THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Civil Action No. 2015-CP-23-00973

Appellate Case No. 2019-000701

O'Neal Constructors, LLC.....Respondent,

v.

GE Betz, Inc. d/b/a GE Water & Process Technologies .....Appellant.

INITIAL BRIEF OF APPELLANT GE BETZ, INC. D/B/A GE WATER & PROCESS TECHNOLOGIES

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II) Whether O'Neal presented any evidence that its reliance on any representation made by GE Betz was justified or reasonable.

STATEMENT OF THE CASE

Respondent O'Neal Constructors, LLC ("O'Neal") is a construction company based in Greenville, South Carolina. In February 2015, O'Neal filed a Complaint against Appellant GE Betz, Inc. ("GE Betz") arising out of damage that occurred to a facility that O'Neal was constructing for GE Power & Water at the GE Turbine facility in Greenville, South Carolina.[1] The March 26, 2016 Amended Complaint[2] asserts causes of action under South Carolina Law against GE Betz for: (1) negligence (2) breach of implied warranty of workmanlike services and (3) negligent misrepresentation.

A trial was held in the Greenville County Court of Common Pleas on February 25-28, 2019. The Honorable Letitia H. Verdin presided. The jury rendered a verdict of $648,698.32[3] in favor of O'Neal on the negligent misrepresentation claim. GE Betz filed a Motion pursuant to Rules 50(b) and 59 (a) & (e), SCRCP, for Judgment Notwithstanding the Verdict, a new trial, and/or an Order altering or amending the judgment on the grounds that Plaintiff failed to produce any evidence of a false representation made by GE Betz to O'Neal, and Plaintiff failed to produce any evidence that it justifiably relied on an alleged representation made by GE Betz. By Order filed March 25, 2019, GE Betz's Motion was denied. This appeal follows.

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[1] Although GE Betz and GE Power & Water have a common first name, that is where the similarities end.
[2] A Consent Order to Amend Pleadings to Conform to Evidence at Trial was entered March 13, 2019, and a Second Amended Complaint was filed for the sole purpose of changing Defendant's name from "GE Water & Process Technologies" to "GE Betz, Inc. d/b/a GE Water & Process Technologies."
[3] The $1,081,163.87 award was reduced based on the jury's finding that the fault attributable to O'Neal was 40%.

STATEMENT OF FACTS

The GE Turbine facility in Greenville, South Carolina, is a "center facility" for the manufacturing of gas turbines for GE Power & Water ("Owner"). (Trial Tr. 394:19-20.) In addition to a massive manufacturing plant, the facility includes a technology lab and several separate systems, some of which maintained contracts with GE Betz, a water treatment company specializing in the sale and service of water treatment chemicals for water-dependent machines. (*Id.* at 394:3-20; 420:15-18.) In addition to selling chemicals such as corrosion inhibitors and biocide required to maintain cooling towers and other water-dependent machines, GE Betz also offered service as part of the contracts with the individual systems at the facility. (*Id.* at 422:2-16.) These chemical monitoring services include testing chemical residuals and the chemistry that is fed to system applications. (*Id.* at 422:25-423:3.) Each system or location on the GE Turbine site maintained its own contract with GE Betz. (*Id.* at 394:19-22, 526:12.)

O'Neal is an engineering design and construction company which was hired by Owner to design and construct a project used to test turbines after they are manufactured. (*Id.* at 35:10-17, 36:10-13.) O'Neal entered into a contract in 2012 with Owner to design and construct a process which would allow gas turbine testing through the use of liquefied natural gas, an assignment which came to be known as the LNG Project. (*Id.* at 58:7-17, Second Am. Comp. ¶ 6.) According to the LNG project manager for Owner, Randy Paul, responsibility for the LNG Project was completely on O'Neal until the keys were turned over to Owner: "O'Neal was responsible for every aspect of the plant from engineering, construction, commissioning, turnover, and successful operation of the plant." (*Id.* at 395:2-10.)

