

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2020-001657
Trial Court Case No. 2018CP4602502

Kimberly Ann CondraAppellant,

v.

Gregory Scott Childers and Jeffrey Steven Childers.....Respondents.

INITIAL BRIEF OF APPELLANT

March 22, 2021

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STATEMENT OF ISSUES ON APPEAL

CONCERNING THE DEFENDANT GREGORY SCOTT CHILDERS:

1. DID THE TRIAL COURT ERRONEOUSLY PLACE AN AFFIRMATIVE DUTY ON THE FRAUD AND NEGLIGENT MISREPRESENTATION VICTIM TO CONFIRM THE RESPONDENT GREG CHILDERS' BUILDER'S LICENSE?
2. DID THE TRIAL COURT ERRONEOUSLY RELY ON S.C. CODE ANN. §40-59-30 AS THE BASIS FOR IMPOSING A DUTY ON THE FRAUD AND NEGLIGENT MISREPRESENTATION VICTIM TO CONFIRM THE RESPONDENT GREG CHILDERS' BUILDER'S LICENSE?
3. DID THE TRIAL COURT ERR BY FAILING TO APPLY A RECKLESS AND GROSSLY NEGLIGENT STANDARD TO DETERMINE THE REASONABLENESS OF THE FRAUD AND NEGLIGENT REPRESENTATION VICTIM'S RELIANCE?
4. DID THE TRIAL COURT ERR IN FAILING TO PROPERLY APPLY A "JUSTIFIABLE RELIANCE" STANDARD AND A PREPONDERANCE BURDEN OF PROOF TO THE VICTIM'S NEGLIGENT MISREPRESENTATION CAUSE OF ACTION?
5. DID THE TRIAL COURT ERRONEOUSLY FIND THAT THE UNFAIR TRADE PRACTICES ACT PROHIBITS A VICTIM FROM RECOVERING DAMAGES FROM AN UNLICENSED BUILDER FOR AN UNFINISHED CONSTRUCTION JOB WHEN THE VICTIM HAS PREPAID THE BUILDER?

CONCERNING THE DEFENDANT JEFFREY STEVEN CHILDERS:

6. DID THE TRIAL COURT ERR IN GRANTING A DIRECTED VERDICT AS TO BOTH THE NEGLIGENCE AND BREACH OF THE UNFAIR TRADE PRACTICES ACT CAUSES OF ACTION TO THE LICENSED BUILDER WHO HAD ILLEGALLY ASSISTED IN THE CONSTRUCTION PROJECT THAT CAUSED THE APPELLANT'S DAMAGES?

STATEMENT OF THE CASE

Kimberly Ann Condra ("Condra"), the Appellant, initially brought this action on August 18, 2018, alleging fraud, negligent misrepresentation, and violation of the South Carolina Unfair Trade Practices Act (S.C. Code Ann. §39-5-10 et seq.: "the UTPA") against Gregory Scott Childers ("Greg Childers" or "Greg," in order to distinguish him from his co-defendant and

brother, Steve Childers). Condra alleged that Greg Childers was unlicensed and incompetent to do construction work and had deceived her to induce a contract to remodel her house, afterward abandoning the project after being paid \$52,000.

Greg Childers answered *pro se* by an Answer dated October 8, 2018. He failed to respond fully to discovery and two sanction orders were ordered against him, one by Special Circuit Judge Teasa Weaver on November 20, 2018, and one by Judge William A. McKinnon on February 19, 2019.

Condra amended her complaint on February 6, 2019, to add Greg Childers' brother, Jeffrey Steven Childers ("Steve Childers" or "Steve," to distinguish him from Greg Childers), as a defendant. Condra alleged negligence and violation of the UTPA against Steve Childers, a licensed South Carolina builder, based on Steve's illegal assistance in Greg's project.

Steve answered the amended complaint through counsel on March 28, 2019, and asserted a crossclaim against Greg. Greg answered the amended complaint through counsel on March 21, 2019, and replied to Steve's crossclaim on April 10, 2019.

Steve filed a motion for summary judgment on January 27, 2020. After a hearing, Judge Daniel D. Hall denied the motion by a Form 4 Order filed March 24, 2020.

Judge William A. McKinnon tried the case as a bench trial on August 20 and 21, 2020. At the conclusion of Condra's case, he orally dismissed her claims against Steve Childers by directed verdict, followed by a written Form 4 order filed September 22, 2020. Steve did not pursue his cross-claim against his brother.

Trial continued against Greg Childers, and following its conclusion and the submission of post-trial briefs, Judge McKinnon found by an order filed September 21, 2020, that Condra had

failed to prove any of her three causes of action against Greg. Judge McKinnon found that Condra's causes of action for fraud and negligent misrepresentation were barred by unreasonable reliance on Greg's pre-contract representations and that her UTPA cause of action was barred by her payment in full to Greg before he abandoned her project.

Condra filed a post-trial motion on September 30, 2020, followed by a corrected motion on October 2, 2020, seeking reconsideration and other post-trial relief as to both defendants. Following a hearing, on November 18, 2020, Judge McKinnon issued amended orders on December 7, 2020, separately denying reconsideration as to each defendant. This appeal was filed on December 16, 2020.

STANDARD OF REVIEW

Condra's causes of action against each defendant are actions at law, tried by the Court alone. In a non-jury case the findings of fact will not be disturbed unless found to be without reasonable evidentiary support. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). An appellate court does not disturb the trial court's conclusions unless they are wholly unsupported by the evidence or controlled by an erroneous conception or application of the law. *Maddux Supply Co. v. Safhi, Inc.*, 316 S.C. 404, 406, 450 S.E.2d 101, 102 (Ct. App. 1994).

An appellate court, however, is free to review whether the trial court properly applied the law to undisputed facts; in such cases, the appellate court owes no particular deference to the trial court's legal conclusions. *J.K. Const., Inc. v. W. Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999). Further, questions of statutory interpretation are questions of law, which an appellate court is free to decide without any deference to the trial court *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

FACTS

Condra bought her aged residence at 1497 Alexander Road in Rock Hill, in 2016.¹ The house needed renovating and Condra, a single woman employed as a compliance officer for Wells Fargo, decided to remodel it.² Having attended a welcome seminar put on for new residents by the City of Rock Hill, she had learned from the segment on remodeling that she could remodel her home as her own general contractor under certain conditions.³

An explanation of terms is helpful. In this brief, as at trial, the terms “contractor,” “general contractor,” “builder,” and “residential builder” are sometimes used colloquially and interchangeably to refer to the person in overall charge of a construction project such as Condra’s remodeling. Statutorily, however, the terms have distinct definitions, depending on the licensing agency. For safety’s sake, construction work above a certain minor size and nature has to be supervised and performed by individuals tested, evaluated, and licensed to do so by one of two state regulatory agencies, the South Carolina Residential Builders Commission (the “SCRBC”) or the South Carolina Contractor’s Licensing Board (the “Contractor’s Board”). S.C. Code Ann. §§40-11-30; 40-59-20; and 40-59-30.

Generally speaking, a “residential builder” licensed by the SCRBC, is approved to supervise residential construction while a contractor or “general contractor” is approved by the Contractor’s Board to supervise complex commercial construction as well. S.C. Code Ann. §§40-11-20 and 40-59-30. Confusingly, both residential builders and general contractors are frequently referred to colloquially as “contractors.”

To attenuate things further, a third agency, the South Carolina Department of Labor,

1 Tr. p. 7, lines 7-23; p. 144, lines 20-23.

2 Tr., p. 7, lines 7-25; p. 6, lines 10-12 and 20-21; p. 129, line 12 – p. 130, line 2.

3 Tr., p. 9, line 9 – p. 10, line 13.

Licensing and Regulation (“SCLLR”), S.C. Code Ann. §40-1-40, administers both the SCRBC and the Contractor’s Board through the SCLLR’s Division of Professional and Occupational Licensing. S.C. Code Ann. §40-1-40. As happened here, SCLLR is the overarching agency that actually investigates and enforces breaches of the SCRBC’s and Contractor’s Board’s license requirements.

Construction projects themselves, beyond certain minimal repairs and refurbishing, have to meet applicable standards of the current Building Code, as adopted by the South Carolina Building Codes Council. S.C. Code Ann. §6-9-5 et seq. Enforcement is delegated to local governments. *Id.* Construction projects must be registered with, permitted by, and inspected for compliance by the county or city building officials who administer the Building Code where the work takes place. S.C. Code Ann. §6-9-10 et seq. The local building officials are specifically charged with making sure in the permitting process that the residential builder or general contractor in charge is properly licensed, as are any subcontractors, who must also each be licensed to do certain discrete components of the work, such as electrical, plumbing, and HVAC work. *Id.* S.C. Code Ann. §40-59-280.

