleader to relief on any theory of the case.” *Robinson*, 384 S.C. at 585, 682 S.E.2d at 496; *Burns v. Wannamaker*, 286 S.C. 336, 339, 333 S.E.2d 358, 360 (Ct.App.1985). A court should not strike a cause of action merely because the court doubts the plaintiff will prevail in the action. *McCormick*, at 633, 494 S.E.2d at 434.

Further, “[t]he question [on a motion to dismiss a counterclaim] is whether in the light most favorable to the complainant, and with every doubt resolved on his behalf, the counterclaim states any valid claim for relief.” *Menezes v. WL Ross & Co. LLC*, 392 S.C. 584, 709 S.E.2d 114 (2011); *Charleston Cnty. Sch. Dist v. Laidlaw Transit, Inc.*, 348 S.C. 420, 424, 559 S.E.2d 362, 364 (Ct.App.2001).

In this case, the Court appears to adopt as a factual background, not the Defendants allegations, but the Plaintiff’s allegations. That is the incorrect standard. Further, the Court appears to adopt the Plaintiff’s theory of the Defendants’ claims, not the Defendants’ theories. Again, that is not the correct standard.

II. UNCLEAN HANDS IS AN AFFIRMATIVE DEFENSE

As admitted by all parties, in the prior litigation, the parties were involved in a breach of contract cause of action. The Plaintiff alleged that Palmetto breached a contract and Palmetto

alleged that the Plaintiff had breached a contract. The equitable defense of unclean hands is not available as a defense to a legal claim. Thus, the defense could not and was not brought in the prior litigation.

Instead of addressing this issue, the Court adopts, without explanation, the Plaintiff's theory that somehow the affirmative defense to the Plaintiff's equitable claim is a collateral attack on a the Plaintiff's prior judgment. The Court then distinguishes the different types of dishonesty that the Plaintiff could have engaged in and holds that the particular type of dishonesty cannot be used to attack a judgment. Unclean hands does not distinguish between types of dishonesty, just the existence of the dishonesty.

Further, when discussing Rule 60(b)(5), the court fails to consider the future aspect of the Plaintiff's damages. The court holds that a judgment for damages for past wrongs is not a judgment covered or contemplated by Rule 60(b)(5) but fails to recognize, as argued in Defendants brief, that damages were not for past wrongs but were for future prospective damages, that never occurred.

II. Res Judicata and International Interference with Contractual Relations

In order to establish a plea of res judicata, three elements must be established by the Plaintiff: (1) identity of the parties;¹ (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." Renaissance Enterprises, Inc. vs. Ocean Resorts, Inc., 496 S.E. 2d 858, 330 S.C. 13 (S.C. 1998). Citing Sealy v. Dodge, 289 S.C.543, 347 S.C. 2d 504 (S.C. 1986).

As previously indicated, the prior action involved each side alleging that the other breached certain contracts. Breach of contract requires a showing of (a) a contract plaintiff and defendant, (b)

¹ In discussing the identity of the parties element, the Court again accepts the facts as alleged by the Plaintiff, instead of accepting the facts as alleged by the Defendants. Once again, using the incorrect standard of review.

its breach and (c) damages. Intentional interference with a contract requires a showing of (a) a contract between the Defendant and a third party, (b) the interference with that contract by the Plaintiff, (c) as a result of the interference the contract was breached, and (d) damages. The legal theories are different and the factual background is different. Specifically, the Goosecreek project that is referred to in the factual allegations of the Defendants' Amended Answer was not one of the DHEC contracts. The harassment associated with this project was not litigated and was not part of the prior litigation. Thus, the court errs when it finds that the intentional interference cause of action is "based upon the breach of contracts entered into between Palmetto and Plaintiff".

Further, in order to be subject to res judicata, the Court must find that international interference of a contract between Palmetto and its engineer is a compulsory counterclaim to a breach of contract cause of action between Palmetto and the Plaintiff. No such ruling was made, instead the requirement that the international interference of a contract be a compulsory counterclaim was simply not addressed.

IV. The Incorrect Standard for Condition Precedent.

In its ruling on the failure to obtain a condition precedent, the "court notes that Defendants have not provided evidence to support their claim that a partnership between Plaintiff and Palmetto existed." Order. P. 10. As previously indicated, the standard on a motion to strike is the same standard as a motion to dismiss. The issue is whether the condition precedent is properly plead, not whether the court has doubts as to the proof. See *Robinson v. Code*, 384 S.C. 582, 682 S.E.2d 495 (2009), *McCormick v. England*, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct.App.1997).

II. CONCLUSION

Thus, the court should reconsider its prior order and vacate its decision, thereby allowing the Defendants to proceed under their equitable theories and their non-compulsory counterclaims against the Plaintiff. Simply, the final judgment in the previous case is no bar to the causes of actions and affirmative defenses of the present action.

Respectfully Submitted,



Richard R. Gleissner, Esquire
S.C. Bar Number 15139
Gleissner Law Firm, L.L.C.
1237 Gadsden Street, Suite 200A
Columbia, South Carolina 29201
(803) 787-0505
Attorneys for the Defendants, James L. Cooper, Jr.;
Pamela C. Cooper; Palmetto Environmental Group,
Inc.; Ecological Resources, Inc.

Dated: December 4, 2012

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

V.E Amick & Associates, LLC,)

Civil Action No. 2012-CP-40-02906

Plaintiff,)

vs.)

CERTIFICATE OF SERVICE)

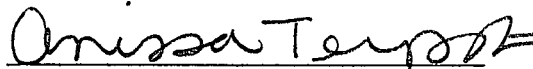
James L. Cooper, Jr.; Pamela C. Cooper;)
Palmetto Environmental Group, Inc.; and)
Ecological Resources, Inc ,)

Defendants.)

FILED
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JENNIFER M. HOSBRIDE
C.C.P. & G.S.

I, the undersigned employee of the Gleissner Law Firm, LLC, hereby certifies that I have served Defendants Motion to Reconsider Order on Plaintiff's Motion to Strike in the above captioned matter by placing a copy in the first class mail with sufficient postage prepaid addressed to

Wesley D. Peel, Esquire
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260



Anissa Terpstra, Paralegal to
Richard R. Gleissner
Gleissner Law Firm, L.L.C.
1237 Gadsden Street, Suite 200A
Columbia, South Carolina 29201
(803) 787-0505

Dated: 12-4-12

State of South Carolina)
County of Richland)

In The Court of Common Pleas
Fifth Judicial Circuit
2012-CP-40-02906

V.E. Amick & Associates, LLC,)
Plaintiff,)

vs.)

James L. Cooper, Jr.,)
Pamela C. Cooper, Palmetto)
Environmental Group, Inc., and)
Ecological Resources, Inc.,)
Defendants.)

Transcript of Record

August 14, 2012
Columbia, South Carolina

B E F O R E:

The Honorable Alison Renee Lee, Judge

A P P E A R A N C E S:

Wesley D. Peel, Esquire
Attorney for the Plaintiff

Richard R. Gleissner, Esquire
Attorney for the Defendant

rcv'd 4-11-13

amt

Elizabeth B. Harris, CVR-M
Circuit Court Reporter

I N D E X

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<u>Description</u>	<u>Page No.</u>
Motion by Mr. Peel	3
Certificate Page	18

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>I.D.</u>	<u>Ev.</u>
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No Exhibits Introduced.

