THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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.

FINAL BRIEF OF THE APPELLANT/RESPONDENT

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June 29, 2020
Mt. Pleasant, South Carolina

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STATEMENT OF ISSUES ON APPEAL

1. Did the Special Referee violate the holding in *16 Jade Street, LLC v. R. Design Constr. Co.,* 405 S.C. 384, 747 S.E.2d 770 (2013) in finding Brown Contractors was unlicensed?

2. Did the Special Referee err in allowing the Defendants to make a damages claim when they did not prove compliance with S.C. Code § 49-59-810?

3. Did the Special Referee err in finding that the omission of the RBC license violated the S.C. Code 29-5-15?

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

5. Did the Special Referee make other errors of law in determining that Brown-Contractors was not licensed?

6. Did the Special Referee err in granting attorneys' fees to the Defendants?

STATEMENT OF THE CASE

The Plaintiff Brown Contractors, LLC ("Plaintiff" or "Brown Contractors") was established in April 14, 2009 for the purpose of residential home building, with James L. "Jay" Brown IV as its sole member. Its address was given as 103 Palm Boulevard, Suite 34, Isle of Palms, South Carolina 29451. [R. 640].

Jay Brown has been in the business of building and renovating custom houses on the Isle of Palms and Sullivan's Island for over a decade. Originally from the Charlotte, North Carolina area, he was partnered with a South Carolina residential contractor named Andy Meihaus. Brown and Meihaus separated in 2012, so that Meihaus could build houses in Kiawah and Seabrook Islands, while Brown concentrated East of the Cooper. [R. 123].

On June 6, 2012, Brown Contractors filled out a Certificate of Authorization ("COA") form with the State of South Carolina's Residential Builder Commission

("RBC"), with a $100.00 fee attached. Therein, Brown Contractors indicated that Vuong Ngyuen would serve as the "qualifying party" for the company pursuant to S.C. Code Ann. § 40-59-400 *et seq*. The COA application was received by the RBC on June 8, 2012. [R. 640-643; 123-126].

There was correspondence from the RBC to Brown Contractors on June 12, 2012 seeking a bond to be filed – which was done. [R. 647-648]. At that point, Brown Contractors reasonably believed itself to be in full compliance with South Carolina's Residential Building Code, as confirmed by a telephone call to the RBC from Jay Brown. [R. 127]. Ultimately, the RBC finally performed the ministerial act of issuing the COA on January 28, 2013. [R. 550]. No evidence was submitted that this delay was anything other than a bureaucratic mistake. It was issued again on May 1, 2013 and April 16, 2014. (Id.). The McMarlins have never filed a complaint with the RBC against Brown Contractors and/or Jay Brown. [R. 428].

Neither party is sure of the exact date, but in the spring-summer of 2012, Dr. Andy McMarlin and Mrs. Amy Salzhauer McMarlin began to interview contractors for structural renovations to their home at 1850 Flag Street on Sullivan's Island, South Carolina ("1850 Flag") and spoke to several contractors, including Jay Brown.

A number of "bids" and "estimates" were sent by Brown Contractors and/or requested by the McMarlins, though Henry "Hank" Salzhauer (the Defendants' father in law and father, respectively), who was an experienced electrical services contractor who resided in New York. [R. 664-677; 700-709]. No one disputes that Mr. Salzhauer handled the business side of the arrangement.

Importantly, none of these "bids" or "estimates" [R. 664-677; 700-709] indicated that they constituted a "guaranteed maximum price" or "not to exceed" pricing or reflected any agreement by Brown Contractors to do the work for specific sum of money. (Id.). This would have been impossible, since the scope of the renovation was a moving target.

Jay Brown did send two contracts to the Defendants on July 20, 2012 and July 24, 2012. [R. 715-719]. The first clearly states on the front page that it is a Cost-Plus contract; the second's cover email makes it clear that it is another cost-plus contract. (Id.). Neither were signed, however. (Id.).

For their part, the McMarlin-Salzhauer's explained that they assumed the work would be performed for specific sums of money and this was the reason why they rejected signing the contracts. Despite their numerous, written communications directly to Jay Brown and/or his staff, however, the Defendants could point to no contemporaneous writings – either email or letter – which sets forth their position on the "guaranteed pricing" angle, or even that they rejected the Contracts. [R. 120, 138, 141].