Licensed contractors and subcontractors themselves are also responsible for making sure the projects on which they work are being done by properly licensed and permitted professionals. They may be fined or have their own licenses revoked for ignoring that responsibility and assisting in an illegal project. S.C. Code Ann. §40-1-110(1): “A board may cancel, fine, suspend, revoke or restrict the authorization to practice of an individual who: . . . (c) has intentionally or knowingly, directly or indirectly, violated or has aided or abetted in the violation or conspiracy to violate this article or a regulation promulgated under this article;” . . .)

One exception is allowed for the project supervisor role. State law, S.C. Code Ann. §40-59-260, allows an unlicensed homeowner to act as his or her own supervisor for certain residential remodeling projects, while at the same time imposing conditions for that exemption. That statute's exemption applies only to homeowners doing renovations for their private use rather than to "flip" the house, and it further prescribes when a homeowner may claim the exemption. For Condra's house, S.C. Code Ann. §40-59-260 is administered by the City of Rock Hill's Planning and Development Department as part of its permitting authority.⁴

The City, as the statute specifies, requires an owner supervising his or her construction to obtain her own building permit from the City and to sign and file a prescribed Disclosure Statement. Although the owner herself does not have to be licensed, the statute requires that she use properly licensed subcontractors for the actual specialty work under her supervision. As with any building permit, the City must still approve the owner's plans and inspect and approve the resulting work. To prevent the exemption from being misused, §40-59-260 imposes other restrictive conditions as well.

Condra, intending to act under that exemption, had an architect prepare her remodeling plans, which she submitted to the City.⁵ She also identified to the City her intended licensed subcontractors for the initial work, which she called Phase 1.⁶ The City approved her plans and granted her a building permit on April 21, 2017, to begin the specified remodeling and to act as her own supervisor.⁷

4 Tr. p. 6, lines 5-9; p. 168, line 15 – p. 169, l. line 15.

5 Tr., p. 8, lines 1-8, Pl's Ex. 1.

6 Tr. p. 8, line 17- p. 9, line 21; p. 179, lines 3-5.

7 Tr. p. 9, line 9 – page 10, line 21; p. 168, lines 6-15; Def's Ex. 8B.

As the City required, Condra posted the issued permit in a window of her house.⁸ Rock Hill’s Building Official Mike Nugent explained that having the permit visible tells city building inspectors driving by that some type of permit has been granted with regard to ongoing construction they observe.⁹ It also makes the scope of the work available to subcontractors working there, who can read it to make sure that they are working on a job properly authorized under §40-59-260 or that the work has been permitted to a licensed residential builder as the supervisor.

After getting her exemption permit and starting her work, Condra realized within two months, however, that her intention of scheduling and supervising the remodeling work was impractical. Her work travel demands had increased, her inexperience in scheduling subcontractors hampered her, and she encountered an unsatisfactory framing workman.¹⁰ Following the disappearance of jewelry from her house while the initial work was being started, Condra realized her plan to proceed as her own contractor was impractical.¹¹ She stopped the work and began looking about for a qualified, licensed builder to whom she could turn over the entire project.¹²

Acting on a referral from her masonry subcontractor, who referred to Greg Childers as a “good contractor,” Condra called “the good contractor” about doing a limited component of the project, the construction of her deck.¹³ After Greg came to the house, though, she found him to be an “[e]xtremely charismatic, engaging person who “[c]onveyed a lot of knowledge about being a

8 Tr. p. 132, lines 3-5; p. 133, lines 14-18.

9 Tr. p. 183, p. 5-18.

10 Tr. p. 8, line 21 – page 9, line 8; page 10, line 24 – page 12, line 12.

11 Tr. p. 8, line 21 – page 9, line 8; page 10, line 24 – page 12, line 12.

12 Tr., p. 11, line 23 – p. 13, line 4.

13 Tr. p. 13, line 5 – p. 14, line 7.

contractor” and “a lot of experience.”¹⁴ He was “intelligent” and someone who knew how to instill confidence.¹⁵ He stressed his honesty.¹⁶

Greg also represented himself to be qualified to take over the complete remainder of Condra’s project.¹⁷ He inspected the house and reviewed the scope of the work.¹⁸ He described himself as properly licensed with a longstanding relationship with the City building permit department and told her about his considerable construction experience working both for his father and for his brother Steve.¹⁹

He talked about Steve’s good reputation, later providing provided details of his own construction history with Steve, which Steve himself confirmed during post-contract conversations with Condra.²⁰ Greg additionally and accurately referred to Steve as a licensed residential builder.²¹ Ultimately Greg submitted a sophisticated and itemized contract showing himself as “contractor” to finish Condra’s entire project for \$48,500.²² He told her he would handle everything with the City.²³

Condra verified on the Internet the existence of Greg’s father’s family construction business in North Carolina, where Greg had referenced some of his years of experience.²⁴ She was satisfied with the existence and history of the father’s business and with Greg’s representations of his own extensive construction experience and license, as well as with the good

14 Tr., p. 13, line 15 – p. 14, line 7.

15 Tr. p. 26, lines 12-21.

16 Tr. p. 74, lines 13-19.

17 Tr. p. 13, line 15 – p. 16, line 11.

18 Tr. p. 16, lines 12-20.

19 Tr. p. 13, line 15 – p. 16, line 11; p. 77, lines 2-16.

20 Tr. p. 83, line 25 – p. 84, line 21.

21 Tr. p. 36, lines 1- 23, p. 88, lines 9-22; p. 77, lines 2-16; p. 96, lines 14 – 25.

22 Tr. p. 16, lines 12-23; Pl. Ex. 2.

23 Tr. p. 16, lines 4-11.

24 Tr. p. 91, lines 5-15.

relationship and experience he touted with Rock Hill's building department.²⁵ She did not ask to see his residential builder's license, nor did she verify his license online, testifying later that she was unaware at the time that license information was available on the Internet.²⁶

Greg additionally stressed to her that he always carried liability insurance for his work because he knew how important it could be.²⁷ In addition, his own written contract, which described him as the "contractor," but left blank the space for "License No.," promised his commitment to "use reasonable care to meet the Requirements of state, federal and local law when discharging [his] responsibilities under this agreement."²⁸

He promised to "supervise and direct the Work" and accept "the responsibility for construction means, methods, techniques, sequences and procedures required to complete the Project in compliance with the Contract Documents."²⁹ He committed to begin work on June 26, 2017, the day following Condra's signing and initial payment, and to substantially complete the work within 90 days, that is, by the end of September 2017.³⁰

Greg's own itemization of the work he proposed to perform evidenced that the project required electrical, plumbing, and HVAC work and would have to be permitted and inspected by the City.³¹ His contract further confirmed his oral promise to carry liability insurance by reciting that he would carry "workers compensation insurance the public liability insurance as required by Law and regulation for the protection of Contractor and Owner during progress of the Work."³²

25 Tr. p. 16, lines 4-11.

26 Tr. p. 92, lines 1-18.

27 Tr. p. 15, line 22 – p. 16, line 3; p. 18, lines 10-16.

28 Plaintiff's Ex. 2

29 Plaintiff's Ex. 2.

30 Plaintiff's Ex. 2.

31 Plaintiff's Ex. 2.

32 Plaintiff's Ex. 2.

Except for an initial down-payment of \$24,250, Greg's contract specified he was to be paid the balance in draws based on stages of completion.³³ Satisfied by the favorable reference from her brickmason, Greg's recitation of his experience, his knowledge of City permitting, and his detailed contract, Condra signed on June 25, 2017.³⁴ Shortly afterward, she agreed for Greg to also replace her kitchen floor for an upcharge of \$3,500, bringing the total contract price for the entire completion of the project from \$48,500 to \$52,000, as reflected by Greg's written change-order to that effect.³⁵

Condra's decision to relinquish her §40-59-260 exemption meant that Greg had to re-permit the project with the City by substituting himself as the licensed contractor-builder.³⁶ That included identifying his own licensed subcontractors, who, in turn, had to then obtain their own sub-permits from the City for the specialty work they subcontracted to do.³⁷ Mike Nugent, Rock Hill Building Official, testified that, while the owner is ultimately responsible to make sure a project is properly permitted, generally it is the licensed builder who handles the permitting directly with the City.³⁸

Greg knew, however, when he solicited Condra's work, proffered his contract, and assured her he would handle everything with the City, that he would not do any of that. He knew that he could not and would not comply with the contract or his promises. He had no builder's license or license of any type, and therefore knew he could obtain no permit for the project. S.C. Code Ann. §40-59-280.³⁹ His explanation was that he meant to get his license, but that he got held up by his

33 Plaintiff's Ex. 2..

34 Plaintiff's Ex. 2

35 Plaintiff's Ex. 2.

36 Tr. p. 174, lines 10-21; p. 175, line 10 – p. 177, line 6.

37 Tr. p. 173, line 22 – p. 175, line 9.

38 Tr. p. 175, line 25 – p. 176, line 3; line 20 – p. 177, line 11.

39 Tr. p. 171, line 9 – p. 172, line 1; p. 174, lines 10-21.

brother Steve not giving him a timely trade reference for the application.⁴⁰ He also testified that he started the license application process but just never got around to taking the required test.⁴¹ In fact, Greg, by his own admission, never had a license and never got a license of any type.⁴²

Greg also knew his purported take-over of Condra's project would be a criminal act under S.C. Code §40-1-200 ("A person who practices or offers to practice a regulated profession or occupation in this State in violation of this article . . . is guilty of a misdemeanor . . .") and §40-59-200 ("A person who knowingly violates the provisions of this article [Article 1. Residential Home Builders Generally] or regulations promulgated pursuant to this chapter is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned for not more than two years, or both.")