1 THE COURT: I think the only matter I have left is
2 *V.E. Amick and Associates vs. James L. Cooper.*

3 MR. GLEISSNER: That's us.

4 THE COURT: *Pamela Cooper, Palmetto Environmental*
5 *Group, Incorporated, and Ecological Resources,*
6 *Incorporated.* This is docket number 2012-CP-40-02906. The
7 plaintiff is represented by Wesley Peel, the defendant is
8 represented by Rick Gleissner, and we are here on a motion
9 to strike portions of the answer. Is that correct?

10 MR. GLEISSNER: That's correct, Your Honor.

11 MR. PEEL: That's correct, Your Honor.

12 THE COURT: Okay. So, Mr. Peel, that would have been
13 your motion?

14 MR. PEEL: Yes, Your Honor.

15 THE COURT: Yes, sir.

16 MR. PEEL: Your Honor, the action before the court
17 now, *V.E. Amick* against all named defendants, is ---

18 THE COURT: I can barely hear you.

19 MR. PEEL: I'm sorry. I'm going to speak up -- is a,
20 is a piercing action. *V.E. Amick and Associates, LLC,*
21 filed a suit against *Palmetto Environmental Corporation*
22 back in -- well, a long time ago. It was tried in 2009
23 before the court here and -- to verdict, which is attached
24 as the judgment -- was attached as an exhibit to this
25 complaint in the amount of \$391,000.

1 Just to give a little background, the suit was about
2 -- was between contractor and a subcontractor on DHEC
3 groundwater remediation, and the allegations of the suit
4 where that Palmetto Environmental didn't finish the job.
5 Took a bunch of money, walked off, and left the contractor
6 to finish it at his expense. The judgment represented cost
7 incurred by the contractor to complete and cost, and also
8 future costs to complete.

9 Palmetto Environment -- Environmental appealed to the
10 South Carolina Court of Appeals. Went up. Judgment was
11 affirmed. Final judgment entered. We executed on it.
12 They've not paid, so we began this piercing action based on
13 information we obtained during the course of post-judgment
14 discovery against Palmetto Environmental.

15 The -- I want to get the names right, Ecological
16 Resources. James L. Cooper, who was the owner of Palmetto,
17 Palmetto Environmental and Pamela Cooper, who is his wife,
18 and the allegations are basically they took the assets of
19 Palmetto Environmental during the course of -- during the
20 course of the trial and after the judgment, during the
21 course of the lawsuit, and funneled them to this other
22 company and to themselves.

23 They, they have obtained Mr. Gleissner, who's
24 representing all the defendants, and they have filed an
25 answer which portions of it are subject to our motion to

1 strike, and I need to talk about each of the defenses in
2 turn.

3 Basically in each of them, what they're, what they're
4 trying to do is relitigate the issues that have already
5 been tried before this court and brought up at the Court of
6 Appeals. And there was an amended answer and counterclaim
7 that was filed.

8 THE COURT: And that was filed? Okay, I see.

9 MR. PEEL: I was looking. I don't have a stamped
10 copy.

11 THE COURT: There is an answer and a counterclaim, and
12 you replied to the counterclaim, and then there was an
13 amended answer and counterclaim.

14 MR. PEEL: Around June 14th of this year.

15 THE COURT: Okay.

16 MR. PEEL: The, the first defense -- or the second
17 defense is dismissal for failure to obtain a condition
18 precedent, and the defendants here discuss they should be
19 dismissed because, because we didn't have a professional
20 engineer in the case. It asserts facts that have already
21 been decided in the case. Really have nothing to do with
22 what we're doing here.

23 The only thing this case is about is V.E. Amick has a
24 judgment against the corporation, and we're pursuing, we're
25 attempting to hold the subsequent corporation, what we call

1 the subsequent corporation, and the two individuals that we
2 think have gotten the money responsible for that verdict.
3 Therefore, any defenses related to facts from that other
4 case aren't applicable. The only thing that really matters
5 is what they've done with the money and their defenses as
6 to how they've maintain their corporate formalities.

7 What they're trying to do is get a second bite of the
8 apple. All this, everything in this complaint was brought
9 up and argued either before Judge Kinard or at the Court of
10 Appeals, and the jury made its decision, and the Court of
11 Appeals made its decision.

12 The third defense of unclean hands, they're again
13 talking about facts from the cases below: that the company
14 didn't have a professional engineer somehow violated DHEC
15 regulations. Again, the Court of Appeals specifically
16 ruled on those issues, and they don't have anything to do
17 with the corporate formalities and the attempt to tie these
18 other parties into being responsible for the verdict
19 already rendered.

20 Fourth defense, intentional interference with
21 contractual relations, that's a counterclaim and they're
22 saying Amick's actions damaged the business reputation of
23 PEG. Well, the verdict was in 2009 against this -- against
24 Palmetto Environmental. They're attempting to now bring
25 the counterclaim that would have had to have arisen during

1 that lawsuit, and that absolutely flouts the findings of
2 the circuit court and the Court of Appeals in bringing up
3 these issues again.

4 So, the second, third, and fourth defenses in first
5 counterclaim -- there's a typo on the page 7. I think
6 should be fourth, fifth defense, and I'm not discussing
7 that, the abuse of process. We'll deal with that in due
8 course. But the, the three middle defenses, all they're
9 asking were issues like accounting and things like that
10 that all relate to the original lawsuit, and we'd ask the
11 court to strike these answers and/or give them a chance to
12 amend.

13 THE COURT: Okay, Mr. Gleissner.

14 MR. GLEISSNER: May it please the court? I'm Rick
15 Gleissner.

16 THE COURT: I'm sorry.

17 MR. GLEISSNER: That's all right; that's all right,
18 Your Honor. You pronounced it a whole lot better than
19 most.

20 We're here on a motion to strike. Apparently the
21 motion to strike is based upon the affirmative defense of
22 *res judicata*. *Res judicata* is an affirmative defense. I
23 should be allowed to engage in discovery associated with
24 this matter and the allegations of the answers and
25 counterclaims before a ruling on the affirmative defense is

1 made.

2 I think that affirmative defenses are appropriate for
3 motions for summary judgment, but in this case I believe I
4 properly pled the elements of the joint venture, which is
5 the second defense; the unclean hands, which is the third
6 defense; the intentional interference with contract and
7 prospective business relations.

8 In listening to Mr. Peel concerning the intentional
9 interference with contract relations, I think he, I think
10 he admitted that, in fact, that there was no intentional
11 interference with contract relations litigated in the prior
12 lawsuit, and I think that's correct. I think he said that
13 he believes that the intentional interference occurred at
14 such a time that it should have been brought, but we have
15 no evidence of that. In, in looking at my pleading, I
16 don't believe I, I pled the timing of the, the particular
17 intentional interference. I don't believe that's a
18 requirement in the pleading, intentional interference with
19 contract relations.

20 So, first of all, I think as it relates to *res*
21 *judicata*, I believe it's inappropriate in the motion to
22 strike stage. I believe discovery is appropriate so that
23 we can flesh out the issues associated with the affirmative
24 defenses and the counter defense.

25 Next, Your Honor, as it relates to *res judicata*

1 itself, *res judicata* is, is, is -- and you got to prove
2 three things to prove *res judicata*. You got to prove the
3 identity of the parties, you got to prove the identity of
4 the subject matter, and you got to prove the adjudication
5 of the issues. Those are the three things you have to
6 prove to prove *res judicata* in order to bar somebody from
7 doing something.

8 Well, okay, identity of the parties, all right,
9 Palmetto Environmental Group, I admit it. They were a
10 party before, but Ecological Resources wasn't a party
11 before. James Cooper wasn't a party before; Pamela Cooper
12 wasn't a party before. Then clearly *res judicata* can't
13 apply to those three individuals, or those three parties in
14 this lawsuit.

