THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Henry W. Brown
Special Referee

APPELLATE CASE NO.: 2019-000513

Brown Contractors, LLC under S.C. Residential Builders License No. 20378,
.....Appellant/Respondent,

v.

Andrew Joseph McMarlin a/k/a Andrew Joseph McMarlin and Amy Salzhauer,
.....Respondents/Appellants,

And

Andrew McMarlin and Amy Salzhauer,
.....Respondents/Appellants,

v.

James Brown IV and Brown-Meihaus Construction, LLC,
.....Third-Party Defendants.

INITIAL REPLY BRIEF OF THE APPELLANT/RESPONDENT

Robert B. Varnado (SC Bar # 0007085)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant/Respondent and Third-Party Defendants.

October 3, 2019
Mt. Pleasant, South Carolina

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION and STATUTES

OTHER AUTHORITIES

A. The holding in *16 Jade Street, LLC v. R. Design Constr. Co.*, 405 S.C. 384, 747 S.E.2d 770 (2013) is neither dependent nor governed by whether the Special Referee looked into Brown Contractor's license as a 'defense' to its payment claim.

The Respondents state that "the issue addressed by the Special Referee was the McMarlins *defense* to Brown's claim for payment based on the fact that he was not properly licensed ... (emphasis in original)." [Respondent Br. p. 2].

In other words, because the Special Referee interpreted Brown Contractor's licensure status as a defense to the case rather than as a claim – the Respondents argue – then the Court of Appeals can safely ignore the holding of *16 Jade Street.*

However, *16 Jade Street* does not make a distinction when it comes to 'defenses' as opposed to 'claims.' Instead, the South Carolina Supreme Court expressly **rejects** any notion that Section 40-59-410 of the Residential Home Builders Act ("Act") creates **any** legal benefit for private parties in the circuit court:

> **"The only consequences imposed by virtue of an individual's license are to be meted out specifically by the appropriate licensing board, not a civil court.** *See* S.C. Code Ann. § 40–1–110(1) (2005) (listing the acts for which the licensing board can sanction a licensee, including when he "lacks the professional or ethical competence to practice the profession"); § 40–59–110 (2005) (stating additional grounds for which a residential contractor, specialty contractor, or home inspector can be sanctioned)).

Id., 405 S.C. at 389-390, 747 S.E.2d at 773 (emphasis added) .

Therefore, following *16 Jade Street*, it does not matter if the McMarlins or the Special Referee wanted to treat § 40-59-410 differently because it was done as a defense rather than a claim. They cannot. The Supreme Court has conclusively said that the circuit court cannot delve into the merits of Section 40-59-410 to benefit a private party.

Thus, the Special Referee could not substitute his judgment for that of the Supreme Court. Neither can the McMarlins. Neither can the Court of Appeals. While it might be

true that the "point of the Certificate of Authority requirements is to ensure that the person whose license is used to pull the permit is in charge of the construction company," (Respondent Br. p. 5) – or it might not – following the holding of *16 Jade Street* that is an issue for the RBC and *not* the Special Referee.

It is undisputed that Brown Contractors *was* licensed. [COA]. It is undisputed that Brown Contractors submitted their license prior to entering into an arrangement with the McMarlins. [Application]. Whether Brown Contractors received its license in time (as opposed to a harmless error on the part of LLR) – or whether Vuong Nguyen met the standard for a "qualifier" who was "in charge of the construction company" – are both issues which *had* to be addressed before the RBC, under the holding of *16 Jade Street*.

The Court of Appeals would fall into the same trap as the Special Referee if it rules against the Supreme Court – i.e., if and finds that there is somehow, someway, a secret, *unwritten* distinction contained in holding of *16 Jade Street* that allows the circuit court to go ahead and interpret the Act for a private party when it involves a *defense*, but not a claim! Such a distinction is not there and cannot be read into the case. S.C. Const. Art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."); *Daniels v. City of Goose Creek*, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993) (holding where the law is unmistakably clear, the decisions of the Supreme Court bind the Court of Appeals as precedents; any modification or limiting of a Supreme Court opinion must be done by the Supreme Court).