He further knew that no other licensed builder and no licensed subcontractor would work for him on Condra's project because doing so would jeopardize the licensed person's own SCRBC license (S.C. Code Ann. §40-1-110(1): "A board may cancel, fine, suspend, revoke or restrict the authorization to practice of an individual who: . . . (c) has intentionally or knowingly, directly or indirectly, violated or has aided or abetted in the violation or conspiracy to violate this article or a regulation promulgated under this article;". . .)

Further, even as Greg was touting his insured status to Condra and she was signing his contract on June 25, 2017, he knew he had already received a notice dated June 15, 2017, that his commercial general liability insurance was being cancelled effective July 3, 2017 for nonpayment.⁴³ He knew cancellation was pending while he was touting his "always-insured"

40 Tr. p. 36, lines 12 – 23; p. 248, line 25 – p. 249, line 3.

41 Tr. p. 248, line 25 – p. 249, line 3.

42 Tr. p. 289, lines 1-9.

43 Pl's Ex. 16; Tr. p. 277, line 22 – p. 281, line 9.

status to Condra.⁴⁴ He further knew he was financially shaky, with at least one outstanding unpaid judgment already on his record.⁴⁵

Condra, in ignorance of all of this, signed Greg's contract on June 25, 2017.⁴⁶ She paid him the \$24,250 downpayment in two installments on June 23 and 27, 2017.⁴⁷ After work began, Greg dodged producing the replacement permit by telling Condra to leave her former permit in her window while he decided whether he would continue to use the same subcontractors the City had approved for her permit; later he used the excuse that his initial work was not the type that required a permit.⁴⁸ He began demolition of the parts of the house that were to be replaced.⁴⁹ On July 28, 2017, Condra paid him the \$3,500 additional charge for the kitchen-floor change-order.⁵⁰

In the little actual construction that took place after demolition, Steve Childers appeared from mid-July to mid-August of 2017.⁵¹ Together with a crew Steve supervised, he did some demolition work, began replacing hardwood flooring and windows, did some masonry work, and added an attachment for the deck.⁵² Much of that work was not completely finished, but Condra saw that it moved the project forward.⁵³

For the weeks Steve and his crew were there, Condra observed that the crew worked exclusively under Steve's supervision and Greg himself only rarely appeared.⁵⁴ She also

44 Pl's Ex. 16; Tr. p. 277, line 22 – p. 281, line 9.

45 Tr. p. 275, lines 10-11; line 17 – p. 277, line 6; Plaintiff's Ex. 17.

46 Tr. p. 16, lines 21-23; p. 17, lines 16-19; Pl's Ex. 2

47 Tr. p. 24, lines 1-25; p. 282, line 25 – p. 283, line 7; Plaintiff's Exhibit 3.

48 Tr. p.21, lines 4-21; p. 79, line 25 – p. 80, line 20; p. 105, line 11 – p. 106, line 7;

49 Tr. p. 23, lines 11-25.

50 Plaintiff's Exhibit 3.

51 Tr. 22, line 18 – p. 23, line 10; p. 24, line 23 – p. 25, line 6; p. 17, lines 9-22; p. 27, line 22 – p. 27, line 22; p. 76, lines 5-9.

52 Tr. 22, line 18 – p. 23, line 10; p. 24, line 23 – p. 25, line 6; p. 17, lines 9-22; p. 27, line 22 – p. 27, line 22; p. 74, line 20 – p. 77, line 1.

53 Tr. p. 22, line 18 – p. 23, line 10.

54 Tr. p. 78, line 10 – p. 79, line 4.

observed that when Greg did appear, he deferred to Steve and sought his advice.⁵⁵ Despite her prior dealings with Greg alone, Greg and Steve appeared to her to be partners in the work.⁵⁶

Condra herself also told Steve at that point about having tried and failed to be her own contractor under the exemption.⁵⁷ Even after that conversation, Steve never asked her about, or asked to see, the current permit for the project.⁵⁸ He told her about Greg having previously worked for him but never mentioned that Greg was unlicensed or that both he and Greg were doing Condra's work illegally.⁵⁹

In August, as Steve and his crew worked but progress otherwise began to stall, Greg persuaded Condra it resulted from his financial pressures.⁶⁰ He persuaded her to pay him an additional \$15,000 on August 11, 2017, even though the completion stage specified by the contract had not been reached.⁶¹ Even with that payment made, construction then essentially stopped and never resumed.⁶² After mid-September, Greg became evasive and unresponsive.⁶³

The work that had begun ended after some sporadic stabs and mistakes and Greg again pleaded financial need in order to finish.⁶⁴ Reassured by the actual construction work Steve Childers and his crew had partially done by that point, Condra decided to pay Greg the remaining \$9,250 of the contract price on September 15, 2017, despite the inadequate overall percentage of completion.⁶⁵

55 Tr. p. 76, lines 10-23; p. 78, line 10 – p. 79, line 4.

56 Tr. p. 78, lines 10-21.

57 Tr. p. 79, lines 22-24.

58 Tr. p. 80, line 25 – p. 81, line 19.

59 Tr. p. 83, line 25 – p. 85, line 9.

60 Tr. p. 24, line 1 – p. 25, line 18; Pl's Ex. 3

61 Tr. p. 24, line 1 – p. 25, line 18; Plaintiff's Exhibit 3.

62 Tr. p. 40, lines 11-20; p. 48, lines 12-21; p. 286, lines 14-15.

63 Tr. p. 40, lines 11-20;

64 Tr. p. 29, line 3 – p. 33, line 20; Pl's Ex. 4.

65 P. 26, line 22 – p. 27, line 22; p. 85, lines 10-19; Plaintiff's Exhibit 3.

Sightings of Greg or any subcontractors then became increasingly rare, other than a painter who sketchily appeared and ruined some of the porch ceiling.⁶⁶ Not having seen any plumbing or electrical subcontractors or any City inspections, Condra became more concerned, particularly since Greg had not yet produced the necessary new permit.⁶⁷ After more dodging by him, she called the City herself and learned for the first time that he had never applied for or obtained the new permit and that the City could not confirm that he had any type of license.⁶⁸ Upon Condra's inquiry and self-reporting, the City inspected the house's condition and issued a stop-work order on any further unpermitted and unlicensed work.⁶⁹

Condra actively attempted to pin down Greg, but with more evasive responses.⁷⁰ After meeting with the City permitting office, she asked him for his builder's license number by text on October 30 in order to provide it to the City.⁷¹ Greg responded with the number "81-52202."⁷² Condra re-texted him that the City said that was not a license number, but Greg did not answer again.⁷³

At the same time, Condra asked for a copy of the City permit he had told her he'd gotten but also asked him to continue with any work in the meantime that did not require a permit.⁷⁴ She began asking about materials she had bought as part of Greg's draws but which were not at her house.⁷⁵

66 Tr. p. 27, lines 1-22; p. 29, lines 3-20; p. 48, lines 9-21;

67 Tr. p. 32, line 11 – p. 33, line 20.

68 Tr. 34, line 7 – p. 37, line 23.

69 Tr. p. 38, line 10- p. 39, line 23.

70 Tr. p. 32, line 8 – p. 40, line 20; Pl's Ex. 4.

71 Plaintiff's Exhibit 4

72 Plaintiff's Exhibit 4.

73 Plaintiff's Exhibit 4.

74 Plaintiff's Exhibit 4.

75 Plaintiff's Exhibit 4.

On November 7, 2017, Greg responded evasively that he was in the process of getting the permit, which he said had been held up by “plans” from his “craftsman.”⁷⁶ On November 8, 2017, Condra texted him the City informed her he had not even started the permit process and she reminded him that he was now saying he would have it by Monday morning.⁷⁷ Throughout these exchanges, of course, Greg knew, as he had always known, that he had not gotten and could never get a permit because he had no builder’s license.