The LNG Project included a cooling tower and related piping and equipment, which circulates chemically treated water through certain equipment such as heat exchangers. (*Id.* at

59:20-60:25.) The cooling tower system contained water which was open to the atmosphere such that it naturally became contaminated with dust, microbes, algae spores and the like. (*Id.* at 64:24-65:7.) Consequently, the water required treatment in order to prevent scale corrosion and microbiological attack. (*Id.* at 65:7, 515:8-10.) Water treatment services included "testing chemical residuals based on the equipment and the chemistry that is being fed to the system application ... basically chemical monitoring services." (*Id.* at 422:25-423:3.) Because O'Neal had complete responsibility for the LNG Project until the keys were turned over to Owner, O'Neal was responsible for water treatment on the site. (*Id.* at 395:2-7.) However, O'Neal does not design, treat or otherwise operate cooling tower water treatment systems. (*Id.* at 65:10-11, 75:7-8, 183:5 "O'Neal does not do water treatment.") So in order to fulfill its contractual obligations to Owner, O'Neal needed to hire and enter into an agreement with a water treatment service provider like GE Betz. Service agreements like the one O'Neal should have entered in order to fulfill its obligations to Owner are typically reduced to writing in some type of contract which details what the service will consistent of and how frequently it will occur. (*Id.* at 580:9-11, 581:3-10.)

Because Owner was not responsible for any aspect of the water treatment, Owner instructed O'Neal to solicit components and chemicals needed for the Chemical Treatment System from GE Betz. (*Id.* at 68:24-69:5; 72:2-4, 396:11-13.) Specifically, a member of O'Neal's design team asked Owner for the name and contact information for the GE Betz employee responsible for Owner's cooling tower so that O'Neal could coordinate with that person for the LNG project. (*Id.* at 74:24-75:3.) In response, Owner gave O'Neal contact information for the GE Betz account manager for the GE Turbine site. (*Id.* at 75:19-21.)

GE Betz formulated a quote for the LNG Project and initially sent the quote for the water treatment system to Owner in August, 2013. (*Id.* at 78:3-9, 18-19, 146:11-13; Def.'s Ex. 3.) Owner's project manager for the LNG Project, Randy Paul, responded to the quote in an email to GE Betz that also included O'Neal's project and construction managers as recipients. (*Id.* at 396:24-397:7.) Paul, on behalf of Owner, informed GE Betz and O'Neal of the following:

> The chemical treatment system for the cooling water system is part of the O'Neal EPC contract. Your contacts at O'Neal are Jay Hendrix, project manager ... and Ron Bice, construction manager ... Jay and Ron will keep us in the approval process but it is ultimately O'Neal's responsibility from a contractual standpoint. Please address all future correspondence to O'Neal until the commissioning is complete and GE takes possession of the "keys" to the plant.

(*Id.* at 397:15-25, Def. Ex. 5.) According to Owner, it was always up to O'Neal to make arrangements for water treatment. (*Id.* at 398:23-25.) At no point did Owner ever tell O'Neal it would pay for the water treatment prior to the turnover of the plant. (*Id.* at 398:1-5.)

According to these instructions from Owner, GE Betz sent a quote to O'Neal in October, 2013, for the equipment and chemicals needed to treat the water in the cooling tower at the LNG Project. (Def. Ex. 8.) Notably, GE Betz's quote did not include service of the water treatment system. (*Id.* at 147:8-10, 428:16-18.) In fact, there is no evidence that GE Betz told anyone from O'Neal that it would be providing chemical treatment service to the LNG site prior to August 2014. (*Id.* at 424:8-13.) Thus, when GE Betz's account manager, Scott Rutledge, sent the O'Neal project manager the initial quote for the LNG Project, he specifically informed O'Neal that he was "not includ[ing] the monthly TruSense monitoring fee." (*Id.* at 426:8-15, Def. Ex. 7.)