Brown-Meihaus was a fully licensed entity in 2012, it was sufficient for Jay Brown to solicit the McMarlin job. [Testimony]. Afterwards, Mr. Brown changed his company to Brown Contractors. [*Id.*] Since the testimony and evidence shows that Brown Contractors

submitted the paperwork to RBC in June 2012 (***before*** the commencement of the project), then the LLR obviously made a ministerial mistake in failing to mail that license to Brown Contractors until January of 2013[1]. [Plfts. Exh. 1; Testimony; Order, p. 7].

This is something that the RBC – and the RBC alone – can determine. Thus, the holdings of cases such as *Lenz v. Walsh*, 362 S.C. 603, 608 S.E.2d 471 (Ct. App. 2004), *Wagner v. Graham*, 296 S.C. 1, 370 S.E.2d 95 (1988), and *Columbia Pools, Inc. v. Moon*, 284 S.C. 145, 325 S.E.2d 540 (1985), are either satisfied or are otherwise not controlling.

Because exclusive jurisdiction is invested in the RBC with appeal to the Administrative Law Judge Division [S.C. Code Ann. §§ 40-59-115, -90 and -160], the Court of Appeals simply does not have jurisdiction to challenge how a contractor obtained a license, or whether it was timely. *Id.*, 405 S.C. at 389-390, 747 S.E.2d at 773. Thus, the RBC – and it alone – has complete, exclusive and administrative control over licenses and qualifications for certificates of authorization. S.C. Code Ann. § 40–1–110(1) (2005).

The fact that Brown Contractors has had a residential homebuilders Certificate of Authority deprives the circuit court of jurisdiction. To allow the McMarlins and the Special Referee to ignore §§ 40–1–110(1) and -410, as well as *16 Jade Street*, because the case involved a 'defense' rather than a 'claim,' ignores the clear holding of valid precedent.

B. The Respondent's Brief completely ignores Appellant's other appeal points, which is tantamount to a confession that the appellate arguments are correct.

The Appellant raised five (5) additional appeal points beyond *16 Jade Street, LLC*:

2. The Special Referee erred in allowing the Defendants to make a damages claim when they did not prove compliance with the *South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act*, S.C. Code Ann. § 49-59-810;

---

1 The LLR's sole inquiry after receiving the application was immediately resolved. [Testimony].

A. The holding in *16 Jade Street, LLC v. R. Design Constr. Co.*, 405 S.C. 384, 747 S.E.2d 770 (2013) is neither dependent nor governed by whether the Special Referee looked into Brown Contractor's license as a 'defense' to its payment claim.

The Respondents state that "the issue addressed by the Special Referee was the McMarlins *defense* to Brown's claim for payment based on the fact that he was not properly licensed ... (emphasis in original)." [Respondent Br. p. 2].

In other words, because the Special Referee interpreted Brown Contractor's licensure status as a defense to the case rather than as a claim – the Respondents argue – then the Court of Appeals can safely ignore the holding of *16 Jade Street*.

However, *16 Jade Street* does not make a distinction when it comes to 'defenses' as opposed to 'claims.' Instead, the South Carolina Supreme Court expressly **rejects** any notion that Section 40-59-410 of the Residential Home Builders Act ("Act") creates **any** legal benefit for private parties in the circuit court:

> **"The only consequences imposed by virtue of an individual's license are to be meted out specifically by the appropriate licensing board, not a civil court.** *See* S.C. Code Ann. § 40–1–110(1) (2005) (listing the acts for which the licensing board can sanction a licensee, including when he "lacks the professional or ethical competence to practice the profession"); § 40–59–110 (2005) (stating additional grounds for which a residential contractor, specialty contractor, or home inspector can be sanctioned)).

Id., 405 S.C. at 389-390, 747 S.E.2d at 773 (emphasis added) .