15 I mean, I didn't draft the complaint. He drafted
16 complaint. He named these people and so, you know, to me,
17 *res judicata* doesn't work because, one, the identity of
18 parties is settled. It might work as it relates to
19 Palmetto Environmental Group, so let's talk about Palmetto
20 Environmental Group and the second element of *res judicata*,
21 and the second element of *res judicata* is identity of
22 subject matter.

23 In that prior lawsuit, Your Honor, we had a breach of
24 contract claim being brought by Mr. Amick -- or, I'm sorry,
25 V.E. Amick, an entity, against Palmetto Environmental

1 Group, which counterclaimed for breach of contract. It was
2 two actions at law, right, and here, Your Honor, what we
3 have is we have an equitable cause of action. We have
4 equity.

5 Now in that prior lawsuit, unclean hands isn't a
6 defense to a breach of contract cause of action, and here
7 I've brought unclean hands. Similarly, accounting, the
8 requirement for accounting a joint partnership, that's an
9 equitable cause of action, Your Honor. And as an equitable
10 cause of action, again it wouldn't have been in that breach
11 of contract versus breach of contract cause of action. So,
12 Your Honor, I don't think either joint venture or unclean
13 hands is, is, is barred.

14 And then third, Your Honor, the third element is
15 adjudication of the issues, and I believe Mr. Peel
16 mentioned it. Your Honor, we actually drafted and filed
17 yesterday a brief in response to the plaintiff's motion to
18 strike, and with the court's permission, I'd like to hand
19 up that brief. May I, Your Honor?

20 THE COURT: Yes, sir.

21 MR. GLEISSNER: Thank you, Your Honor, and, Your
22 Honor, we did the brief because an important element in
23 this, in this, this equitable cause of action is, is, is
24 what are these damages, and these damages -- we looked at
25 the trial transcript, okay, and Mr. Peel mentions that the,

1 the damages are 300 and -- make sure I've got the right
2 number. \$391,000 was awarded by the jury, okay, 391,
3 391,000 two hundred and some dollars. Okay, and if you
4 look at the trial transcript which we have attached as an
5 exhibit to our brief, at pages 141, 142, and 143, the
6 person actually testifies as relates to those damages, and
7 those damages are all future damages, prospective future
8 damages, anticipated ---

9 MR. PEEL: Objection. That, that's absolutely untrue.
10 You're misrepresenting to the court what happened. You
11 weren't there. I know, and that is not, that is not where
12 that figure of \$391,000 came from.

13 THE COURT: I'll give you a chance to reply, Mr. Peel.

14 MR. GLEISSNER: Well, okay. Well, I mean, that's the
15 way I read those pages of the, of the trial transcript,
16 Your Honor. I think Mr. Peel admitted some of the damages
17 related to future damages, right? And as relates to the
18 sum of the damages that relate to future damages, I mean,
19 what this court has right now before it is this court has
20 the benefit of time, okay? What has happened since this
21 judgment was entered? Did they spend \$391,000? Did they
22 spend \$371,000? Did they spend \$15,000, Your Honor, okay?

23 Now, clearly if they only spent -- if they were only
24 really damaged \$15,000, then I think that the parties that
25 weren't involved in this litigation -- Mr. Cooper, Ms.

1 Cooper, and Ecological Resources -- should be able to show
2 that to the court. They should be able to say to the court
3 hey, look. That \$371,000 judgment against Palmetto
4 Environmental Group is good for them, but you shouldn't
5 collect that against us. We weren't involved in that
6 lawsuit.

7 THE COURT: I'm not so sure that that argument flies.

8 MR. GLEISSNER: Well, Your Honor, if I can show that,
9 in fact, they were really only damaged \$15,000, then, Your
10 Honor, I can make a motion under Rule 60(b)(5) and 60(b)(6)
11 to set aside that judgment for the purposes of making it
12 what those actual damages were, all right, and that's --
13 five and six are based on equitable grounds.

14 Now, if I can make that motion on behalf on Palmetto
15 Environmental Group based upon Rule 60(b)(5) and 60(b)(6),
16 why can't people who weren't involved in that lawsuit,
17 right, why can't they bring it as an equitable defense as
18 part of the unclean hands defense which is associated with
19 this action? I mean, they're basically trying to collect a
20 judgment that they got against Palmetto Environmental Group
21 against three people that weren't involved in that lawsuit,
22 right?

23 And because of that, Your Honor -- and they're
24 bringing an equitable cause of action. We believe it is
25 appropriate for us to be able to bring equitable defenses.

1 Those equitable defenses are joint venture and unclean
2 hands. And plus, Your Honor, we believe we should be able
3 to bring a legal cause of action which was not litigated
4 prior, which is the intentional interference with
5 contractual relations and prospective business relations.

6 So, therefore, we believe that motion to strike,
7 motion to dismiss should be denied at this stage. And if
8 they later on after discovery, if they have no-genuine
9 issues of material fact, then they can bring a motion for
10 summary judgement. Thank you, Your Honor.

11 THE COURT: Yes, sir.

12 MR. PEEL: Your Honor, I apologize for interrupting
13 earlier. I blame it on lack of sleep and my children being
14 home.

15 This is just a piercing action. The facts, underlying
16 case, have absolutely nothing to do with this. I am trying
17 to hold those people responsible, the corporations, to
18 judgment just like they were the corporation. What it was
19 made of, we don't know what the verdict was made up of
20 because it was a jury verdict. They had evidence presented
21 to them; they decided on a number.

22 But the 60(b) motions on it, they can't do that. You
23 can only go back a year for fraud, for evidence of fraud.
24 That judgment's been all the way up the Court of Appeals.
25 Everything in here is nothing new. This, this is Palmetto

1 Environmental's third lawyer in this case. Had a lawyer at
2 the trial, a lawyer at the Court of Appeals, and now a
3 lawyer in this piercing action. Everything argued.

4 And I have to say, by the way, that underlying action
5 was originally filed in 2006. It was 40(j)'d, brought back
6 on in 2008 and tried in 2009, and so as to any defenses,
7 claims, or otherwise, they're about seven years too late.
8 Plus, it's already been brought to verdict.

9 But anyway, all these defenses are trying to do is
10 muddy the waters and confuse the court and give them a
11 third bite of the apple on the, on the verdict. These,
12 these claims attempt to bring in issues related to the
13 contract between V.E. Amick and Palmetto Environmental.
14 Need to be stricken because they've already been decided.
15 Have nothing to do with what's before the court in this
16 case.

17 THE COURT: I'll look at it. I have not read all the
18 -- both complaints from both, from the previous action and
19 this one, carefully. I'll look at it, and since -- I'll
20 look at the information that was provided to me today and
21 will issue an order.

22 MR. PEEL: Your Honor, would you like me to -- I
23 didn't provide the court with the underlying complaint and
24 the answer. Would you like me to send those?

25 THE COURT: There's one attached to your complaint.

1 MR. PEEL: One. I don't know if I put the answer in
2 there or not.

3 THE COURT: You may not have put the answer to the
4 original lawsuit, but certainly the summons and complaint
5 is in there, and then the jury verdict is in there as well.

6 MR. PEEL: That's fine. Judge Kinard didn't do a
7 written order. It was just a form order.

8 THE COURT: Right, and then there's the current
9 amended answer and counterclaim, and I don't know that --
10 there's not a reply to the amended answer, is there?