After O'Neal purchased the initial equipment and materials needed to start the water treatment system from GE Betz, Scott Rutledge went to the LNG site on March 3, 2014, to check the system. (*Id.* at 431:11-13.) Per O'Neal's request and because O'Neal had purchased

supplies from GE Betz, Rutledge got the system started including plugging the pumps into the controller and making sure the controller was operational. (*Id.* at 431:18-24, 435:17-436:11.) Rutledge's "good faith" efforts on March 3 were not part of a service contract because there was no service contract in place at that time. (*Id.* at 438:8-12, 439:21-22, 554:13-16.) Rutledge merely got the system "online." (*Id.* at 528:10-15.) GE Betz's area manager in 2014, David Kirkland, testified that in his twenty-five (25) years of experience in the water treatment business, starting equipment or getting it "online" does not equate to servicing the system. (*Id.* at 528:25-529:4.)

Because there was no service contract in place, Rutledge did not intend to return to the LNG site on a regular basis and perform services. (*Id.* at 439:23-440:2.) Between March 3 and July 7, 2014, Rutledge visited the LNG site periodically when he was in the area servicing other, separate contracts at the GE Turbine site. (*Id.* at 440:13-21.) Rutledge would not always be able to access the chemical treatment system at the LNG site because construction was ongoing and the area was sometimes taped off. (*Id.* at 504:5-13.)

During this time, in an effort to help and answer questions, Rutledge occasionally made recommendations to O'Neal representatives regarding the chemical treatment system. (*Id.* at 454:19-23.) Rutledge hoped to get the service contract for the LNG site at some point. (*Id.* at 452:6-7, 55:3-4 "[GE Betz] did hope it would become another GE [Betz] account.") Rutledge received commission for such contracts. (*Id.* at 444:19-22.) He testified that occasional servicing without a contract and without compensation is sometimes performed in an effort to market the business. (*Id.* at 475:7-11.) Similarly, GE Betz's area manager, David Kirkland, testified that GE Betz was "working to support the efforts of getting the project started." (*Id.* at 539:22-23.)

Rutledge's visits to the LNG site between March 3 and July 7 were not according to a service schedule. (*Id.* at 456:9-13.) Indeed, O'Neal was not aware of any set service schedule during the relevant time period. (*Id.* at 161:2-4.) Rutledge testified he was never asked by O'Neal when he was coming to visit the site. (*Id.*) Also, he never gave O'Neal startup reports or any other reports related to monitoring of the system. (*Id.* at 149:13-14.) During this time, GE Betz was not paid by anyone to perform service on the LNG chemical treatment system. (*Id.* at 566:18-23.)

After Rutledge started the chemical treatment system on March 3, O'Neal failed to monitor the system and failed to hire GE Betz or anyone else to monitor the system. Consequently, untreated water circulated through cooling water piping at the LNG site for months. Finally, around July 7, 2014, O'Neal contacted GE Betz about a potential issue at the LNG site. (*Id.* at 447:12-17.) In response to O'Neal's concerns, Rutledge visited the site and found the water treatment pumps and controller to be "discombobulated". (*Id.* at 448:7-10.) Rutledge recalled that on prior visits, he had seen tools on top of the chemical drums and possibly "some things unplugged and not in order." (*Id.* at 442:20-25, 443:15-16.) Similarly, Kirkland observed that the pumps were not plugged into the correct pigtails or not plugged in at all. (*Id.* at 531:17-24.)

O'Neal representatives also noticed things were awry. Though he had been to the location "numerous times", O'Neal's manager of field services, Phillip Honea did not notice any irregularities with the water treatment system until it was too late. For the first time on July 7, Honea observed a water treatment pump for the biocide drum plugged directly into the wall and "it didn't really look correct to [him] at all." (*Id.* at 274:10-12, 306:19-19-307:1.) Per Honea's familiarity with similar treatment systems, the pump was continuously pumping chemical instead

of running through the controller which would have regulated the amount of chemical released into the water. (*Id.* at 278:4-11.) According to Honea, other O'Neal employees passed the equipment and failed to notice any irregularities. (*Id.* at 307:2-7.)