Jay Brown and his office assistant, Deborah Kahn (who no longer works for him) both testified that: (1) all of Brown Contractors' building projects during this time frame were cost-plus jobs; (2) that this project was billed as a cost-plus job; and (3) that Hank Salzhauer and Amy Salzhauer McMarlin were well aware of that fact, as demonstrated by not only by the proposed contracts but by the billing details that Brown Contractors sent Mr. Salzhauer.

Proceeding without a written contract was an oversight on Jay Brown's part, but this oversight falls equally on the Defendants, who accepted the cost-plus billing system. Each invoice, prepared and sent by Brown Contractors, clearly had an "overhead and

profit" number of 15% as the last entry on the invoice, throughout the work. [R. 678-699]. If the parties "do not have an executed, written contract" [R. 005], and Brown billed on a cost-plus basis, then the bid documents are irrelevant.

Thereafter, on July 25, 2012, Brown Contractors pulled a demolition permit with the Town of Sullivan's Island for 1850 Flag Street. [R. 653]. This was followed by a full construction permit issued by the Town to Brown Contractors on August 28, 2012. [R. 654]. The job was completed to the satisfaction of the Town of Sullivan's Island code enforcement official on September 23, 2013 [R. 655], although Brown Contractors and its sub-contractors, continued to perform punch-type work through the fall and into the New Year at the Defendants' request.

A mechanic's lien followed on March 19, 2014. The lien set forth the license number of the qualifier, Vuong Ngyuen, which appeared in all the subsequent pleadings. Thereafter, a timely Lis Pendens, Summons and Complaint followed on June 18, 2014. [R. 656-659, 26-32]. Brown Contractor's books showed that the Defendants still owed $206,428.59 in unpaid invoices. [R. 671-677].

Defendants timely answered and, thereafter, amended their answer and filed counterclaims and third-party actions against Jay Brown, individually, and Brown-Meihaus Construction Co., LLC for negligence, breach of implied warranties, breach of contract and unfair and deceptive practices. Importantly, neither Mr. Salzhauer and/or the Defendants sent Brown Contractors a certified letter, setting forth its right to cure, at any time during the pendency of the case.

The case was assigned to Henry W. Brown, Special Referee. The case was heard non-jury from November 7-10, 2017 and the Special Referee gave a written *Order* granting

the Defendants judgment for $346,693.00, which was issued on May 1, 2018. [R. 3-19]. Appellant filed a timely Rule 59(e) motion to alter or amend on May 11, 2018 [R. 71-96], but it was denied by written Order dated February 22, 2019 and served on February 25, 2019. [R. 20-26]. The Special Referee also gave an *Order Awarding Attorney's Fees* on February 22 (and also served February 25), in which he awarded Plaintiffs $133,161.00 in attorneys' fees. This appeal timely followed on March 25, 2019 – two days prior to the deadline. [R. 111-112].

STANDARD OF REVIEW

The issues raised in this appeal concern only the legal claims asserted by the parties; therefore, the standard of review is that applicable for actions at law. "When reviewing an action at law, referred to a master or special referee for final judgment with direct appeal to the supreme court or the court of appeals, the appellate court's jurisdiction is limited to correcting errors of law, and the appellate court will not disturb the master or special referee's findings of fact as long as they are reasonably supported by the evidence." *Allen v. Pinnacle Healthcare Sys., LLC,* 394 S.C. 268, 272, 715 S.E.2d 362, 364 (Ct. App. 2011).

ARGUMENT

1. The Special Referee violated the holding in *16 Jade Street, LLC v. R. Design Constr. Co.,* 405 S.C. 384, 747 S.E.2d 770 (2013) in finding Brown Contractors was unlicensed.

The Special Referee determined that at the time the "contract" was entered with the Defendants, Brown Contractors was unlicensed pursuant to S.C. Code Ann. §§ 40-59-30 and -20. As such, he found that it was not entitled to pursue a claim for damages or a mechanic's lien under S.C. Code Ann. § 29-5-10. [R. 006-009].

This is ***not*** the case, however. Vuong Nguyen was the "qualifier" for Brown Contractors, Inc. [to obtain a certificate of authorization, pursuant to S.C. Code Ann. § 40-59-410] and Mr. Nguyen is a duly licensed South Carolina residential builder since 2004. The Special Referee found these facts, and his inquiry should have ended there. (Id.).