Hearing nothing, Condra texted him on November 6, 2017, that the City said he had not come by to apply for the required permit.⁷⁸ Greg responded on November 8 with more evasions: that since the City had scheduled an inspection of the project for the following Friday, he would meet Condra over the weekend to go over “contract modifications” and “the permits will be established after that Monday morning.”⁷⁹ He said he planned to “work on the project this week.”⁸⁰

Upon Condra’s discovery of his unlicensed status, Greg then began saying the required permit would be obtained under his brother Steve’s license.⁸¹ Condra told him the City would require Steve to do that in person.⁸² Greg then texted Condra that he “couldn’t get Steve to go by today due to job conflict” and indicated that Steve would do so the following day.⁸³ Condra called Steve directly but never received a return call from him.⁸⁴

76 Plaintiff’s Ex. 4.

77 Plaintiff’s Ex. 4

78 Plaintiff’s Ex. 4

79 Plaintiff’s Ex. 4.

80 Plaintiff’s Ex. 4.

81 Plaintiff’s Ex. 4.

82 Plaintiff’s Ex. 4.

83 Plaintiff’s Ex. 4

84 Plaintiff’s Ex. 4.

Neither Greg nor Steve obtained any permit or did any further work.⁸⁵ On approximately November 22, 2017, Condra was notified by Carter Lumber of the South, Inc., that it had filed a \$13,544 mechanic's lien against her property because of Greg's failure to pay for materials he had obtained for the remodeling.⁸⁶ Judging by the sums marked for Condra's project on Carter's account, the lien amount represented everything Greg had gotten for her project.⁸⁷ He had paid for nothing used in her remodeling. Condra had to hire a lawyer to get the lien removed.⁸⁸

After making unfulfilled promises to do an accounting and promising a refund of \$20,000,+ Greg began instead demanding that he be allowed to pick up his remaining tools.⁸⁹ Neither he nor Steve refunded any money, but instead faded into the ether, leaving Condra with a partly demolished house and with her \$52,000 already spent.⁹⁰

After Condra learned that Greg had never been licensed or permitted and there was no prospect of that changing or of Steve getting the permit, she turned to a licensed South Carolina residential builder to complete her project.⁹¹ Gary Shamp, owner of Garver Homes, inspected the quality and extent of the work already done and priced its remaining completion at \$90,465.⁹²

Having paid all of her remodeling funds to Greg, Condra could afford only a reduced scale of completion, for which she ended up paying \$54,442.⁹³ Shamp obtained the required building permit from the City on December 21, 2017, and, with the help of his licensed subcontractors,

85 Tr. p. 48, lines 9-11; p. 179, line 6 – p. 180, line 24.

86 Tr. p. 49, line 19 – p. 50, line 6; Pl's Ex. 5.

87 Pl's Ex. 14.

88 Tr. p. 51, 19 – p. 52, line 3.

89 Tr. p. 49 – lines 12-18; p. 57, line 13 – p. 58, line 24.

90 Tr. p. 48 line 22 – p. 49, line 11; p. 86, lines 8-11.

91 Tr. p. 53, line 20 – p. 57, line 3; Pl's Ex. 6 and 7.

92 Tr. p. 54, lines 16-23; Pl's Ex. 6.

93 Tr. p. 56, line 14 – p. 57, 3; p.161, line 5- p. 162, line 3; Pl's Ex. 7.

completed the scaled-down project on March 20, 2018, at which point the City issued a Certificate of Occupancy.⁹⁴

To afford the truncated remainder of her remodeling, Condra sacrificed an entire bathroom, along with other features she could no longer afford.⁹⁵ Her project extended some five months past the completion date pledged by Greg Childers, during which time much of the house was unusable because of the disruption and interior inaccessibility from the renewed construction.⁹⁶

Following discovery of her deception, Condra reported both Greg and Steve Childers to the SCLLR.⁹⁷ After investigation, SCLLR, acting on behalf of the SCRBC, sanctioned and fined both of the Childers in separate citations on February 1, 2018.⁹⁸ Greg was sanctioned for engaging in residential building at Condra's house without a license and fined \$500.⁹⁹ Steve Childers was sanctioned and fined \$500 for having intentionally and knowingly aided and abetted Greg's actions, as prohibited by S.C. Code Ann. §40-1-110(c).¹⁰⁰ Both were enjoined by their separate citations to "immediately cease and desist from further violation."¹⁰¹

As Condra later learned to her dismay, Greg's escapades were not limited to her project; in fact, he had been cutting a swath through the community before and during her project, and continuing after abandoning her project.¹⁰² His widespread activity was not inadvertent, but planned. On June 1, 2017, only weeks before soliciting her business, when he opened his credit

94 Tr. p. 59, lines 18-23; p. 155, line 24 – p. 164, line 3.

95 Tr. p. 55, line 9 – p. 57, line 3; Pl's Ex. 7.

96 Tr. p. 59, lines 9-23; p. 71, lines 5-13; line 1 – p. 72, line 3; p. 72, line 2 15-24; Pl's Ex. 8.

97 Tr. p. 60, lines 6-17; lines 22-23; p. 61, lines 2-4; p. 62, lines 11-21; p. 70, lines 16-21; Pl's Ex. 11 and 12.

98 Tr. p. 68, lines 16-18; p. 283, lines 14-20; p. 289, lines 7-9; p. 299, lines 5-12; Pl's Ex. 11 and 12.

99 Tr. p. 68, lines 16-18; p. 283, lines 14-20; p. 299, lines 5-12; Pl's Ex. 11 and 12.

100 Tr. p. 68, lines 16-18; Pl's Ex. 11.

101 Pl's Ex. 11 and 12.

102 Tr. p. 270, line 15 – p. 272, line 24; p. 273, line 18 – line 24; p. 304, line 22 – p. 305, line 24; Pl's Ex. 17.

account for building supplies with Carter Lumber Company, despite having no legal ability to do construction work, he projected annual sales of \$100,000.¹⁰³ His brother Steve (JS Childers Construction) was one of his references for his Carter account.¹⁰⁴

Using the name GSC Construction, Greg had begun immediately making thousands of dollars of purchases from Carter's for numerous construction projects.¹⁰⁵ After some sporadic payments at the start, Greg's overall account with Carter ended with an unpaid balance of some \$12,000.¹⁰⁶

The unlicensed Greg was invoicing other gullible homeowners for illegal projects totaling over \$68,000.¹⁰⁷ Nor did the SCLLR's cease-and-desist order of February 1, 2018, slow him down.¹⁰⁸ Immediately following the order, he proposed a construction contract for \$95,000 to Robbie Rayfield in Chester.¹⁰⁹ He never obtained building permits for any of his work, before or after Condra's.¹¹⁰

Some five months after SCLLR ordered him to stop, Greg undertook still more construction work, this time in July 2018 for Cheryl Forlines in McConnells.¹¹¹ Forlines knew Greg slightly from his work at her home for his brother Steve.¹¹² After Steve changed jobs, Forlines contacted Greg directly about work on a rental house, for which she paid him \$7,000.¹¹³ He did not tell Forlines that he himself had no license or that he'd been enjoined by SCLLR from

103 P. 272, lines 12-24; p. 273, lines 18-24; Plaintiff's Exhibit 14.

104 Plaintiff's Ex. 14.

105 Plaintiff's Ex. 14.

106 Tr. p. 301, line 18 – p. 302, line 5; Plaintiff's Ex. 14

107 Plaintiff's Exhibits 17 and 18.

108 Tr. p. 299, line 5 – p. 300, line 6; p. 303, lines 10-16; Pl's Ex. 18.

109 Tr. p. 299, lines 9-14; p. 302, lines 14-16; p. 303, lines 8 – 16.

110 Pl's Ex. 12.

111 Tr. p. 192, line 18 – p. 200, line 3.

112 Tr. p. 192, lines 18-21; p. 197, line 23 – p. 198, line 11.

113 Tr. p. 197, line 23 – p. 198, line 11; Pl's Ex. 13.

doing any more construction work.¹¹⁴ After a desultory effort, Greg went dark on Forlines as he had with Condra.¹¹⁵ Forlines got a judgment against him for her \$7,000, a judgment that remained unpaid at the time of her testimony in this case two years later.¹¹⁶

Greg's defenses to Condra's lawsuit were that she should have known better than to believe him, that he never orally told her he had a residential builder's license, and that the contract he submitted to do her remodeling project, despite its comprehensive language and thorough itemization, was only meant to cover part of the work. Judge McKinnon found as a matter of fact that Greg had indeed told Condra he had the necessary license.¹¹⁷

As to insurance, Greg testified that, despite the pending cancellation of his commercial general liability insurance when he contracted with Condra, his insurance had remained in force for her project.¹¹⁸ He presented no proof of that. Instead he submitted a certificate showing the coverage had been in force prior to the notice of cancellation, and he introduced a statutory licensing bond the SCRBC requires for applicants, but which had no other significance.¹¹⁹ In addition, he testified that he maintained records of all of his work, but submitted virtually none into evidence.