O'Neal's failure to contract with anyone to monitor the chemical treatment system from March 3 to July 7 resulted in corrosion to the pipes and other equipment on the LNG site. In response to the discovery of corrosion, David Kirkland, on behalf of GE Betz, investigated the situation and did not see where GE Betz had a statement of work that would have defined what it was being asked to do or that anybody came to service the system. (*Id.* at 526:14-25.) Indeed, it is undisputed there never was a contract between O'Neal and GE Betz for service of the water treatment system. (*Id.* at 148:11-14, 486:14-15 "[GE Betz] didn't have a service contract for [the LNG] system.") According to O'Neal's engineering project manager, Don Bliss, O'Neal operated under an assumption that service was being provided pursuant to some other contract. (*Id.* at 148:15-19.) O'Neal's construction project manager, Lonnie Blanton, believed Owner was going to hire GE Betz to run the water treatment system as Owner had done with other locations on the GE Turbine site. (*Id.* at 214:23-215:3.) And O'Neal's manager of field services, Phillip Honea, believed water treatment on the LNG site would be "umbrellaed" under the contract GE Betz had with Owner for the GE Turbine site. (*Id.* at 272:5-7). No evidence was presented at trial showing anyone from GE Betz ever made an affirmative statement to anyone from O'Neal that it had a contract with Owner to monitor and service the system at the LNG site.

Following the July 7 corrosion event, Owner intervened, and for the first time, established a contract with GE Betz for water treatment at the LNG site. In an August 20, 2014 email from Owner to both GE Betz and O'Neal, Owner confirmed its entry into a contract with GE Betz for the LNG site was "to prevent the damage of the LNG cooling water system that

occurred in the past under O'Neal's custody." (*Id.* at 182:13-22; Def.'s Ex. 18.) Owner also clarified it was "merely funding the water treatment service" and not accepting ownership of the system because O'Neal had ownership of the system until the entire plant was commissioned and ownership was accepted by Owner. (*Id.*) Unlike the October 2013 proposal submitted to O'Neal, the August 2014 proposal to Owner specifically stated in the first line that it would be for "ongoing chemistry and service for LNG." (*Id.* at 546:10-14; Def.'s Ex. 20.)

STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings. *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 464, 629 S.E.2d 663-64 (2006). The grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989).

ARGUMENT

I) O'Neal Failed to Present any Evidence GE Betz Negligently Misrepresented it was Servicing the Water Treatment System Pursuant to a Contract with Owner.

To establish liability for negligent misrepresentation, a plaintiff must show (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a

pecuniary loss as the proximate result of his reliance upon the representation. *Hurst v. Sandy*, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997). The false misrepresentation at issue must be of a material fact. *See Pitten v. Jacobs,* 903 F. Supp. 937 (D.S.C. 1995) ("South Carolina's courts have made it clear that negligent misrepresentation ... can be based only on misrepresentations of material fact."). "To be actionable, the representation must relate to a present or pre-existing fact and be false when made." *Fields v. Melrose P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993) (citing *Ama Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992)). "The representation cannot ordinarily be based on unfulfilled promises or statements as to future events." *Id.*

A verdict based on negligent misrepresentation is wholly unsupported by the evidence and riddled with errors of law because: (1) there is no evidence GE Betz made any representation to O'Neal that it was providing chemical treatment services pursuant to a contract with Owner; and (2) even if GE Betz made a representation as to service, it related only to future events and not to existing facts.

According to O'Neal, the negligent misrepresentation claim is based on two representations. The first representation was made by Scott Rutledge when he sent an email to O'Neal the day after he put the system online. (Trial Tr. 373:2-8.) The March 4, 2014 email states:

> Hello Jim,
> Typically these reports [regarding the site visit] will be returned within 24-48 hours. Additionally, with the information provided that the LNG tower will be drained and cleaned one more time we will need to recharge the system and come back and test residuals at that time, At that time, we will provide a full report so please just let me know when this will be done. Of course, corrosion coupons were placed yesterday and a controller was calibrated. Chemistry to include biocide and corrosion inhibitor fed to system as pumps were primed and dialed in for proper feed. Thanks
> All the best,
> Scott

(Pl's Ex. 13.) The second representation is a conversation between the GE Betz account manager assigned to the GE Turbine sight in 2012, Jason Howell, and Phillip McCollum, O'Neal's mechanical group department head. (Trial Tr. 373:11-15.) McCollum testified that Howell stated GE Betz planned to handle the LNG Project as an extension of its existing contract with Owner at the GE Turbine site. (*Id.* at 191:21-24.)