Nevertheless, the Special Referee still held that Brown Contractors was not "properly licensed" [through §40-59-410] based on the ***application*** submitted by Brown Contractors for these reasons:

(i) The Special Referee held that Nguyen was listed on the application as an employee of Brown Contractors, and that both James Brown and Nyguen attested to that fact on the application [R. 009]. He found, however, that: (a) Brown testified that Nguyen was a 1099 independent contractor [Id.] and; (b) his bookkeeper, Deborah Winner, testified that Brown Contractors had no employees [Order, p. 8]. Thus, the Special Referee found that the testimony established that "Ngyuen was not an employee of Brown, LLC [sic] within the intent of the statute." [R. 010].

(ii) The Special Referee also found that Nguyen did not meet the definition of the "role of resident licensee in responsible charge" as set out in Sections 40-59-400(5) and

(6), because the qualifying party "may be in responsible charge of only one place of business at a given time," but Nguyen "was using one license for two places of business and this is in clear violation of the statute." [R. 010]. The Special Referee also found that "Brown not Mr. Nyguen was directing the building services to a successful completion and Brown, not Mr. Nyguen, was the person in responsible charge." [R. 009-010].

(iii) Thus, the Special Referee held that the COA was "issued in response to misrepresentations and false statements of fact" [Order, p. 8] and, accordingly, "Brown was not properly licensed at any time during the solicitation or performance of the McMarlin job." [R. 011].

However, the Special Referee's findings (that Brown Contractors made "misrepresentations and false statements of fact" in its application) directly violates the provisions of the South Carolina Residential Homebuilders Act and contradicts the clear holding of *16 Jade Street, LLC v. R. Design Constr. Co.*, 405 S.C. 384, 747 S.E.2d 770 (2013).

In *16 Jade Street*, the South Carolina Supreme Court expressly **rejected** the notion that Section 40-59-410 of the Residential Home Builders Act creates any legal benefit for private parties in circuit court. *Id.*, 405 S.C. at 389-390, 747 S.E.2d at 773. In her opinion, Justice Hearn wrote:

> Based on this language, the circuit court concluded that as a resident licensee, Aten assumed professional responsibility for the project and, furthermore, that the use of the term professional responsibility "is broad enough to include civil liability."
>
> We reject this construction of the statute. Nothing in the language of the statute evinces a legislative intent to create such a legal duty**, nor was this statute enacted for the benefit of a private party**. The provisions in question concern the issuance of certificates of authorization for a company engaging in residential home-building, specialty contracting, or home

> inspection and serve essentially to define terms used within a subsection the Residential Home Builders Act. Section 40–59–410 of the South Carolina Code (2005) requires the company to identify a resident licensee in "responsible charge" of each principal or branch office. § 40–59–410(B)(1), (D), & (H). The statute therefore requires at least one person in each office of the company to be licensed and assume professional responsibility for the project. However, we disagree with the court's conclusion that professional responsibility is tantamount to civil liability. **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. (emphasis added).

While *16 Jade Street* directly concerned whether a plaintiff could use § 40-59-410 to sue a resident licensee (i.e., qualifier) in tort, the principles in the opinion that the statute was not "enacted for the benefit of a private party" and "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" are directly applicable in the instant case. *Id.* In spite of *16 Jade Street's* clear holding that the Residential Home Builders Act was "not enacted for the benefit of a private party" and that Residential Home Builders Act, the Special Referee nevertheless ignored it.

The Special Referee found that "*Jade Street* did not repeal the provisions of the licensing statute." [R. 011]. But this is a straw-man argument; the case specifically says that the statute was not "enacted for the benefit of a private party." 405 S.C. at 389-390, 747 S.E.2d at 773.

The Special Referee also held that "the delicts related to the use of the license are a matter to be dealt with by the licensing body, unless there are omissions by the individual

license holder that would subject the licensee to liability for claims by the firm's wrongful conduct, independent of the license held." [R. 011]. This reasoning is included nowhere in *16 Jade Street*; to allow it to stand as the ruling of the circuit court would fundamentally do violence to the case's clear reasoning, which disagrees with the position that "professional responsibility is tantamount to civil liability." *Id.*

Finally, the Special Referee held that "[w]hile the qualifier may not be personally liable solely because he or she is the qualifier, the firm remains unable to enforce its contract or assert equitable claims if the firm fails to comply with the licensing statute." [Order, p. 9]. Once again, the Special Referee is driving a huge hole through the heart of *16 Jade Street's* blanket prohibition against the circuit court making findings of licensure, <u>when that function is clearly reserved to the licensure board</u>. 405 S.C. at 389-390, 747 S.E.2d at 773.