11 MR. GLEISSNER: No, Your Honor. He moved to dismiss
12 instead of filing.

13 THE COURT: Okay, what I have in here is the answer
14 and counterclaim. Then there's the motion to strike, and
15 then there's the reply to the counterclaim, and then
16 there's the first amended answer and counterclaim.

17 MR. GLEISSNER: Oh. I see what you're saying, Your
18 Honor. Yeah, okay, there's a timing situation. He moved
19 to strike on the 15th of June, and I filed my answer on the
20 19th of June -- I mean, my amended answer on the 19th of
21 June.

22 THE COURT: Yes.

23 MR. GLEISSNER: But I don't think ---

24 THE COURT: I just want to make I ---

25 MR. GLEISSNER: I'm sorry. Let me, let me do that so

1 that the court -- never mind.

2 THE COURT: I just want to make sure I hadn't
3 overlooked anything, any other documents. If some hadn't
4 been filed in the clerk's office that's just not in the
5 file.

6 MR. PEEL: I'll check when I get back, or we'll...

7 THE COURT: Okay.

8 MR. PEEL: We'll do that. I don't think anything has
9 really changed in the answer substantively.

10 MR. GLEISSNER: No. Just some factual allegations
11 changed, Your Honor, specifically relating to -- in the
12 original lawsuit, they had pled that there were five
13 underground storage tanks, and they did that this complaint
14 as well. I believe that they abandoned two of those
15 underground storage tanks in the underground trial. And so
16 when I filed my original one, I was, like, all five, but
17 then when I filed my first amendment, I said no. There's
18 only three of those five that are really subject matter of
19 the judgment.

20 THE COURT: Okay.

21 MR. GLEISSNER: I think that's right. Is that right?

22 MR. PEEL: That's right. That's right. You sent me a
23 letter of that.

24 MR. GLEISSNER: Yes.

25 THE COURT: Okay, and so -- all right.

1 MR. GLEISSNER: Same causes of action. I just assumed
2 his strike was for this one, too.

3 THE COURT: I'll look at the information that's been
4 provided and look at the documents and pleadings a little
5 more carefully and issue a brief written order.

6 MR. PEEL: Thank you, Your Honor.

7 THE COURT: Thank you.

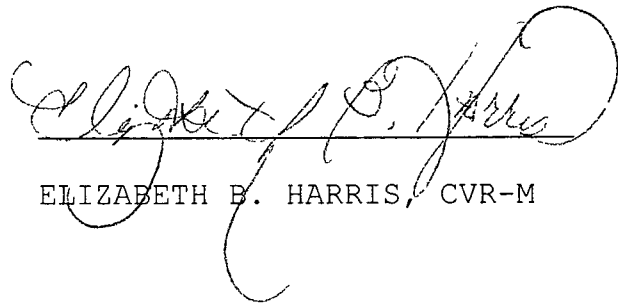
8 MR. GLEISSNER: Thank you, Your Honor.

9 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 14TH DAY OF AUGUST, 2012.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



ELIZABETH B. HARRIS, CVR-M

COLUMBIA, SOUTH CAROLINA

APRIL 8TH, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No: 2012-CP-40-02906

RECEIVED
JAN 31 2013
COURT OF APPEALS

V E. Amick & Associates, LLC, Respondent,

v.

James L. Cooper, Jr.; Pamela C. Cooper; Palmetto Environmental Group, Inc.;
Ecological Resources, Inc.
Defendants,

Of Whom James L. Cooper, Jr.; Pamela C. Cooper; Palmetto Environmental Group, Inc.;
Ecological Resources, Inc. are the Appellant.

NOTICE OF APPEAL

Defendants/Appellant, James L. Cooper, Jr.; Pamela C. Cooper; Palmetto Environmental Group, Inc.; Ecological Resources, Inc., files this Notice of Appeal in regard to the attached Order dated November 20, 2012 and received or about November 21, 2012. The attached Order appears to be a finalized version of the ruling of Judge Alison Renee Lee in regard to the Plaintiff's Motion to Strike.

Further, this Notice of Appeal is in regard to the attached Order on Motion to Reconsider dated January 8, 2013 and received on or about January 9, 2013. The attached Order appears to be a finalized version of the ruling of Judge Alison Renee Lee in regard to the Defendants' Motion to Reconsider the November 20, 2013 Order.



Richard R. Gleissner, Esquire
Gleissner Law Firm, LLC
1237 Gadsden Street, Suite 200A
Columbia, South Carolina 29201
(803) 787-0505
Attorneys for Appellants

Columbia, South Carolina
January 29, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No: 2012-CP-40-02906

V.E. Amick & Associates, LLC, Respondent,

v.

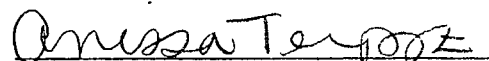
James L. Cooper, Jr ; Pamela C. Cooper; Palmetto Environmental Group, Inc.;
Ecological Resources, Inc.
Defendants,

Of Whom James L. Cooper, Jr.; Pamela C. Cooper; Palmetto Environmental Group, Inc.;
Ecological Resources, Inc. are the Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on January 30, 2013, addressed to its attorney of record as follows:

Wesley D Peel, Esquire
Bruner, Powell, Wall & Mullins, LLC
P.O Box 61110
Columbia, SC 29260



Anissa Terpstra, Paralegal to
Richard R. Gleissner
Gleissner Law Firm, L.L.C.
1237 Gadsden Street, Suite 200A
Columbia, South Carolina 29201
(803) 787-0505
Attorneys for the Appellants

Dated: January 30, 2013

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4002906

V E Amick And Associates LLC

James L Cooper Jr

Pamela C Cooper

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered
- DECISION BY THE COURT** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered
- ACTION DISMISSED (CHECK REASON)** Rule 12(b), SCRPC, Rule 41(a), SCRPC (Vol Nonsuit), Rule 43(k), SCRPC (Settled), Other _____
- ACTION STRICKEN (CHECK REASON)** Rule 40(j), SCRPC, Bankruptcy, Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award, Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
 Affirmed, Reversed, Remanded, Other _____

RICHLAND COUNTY
FILED
20 NOV 20 11 31 AM
JANET W. RICHIE
CLERK

NOTE ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court

ORDER INFORMATION

This order ends does not end the case

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 20 November 2012 to attorneys of record or to parties (when appearing pro se) as follows

Wesley Dickinson Peel

Richard R Gleissner

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. Richie

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

V.E. Amick & Associates, LLC,)
)
Plaintiff,)

Civil Action No.: 2012-CP-40-02906

v.)

ORDER

James L. Cooper, Jr.; Pamela C. Cooper;)
Palmetto Environmental Group, Inc.;)
Ecological Resources, Inc.,)
)
Defendants.)

RICHLAND COUNTY
FILED
2012 NOV 20 PM 3:28
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter came before the Court on Plaintiff V.E. Amick & Associates, LLC's Motion to Strike the second, third, and fourth defenses of Defendants Palmetto Environmental Group, Inc. ("Palmetto"), James L. Cooper, Jr., Pamela C. Cooper, and Ecological Resources, Inc. (collectively the "Defendants") pursuant to Rule 12(f), SCRCP. A hearing was held on August 14, 2012. Present at the hearing were Wesley D. Peel, Esquire, counsel for Plaintiff, and Richard R. Gleissner, Esquire, counsel for Defendants. After considering the law, the briefs filed by the parties, the arguments of counsel, and all matters submitted, Plaintiff's Motion to Strike is GRANTED.