As an initial matter, neither one of these statements conveyed that GE Betz currently had a contract with Owner for water treatment service at the LNG site. O'Neal's assumption that GE Betz was servicing the water treatment system under an ongoing contract with Owner was based on the fact that Scott Rutledge, GE Betz's account manager, was "on site very periodically" and a representative from Owner saw him. (*Id.* at 11:1-5.) O'Neal's engineering project manager, Don Bliss, believed there were emails wherein GE Betz stated it was servicing the system pursuant to a contract with Owner; but O'Neal failed to present any such emails at trial. In fact, O'Neal failed to present any evidence that GE Betz made any affirmative representation that it was currently servicing the water treatment system pursuant to a contract with Owner. Instead, Bliss's beliefs were based on assumptions. (*Id.* at 148:15-19.) O'Neal, according to Bliss, "didn't pay much attention." (*Id* at 162:24-163:2.) If there were only assumptions and no representations, then there can be no negligent misrepresentation.

The emails and communications between GE Betz and O'Neal only state that GE Betz planned to service the system pursuant to a contract with Owner at some point in the future. Actionable misrepresentation must relate to a present or pre-existing fact and be false when made, and cannot be based on unfulfilled promises or statements as to future events. *Fields*, 312 S.C. at 105, 439 S.E.2d at 285. For instance, in *Fields*, a real estate development company represented to homebuyers that it would sell future memberships to the residential club at higher

prices and would complete various planned construction projects. *Id.* at 105-06, 439 S.E.2d at 285. In affirming the dismissal of the homebuyer's negligent misrepresentation claim, the Court of Appeals held the claim failed because these statements related to future events, not existing facts. *Id.*

Similarly, in *Winburn v. Insurance Co. of North America*, 287 S.C. 435, 339 S.E.2d 142 (Ct. App. 1985), the Court of Appeals held that an unfulfilled commitment does not constitute proof of negligent misrepresentation. The plaintiff in *Winburn* was told by his insurance adjuster following the sinking of his boat that a recommended boat mechanic was "good". *Winburn*, 287 S.C. at 439, 339 S.E.2d at 145. When the plaintiff boat owner became concerned about the mechanic's skills, he refused to endorse the insurance check that covered the mechanic's invoice. Consequently, the adjuster assured the plaintiff that he would "see to it that [the mechanic] fixed the boat" if the plaintiff would endorse the check. *Id.* When the mechanic failed to properly repair the boat, the plaintiff brought an action for fraud and negligence against the adjuster and the insurance company.

Addressing the adjuster's "mere expression of an opinion" that the mechanic was "good", the Court of Appeals found the record to be devoid of any evidence such representation was false when the adjuster made it. *Id.* at 440, 339 S.E. at 146. "The truth or falsity of a representation must be determined as of the time it was made or acted on and not at some later date." *Id.* (citing *Austin v. Tire Treads, Inc.*, 21 N.C. App. 737, 205 S.E.2d 615 (1974); 37 C.J.S. *Fraud* § 17c at 251 (1943)). Thus, the fact that the mechanic did not subsequently repair the boat was insufficient to prove he was not a good mechanic at the time the adjuster made the representation. *Id.* at 442, 339 S.E.2d at 147; *see also Spires v. Acceleration Nat'l Ins. Co.*, 417 F. Supp.2d 750 (D.S.C. 2006) (no negligent misrepresentation by insurance broker who

characterized insurer as being "sound" company in obtaining policy for plaintiff, when insurer had a "B" rating and later became insolvent).