Thus, at the time the contract with the McMarlins was actually entered, and before any work was done on the McMarlin residence, Brown Contractors <u>had</u> met the requirements of the certificate of authorization act by submitting the application to the Residential Builders Commission.

The Special Referee cannot ignore the plain language of *16 Jade Street* to make the findings that Brown Contractors had made "misrepresentations and false statements of fact" in its application, since such findings are properly the purview of the Residential Builders Commission and not the circuit court.

In other words, the RBC – and it alone – has complete, exclusive and administrative control over licenses, qualifications for certificates of authorization. *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") and § 40–59–110 (2005) (stating additional grounds for which a residential contractor, specialty contractor, or home inspector can be sanctioned).

Therefore, while Defendants may wish to argue that Plaintiff misled, misread or misunderstood the Residential Home Builders Act, they should have taken that up with the Commission directly. They did not. In missing this clear administrative step (filing and litigating a complaint with the RBC), the Plaintiffs cannot now argue that they proved anything in Circuit Court as to the Plaintiff's 'fraud.' The Special Referee erred by ignoring this fact.

To affirm the Special Referee would not only ignore the precedent of *16 Jade Street* but fly in the face of the principles of statutory construction. *Browning v. Hartvigsen,* 330 S.C. 175, 181, 498 S.E.2d 635, 638 (1998) (a statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers); *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989) (In ascertaining legislative intent, statutes which are part of the same act must be read together.). Moreover, in *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013), Justice Kittredge wrote:

> South Carolina circuit courts are vested with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law. S.C. CONST. ART. V, § 11. "In determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute."

Id., 404 S.C. at 323, 745 S.E.2d at 83.

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], this

Court simply does not have jurisdiction to challenge how a contractor obtained a license, **merely whether he has a license at all**. *Id.*; *see also Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 82, 742 S.E.2d 371, 374 (2013) (holding that when General Assembly gave exclusive power to challenge A-Tax funds to the Tourism Expenditure Review Committee, the circuit court lacked subject matter jurisdiction even to consider a declaratory judgment action); *Cf. Park v. Safeco Ins. Co.*, 251 S.C. 410, 414, 162 S.E.2d 709, 711 (1968) (Courts generally decline to pronounce a declaration wherein the rights of a party are contingent upon the happening of some event which cannot be forecast and which may never take place); *Baber v. Greenville County*, 327 S.C. 31, 45, 488 S.E.2d 314, 321 (1997).

Insofar as the Plaintiff's license was valid, then its lien was valid. Plaintiff proved its damages with particularity, it should be awarded its full lien amount of $206,428.59, along with pre-judgment interest at the lawful rate, which the Special Referee should accordingly add to the award. It was an error by the Special Referee not to include it.

2. The Special Referee erred in allowing the Defendants to make a damages claim when they did not prove compliance with S.C. Code § 49-59-810.

The law of South Carolina is very clear that under the *South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act*, codified at S.C. Code Ann. § 49-59-810 ("Right to Cure Act"), homeowners must serve on the general contractor, no less than ninety days before filing an action, setting forth required information about the claim.

In the case of *Grazia v. South Carolina State Plastering*, 390 S.C. 562, 570, 703 S.E.2d 197, 200-201 (2010), the Supreme Court endorsed the view that the Right to Cure Act "encompasses civil law suits filed against a contractor" and "requires the claimant to serve written notice no less than ninety days before the action." The *Grazia* Court then

held that "[t]he stated public policy therefore is to ... provide an opportunity to resolve the claim without litigation." *Id.* Thus, any notice or a stay under the Act must be obtained before the claimant engages in work; to the extent the Plaintiff seeks recovery of work performed without first giving formal notice and the right to inspect the property, the Act is considered breached. *See Andrew and Kimberly McIntyre v. Seaquest Development Co., Inc.*, 2016-CP-10-1833 (Charleston Co. Ct. Common Pleas, 2017) (Toal, J.), p. 6, (on appeal to the South Carolina Court of Appeals, Appellate Case No. 2017-001270).