Steve Childers did not testify because he was dismissed by the trial judge at the conclusion of Condra's case. The evidence relevant to Steve's liability arises from Condra's own testimony and exhibits, the testimony of the Building Official concerning Steve's legal responsibilities, and the uncontested findings and sanction against Steve by SCLLR.

114 Tr. p. 196, line 18 – p. 197, line 4; p. 199, lines 2-13.

115 Tr. p. 196, line 18 – p. 197, line 4; p. 198, lines 12-20; p. 199, lines 17-23.

116 Tr. p. 199, line 24 – p. 200, line 3.

117 Tr., 1/18/20 hearing, p. 20, lines 16-18.

118 Tr. p. 277, line 22 – p. 279, line 5; line 15 – page 281, line 9.

119 Def's Ex. 9 and 10.

ARGUMENTS

SUMMARY

Despite Condra's proof of every element of her fraud and negligent misrepresentation claims against Greg Childers, Judge McKinnon denied her a verdict on the sole finding that she "shoulda known better." Specifically, he imposed on her an affirmative duty to verify Greg Childers' builder's license, even though no circumstances warranted that burden or even suspicion on Condra's part. Second, the judge based that enhanced duty not on any circumstances suggesting fraud, but solely on misapplication of a regulatory statute that was never intended to be used in a common-law tort setting or to shield dishonest builders from civil liability. Third, the judge loaded the scale against Condra by using too low a standard to weigh the reasonableness of her reliance in the face of active intentional fraud. Finally, the errors were compounded when they deprived Condra not only of a fraud verdict under the clear and convincing proof standard for fraud, but also of a negligent misrepresentation recovery under the lower standard of proof and the "justifiable reliance" test for negligent misrepresentation.¹²⁰

I. CONDRAS WAS IMPROPERLY BURDENED WITH AN ABSOLUTE DUTY TO CONFIRM GREG CHILDERS' BUILDER'S LICENSE, WHEN NO EXTRINSIC CIRCUMSTANCES PUT HER ON NOTICE OF ANY MISREPRESENTATIONS AND WHEN HER OTHER LIMITED CHECKING CONFIRMED WHAT SHE HAD BEEN TOLD.

Initially, it was not Greg's lack of a license that caused Condra's damages, although it would have done so ultimately. Before the City's stop-work order halted the project, Greg had already essentially abandoned the work. Proof of his license became pivotal in hindsight because,

¹²⁰ *Milliman v. Turner*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011), sets forth the applicable standards of proof.

in addition to being evidence of his overall incompetence, Condra acknowledged that she would never have contracted with him had she known he lied about that fact alone.

No extrinsic facts reasonably required Condra to physically verify Greg Childers' builder's license before she contracted with and paid him, and the trial court found none. The Court found no circumstances that alerted her, or would have alerted any reasonable homeowner, that Greg was anything other than the licensed, insured, and experienced builder he claimed to be. On the contrary, everything Condra experienced corroborated his representations that he was a knowledgeable, experienced, and licensed builder.

As noted in the Statement of Facts, her own brickmason initially referred Greg to her as a "good contractor." Greg then supported his statement that he was properly licensed by describing his experience dealing with Rock Hill City building permits, his adult lifetime of work for his father's North Carolina construction company, and for his brother Steve, a licensed residential builder. As noted in the Statement of Facts, Condra even took the extra step of verifying the existence and duration of his father's construction business to her satisfaction on the Internet.

Everything else supported Greg's veracity: the degree of sophistication reflected by his comprehensive, exhaustively itemized contract and his statements about being (and staying) fully insured. He itemized the scope of his promised work in detail, he specified a reasonable 90-day period for completion, and he structured Condra's progress payments under the contract for her protection, by conditioning disbursements after the initial down payment on his completion of sufficient work. His own written contract, despite showing no license number, further promised that he would comply with the law in all regards, would act as Condra's contractor, and would perform all necessary duties.

The reasonability of a victim's reliance is always a fact-specific determination. *Florentine Corporation v. Peda I, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985). South Carolina appears to impose no absolute requirement of independent verification by a victim. The verification requirement generally arises when the circumstances of the contract's inducement indicate a reason for wariness or when the written contract itself or other evidence before the victim undermine or even contradict the other party's representations.

A contracting party has no absolute requirement to determine that the other party is legally able to perform all of his promised duties under their contract. In an arms-length transaction, for example, a buyer is not required to verify the seller's ownership of the goods:

'The buyer has a right to rely upon the seller's representations as to matters which are peculiarly within the latter's knowledge and of which the buyer is ignorant, and the failure of the buyer to investigate the facts, although he has an opportunity to do so, does not in such a case preclude him from asserting as against the seller the latter's misrepresentations with respect to such matters. In order for the buyer to be justified in relying upon the seller's representations, it is not required that the matter represented be exclusively within the knowledge of the seller; all that is necessary is that the latter have a peculiar knowledge thereof.' 46 American Jurisprudence 289, Sec. 100. [Emphasis added.]

Tallevast v. Herzog, 225 S.C. 563, 570, 83 S.E.2d 204, 207 (1954).

It would be an unusual state of affairs, if plumbers, builders, electricians, attorneys, CPAs, and all other persons serving consumers could victimize them with impunity from civil fraud when, in the absence of any circumstances suggesting deception, their victims fail to demand copies of their licenses and proof of all their qualifications. As Condra wryly testified, not only did she not ask to see Greg's license, she did not ask to see her attorney's license either.¹²¹

¹²¹ Tr. p. 104, lines 23-24.

Judge McKinnon concluded, even under the clear and convincing standard, that Greg did, in fact, lie to Condra about having a license.¹²² Although denying that particular lie, Greg admitted that he never had a construction license of any type and that he could not legally perform the promised project.¹²³ The judge found nothing, however, in Greg's own conduct or representations to alert Condra to their falsity. Instead the judge found that Condra had an affirmative duty as a matter of law to investigate and verify Greg's license and, inferably, that any other victim would have the same duty in contracting with a party required to have an applicable license.

There is no such black-letter rule in South Carolina. The judge's conclusion, if applied in all fraud cases, would redefine the concept of "reasonable reliance" and elevate it to defeat fraud and misrepresentation claims by otherwise reasonable victims. Here, where no factual circumstances justify it, the Court's imposition of an enhanced duty protects the dishonest Greg from his own intentional wrongdoing, without any corresponding deterrent effect on unreasonable reliance by ordinary consumers.

To the extent the judge relied on the common-law, without resort to a statutory enhancer, his reliance rests on language plucked from fraud cases that rely on specific extrinsic circumstances putting the victim on notice of the fraudster's misrepresentations. In *Florentine Corporation v. Peda I, Inc.*, 287 S.C. 382, 339 S.E.2d 112 (1985) the defendant's alleged oral assertion was contradicted by the written contract. In *Schnellmann v. Roettger*, 368 S.C. 17, 627 S.E.2d 742 (Ct.App.2006) (aff'd. as modified on other grounds by the Supreme Court of South Carolina at 373 S.C. 379, 645 S.E.2d 239 (2007)), a fraud and negligent misrepresentation case, the homebuyers were unreasonable in relying on the advertised square footage because the listing

¹²² "I mean, I believe and I found as the fact finder that he claimed to be a licensed contractor, you know." 1/18/20 hearing, p. 20, lines 16-18.

¹²³ Tr. p. 288, lines 9-18; p. 289, lines 7-9.

itself alerted them that the figure was an approximation that they should confirm and because the contract gave them the right to view and measure the square footage. In *O'Shields v. Southern Fountain Mobile Homes*, 262 S.C. 276, 204 S.E.2d 50 (1974), the mobile home buyers' reliance on promises of certain features was unreasonable when the actual features were open, obvious, and visible to them upon inspection. The tobacco farmer claiming fraud in the weighing of his tobacco in *Flowers v. Price*, 190 S.C. 392, 3 S.E.2d 38 (1939) actually did not rely at all, instead aborting the sale after having his crop re-weighed.