As for the adjuster's "mere expression of intention" to make sure the mechanic repaired the boat, the Court found no evidence the adjuster negligent made a false statement. *Id.* The fact that the commitment was not honored, according to the Court, did not constitute proof of negligent misrepresentation. *Id.* "Evidence of a mere broken promise is not sufficient to prove negligent misrepresentation." *Id.*

The alleged misrepresentations from Rutledge and Howell are not actionable because they relate to future events. O'Neal argued Howell's statement as to what GE Betz was "doing going forward" was a misrepresentation. (*Id.* at 373:12-15.) Intentions "going forward" are not statements of pre-existing or present facts. GE Betz's statements were simply "unfulfilled promises or statements as to future events." *Fields*, 312 S.C. at 105, 439 S.E.2d at 285. Further, GE Betz's statements were not false at the time they were made. GE Betz planned to service the system on the LNG site at some point in the future; and that is in fact what occurred when it entered into a servicing agreement with Owner in August, 2014. The finding that GE Betz committed negligent misrepresentation is wholly unsupported by the evidence and is an error of law because there is no evidence GE Betz made an affirmative statement it was providing service pursuant to a contract with Owner, and statements as to future plans to service the system do not constitute actionable misrepresentation. Accordingly, the verdict entered against GE Betz on O'Neal's negligent misrepresentation claim should be reversed.

II) O'Neal Failed to Present any Evidence that its Reliance on any Representation Made by GE Betz was Justified or Reasonable.

In addition to the fact that an actionable misrepresentation must relate to a present or pre-existing fact and must be false at the time it is made, there must be justifiable reliance on the

misrepresentation. O'Neal must "show that [its] reliance on the misrepresentation was reasonable." *AMA Mgmt. Corp.*, 309 S.C. at 222, 420 S.E.2d at 874. "There is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." *Id.*

Even if GE Betz represented that it was servicing the system pursuant to a contract with Owner, O'Neal's reliance on such a representation was unreasonable. O'Neal admittedly did not know anything about water treatment systems. O'Neal's engineering project manager for the LNG site, Don Bliss, testified O'Neal does not design, treat or otherwise operate cooling tower water treatment systems. (*Id.* at 65:10-11, 75:7-8, 183:5 "O'Neal does not do water treatment.") Bliss testified he did not know how much water treatment service costs, what was being charged on the other contracts on the GE Turbine site, or how many contracts GE Betz had for service at different locations on the site. (*Id.* at 148:1-10.) According to Bliss, O'Neal was told that GE Betz had a contract with Owner, and so O'Neal did not worry about treating the water. (*Id.* at 103:3-6.) Bliss testified, "We were totally under the understanding that [the water treatment] was an ongoing contract ... with GE [Betz] and [Owner]." (*Id.* at 108:5-7, 118:24-25 "O'Neal certainly felt like that [contract] was already in place.")

Even though O'Neal had full control of and responsibility for the LNG Project until the keys were turned over to Owner, Bliss admitted O'Neal "didn't pay much attention" to the water treatment system. (*Id.* at 162:24-163:2.) Instead, Bliss operated under a misunderstanding that the equipment had been operating properly between March 3 and July 7, 2014. (*Id.* at 94:25-95:2.) Bliss could not even say that GE Betz was operating the treatment system between March and July; instead testifying only that GE Betz "certainly came by and observed it." (*Id.* at 117:13-16.) According to Bliss, O'Neal believed GE Betz had been maintaining the system

because a representative for Owner saw Scott Rutledge, GE Betz's account manager, "on site very periodically." (*Id.* at 1111-5.) In fact, Bliss talked to Rutledge on March 3, 2014, and on July 7, 2014, but there were no interactions between the two between those dates. (*Id.* at 151:16-18.) Even when he saw Rutledge on March 3, he did not observe Rutledge doing anything. (*Id.* at 151:2.)

Between March 3 and July 7, 2014, O'Neal requested but never received any field reports from GE Betz. (*Id.* at 85:12-13.) No field reports were generated by GE Bez because there was no service agreement in place for the LNG site during the relevant time period. (*Id.* at 444:4-12.) Although Rutledge was on site "very periodically", his visits were never according to a set service schedule. Despite the fact there was clearly no regular maintenance or reporting of the system, O'Neal never raised any concerns about GE Betz not having a contract in place with Owner between March 3 and July 7. (*Id.* at 115:6-11.) O'Neal's construction project manager, Lonnie Blanton, testified he never investigated to see whether or not there was a contract between Owner and GE Betz for water treatment service. (*Id.* at 258:1-5.)