In other words, the Defendant homeowners must do more than merely give a contractor the right to inspect or say that repairs are underway. Rather, they must strictly follow the requirements of S.C. Code Ann. § 49-59-810. Otherwise, their entire counterclaim case is irreparably lost.

In this case, however, no evidence whatsoever was adduced anywhere at trial that the Defendants complied with the Act at any time over the last four years. Thus, any damages which they claim have been performed by repair contractors cannot be obtained against the Plaintiff or Third-Party Defendants. Likewise, since the trial is concluded, no damages can be obtained against the Plaintiff or Third-Party Defendants, either. This is a harsh decision but a fair one.

In much the same way that the Defendants claim that the mechanics lien is void for various technical issues, which the Defendants say cannot be washed away, then their claims must also be barred by the dictates of the Right to Cure Act. S.C. Code Ann. § 49-59-810; *Grazia*, 390 S.C. at 570, 703 S.E.2d at 200-201. This was a residential construction project; therefore, § 49-59-810 must be complied with strictly.

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.**

As an additional ground to find the Mechanic's Lien invalid, the Special Referee held that "[s]ection 29-5-15 requires that a contractor seeking to file a lien record his contractor's license number on the lien document when the lien is filed" but that "Plaintiff used Nguyen's license number, and based on the findings above, this was not a valid license number for Brown Contractors and failed to satisfy the requirements of the statute." [R. 012]. In fact, the "findings above" do not specify which number Brown Contractors should have used; instead, the "findings above" focus entirely on the purported lack of licensure for Brown Contractors [R. 006-011]. For this reason, the appeal should be granted.

Assuming, however, that the Special Referee meant to say that the failure of the undersigned to include the Brown Contractors RBC number (# 198), on the lien is a violation of S.C. Code Ann. § 29-5-15, then the Special Referee is demanding the strictest statutory construction of the Mechanics Lien statute, in contravention of the law.

The purpose of the mechanic's lien statute is to aid both builders and owners. *A. V.A. Const. Corp. v. Santee Wando Constr.*, 303 S.C. 333, 335, 400 S.E.2d 498, 500 (Ct. App. 1990). All the statutory requirements for enforcement of a mechanic's lien must be strictly followed and that the failure to adhere to the requirements of statutes will result in the dissolution of the lien. *Cohen's Drywall Co., Inc. v. Sea Spray Homes, Inc.*, 374 S.C. 195, 199, 648 S.E.2d 598, 600 (2007). However, "[t]echnical requirements should not stand in the way of achieving the purposes of the mechanic's lien law. Even though a claim contains some defect or error it will be upheld where the owner is informed of the claim and not misled by it or prejudiced." 53 Am. Jur.2d *Mechanic's Liens* § 235 (1996).

Additionally, it is also equally true, that because "the mechanic's lien statutes are remedial, they are to be given a liberal construction." *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). Turning to S.C. Code Ann. § 29-5-15, which was enacted in 2009, the General Assembly provided *"[a]s proof of licensure or registration, the contractor must record his contractor license number or registration number on the lien document when the lien document is filed."* The clear intent and purpose is to keep unlicensed contractors from availing themselves of the mechanic's lien statute. The use of the masculine "his" is consistent with the other parts of the act.

Mindful of the admonition in *Clo–Car* that the statutes are to be interpreted liberally, then Plaintiff complied with the letter and spirit of S.C. Code Ann. § 29-5-15. Nguyen's # 20378 was the contractor's license number and was Brown Contractors used it during work on the Defendant's residence, Thus, it's inclusion on the Notice showing compliance with the statute. 282 S.C. at 575–76, 320 S.E.2d at 53 (Ct. App. 1984). The legislative intent was satisfied because it allowed Defendants to inquire into licensure status – which they did. Defendants have had zero prejudice as a result; they have not been misled.

Moreover, it is an equally valid and liberal interpretation of S.C. Code Ann. § 29-5-15 that Plaintiff could have *either* used: (1) License # 20378 or (2) RBC # 198 or (3) both. At most, the non-inclusion of Certificate of Authorization # RBC 198 in addition to License # 20378 is a minor technical issue. *See* 53 Am. Jur.2d *Mechanic's Liens* § 235 (1996) ("[T]echnical requirements should not stand in the way of achieving the purposes

of the mechanic's lien law. Even though a claim contains some defect or error it will be upheld where the owner is informed of the claim and not misled by it or prejudiced.").