FACTS

Plaintiff is a DHEC certified company that performs remediation construction projects to rectify environmental contamination caused by petroleum products. Palmetto is also an environmental contracting company that remediates soil and ground water contamination caused by petroleum products. Defendant James L. Cooper, Palmetto's owner and principal shareholder, was formerly employed by David Jordan and David Snodgrass, the owners of a large construction enterprise including Plaintiff. After Defendant James L. Cooper was fired, he formed Palmetto and began bidding for DHEC remediation projects through Plaintiff.

Defendant James L. Cooper assembled bids for three remediation projects: the Huse site, the Cromer's Grocery site, and the Lakeside Market site (the "DHEC sites") so that Plaintiff could submit the bids to DHEC for approval. Plaintiff would mark up Palmetto's estimates by 10% and submit the bid to DHEC in exchange for furnishing Palmetto with performance bonds

required by DHEC. DHEC awarded Plaintiff contracts for all three DHEC sites, and Plaintiff subcontracted 100% of the DHEC contracts to Palmetto by oral agreement. Palmetto was paid by Plaintiff on a percentage basis once Palmetto reached each reduction milestone set by DHEC relating to the percentage reduction of petroleum in the groundwater. Defendant James L. Cooper agreed to reach 100% of the ultimate clean-up target levels set by DHEC in exchange for 90% of the DHEC contract with Plaintiff. Once Palmetto met a certain milestone, DHEC would pay Plaintiff, and Plaintiff would remit 90% of the DHEC payment to Palmetto. Palmetto reached 75% of the target level milestone on all three of the DHEC sites before it was unable to meet its obligations arising under the subcontract and ceased work. Palmetto was paid for all invoices submitted to Plaintiff and did not submit any additional invoices after reaching the 75% milestone.

After Palmetto ceased work on the three DHEC sites, Plaintiff hired Carolina Technical Services, Inc. (CTSI) to complete the contracts. On November 14, 2005, Plaintiff filed a lawsuit against Palmetto in Richland County styled *V.E. Amick & Associates, LLC, v. Palmetto Environmental Group, Inc.*, Docket No. 2008-CP-40-2589R¹ ("the original action"). The original action was tried, and on May 14, 2009, a jury rendered a verdict in the amount of \$391,209.21 in favor of Plaintiff. The South Carolina Court of Appeals affirmed the jury verdict in Opinion No. 4860 (394 S.C. 538, 716 S.E.2d 295 (Ct.App. 2011)) on August 10, 2011. After attempts to collect on the verdict were unsuccessful, Plaintiff filed an action on April 23, 2012 styled *VE Amick & Associates, LLC, v. James L. Cooper, Jr.; Pamela C. Cooper; Palmetto Environmental Group, Inc.; Ecological Resources, Inc.*, Docket No. 2012-CP-40-02906 ("the present action") in an attempt to pierce Palmetto's corporate veil. Defendants filed an Answer on June 4, 2012 asserting among other defenses unclean hands, intentional interference with contractual relationships and prospective business relationship, failure to obtain condition precedent, and abuse of process. Defendants also asserted a counterclaim for intentional interference with contractual relationships and prospective business relationship. Plaintiff seeks to strike the defenses of unclean hands, failure to obtain condition precedent, and intentional interference with contractual relationships and prospective business relationship.

¹ The Original Docket No. 2005-CP-40-05995 was dismissed pursuant to Rule 40(j), SCRCR and the case was refiled as Docket No. 2008-CP-40-2589R.

STANDARD OF REVIEW

The court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Rule 12(f), SCRC. When a court rules on a 12(f) Motion to Strike, the court determines “whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded.” *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 95, 390 S.E.2d 370, 372 (Ct.App. 1990).

DISCUSSION

In its Complaint, Plaintiff alleges that Palmetto sold substantially all of its assets to Defendant Pamela C. Cooper or Ecological Resources, Inc. in December 2008 in order to put its assets out of the reach of Palmetto’s creditors. At the time of the sale, Plaintiff claims that Palmetto knew it was likely that a substantial verdict would be entered against Palmetto at trial. Defendant Pamela C. Cooper signed the sales agreement as president of Ecological Resources, Inc., although Plaintiff claims that Ecological Resources, Inc. did not exist at the time of the alleged sale. On these facts, Plaintiff seeks to have the sale between Palmetto and Pamela C. Cooper or Ecological Resources, Inc. set aside in order for Plaintiff to execute on those assets and recover the amount of the verdict. Additionally, Plaintiff seeks to pierce Palmetto’s corporate veil to recover assets to pay outstanding debts owed by Palmetto from James L. Cooper, Jr. and Pamela C. Cooper individually as the former owners or officers of Palmetto, as well as Ecological Resources, Inc., the successor-in-interest to Palmetto.

The doctrine of “piercing the corporate veil” is one of equity. *Sturkie v. Sifly*, 280 S.C. 453, 456, 313 S.E.2d 316, 318 (Ct.App. 1984). It is a well settled principle that “a corporation is an entity, separate and distinct from its officers and stockholders, and that its debts are not the individual indebtedness of its stockholders.” *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 683 (4th Cir. 1976). However, “when the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons.” *Sturkie*, 280 S.C. at 457, 313 S.E.2d at 318. South Carolina courts have established a two-pronged test for piercing the corporate veil. *Id.* “The first part of the test, an eight-factor analysis, looks to observance of corporate formalities by the dominant shareholders.”² *Id.* “The second part requires that there be an element of injustice or

and
*3

² Those eight factors include: (1) whether the corporation was grossly undercapitalized; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) insolvency of the debtor corporation at the time; (5)

fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals.” *Id.* To establish fundamental unfairness, Plaintiff must show: “(1) that the defendant was aware of the plaintiff’s claim against the corporation, and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff’s claim in the property.” *Id.* at 459, 313 S.E.2d at 319.

Plaintiff claims that Palmetto was undercapitalized from the date of its formation, continuing through the sale of its assets to Ecological Resources, Inc. Additionally, Plaintiff alleges that James L. Cooper and Pamela C. Cooper advanced their own personal interests, while failing to observe requisite corporate formalities with respect to Palmetto and Ecological Resources, Inc., which caused Palmetto to become insolvent.

1. UNCLEAN HANDS

In response to Plaintiff’s action to pierce the corporate veil, Defendants claim that Plaintiff has suffered none of the \$391,209.21 in damages awarded by the verdict and that Plaintiff has come to ask the Court for equitable relief with unclean hands. In its Motion to Strike, Plaintiff argues that the unclean hands defense is an attempt to collaterally attack the verdict in the original action.

Within their unclean hands defense, Defendants make several allegations that Plaintiff committed fraud. First, Defendants allege that when Plaintiff obtained the DHEC contracts, Plaintiff misrepresented to DHEC that it had a licensed professional engineer on staff. Second, Defendants allege that Palmetto attempted to employ other subcontractors to complete work under the DHEC contracts, but those contractors refused to work on a job with Plaintiff, in part because Plaintiff’s owner, David Jordan, had a reputation for abuse of subcontractors. Subsequently, Defendants allege that Plaintiff used this as an excuse to take over the project and failed to pay Palmetto what it was due under the subcontract. As a result of this alleged fraud, Defendants claim that Palmetto was left essentially bankrupt and unable to meet obligations under the DHEC subcontracts. Third, Defendants claim that Plaintiff represented to the Court and the jury during trial of the original action that Plaintiff would be liable for future damages in relation to the DHEC contracts, yet has performed no work under the DHEC contracts since the

siphoning of funds of the corporation by the dominant stockholder, (6) non-functioning of the other officers or directors; (7) absence of corporate records; and (8) the fact that the corporation was merely a façade for the operations of the dominant stockholder.” *Dumas v. Infosafe Corp.*, 320 S.C. 188, 191, 463 S.E.2d 641, 644 (Ct.App 1995). A plaintiff must show a number of the eight factors, but need not show all of them. *Id.*

trial and thus has suffered no damages under the DHEC contracts. Fourth, Defendants claim that Plaintiff maintains contractor certification through illegal or improper agreement with DHEC whereby it uses a CTSI employee who is a professional geologist, ignoring DHEC regulations that prohibit this conduct.