O'Neal also ignored clear instructions from Owner that O'Neal was contractually responsible for the water treatment system until the Project was completed and Owner took possession of the plant. Specifically, on September 4, 2013, Randy Paul, on behalf of Owner, informed GE Betz and O'Neal of the following:

> The chemical treatment system for the cooling water system is part of the O'Neal EPC contract. Your contacts at O'Neal are Jay Hendrix, project manager ... and Ron Bice, construction manager ... Jay and Ron will keep us in the approval process but it is ultimately O'Neal's responsibility from a contractual standpoint. Please address all future correspondence to O'Neal until the commissioning is complete and GE takes possession of the "keys" to the plant.

(*Id.* at 397:15-25, Def. Ex. 5.) According to testimony from Don Bliss, the critical information contained in this email may not have been communicated within the O'Neal organization. Bliss

testified that during the LNG Project, O'Neal experienced turnover in the project and construction manager positions. (*Id.* at 142:24-143:1.) Bliss admitted it is "very likely" the initial managers were distracted with searching for new jobs may have failed to pass along information from Owner that the water treatment was O'Neal's responsibility and not Owner's. (*Id.* at 142:7-143:7.)

When corrosion was discovered and O'Neal finally realized there was no contract for water treatment service or monitoring in place, O'Neal representatives expressed surprise. (*Id.* at 535:5-7.) Bliss's supervisor at the time wondered how O'Neal missed the fact the water treatment system was not being controlled or monitored. (*Id.* at 158:15-159:9; Def.'s Ex. 11.) Bliss admitted O'Neal's failure to recognize the system was not being serviced was an oversight. (*Id.*)

Actions such as O'Neal's unreasonable reliance on false assumptions are typically frowned upon by South Carolina Courts:

> It is the policy of the courts not only to discourage fraud, but also to discourage negligence and inattention to one's own interests. Courts do not sit for the purpose of relieving parties who refuse to exercise reasonable diligence or discretion to protect their own interests. A party must avail himself of the knowledge or means of knowledge open to him. The court will not protect the person who, with full opportunity to do so, will not protect himself.

King v. Oxford, 282 S.C. 307, 312, 318 S.E.2d 125, 128 (Ct. App. 1984). For example, in *King*, the Court of Appeals affirmed the dismissal of a counterclaim for fraudulent misrepresentation and rescission of a contract asserted by the seller of a business against the buyer after the parties transferred possession of the business without first agreeing on a specific sale price. *King*, 282 S.C. 307, 318 S.E.2d 125. The seller claimed the buyer and the parties' mutual attorney falsely assured her of a specific value she would receive and that she would not have signed the sales contract without such assurances. Finding the seller's reliance on the assurances unreasonable,

the Court cited "the often stated principle that 'one cannot rely upon misstatement of facts, if the truth is easily within his reach.'" *Id.* at 312, 318 S.E.2d at 128 (internal citations omitted); *see also Florentine Corp. v. Peda I, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985) ("Where there is no confidential or fiduciary relationship and an arm's length transaction between mature, educated people is involved, there is no right to rely. This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests.").

Recognizing no confidential or fiduciary relationship existed between buyer and seller, the Court found the sale of the business was an arms' length transaction, that the seller was a mature college graduate with experience running a business, and that the seller negotiated the contract, retained a lawyer to draft it, and had several days to study it before signing it. *Id.* at 311, 318 S.E.2d at 128. Consequently, if the seller was deceived as to the value of the business, according to the Court, it was because of her own lack of due diligence and not any assurances made by the buyer. *Id.* at 312, 318 S.E.2d at 128.