Finally, the mechanic's lien statute also provides for simple amendments under S.C. Code Ann. § 29-5-180, which can be used to add # RBC 198, and which was done in this case.

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.

In also making his finding that Brown Contractors was unlicensed, the Special Referee adopted the Plaintiff's use of "W-2 employee" vs. "1099 subcontractor." This was in error to.

The General Assembly did not include "employee" in one of its defined terms in the Residential Home Builders Act. S.C. Code Ann. § 40-59-400. In *Perry v. Bullock*, 409 S.C. 137, 140-141, 761 S.E.2d 251, 253 (2014), however, the Supreme Court ruled that "[w]hen interpreting an undefined statutory term, the Court must look to its usual and customary meaning." there is apparently no South Carolina precedent that gives an all-encompassing, across-the-board definition of employee—but the vast majority of the jurisprudence about what constitutes an employee comes in the field of workers' compensation law. *Wilkinson ex rel. Wilkinson v. Palmetto State Transport*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009); *cf.* South Carolina Workers Compensation Act, S.C. Code Ann. § 42-1-130 ("[t]he term employee means every person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written, ... whether lawfully or unlawfully employed, but excludes a person whose employment is both casual and not in the course of the trade").

"W-2" and "1099" are IRS terms which govern method of payment; they do not define who is and is not an employee under South Carolina law. While attorneys, accountants and tax professionals may be familiar with this IRS nomenclature, it fails to meet *Perry's* admonition to look for a 'usual and customary" meaning and instead tries to insert a more specialized one. 409 S.C. at 140-141, 761 S.E.2d at 253.

The same holds true for trying to draw a distinction in the area of construction practices – where a general contractor may have office staff, day laborers, sub-contractors and material provider; again, this is using specialized nomenclature instead of usual and customary definition. If the Court follows *Perry* to adopt a usual and customary definition, the Court would reject IRS definitions and look to standard definitions.

In how it defines employee, BLACK'S LAW DICTIONARY places a heavy emphasis on the master's control:

> A person in the service of another under any contract of hire, express or implied, oral or written, **where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed** .... Generally, when person for whom services are performed has right to control and direct individual who performs services not only as to result to be accomplished by work but also as to details and means by which result is accomplished, individual subject to direction is an "employee".

BLACK'S LAW DICTIONARY, 6th Ed., p. 525 (1990)(emphasis added). The Merriam-Webster Online Dictionary is far more anodyne: "one employed by another usually for wages or salary and in a position below the executive level."

Plaintiff submits that the Court was safest to follow workers' compensation precedent, in which the Court of Appeals has previously opined: "[t]hat the employment relationship is contractual in character; however, no formality is required. The contract may be oral or written, and also may be implied from conduct of the parties. It is enough

if the circumstances show unequivocally that the parties recognize the relationship." *Spivey v. D.G. Const. Co.,* 321 S.C. 19, 22, 467 S.E.2d 117, 119 (Ct. App. 1996).

In 2013, the Supreme Court emphasized the control factor in determining the existence of an employee-employer relationship: "[u]nder settled law, the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control." *Shatto v. McLeod Reg. Med. Ctr.*, 406 S.C. 470, 475, 753 S.E.2d 416, 419 (2013). Justice Kittredge explained that "while evidence of right of actual control exerted by a putative employer is evidence of an employment relationship, the critical inquiry is whether there exists the right and authority to control and direct the particular work and undertaking. The right to control does not require the dictation of the thinking and the manner of performing the work. It is enough if the employer has the right to direct the person by whom the services are to be performed, the time, place, degree and amount of said services." *Id.*, 406 S.C. at 420, 753 S.E.2d at 477.

The use of the workers' compensation precedent outside of the traditional workers' compensation arena is supported by *Todd's Ice Cream, Inc. v. South Carolina Employment Security Comm'n,* 281 S.C. 254, 258, 315 S.E.2d 373, 375-376 (Ct. App. 1986), in which the Court of Appeals extended the employee versus independent contractor analysis into the realm of an employment security claim. In *Todd's Ice Cream*, the panel found: "[i]n determining whether an individual is a servant (employee) or an independent contractor, the proper test to be applied is not the actual control exercised by the alleged master, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." *Id.*

The Special Referee should have applied workers' compensation precedent, which focuses on control, and therefore must analyze four factors in determining that right of right of control: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire. *Wilkinson ex rel. Wilkinson v. Palmetto State Transport*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009) (In evaluating the right of control, the Court examines four factors which serve as a means of analyzing the work relationship as a whole ...we return to our jurisprudence that evaluates the four factors with equal force in both directions."); *see also Shatto v. McLeod Reg. Med. Ctr.*, 406 S.C. 470, 475-476, 753 S.E.2d 416, 419 (2013).