Plaintiff claims that Defendant's unclean hands defense is an attempt to collaterally attack the verdict in the original action. A collateral attack upon a judgment is one where the attack is "in an action other than that in which it was rendered." *Singleton v. Mullins Lumber Co.*, 234 S.C. 330, 346, 108 S.E.2d 414, 420 (1959). A judgment "is immune from attack in any action other than that in which it was rendered, except upon proof of fraud or want of jurisdiction." *Id.* at 342, 108 S.E.2d at 420. "In order to secure equitable relief on the basis of fraud, the fraud must be extrinsic." *Chewning v. Ford Motor Co.*, 354 S.C. 72, 80, 579 S.E.2d 605, 610 (2003). "Extrinsic fraud is 'fraud that induces a person not to present a case or deprives a party of the opportunity to be heard.'" *Id.* (quoting *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 is "fraud which was presented and considered in the trial." *Id.* "It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." *Chewning*, 354 S.C. at 82, 579 S.E.2d at 610. "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." *Id.*

Any fraud alleged by Defendants is intrinsic because it is based on evidence considered at trial, and thus is not grounds for equitable relief from the judgment. Defendants allege that Plaintiff misrepresented to DHEC that it had a professional engineer on staff and that Plaintiff maintains a contractor certification through illegal or improper means with DHEC. The trial court considered similar arguments and explained that DHEC could make an exception for Plaintiff to complete its contracts. In denying Palmetto's Motion for Directed Verdict, the trial court stated that "all that stuff about the regulation about having a qualified person doesn't matter. [N]o evidence that anything was ever kicked out because it was not certified. DHEC accepted those things" *V.E. Amick & Associates*, 394 S.C. at 544, 716 S.E.2d at 298. Additionally, the trial court considered allegations that Plaintiff committed fraud in taking over the project and failing to pay Palmetto what it was due under the subcontract. Defendant James L. Cooper admitted at trial that Palmetto was paid for all invoices submitted to Plaintiff under the

subcontract. *Id.* Although Defendants claim that Palmetto completed over 95% of the services necessary under the DHEC contracts, James L. Cooper admitted that no other invoices were submitted to Plaintiff for payment after reaching the 75% milestone. *Id.*

Finally, Defendants' argument that Plaintiff committed fraud by representing to the trial court and jury that it would be liable for \$391,000 in future damages is not a basis for collateral attack because this issue has already been tried. In its appeal, Palmetto argued that the court erred in denying its Motion for a Judgment Notwithstanding the Verdict (JNOV) or, in the alternative, for a new trial *nisi remittitur* because Plaintiff will receive \$137,650 in future contract payments from DHEC and this amount should have been offset from the jury's verdict. The Court of Appeals affirmed the trial court, finding there was adequate evidence to support the jury's verdict. Therefore, any fraud alleged by Defendants is intrinsic in nature and based on evidence previously considered by the court. Such allegations are not a basis for equitable relief.

As a further basis for equitable relief, Defendants cite Rule 60(b)(5), SCRCF, which provides that "the court may relieve a party or his legal representative from a final judgment, order, or proceeding . . . if it is no longer equitable that the judgment should have prospective application." "The general authority is that a judgment of damages for past wrongs is not such a judgment as is covered or contemplated in this section." *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 120 n.3, 441 S.E.2d 835, 838 n.3 (Ct.App. 1994). Rule 60(b)(5) "is generally applicable when there has been a decree for injunctive relief." *Id.* The verdict in the original action does not have prospective application and Rule 60(b)(5), SCRCF does not provide Defendants a basis for relief. Plaintiff's Motion to Strike the defense of unclean hands is GRANTED.

2. INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONSHIPS AND BUSINESS RELATIONSHIP

Defendants' defense of intentional interference with contractual relationships and business relationship alleges that Plaintiff intentionally interfered with the employer/employee relationship between Palmetto and its professional engineer. Specifically, Defendants claim that Plaintiff's actions put Palmetto's professional engineer's license at risk and damaged the business reputation of Palmetto and Defendant James L. Cooper. As a result, Defendants allege that Palmetto lost use of its professional engineer and therefore lost its ability to perform under existing or future contracts with DHEC. Plaintiff's Motion to Strike claims that this defense

arises out of the same operative facts as the judgment in the original action and is barred by the doctrines of *res judicata* and/or collateral estoppel. Defendants argue that this cause of action was not presented in the prior litigation.

The doctrines of *res judicata* and collateral estoppel are different concepts. “*Res judicata* bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding.” *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct.App. 1997). “Collateral estoppel applies to *specific issues*, regardless of whether the [causes of action] in the first and subsequent suits are the same.” *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct.App. 2009) *aff’d*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011)(emphasis added). Because collateral estoppel applies to specific issues, it is inapplicable in this case. The specific issue of interference with the relationship between Palmetto and its professional engineer was not litigated and determined in the original lawsuit. However, the doctrine of *res judicata* is applicable.

“*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of *res judicata*, “[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” *Judy*, 393 S.C. at 172, 712 S.E.2d at 414 (quoting *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). “The rule precluding relitigation of issues that might have been raised in the prior action applies only where the two actions involve the same cause of action.” *Judy*, 383 S.C. at 8, 677 S.E.2d at 217-218. Whether the original action and the present defense involves the same cause of action “is not merely a matter of aligning identical causes of action or theories of liability; rather, the subject matter of the two suits must be the same.” *Id.* The subject matter of the present action and the original action are the same in that both lawsuits are based upon the breach of contracts entered into between Palmetto and Plaintiff for work on underground storage tanks at DHEC sites. In order to determine whether the issue of interference with the relationship between Palmetto and its professional engineer should have been raised in a prior suit, three elements must be established by the Plaintiff: “(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.” *Id.*; *See also Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 330 S.C. 13, 19, 496 S.E.2d 858, 861 (1998)(citing *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986)).

First, there is identity of the parties in the original action and the present action. The present action is styled *V.E. Amick & Associates, LLC, v. James L. Cooper, Jr.; Pamela C. Cooper; Palmetto Environmental Group, Inc.; Ecological Resources, Inc.* (Docket No. 2012-CP-40-02906). The original action is styled *V.E. Amick & Associates, LLC, v Palmetto Environmental Group, Inc.* (Docket No. 2005-CP-40-05995; 2008-CP-40-2589R). Defendants claim that James L. Cooper, Jr., Pamela C. Cooper, and Ecological Resources, Inc. are separate and distinct parties that were not a part of the original action. However, there is an identity of parties because James L. Cooper, Jr., Pamela C. Cooper, and Ecological Resources, Inc. are privies of Palmetto. “When one is not a party to the prior action, the only way he can be precluded from relitigating an issue is if he is in privity with a party to the prior action.” *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct.App. 1994). In *res judicata*, the concept of privity rests not on the relationship between the parties asserting it, but rather on each party’s relationship to the subject matter of the litigation.” *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012)(citing *Richburg v. Baughman*, 290 S.C. 431, 351 S.E.2d 164 (1986)). “The term ‘privy,’ when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right.” *Id.*

Ecological Resources, Inc. is in privity with Palmetto because Ecological Resources, Inc., as Palmetto’s successor in interest, represents the same legal rights as Palmetto in relation to the issues litigated in the original action. Defendants James L. Cooper and Pamela C. Cooper formed Palmetto in 2000. James L. Cooper was the president and owner of Palmetto and Pamela C. Cooper was an officer of Palmetto. In 2009, James L. Cooper and Pamela C. Cooper formed Ecological Resources, Inc., and both have been president of Ecological Resources, Inc. and had ownership interests in Ecological Resources, Inc. Because of the nature of James L. Cooper and Pamela C. Cooper’s relationship with Ecological Resources, Inc. and Palmetto, they have the same relationship to the subject matter of the original litigation as did Palmetto. Therefore, privity exists between James L. Cooper, Pamela C. Cooper, and Palmetto.