Similarly, in *Ama Management Corp.*, the Court of Appeals affirmed dismissal of a negligent misrepresentation claim because: (1) there was no evidence the statement by a representative of a lending company to a holder of guaranty agreements that the guaranties were "good" was false at the time it was made; and (2) there was no reasonable reliance on the statement. 309 S.C. at 224-25, 420 S.E.2d at 875. Specifically, the holder of the guaranty agreements alleged the lending company induced it to take an assignment by making affirmative representations the guaranties were valid, enforceable, unconditional obligations. *Id.* at 223-24, 420 S.E.2d at 874. However, despite making such oral assurances, the lending company refused to attest to the validity of the guaranties in the written assignment agreement. *Id.* at 224, 420 S.E.2d at 874-75. Holding the lending company's expression of an opinion could not reasonably

be relied upon as a substitute for a contractual warranty concerning the guaranties the Court stated:

> [Guaranty holder] is a sophisticated commercial lender with expert knowledge in managing and financing large business corporations. It was engaged in arm's length bargaining in which it was the initiating party, it was acting with professional legal advice, it understood that each party was seeking its own commercial advantage, it knew that each party was expected to exercise due diligence to protect its own interests, and it knew that each party must make its own calculations of risk. When [lending company] refused to stand behind the [ ] guaranties as a part of the assignment agreement, [holder] could not, by the expedient of eliciting an extemporaneous opinion that the guaranties were "good", create a liability by operation of law that [lender] would not undertake by contract.

Id. at 224-25, 420 S.E.2d at 875.

O'Neal is a sophisticated business entity that engaged in an arm's length transaction with GE Betz. O'Neal was instructed that the chemical treatment system for the cooling water tower on the LNG site was its responsibility under its contract with Owner. (Def.'s Ex. 5.) Despite this clear directive from Owner, O'Neal operated under the assumption Owner was footing the bill for the water treatment through its own contract with GE Betz. This assumption was unreasonable. The law does not reward lack of diligence by a sophisticated business entity, particularly when that entity fails to avail itself of knowledge open to it and fails to protect itself despite every opportunity to do so.

CONCLUSION

For the reasons stated above, the verdict entered against GE Betz on O'Neal's negligent misrepresentation claim should be reversed because O'Neal failed to produce any evidence of a false representation made by GE Betz to O'Neal, and O'Neal failed to produce any evidence that it justifiably relied on an alleged representation made by GE Betz.

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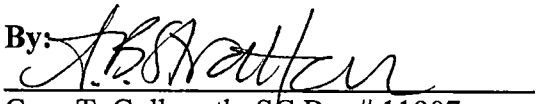
By: 

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October 8, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Civil Action No. 2015-CP-23-00973

Appellate Case No. 2019-000701

O'Neal Constructors, LLC.....Respondent,

v.

GE Betz, Inc. d/b/a GE Water & Process Technologies .....Appellant.

PROOF OF SERVICE

I, the undersigned employee of Gallivan, White & Boyd, P.A., do hereby certify that I have caused the below referenced to be served via U.S. mail, postage prepaid, *or by other delivery as indicated*, to all parties of record at the address(es) shown below.

1. Appellant GE Betz, Inc. d/b/a GE Water & Process Technologies' Initial Brief;
2. Appellant GE Betz, Inc. d/b/a GE Water & Process Technologies' Designation of Matter to be Included in the Record on Appeal; and
3. Appellant GE Betz, Inc. d/b/a GE Water & Process Technologies' Certification as to Designation of Matter.

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By: _____

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October 8, 2019

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October 8, 2019

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
SC Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: *O'Neal Constructors, LLC, Respondent v. GE Betz, Inc. d/b/a GE Water & Process Technologies, Appellant*
Greenville County Case No. 2015-CP-23-00973
Appellate Case No. 2019-000701
GWB File No. 3817-34

Dear Ms. Kitchings:

Enclosed for filing with your office are the following:

1. Appellant GE Betz, Inc. d/b/a GE Water & Process Technologies' Initial Brief;
2. Appellant GE Betz, Inc. d/b/a GE Water & Process Technologies' Designation of Matter;
3. Appellant GE Betz, Inc. d/b/a GE Water & Process Technologies' Certification as to Designation of Matter; and
4. Proof of Service.

I would appreciate you filing the original and returning a clocked copy to me via our courier.

With highest regards, I am

Very truly yours,

GALLIVAN, WHITE & BOYD, P.A.

ABStratton

Ashley B. Stratton

ABS/lhs
Enclosures
cc: N. Ward Lambert, Esquire
Wesley B. Lambert, Esquire