(1) Direct Evidence of Right of Control.

Nguyen was deposed on March 23, 2015. There is little doubt from his testimony that he was in a relationship in which he was actually controlled by Plaintiff. While Nguyen conceded he was not a W-2 employee and invoiced Plaintiff as a sub-contractor (in which he hired and directing the work of sub-sub-contractors), he also testified that during the time that Defendants' house was built that he was working exclusively for Plaintiff; that Brown Contractors could pull him on and off jobs as project manager; that while working as project manager he directed the work of all sub-contractors (in addition to the ones he hired) for Brown Contractors; that he met and received instructions from Brown Contractors' owner, Jay Brown, including instructions to meet the highest standards of construction); and that he was to receive management fees in addition to his invoicing. The testimony and affidavit of Jay Brown further buttressed this notion of control ("I had the ability to control where and when he worked, and what he worked on. I had the right to terminate him.").

(2) Furnishing of Equipment and (3) Method of Payment

There is very little equipment one needs to be a Project Manager working day to day on a job site whether one is an employee or contractor; to the extent that the equipment includes the actual materials provided for the use of the builders, the depositions of Nguyen and Jay Brown establish that Plaintiff provided the building materials, etc. Nguyen sent invoices but this is not necessarily dispositive, as the Supreme Court found in *Shatto*. 406 S.C. at 481, 753 S.E.2d at 421-422.

(4) Right to Fire.

Here the Affidavit of Brown and Brown's testimony showed he had the right to fire. In fact, he dismissed Nguyen as the day to day project manager on the Defendants' residence (at the request of the Defendant Amy Salzhauer) and replaced him with another licensed South Carolina home builder, Cameron Glaws.

Applying the four-point test, Nguyen was clearly employed by the Plaintiff within the meaning of S.C. Code Ann. § 40-59-400(1). Based on the evidence adduced to the Court, thus, he also meets the test of a "resident licensee" and "responsible charge" under S.C. Code Ann. § 40-59-400(1) because he was assigned to the project, was there almost every day, and provided direct control and personal supervision. The fact that Jay Brown did the same thing does not in any way make Nyguen less of a "qualifier." Likewise, the fact that Defendants admit to demanding that Nguyen be replaced is not inconsistent with the act, either, as he was quickly replaced by another licensed residential homebuilder, Cameron Glaws.

In making his finding, the Special Referee also stated that Nyguen "was using one license for two places, and this is a clear violation of the statute" [i.e., S.C. Code Ann. §

40-59-410(H)], which provides that "the resident residential home builder .. is considered in responsible charge of only one place of business at a given time." Contrary to the Special Referee's findings, however, this statute simply means that if a fictitious entity had two or more places of business/offices (e.g., one on Edisto Island, one in Mt. Pleasant and one North Myrtle Beach), then the qualifier could not cover all three.

Here, however, Brown Contractors had only one office. Also, nothing in the Act prohibits Nyguen from maintaining his own sub-contracting business; in fact, Section 40-59-410(F) and (I) can be read to allow it. The definition of "resident licensee" in Section 40-59-400(5) does not require that qualifier never 'use one license for two places' either; rather, he "is a licensed practitioner who spends a majority of each normal workday working out of a principal or branch office and who is in responsible charge of the office and the building services provided." The evidence clearly showed this was, in fact, the case.

In any event, the testimony of Brown and Nyguen is clear that Nyguen was only working for Brown Contractors at the relevant time. [R. 171-172]. It is ironic that Defendants claim '*Nyguen cannot be the qualifier because he's not an employee!*' and '*Nyguen cannot be the qualifier because Brown was actually in charge!*' – yet, an employee is necessarily under the master's direct control, which means he is not a sub-contractor. Just because the Defendants dealt primarily with Brown does not mean that Nyguen did not meet the requirements of the resident licensee; the Special Referee should have seen this, too. This is more grist for the mill in support of *16 Jade Street's* injunction on using the Residential Home Builders Act for the benefit of a private party. 405 S.C. at 389-390, 747 S.E.2d at 773.