The fact that Plaintiff now seeks to pierce the corporate veil, an equitable action, does not change privity between the parties nor alter the issues litigated in the original action. An action seeking to pierce the corporate veil is often filed post-judgment. *See Drury Development Corp. v. Foundation Ins. Co.*, 380 S.C. 97, 103, 668 S.E.2d 798, 802 (2008). However, within that

subsequent action, the law in South Carolina does not allow Defendants to “relitigate the legitimacy of the underlying corporate obligation.” *Id.* at n.2, 668 S.E.2d at 802 n.2.

Second, there is identity of subject matter because the original action and the defenses asserted in the present action involve the same facts, circumstances, and claims of damages and arise out of the same occurrence. It is well settled that “res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties.” *RIM Associates v. Blackwell*, 359 S.C. 170, 184, 597 S.E.2d 152, 160 (Ct.App. 2004)(citing *Nelson v. QHG of S.C., Inc.*, 354 S.C. 290, 304, 580 S.E.2d 171, 178 (Ct.App. 2003)). Both the defenses asserted in this action and the original action arise out of the breach of contracts entered into between Palmetto and Plaintiff for work on underground storage tanks at DHEC sites. Defendants allege that Plaintiff is trying to recover for five DHEC sites when it was established during trial of the original action that two of the five DHEC sites were not involved. The Court of Appeals, affirming the jury’s verdict of \$391,209.21, discusses the three DHEC sites. Despite the fact that Plaintiff’s Complaint in the present action alleges that there were five DHEC site contracts, Plaintiff does not seek damages in excess of the \$391,209.21 awarded.

Third, there was an adjudication of the same issues in the original action that are now the basis for the defenses in the present action, and a final judgment was entered. Defendants claim that their defenses are distinct and separate from any defense litigated in the original action. While the intentional interference with contractual relationships and business relationship defense and counterclaim was not specifically litigated in the prior action, “[i]t is a well settled rule of law that where a defendant neglects to plead a matter proper to his defense at the proper time, he may never take advantage thereafter.” *Griggs v. Griggs*, 214 S.C. 177, 189, 51 S.E.2d 622, 628 (1949). “[A] defendant in an action must plead all his defenses, whether legal or equitable. He could not allow judgment to be entered against him and then commence a separate action against the plaintiff alleging an equitable defense.” *McLeod v. Sandy Island Corp.*, 264 S.C. 463, 467, 215 S.E.2d 903, 905 (1975). By not raising this defense in the original action, Defendants lost the ability to raise this defense in the present action.

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Additionally, there was a final judgment in the original action. A final judgment is one that terminates the litigation. James F. Flanagan, *South Carolina Civil Procedure* 668 (3d ed. 2010). Plaintiff obtained a verdict in the amount of \$391,209.21 on May 14, 2009. The trial

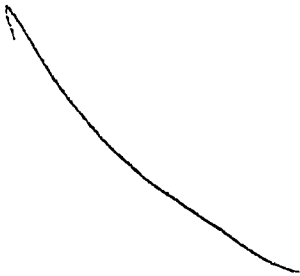
court denied Palmetto's new trial *nisi remittitur* motion. Palmetto appealed, and the Court of Appeals affirmed this verdict. Defendants did not file a Motion for Reconsideration or a writ of certiorari to the South Carolina Supreme Court, and the time to do so has expired. Therefore, there has been a final judgment in the original action.

Based on the clear case law in South Carolina, Defendants' defense and counterclaim for intentional interference with contractual relationships and prospective business relationship is barred by the principle of *res judicata*. Plaintiff's Motion to Strike this defense is GRANTED.

3. FAILURE TO OBTAIN CONDITION PRECEDENT

In their Answer, Defendants allege that Plaintiff and Palmetto entered into a partnership in agreeing to share in the profits and losses of the DHEC contracts. Defendants claim that because a partnership existed, Plaintiff must first seek a partnership accounting prior to bringing any suit against Palmetto. Generally, "copartners cannot sue each other at law for matters arising out of the partnership until there is first an accounting in equity between the partners." *Burch v. Ashburn*, 295 S.C. 274, 280, 368 S.E.2d 82, 85 (Ct.App. 1998). The court notes that Defendants have not provided evidence to support their claim that a partnership between Plaintiff and Palmetto existed.

Plaintiff argues that the defense of failure to obtain condition precedent is an attempt to collaterally attack the verdict in the original case. While the defense may be a collateral attack, it is barred by the doctrine of *res judicata*. Based on the aforementioned application of *res judicata* in this case, Defendants lost the ability to raise this defense in the present action by not raising it in the original action. Plaintiff's Motion to Strike the defense of failure to obtain condition precedent is GRANTED.




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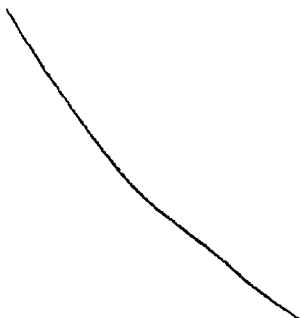
ORDER

For the reasons set forth above, it is **ORDERED** that Plaintiff's Motion to Strike the second, third, and fourth defenses of Defendants Palmetto Environmental Group, Inc., James L. Cooper, Jr., Pamela C. Cooper, and Ecological Resources, Inc. is **GRANTED**.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
November 20, 2012



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STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
 V.E. Amick & Associates, LLC,)
)
 Plaintiff,)
)
 v.)
)
 James L. Cooper, Jr.; Pamela C. Cooper;)
 Palmetto Environmental Group, Inc.;)
 Ecological Resources, Inc.,)
)
 Defendants)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2012-CP-40-02906

**ORDER ON
 MOTION TO RECONSIDER**

RICHLAND COUNTY
 FILED
 2014 JAN -8 PM 3:25
 JEANETTE W. McBRIDE
 C.S.P. & G.S.

This matter comes before the Court by way of a Rule 59(e), SCRPC motion filed by Defendants Palmetto Environmental Group, Inc. (“Palmetto”), James L. Cooper, Jr., Pamela C. Cooper, and Ecological Resources, Inc. (collectively the “Defendants”) to alter or amend this Court’s November 20, 2012 Order Granting Plaintiff’s Motion to Strike. The Motion for Reconsideration was filed with the Clerk of Court on December 6, 2012.

After careful consideration of the record in this case and the arguments raised by Defendants, this Court is unable to discover, with the exception of two issues addressed herein, any new material fact or any principle of law that was either overlooked or disregarded in the previous Order.