Thomas v. American Workmen, 197 S.C. 178, 14 S.E.2d 886 (1941) is a reasonable-reliance opinion that allowed an illiterate plaintiff to recover for intentional oral misrepresentations even in the face of a written contract contradicting the misrepresentations. The *Thomas* court explained well the tension courts face between punishing fraudsters while discouraging foolishness in victims, and it commented on the drift of fraud decisions in favor of punishment. The Court pointed out that, while South Carolina had not yet adopted a black-letter rule, it was moving in the direction of not estopping a victim from recovering on an intentional fraud claim even when the victim "could have investigated the representations made, and would have found that they were untrue:"

The policy of the courts is, on the one hand, to suppress fraud, and on the other, not to encourage negligence and inattention to one's own interest. Either course has obvious dangers. But the unmistakable drift is toward the just doctrine that a wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of the ignorant and unwary. (Emphasis added.)

197 S.C. 178, _____, 14 S.E.2d 886, 887 (1941). The Court also found it worth comment that, among other factors, there had been ". . . no circumstances to incite suspicion . . ." 197 S.C. at _____ and 14 S.E.2d at 887.

The Court of Appeals soundly affirmed a jury fraud verdict for home buyers against a real estate developer when ownership of a house, contrary to oral assertions, turned out to require membership in a homeowners association and maintenance of a community pond. *Reid v. Harbison Dev. Corp.*, 285 S.C. 557, 560–61, 330 S.E.2d 532, 534–35 (Ct. App. 1985), aff'd in part and remanded (for a redetermination of damages) at 289 S.C. 319, 345 S.E.2d 492 (1986). The Court of Appeals cited among other authorities, the Restatement (Second) of Torts §540 (1979), and said “Where the fact misrepresented or the matters which are concealed are peculiarly within the representor's knowledge and the representee is ignorant thereof, it is generally held that, although the real fact appears on the public records, the representee is under no obligation to examine the records, and his failure to do so does not defeat his right of action. 285 S.C. 557, 560–61, 330 S.E.2d 532, 534–35.¹²⁴

Greg emphasized to the trial judge’s apparent satisfaction that Condra could easily have verified that he was properly licensed. While Condra could certainly have required him to provide his physical residential builder’s license, Greg asserted that she could have verified it online. Condra testified, however, without dispute that she did not know that in June of 2017 when she hired Greg, nor would she have known where to find out about a specific individual’s South Carolina builder’s license on the Internet. As she testified, she wished she had known that then.¹²⁵ No witness, in fact, including Greg, ever explained where such information resided online in June of 2017 or how she should have known how to find it.

¹²⁴ Counsel calls to the Court’s attention that, even though the Court of Appeals’ adoption of §540 was not mentioned, criticized, or reversed by the Supreme Court when the Supreme Court modified *Reid* on certiorari and even though the Court of Appeals reiterated the adoption of §540 in the case of *Epstein v. Howell*, 308 S.C. 528, 531, 419 S.E.2d 379, 381-382 (1992), Justice Moore later gratuitously commented in dicta that §540 was not the law in South Carolina. *Slack v. James*, Footnote 2 to 364 S.C. 609, 614 S.E.2d 636 (2005).

¹²⁵ Tr. p. 92, lines 10-25; p. 93, lines 5-9; p. 100, lines 22-25

II. THE STATUTE SOLELY RELIED UPON FOR IMPOSING THE DUTY ON CONDRA TO CONFIRM GREG CHILDERS' LICENSE DID NOT CREATE SUCH A DUTY WITH REGARD TO A COMMON-LAW FRAUD OR NEGLIGENT MISREPRESENTATION CAUSE OF ACTION.

Instead of relying on any factual circumstances meriting more investigation by Condra, the trial judge relied on an inapposite regulatory statute as the sole circumstance requiring Condra to physically verify Greg Childers' builder's license. His order concluded that "S.C. Code Section § 40-59-250 imposes a duty on the Plaintiff to make sure people employed by her have the licenses required by state law, county and municipal license ordinances. The court finds that the Plaintiff was not acting reasonably when she neglected the duty imposed on her by law to see that the people hired by her were licensed. [Emphasis added.]"¹²⁶ The judge reiterated that sole finding in denying reconsideration: "South Carolina Code Section 40-59-260 placed an affirmative duty on the Plaintiff to ensure people who worked on her home had the licenses required by state law and county and municipal license ordinances. [Emphasis added.]"¹²⁷

That was the exemption statute under which Condra had previously been operating. Not only did that statute any longer apply when she turned over her project to be supervised and re-permitted by a supposedly licensed and qualified builder, it never excused her builder's direct obligation to her to be truthful and qualified.

Condra does not dispute that she is always ultimately responsible to the State of South Carolina and the City of Rock Hill to make sure her construction projects comply with all applicable law. S.C. Code Ann. §40-59-260, however, creates no enhanced, affirmative duty in the context of a civil fraud claim to benefit the wrongdoer himself. §40-59-260 is a regulatory statute applying to one specific statutory circumstance, a circumstance that ended when Condra turned over her project in

¹²⁶ Order issued 9/21/20, page 3.

¹²⁷ Order issued 12/7/20, rejecting reconsideration as to Greg Childers.

its entirety to a supposedly licensed builder. It created no enhanced duty on her part to Greg. The Court's explicit reliance on §40-59-260 to impose a special and absolute duty to confirm Greg's license misapplied the statute under both the fraud and negligent misrepresentation causes of action.

Statutes in derogation of the common law are to be strictly construed, of course. *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). Here, the misapplication of §40-59-260 to a common-law tort is particularly egregious in light of Title 40's cautionary language that the regulation of professions should occur only to the extent that "existing common law and statutory causes of civil action or criminal prohibitions are not sufficient to eradicate existing harm or prevent potential harm." S.C. Code Ann. §40-1-10(C)(1).

The reliance on the statute as the sole basis for burdening Condra with an enhanced duty was error. The statute was inapplicable in the tort setting and, even if it had ever applied in the tort setting when Condra was acting as her own exempted contractor, it had no further effect when she surrendered that exemption, a change Greg promised to effect with the City by getting the permit re-issued in his name as the licensed builder.

III. TO ESTOP A FRAUD VICTIM FROM AN INTENTIONAL-FRAUD RECOVERY, THE VICTIM'S RELIANCE MUST BE SHOWN TO HAVE BEEN RECKLESS OR GROSSLY NEGLIGENT RATHER THAN SIMPLY CARELESS AND NEGLIGENT, A STANDARD THAT THE TRIAL JUDGE OVERLOOKED.

The trial court applied an incorrect standard of mere carelessness or negligence to determine that Condra's reliance under the circumstances was unreasonable. Separate from the absence of anything suggesting deception to Condra and separate from the Court's erroneous reliance on a statutory duty of verification, further error occurred in the proof standard applied to the element of reasonable reliance. The judge made no finding that Condra's reliance was

reckless or grossly negligent, but only that it was “unreasonable.” Even after Condra’s post-trial motion raised the point again, the Court never noted the enhanced standard or made any additional finding in that regard. Gross negligence or recklessness is required to make reliance unreasonable, however, a distinction that was overlooked.

Greg Childers’ fraud was intentional and blatant. He never disputed that. The standard that should have been applied to Condra’s “reasonableness” in relying on him was that of recklessness or willfulness under the circumstances. In a case disallowing reliance on oral representations in the face of a written contract, *J. B. Colt Co. v. Britt* discussed the standard in detail, concluding that:

In that view our inquiry here is: Was the defendant, in the circumstances of this particular case, guilty of such reckless or conscious disregard of his duty to protect his own interests by reading the contract, as should be held to preclude him from asserting a right to avoid the contract for fraud?

J.B. Colt Co. v. Britt, 129 S.C. 226, 123 S.E. 845, 848 (1924).

The “reckless disregard” test was again used by the Supreme Court in *Hood v. Life & Casualty Ins. Co. of Tennessee*, 173 S.C. 139, ____, 175 S.E. 76 76, 78-79 (1934); in *Souba v. Life Ins. Co. of Virginia*, 187 S.C. 311, ____, 197 S.E. 826, 828-830 (1938); in *Thomas v. American Workmen*, 197 S.C. 1778, ____, 14 S.E.2d 886, 887-888 (1941); and *O’Connor v. Brotherhood of R.R. Trainmen*, 217 S.C. 442, ____, 60 S.E.2d 884, ____ (1950); and *Reid v. George Washington Life Ins. Co.*, 234 S.C. 599, 602-603, 109 S.E.2d 577, 579 (1959).

More recently, in 1965, Justice Bussey noted the tension between a standard of “simple negligence” and one of “reckless disregard” in weighing whether a victim’s unreasonable reliance estopped her from a fraud recovery, but declined to distinguish which had occurred. *Parnell v. United Am. Ins. Co.*, 246 S.C. 26, 142 S.E.2d 204 (1965). He concluded that it was unnecessary

to do so because the issue had not been raised in the trial court and the victim's reliance in that case was reckless in any event. *Id.* at 246 S.C. 34, 142 S.E.2d 209. He did the same in the later case of *Guy v. National Old Line Ins. Co.*, 252 S.C. 47, 164 S.E.2d 905 (1968), commenting on the standard again, but again not having to discuss it. Chief Justice Moss in *Allen-Parker Co. v. Lollis*, 257 S.C. 266, 185 S.E.2d 739 (1971), citing *Guy*, commented yet again on the standard of reckless or conscious disregard vs. negligence in weighing the reasonableness of a victim's reliance. Again the Court found it unnecessary to do more than note its awareness of the distinction between the two standards.