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

The Special Referee also found that "Brown, if it did not have a contract as of June 2012, was negotiating with Amy McMarlin, and soliciting the residential project in April 2012 and earlier, also prior to the application being submitted." [R. 009]. Yet, the bid sheet which the Special Referee puts so much weight on was stamped "Brown-Meihaus" – not Brown Contractors.

Brown-Meihaus was a fully licensed entity in 2012. [R. 212-214, 242-243]. No evidence was adduced at trial whatsoever, nor exhibit offered, that Brown-Meihaus was unlicensed. Brown Contractors should not be confused with Brown-Meihaus. Since Brown-Meihaus was properly licensed <u>through 2012</u>, it was sufficient for Jay Brown to solicit the McMarlin job.

The Special Referee also found that "on Brown's pay applications, the contract date is stated to be 'January 12, 2012', which the Special Referee finds to be "five months *before* an application for a COA was submitted to the state's licensing board." [R. 009]. Yet, the clear testimony from the parties was that they first met in the spring of 2012 and did not agree to work together until the permits were pulled in July. Thus, the "1/23/12" date on the pay applications was clearly a scriveners' error rather than proof that the contract pre-dated the COA application. Even the Defendant did not argue this in their Proposed Order.

The RBC issued the COA to Brown Contractors in January of 2013 [R. 009], but the clear testimony and the evidence shows that Brown Contractors submitted the paperwork in June of 2012 before the commencement of the project. [R. 640-644]. **The issuance of the COA was merely an administrative act that the RBC failed to accomplish in a timely manner**; it is uncontested that the proper application was

completed before any of the work commenced, and Plaintiff reasonably believed, based on Jay Brown's telephone call to the RBC, that it had satisfied the requirements – as it had Mr. Nguyen served as the "qualifier" and licensed contractor throughout that time.

Thus, the holdings *Lenz v. Walsh*, 362 S.C. 603, 608 S.E.2d 471 (Ct. App. 2004) and *Columbia Pools, Inc. v. Moon*, 284 S.C. 145, 325 S.E.2d 540 (1985) are either satisfied or are otherwise not controlling. In both *Lenz* and *Moon*, the contractor sought licensure status *after* the commencement of the contract; in this case, by contrast, Brown Contractors followed the law by applying before the permits were issued and reasonably assumed that its certificate of authorization had been issued. Likewise, the holding of *Wagner v. Graham*, 296 S.C. 1, 370 S.E.2d 95 (1988) is inapposite also, in that the contractor in *Wagner* never had any licensure whatsoever, while Brown Contractors is licensed here. Based on the facts at bar, the Court should have found that Brown Contractors was duly licensed.

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

Both Plaintiff and Defendant made offers of settlement under S.C. Code § 29-5-10(b). The Plaintiff's offered to settle for $75,000.00, payable to Plaintiff. [R. 636]. The Defendants' offered to settle for $250,000.00, payable to them. [R. 638]. The Special Referee inaccurately stated that Defendants' offer was $150,000.00. [R. 22-25].

The Defendants were awarded $346,693.00 in actual damages. Consequently, the Special Referee found that they were the prevailing party under S.C. Code § 29-5-10(b) and awarded them $133,161.00 in attorneys' fees. [R. 22-25].

However, insofar as the Plaintiff's license was valid, and its lien was good, then its damages were equally valid. Plaintiff proved its damages with particularity and should be

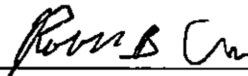
awarded its full lien amount of $206,428.59. Moreover, it was equally an error to grant the Defendants any damages in light of their failure to abide by the "Right to Cure Act" at S.C. Code Ann. § 49-59-810.

Thus, Plaintiff/Third-Party Defendants should have been the prevailing party under S.C. Code § 29-5-10(b), since their offer of settlement for $75,000.00 was closest to the actual damages ($206,428.59) proved by them. Consequently, the case should be remanded to the Special Referee to ascertain Plaintiff's legal fees.

CONCLUSION

For these reasons, the Orders of the Special Referee should be REVERSED, and the case REMANDED to him for the purpose of ascertaining the Plaintiff's attorneys fees and costs under S.C. Code § 29-5-10(b),

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH RULE 211(b), SCACR

I hereby certify that this Brief complies with Rule 211(b), SCACR.

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June 29, 2020
at Mt. Pleasant, South Carolina