Therefore, following *16 Jade Street*, it does not matter if the McMarlins or the Special Referee wanted to treat § 40-59-410 differently because it was done as a defense rather than a claim. They cannot. The Supreme Court has conclusively said that the circuit court cannot delve into the merits of Section 40-59-410 to benefit a private party.

Thus, the Special Referee could not substitute his judgment for that of the Supreme Court. Neither can the McMarlins. Neither can the Court of Appeals. While it might be

true that the "point of the Certificate of Authority requirements is to ensure that the person whose license is used to pull the permit is in charge of the construction company," (Respondent Br. p. 5) – or it might not – following the holding of *16 Jade Street* that is an issue for the RBC and *not* the Special Referee.

It is undisputed that Brown Contractors *was* licensed. [COA]. It is undisputed that Brown Contractors submitted its license application prior to entering into an arrangement with the McMarlins. [Application]. Whether Brown Contractors received its actual license in time (as opposed to a harmless error on the part of LLR) is an issue which *had* to be addressed before the RBC, based under the holding of *16 Jade Street*. The same is equally true for the issue of whether Vuong Nguyen met the standard for a "qualifier" who was "in charge of the construction company/"

If it rules against the Supreme Court, then the Court of Appeals will fall into the same trap as the Special Referee – i.e., if the Court of Appeals finds that there is somehow, someway, a secret, *unwritten* distinction contained in holding of *16 Jade Street* that allows the circuit court to go ahead and interpret the Act for a private party when it involves a *defense*, but not a claim! Such a distinction is simply not there and cannot be read into the case. S.C. Const. Art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."); *Daniels v. City of Goose Creek*, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993) (holding where the law is unmistakably clear, the decisions of the Supreme Court bind the Court of Appeals as precedents; any modification or limiting of a Supreme Court opinion must be done by the Supreme Court).

Brown-Meihaus was a fully licensed entity in 2012, which was sufficient to solicit the McMarlin job. [Testimony]. Afterwards, the company became Brown Contractors.

[*Id.*] Since the testimony and evidence shows that Brown Contractors submitted its licensing paperwork to RBC in June 2012 (***before*** the commencement of the project), then the LLR obviously made a ministerial mistake in failing to mail that license to Brown Contractors until January of 2013[1]. [Plfts. Exh. 1; Testimony; Order, p. 7].

This is something that the RBC – and the RBC alone – can determine. Thus, the holdings of cases such as *Lenz v. Walsh*, 362 S.C. 603, 608 S.E.2d 471 (Ct. App. 2004), *Wagner v. Graham*, 296 S.C. 1, 370 S.E.2d 95 (1988), and *Columbia Pools, Inc. v. Moon*, 284 S.C. 145, 325 S.E.2d 540 (1985), are either satisfied or are otherwise not controlling.

Because exclusive jurisdiction is invested in the RBC with appeal to the Administrative Law Judge Division [S.C. Code Ann. §§ 40-59-115, -90 and -160], the Court of Appeals simply does not have jurisdiction to challenge how a contractor obtained a license, or whether it was timely. *Id.*, 405 S.C. at 389-390, 747 S.E.2d at 773. Thus, the RBC – and it alone – has complete, exclusive and administrative control over licenses and qualifications for certificates of authorization. S.C. Code Ann. § 40–1–110(1) (2005).

The fact that Brown Contractors has had a residential homebuilders Certificate of Authority deprived the circuit court of jurisdiction. To allow the McMarlins and the Special Referee to pass over §§ 40–1–110(1) and -410, as well as *16 Jade Street*, because the case involved a 'defense' rather than a 'claim,' ignores the clear holding of valid precedent.

B. The Respondent's Brief completely ignores Appellant's other appeal points, which is tantamount to a confession that the appellate arguments are correct.

The Appellant raised five (5) additional appeal points beyond *16 Jade Street, LLC*:

2. The Special Referee erred in allowing the Defendants to make a damages claim when they did not prove compliance with the *South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act*, S.C. Code Ann. § 49-59-810;

---

[1] The LLR's sole inquiry after receiving the application was immediately resolved. [Testimony].