The rule remains good law and binding precedent, with the awareness of, and without criticism or change by, subsequent South Carolina appellate courts. Professors Hubbard and Felix recognize it as binding precedent in *The South Carolina Law of Torts*, 4th Ed., 2011, Chapter 5 on Fraud and Other Misrepresentation, §A.1.(b): "Thus, South Carolina is in accord with the rule of many jurisdictions that the victim has a right to rely so long as he is not reckless or grossly negligent." In their discussion of the standard's application even to negligent misrepresentation causes of action, the authors go on to say "[a]rguably, South Carolina's approach is consistent with the view that recklessness is the standard for justifiable reliance under the RESTATEMENT approach." *Id.* at §A.1.(c), p. 410.

The trial judge erred in determining the reasonableness of Condra's reliance under both causes of action by weighing with too low a standard.

IV. CONDRA'S RELIANCE ON GREG CHILDERS' MISREPRESENTATIONS MET THE "JUSTIFIABLE" STANDARD FOR A NEGLIGENT MISREPRESENTATION CAUSE OF ACTION, AS WELL AS THE PREPONDERANCE STANDARD OF PROOF.

Even if the trial court did not err in denying Condra a fraud verdict, it erred in denying her one under the lower burden of proof and the "justifiable reliance" standard of her negligent

misrepresentation cause of action. In denying both the fraud and negligent misrepresentation claims, the trial court did not respect the different burdens and details of proof required by the two causes of action. A victim's reliance on a negligent misrepresentation must be "justifiable." *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 240-241, 692 S.E.2d 499, 508-509 (2010).

The Court of Appeals noted in 1992 that negligent misrepresentation is "an emerging and developing field of law" and that the Court found "no clear authority defining the law relating to reliance in these cases." *Gruber v. Santee Frozen Foods, Inc.*, 309 S.C. 13, 20, 419 S.E.2d 795, 799 (Ct.App.1992), cert. denied January 6, 1993. The Court of Appeals concluded, though, that reliance on a negligent misrepresentation is justified "if the relationship of the parties is such that the defendant occupies a superior position to the plaintiff with respect to knowledge of the truth of the statement made." 309 S.C. at 20, 419 S.E.2d at 799-800. On the contrary, reliance is not justified when the plaintiff "knows the truth of the matter" or when the parties have "equal access to the [misrepresented] fact." *Id.*

Greg Childers, of course, had complete and superior knowledge of his license status and his other deficiencies at the time he falsely represented them to Condra, while Condra had no such knowledge or equal access to it, in that she would have had to affirmatively take steps to confirm his license. She did, of course, take the step of at least verifying the existence of the family construction business on which he also relied for representations of his experience and ability.

Five years later, South Carolina's Supreme Court formally adopted the Restatement (Second) of Torts §522 on the justifiable reliance issue. In a negligent representation case involving an agent's misrepresentation to a third-party, the Court discussed "justifiable reliance" in that setting :

To establish liability under Restatement § 552, the party seeking to recover for a negligent misrepresentation must show he justifiably relied on the information communicated by the accountant. The master held that in order to establish justifiable reliance, a plaintiff must prove it relied *directly* on the information provided by the accountant. . . .

ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241–42, 489 S.E.2d 470 470, 472 (1997). Condra, of course, relied directly on Greg Childers’ misrepresentations. Ironically, that is precisely why the trial judge faulted her and denied her a recovery for negligent misrepresentation.

Without reference to the Restatement, the Supreme Court held in *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 592 S.E.2d 499 (2010) that a developer was not justified in relying on a county official’s misrepresentation about the zoning of a piece of property when a review of the zoning map would have alerted the developer to the official’s error. The Court noted that a review of the Official Zoning Map would have revealed the error, but also commented that the developer’s real estate broker was experienced, implying that his experience required the broker to examine the actual map. The Court went on to emphasize as well that a party may not justifiably rely on an error of law in any event rather than a mistake of fact. The same court one year later strengthened the latter premise as key to the *Quail Hill* decision in *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 165, 714 S.E.2d 869, 875 (2011): “The fact that the error was made by . . . the Zoning Administrator . . . does not negate the fundamental principle recognized in *Quail Hill* that no action will generally lie for a misrepresentation as to a matter of law.” *Id.*

Professors Hubbard and Felix note that while the Restatement is not clear on what constitutes justifiable reliance, as with fraud, “there are provisions indicating that the RESTATEMENT equates the lack of justifiable reliance with recklessness and not with the failure to exercise due care.” *The South Carolina Law of Torts* (4th Ed. 2011), Chapter 5, Section

A(3)c, page 409. See also Footnote 219. They go on to say that “[a]rguably, South Carolina’s approach is consistent with the view that recklessness is the standard for justifiable reliance under the RESTATEMENT approach.”

Under either the standard already specifically applied in *Gruber*, which would find Condra’s reliance justifiable because Greg’s falsities were not obvious and because her knowledge of the truth of them was not equal to his, or under the reckless standard noted by the commentators, Condra was justified in relying on Greg’s misrepresentations, including that he was licensed. Factoring in the preponderance standard applicable to negligent representation, she was wrongly estopped from a negligent misrepresentation finding and award.

V. THE TRIAL JUDGE ERRONEOUSLY FOUND THAT THE UNFAIR TRADE PRACTICES ACT PROHIBITS A CONSUMER FROM RECOVERING DAMAGES FROM AN UNLICENSED BUILDER FOR AN ABANDONED AND UNFINISHED CONSTRUCTION JOB WHEN THE CONSUMER HAS PREPAID THE BUILDER.

Despite Greg Childers’ plainly unfair and deceptive commercial practice of promising construction work he could not and would not do, with the proximate result of the expense and delay Condra suffered, she was denied a UTPA verdict. That denial was based on one case: *Lenz v. Walsh*, 362 S.C. 603, 608 S.E.2d 471 (Ct.App.2005). *Lenz* was misconstrued for the proposition that illegal and abandoned construction by an unlicensed builder cannot be a UTPA violation. *Lenz* does not do that, and the conclusion gratuitously exonerates unlicensed builders from the special legal liability that the UTPA creates to protect deceived and injured customers. Applying *Lenz* for such an unintended result gives crooked and unlicensed builders like Greg immunity from the UTPA’s special statutory liability for their deceptive and unfair trade practices.

In *Lenz*, the residential builder of that name contracted to build and then permitted and built the defendants’ house to a 95% state of completion, when a dispute developed regarding overages.

The defendant homeowners withheld Lenz's final contract payment of \$18,000, Lenz stopped work, and the owners barred him from returning. They then paid another builder \$4,059 to finish the final 5%. Lenz foreclosed a mechanic's lien for his unpaid final draw. The homeowners counterclaimed under breach of contract, fraud, and outrage for the delay and the amount they paid another builder to finish the house.

The trial court found Lenz to have been unlicensed at the time of the contract and denied him a mechanic's lien or contract recovery based on S.C. Code Ann. §40-59-30 (then codified as §40-59-130), the statute barring unlicensed builders and subcontractors from enforcing contract payments and liens for work done without a required license. Relying on that statute, the trial court denied Lenz a recovery of \$13,595, the actual remaining amount he was found to have otherwise earned.

The trial court also disallowed the homeowners from recovering their \$4,059 from Lenz by counterclaim because those damages (which the trial judge had whittled down to an unstated lower amount) were less than the unpaid \$13,595 that would otherwise have been due Lenz, but for the prohibition of §40-59-30.

Citing especially *Hawkins v. Holland*, 97 N.C.App. 291, 388 S.E.2d 22 (N.C.Ct.App.1990), the South Carolina Court of Appeals affirmed *Lenz*, essentially saying that, once a customer has already paid contract money to an unlicensed builder, S.C. Code Ann. §40-59-30 does not enable the customer to recover the payments solely on the basis that the builder was unlicensed. That is likewise all that *Hawkins v. Holland* held in dealing with a similar North Carolina statute. It is all that subsequent cases relying on *Lenz* have said. See *Fausnight vs. Perkins*, 994 So.2d 9212 (Ala. 2008) and also the discussion in the unpublished opinion of

Southwestern Life Ins. Group v. Morehead, 245 Fed.Appx. 304 (4th Cir. 2007).