In their Motion to Reconsider, Defendants raise two issues that merit discussion. First, in relation to the defense of failure to obtain condition precedent, this Court clarifies that the defense is barred by the application of the doctrine of *res judicata*, and the existence of evidentiary support is irrelevant. Second, based upon the issues raised by Defendants in their Motion to Reconsider, this Court amends its Order dated November 20, 2012 only as it is related to Defendants’ unclean hands defense. The unclean hands ruling in the Court’s Order is withdrawn and the following is substituted in full in its place:

1. UNCLEAN HANDS

In response to Plaintiff’s action to pierce the corporate veil, Defendants claim that Plaintiff has suffered none of the \$391,209.21 in damages awarded by the verdict and that Plaintiff has come to ask the Court for equitable relief with unclean hands. In its Motion to

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Strike, Plaintiff argues that the unclean hands defense is an attempt to collaterally attack the verdict in the original action.

Defendants claim that they could not have pled the defense of unclean hands in the original action because it was an action for breach of contract. "The equitable doctrine of unclean hands . . . has no application to an action at law." *Aaron v. Mahl*, 381 S.C. 585, 594, 674 S.E.2d 482, 487 (2009). "The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *First Union Nat. Bank of South Carolina v. Soden*, 333 S.C. 554, 569, 511 S.E.2d 372, 380 (Ct. App. 1998). While unclean hands may have been unavailable as an equitable defense in the original action, the defense attempts to relitigate the same issues that were before the trial court. To the extent that Defendants' unclean hands defense claims that Plaintiff is not entitled to the full amount of the verdict because it did not suffer the amount of damages awarded, the defense is a collateral attack.

Within their unclean hands defense, Defendants make several allegations that Plaintiff committed fraud. First, Defendants allege that when Plaintiff obtained the DHEC contracts, Plaintiff misrepresented to DHEC that it had a licensed professional engineer on staff. Second, Defendants allege that Palmetto attempted to employ other subcontractors to complete work under the DHEC contracts, but those contractors refused to work on a job with Plaintiff, in part because Plaintiff's owner, David Jordan, had a reputation for abuse of subcontractors. Subsequently, Defendants allege that Plaintiff used this as an excuse to take over the project and failed to pay Palmetto what it was due under the subcontract. As a result of this alleged fraud, Defendants claim that Palmetto was left essentially bankrupt and unable to meet obligations under the DHEC subcontracts. Third, Defendants claim that Plaintiff represented to the Court and the jury during trial of the original action that Plaintiff would be liable for future damages in relation to the DHEC contracts, yet has performed no work under the DHEC contracts since the trial and thus has suffered no damages under the DHEC contracts. Fourth, Defendants claim that Plaintiff maintains contractor certification through illegal or improper agreement with DHEC whereby it uses a CTSI employee who is a professional geologist, ignoring DHEC regulations that prohibit this conduct.

A collateral attack upon a judgment is one where the attack is "in an action other than that in which it was rendered." *Singleton v. Mullins Lumber Co.*, 234 S.C. 330, 346, 108 S.E.2d

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414, 420 (1959). A judgment “is immune from attack in any action other than that in which it was rendered, except upon proof of fraud or want of jurisdiction.” *Id* at 342, 108 S.E.2d at 420 “In order to secure equitable relief on the basis of fraud, the fraud must be extrinsic ” *Chewning v Ford Motor Co* , 354 S.C. 72, 80, 579 S.E.2d 605, 610 (2003). “Extrinsic fraud is ‘fraud that induces a person not to present a case or deprives a party of the opportunity to be heard ’” *Id.* (quoting *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 is “fraud which was presented and considered in the trial.” *Id* “It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud.” *Chewning*, 354 S.C. at 82, 579 S.E.2d at 610. “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.” *Id.*

Any fraud alleged by Defendants is intrinsic because it is based on evidence considered at trial, and thus is not grounds for equitable relief from the judgment. Defendants allege that Plaintiff misrepresented to DHEC that it had a professional engineer on staff and that Plaintiff maintains a contractor certification through illegal or improper means with DHEC. The trial court considered similar arguments and explained that DHEC could make an exception for Plaintiff to complete its contracts. In denying Palmetto’s Motion for Directed Verdict, the trial court stated that “all that stuff about the regulation about having a qualified person doesn’t matter. [N]o evidence that anything was ever kicked out because it was not certified. DHEC accepted those things . . . ” *V.E. Amick & Associates*, 394 S.C. at 544, 716 S.E.2d at 298. Additionally, the trial court considered allégations that Plaintiff committed fraud in taking over the project and failing to pay Palmetto what it was due under the subcontract. Defendant James L. Cooper admitted at trial that Palmetto was paid for all invoices submitted to Plaintiff under the subcontract. *Id.* Although Defendants claim that Palmetto completed over 95% of the services necessary under the DHEC contracts, James L. Cooper admitted that no other invoices were submitted to Plaintiff for payment after reaching the 75% milestone. *Id.*

Finally, Defendants’ argument that Plaintiff committed fraud by representing to the trial court and jury that it would be liable for \$391,000 in future damages is not a basis for collateral attack because this issue has already been tried. In its appeal, Palmetto argued that the court erred in denying its Motion for a Judgment Notwithstanding the Verdict (JNOV) or, in the alternative, for a new trial *nisi remittitur* because Plaintiff will receive \$137,650 in future

contract payments from DHEC and this amount should have been offset from the jury's verdict. The Court of Appeals affirmed the trial court, finding there was adequate evidence to support the jury's verdict. Therefore, any fraud alleged by Defendants is intrinsic in nature and based on evidence previously considered by the court. Such allegations are not a basis for equitable relief.

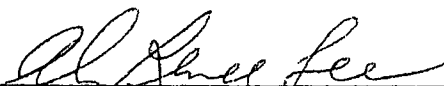
As a further basis for equitable relief, Defendants cite Rule 60(b)(5), SCRCPP, which provides that "the court may relieve a party or his legal representative from a final judgment, order, or proceeding . . . if it is no longer equitable that the judgment should have prospective application." "The general authority is that a judgment of damages for past wrongs is not such a judgment as is covered or contemplated in this section." *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 120 n.3, 441 S.E.2d 835, 838 n.3. (Ct.App. 1994). Rule 60(b)(5) "is generally applicable when there has been a decree for injunctive relief." *Id.* The basis for the verdict in the original action was to compensate Plaintiff for Palmetto's breach of contract. Thus, the verdict was to rectify past wrongs by awarding Plaintiff damages. The verdict in the original action does not have prospective application and Rule 60(b)(5), SCRCPP does not provide Defendants a basis for relief. Plaintiff's Motion to Strike the defense of unclean hands is **GRANTED**.

ORDER

Based upon the foregoing amendment, Defendants' Motion to Reconsider is **GRANTED in part**; however, Plaintiff's Motion to Strike the defense of unclean hands is **GRANTED**.

Pursuant to Rule 59(f), oral argument is not necessary.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
January 8, 2013

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Allison Renee Lee, Circuit Court Judge

Case No: 2012-CP-40-02906
Appellate Case No. 2013-000209

RECEIVED
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COURT OF APPEALS

V.E. Amick & Associates, LLC Respondent,

v.

James L. Cooper, Jr., Pamela C. Cooper, Palmetto Environmental Group, Inc.,
and Ecological Resources, Inc., Appellants

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



Richard R. Gleissner
Gleissner Law Firm, LLC
1237 Gadsden Street, Suite 200A
Columbia, South Carolina 29201
(803) 787-0505
Attorneys for Appellant

Columbia, South Carolina
September 25, 2013