3. The Special Referee erred in finding that the omission of the RBC license number on the Mechanic's Lien violated the S.C. Code § 29-5-15 following 53 Am. Jur.2d *Mechanic's Liens* § 235 (1996) and *Clo–Car Trucking Co. v. Clifflue Estates of S.C.,* 282 S.C. 573, 575–76, 320 S.E.2d 51, 53 (Ct. App. 1984);

4. The Special Referee also erred by adopting the IRS terms "W-2 employee" vs. "1099 subcontractor" in determining that Vuong Ngyuen was not an employee under S.C. Code § 40-59-400;

5. The Special Referee made other errors of law in determining that Brown-Contractors was not licensed; and

6. The Special Referee erred in granting attorneys' fees to the Defendants.

Respondent's brief, however, only addresses *16 Jade Street.* Appellant submits that the others are valid appeal questions, which the Respondents inexplicably does nothing – offering no contradiction, no analysis and no argument, whatsoever.

By failing to address the substance of the Appellant's other 5 grounds for appeal, Respondents have conceded these points to the Appellant. "If [a] respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct." *Turner v. South Carolina Dep't Environ. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008); 5 Am.Jur.2d *Appellate Review* § 555, at 254 (1995). To the extent they are covered at all, the Respondenta use cursory and conclusory arguments which should be disregarded by the Court. *Broom v. Jennifer J.,* 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013).

CONCLUSION

For these reasons, the Court of Appeals should rule for the Appellant.

Respectfully submitted,

Robert B. Varnado (SC Bar # 0007085)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant

October 3, 2019
at Mt. Pleasant, South Carolina

LANDMARK LODGE № 76, A.·.F.·.M.·.
164 Market Street, Suite 283
Charleston, South Carolina 29401

October 3, 2019

Mr. Carlton Simons, Sr.
9 Church Street
Charleston, SC 29401

Re: June and October Rent

Dear Carlton:

Enclosed please find Landmark Lodge check no. 1417 (6.5.19)and check no. 1618 (10.2.19), both in the amount of $100.00 made payable to the Charleston Club for June and October rent. You graciously did not charge us for the use of the Club in August before Baron Fain's funeral, and Hurricane Dorian meant we could not meet at the Club in September. Thanks again for allowing the Lodge the use of your beautiful club building.

With best regards, I remain

Very truly yours,

Robert B. Varnado, P.M.
Secretary
rvarnado@brown-varnado.com
(843) 737-7301 work / (843) 670-1826 cell

cc: Christopher T. Allen, Worshipful Master (via email only)

Respectfully submitted,

Robert B. Varnado (SC Bar # 0007085)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant

October 3, 2019
at Mt. Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Henry W. Brown
Special Referee

APPELLATE CASE NO.: 2019-000513

Brown Contractors, LLC under S.C. Residential Builders License No. 20378,
.....Appellant/Respondent,
v.
Andrew Joseph McMarlin a/k/a Andrew Joseph McMarlin and Amy Salzhauer,
.....Respondents/Appellants,

And

Andrew McMarlin and Amy Salzhauer,
.....Respondents/Appellants,
v.
James Brown IV and Brown-Meihaus Construction, LLC,
.....Third-Party Defendants.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the ***Initial Reply Brief of the Appellant/Respondent*** in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this date to the following:

Robert T. Lyles, Jr., Esquire
Lyles & Associates, LLC
342 East Bay Street
Charleston, South Carolina 29401

(Signature on Following Page)

Robert B. Varnado (SC Bar # 0007085)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant/Respondent and Third-Party Defendants.