Neither *Lenz* nor any subsequent case has said or suggested that §40-59-30 in any way prohibits a victimized homeowner from recovering her damages under the UTPA from the unlicensed builder's abandonment of her project, regardless of whether or not she has already paid him. Condra's trial judge explicitly relied on *Lenz*, however, for the proposition that "... the act of building or construction without the appropriate licenses is not an unfair method of competition or an unfair act or practice as defined by Section § 39-5-20(a) of the Unfair Practices Trade Act," and reiterated upon reconsideration that "*Lenz* held there is no cause of action against a contractor for performing unlicensed work. If a claim against a contractor for unlicensed work is not recognized, then a claim under the Unlawful Trade Practices Act for unlicensed work cannot be recognized."¹²⁸

This deduction is a quantum leap from *Lenz*'s meaning and intent, as well as that of §40-59-30; additionally, it disregards the entire premise of Condra's claims. Condra did not rely on §40-59-30 for any claim against Greg Childers, nor was his unlicensed status the sole basis for her recovery; his deception and his subsequent abandonment of her project were the bases of her claims.

Nor did she seek rescission and a repayment of her contract payments. She affirmed the contract and sought the damages flowing from Greg Childers' abandonment. All of his practices, beginning with his initial deceptions about his license, his experience, his intentions, and his ability were patently unfair and deceptive as those terms are used by the UTPA and they were substantiated by evidence of his same treatment of other South Carolinians. Condra did not seek

¹²⁸ Respectively, Order filed 9/21/20, page 4, and Amended Order on Motion to Alter or Amend filed 12/7/20, page 2.

a refund, and her proof of the damages she sought credited Greg with any value she received from him. That credit was reflected in the amount Condra paid to finish the project, which was net of the cost the new builder saved by not having to duplicate work already sufficiently done.

Ironically, rather than protecting unlicensed builders, §40-59-30 underscores South Carolina's strong public policy of requiring all builders to be tested and licensed in order to operate in this state. That statute, does not, by wording or intent, instead immunize unlicensed builders from the consequences of their own incompetent and incomplete work. As important as the effect of the Court's interpretation of *Lenz* is on Condra is the effect of the error on future consumer plaintiffs seeking relief from unscrupulous and unlicensed builders under the UTPA. Reliance on it to conclude that an unlicensed builder is not liable for his own wrongdoing under the UTPA is a startling proposition, which this Court needs to undo.

VI. CONDRA PRESENTED A SUFFICIENT PRIMA FACIE CASE OF NEGLIGENCE AND UNFAIR TRADE PRACTICE ACT VIOLATIONS AGAINST STEVE CHILDERS TO WITHSTAND HIS DISMISSAL BY DIRECTED VERDICT.

Steve Childers, as a matter of law, knowingly and intentionally, assisted his brother in furthering an illegal project, to Condra's ultimate detriment. He was sanctioned and fined by SCLLR as a direct result. SCLLR found, in the language of the statute, that, with regard to his work on Condra's project, Steve . . . (c) intentionally or knowingly, directly or indirectly, violated or has aided or abetted in the violation or conspiracy to violate this article or a regulation promulgated under this article;" . . . S.C. Code Ann. §40-1-110(1)(c) [emphasis added].¹²⁹

Steve's intentional and knowing behavior was established on a prima facie basis, and it may even have precluded any denial or ameliorating explanation if he had testified. *Zurcher v. Bilton*, 379 S.C. 132, 135-136, 666 S.E.2d 224, 226-227 (2008). The Court, however, required

129 Pl's Ex. 11.

him to rebut nothing as to either of Condra's causes of actions.

In the light most favorable to Condra, that was error. A directed verdict is justified when only one inference can arise from the evidence presented. "In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion where either the evidence yields more than one inference or its inference is in doubt. When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. 'In essence, we must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor.' 'If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury.'" *Harvey v. Strickland*, 350 S.C. 303, 308–09, 566 S.E.2d 529, 532 (2002) [Internal citations omitted].

Steve should not have been dismissed, but held accountable in both negligence and under the UTPA to rebut Condra's evidence. Having shown that he breached a condition of his builder's license by intentionally or knowingly helping his brother carry out the wrongs done to Condra, she presented sufficient evidence of negligence and of breach of the UTPA to withstand a directed verdict. She is entitled to a new trial as to Steve.

Even without Steve's admission to the SCLLR, there was sufficient evidence of his negligence and unfairness to support Condra's claims. Condra testified that she was there when Steve was working on the house and that, even after she told him that she had first tried to supervise the work herself but given up, Steve never asked about the permit under which he and Greg were now working, even though it was apparent that Greg was now supervising the entire

project. Nor did Steve tell her that Greg was unlicensed, even though Steve acknowledged familiarity with Greg's experience and credentials when he acknowledged to her that he had employed his brother on other construction projects.

Mike Nugent, the Rock Hill Building Official, confirmed Steve Childers' legal obligation to avoid helping with an illegal project even unintentionally.¹³⁰ Steve is obligated by regulatory law to know the requirements and responsibilities for building permits.¹³¹ He is responsible for reviewing the permit wherever he proposes to work to make sure it covers the project and the work he proposes to do on that project.¹³² He is, of course, obligated to make sure a licensed builder is in charge of the project or that it is being supervised and permitted by the homeowner under the statutory exemption.

He was not required to present any evidence, however, that he did any of those things. To the knowledge of the trial court, Steve never:

- (1) made sure that the project was being supervised by a licensed builder or by an unlicensed homeowner, properly exempted and permitted by statute.
- (2) if the former, made sure that the builder himself had properly permitted the project, including the subcontracting work Steve was performing;
- (3) if the latter, made sure that the homeowner herself had properly permitted the project, including the subcontracting work Steve was performing; or
- (4) found out whether he himself had to register with and obtain his own subcontracting permit for his work from the City of Rock Hill.

Steve worked even after Condra's conversation alerted him she was no longer acting as an exempt self-supervisor; after he knew from his own work that Greg was the supervisor; after he saw that Greg was responsible for the whole project; and after he could see that the outdated

130 Tr. p. 168, line 15 – p. 182, line 3.

131 Tr. p. 177, lines 3-5

132 Tr. p. 177, lines 6 – p. 178, line 5.

exemption permit was still there for his inspection. He also personally had the benefit of enough experience employing Greg in construction to likely be familiar with Greg's license status and ability, or lack thereof.

It is ironic that the trial court imposed an extraordinary burden on Condra to investigate Greg Childers, while at the same time finding no duty on the part of Steve Childers, a licensed builder, brother, longtime employer, and co-worker of Greg, to investigate, as the law specifically charged him with doing.

Steve's carelessness was prohibited by regulatory law and he was accordingly sanctioned by SCLLR for doing so. SCLLR's authority to do so not only derived from S.C. Code Ann. §40-1-110(1)(c), for aiding and abetting the illegal work, but from the broader subsection allowing sanctions if the individual "(f) has committed a dishonorable, unethical, or unprofessional act that is likely to deceive, defraud, or harm the public." There is ample proof of the public policy of South Carolina reflected in these statutes to support both a negligence cause of action by Condra and to support a UTPA finding that Steve acted unfairly in commerce, if not deceptively as well.

None of this direct evidence and its reasonable implications of wrongdoing at worst or intentional ignorance was refuted by Steve, as the Court freed him from that obligation by directed verdict. As a licensed builder, Steve was not free to cavalierly ignore the requirement to refrain from helping another to breach the same licensing laws that bound Steve. Likewise, Steve was not free to work on an unpermitted or invalidly permitted illegal project except at his own peril. He reaped the fruit of those activities when he received his uncontested sanction for his knowing and willing actions. Unfortunately, Condra reaped the sour fruit of Steve's misdeeds as well. She got some work done by Steve that benefited her, mainly in the form of flooring, windows,

masonry, and a deck attachment, but, in reliance on the appearance from Steve's work that the contract was being fulfilled, she also paid Greg the final contract payment of \$9,250 in advance of her obligation to do so.

Condra did not sue Steve for fraud or negligent misrepresentation. She sued him for negligence and for breach of the UTPA. His negligence was premised on his admission of having knowingly and intentionally aided and abetted Greg, a completely unlicensed person, and in furthering an illegal project, to Condra's detriment, as well as his furthering of the deceit and unfair practices used by Greg to get Condra's money.

CONCLUSION

This Court has an opportunity to correct the misapplication of statutes and to correct the skewed results against Condra. It can clarify the common-law tests applicable to the element of reasonable reliance and justifiable reliance in fraud and negligent misrepresentation. It has the opportunity to correct an unintended expansion of *Lenz*. Finally, it has the opportunity to declare that illegal actions by a licensee in direct violation of his or her licensing responsibilities are actionable under negligence and UTPA causes of action when they proximately cause damage to consumers.

Respectfully submitted,

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