October 3, 2019
Mt. Pleasant, South Carolina

BROWN & VARNADO LLC
ATTORNEYS AT LAW

103 CHURCH STREET (29464)
POST OFFICE BOX 1127
MT. PLEASANT, SC 29465
OFFICE: (843) 737-7300
FACSIMILE: (843) 654-5109

ROBERT B. VARNADO
DIRECT: (843) 737-7301
EMAIL: rvarnado@brown-varnado.com

October 3, 2019

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: ***Brown Contractors, LLC v. Andrew McMarlin***
Appellate Case No.: 2019-00513
Our File No.: 6225.005

Dear Ms. Kitchings:

Enclosed find the ***Initial Reply Brief of the Appellant/Respondent.***

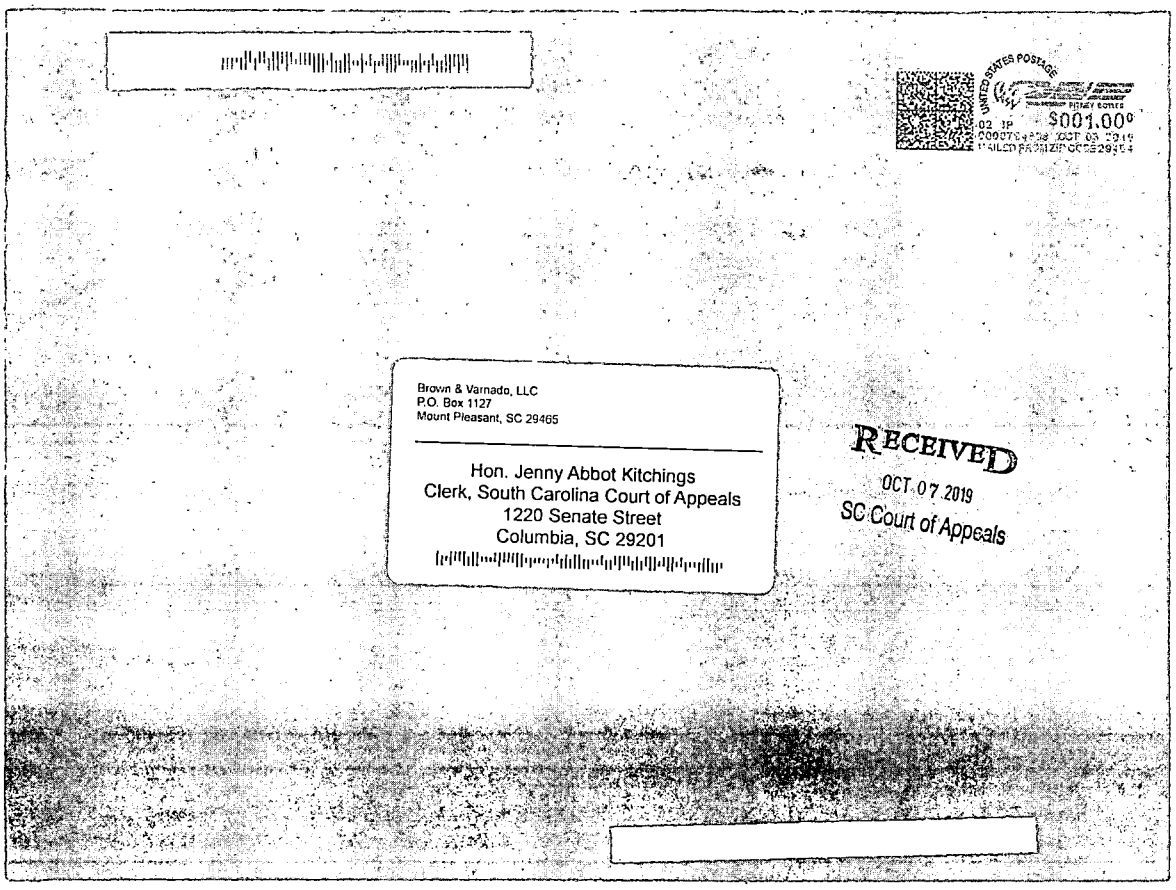
Thank you and with best regards, I remain

Very truly yours,

BROWN AND VARNADO LLC

Robert B. Varnado

RBV/am
cc: Robert T. Lyles, Jr., Esquire (via US Mail)



Brown & Varnado, LLC
P.O. Box 1127
Mount Pleasant, SC 29465

Hon. Jenny Abbot Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
OCT 07 2019
SC Court of Appeals