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**May 21 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

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Appellate Case No. 2020-001657  
Trial Case No. 2018-CP-46-02502

Kimberly Ann Condra.....Appellant,

v.

Gregory Scott Childers and Jeffrey Steven Childers.. Respondents.

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**INITIAL BRIEF OF RESPONDENT**

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May 21, 2021

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## STATEMENT OF THE ISSUES ON APPEAL

I. WAS THE LOWER COURT'S FINDING THAT THE APPELLANT DID NOT REASONABLY RELY ON THE RESPONDENT GREGORY CHILDERS' MISREPRESENTATIONS SUPPORTED BY THE TESTIMONY AND EVIDENCE AT TRIAL?

II. APPELLANTS RELIANCE ON GREG CHILDERS MISREPRESENTATION WAS NOT JUSTIFIABLE.

III. DID THE UNLAWFUL TRADE PRACTICES ACT APPLY TO THE FACTS OF THE CASE?

## FACTS

In 2017, the Appellant decided to remodel her home. She decided to act as her own supervisor for the project pursuant to S.C. Code Ann. §40-59-260. She had an architect prepare building plans (Tr. P. 8 lines 1-8, Pl. ex. 1). The City of Rock Hill approved her plans. The City issued her a building permit on April 21, 2007 allowing her to act as her own supervisor (Tr. P. 9, lines 9-10, line 21; p. 168, lines 6-15; Def. Exhibit 8B). Appellant posted the permit in a window of her home (Tr. P. 132, lines 3-5, p. 133, lines 14-18). Acting as her own supervisor did not work out for the Appellant so she decided to hire someone to perform the job. Appellant met with Respondent, Greg Childers, who she testified told her he was properly licensed (Tr. p. 13, line 15, p. 16, line 11). Appellant further testified that Greg Childers told her he had liability insurance (Tr. p. 15, line 22, p. 16, line 3, p. 18, lines 10-18). Appellant entered into a written contract with Greg Childers on June 25, 2017 (Tr. p 134, lines 12-14). Greg Childers started work on the house but never completed the work. During the time Greg Childers worked on the

property the permit that Appellant had received from the City remained posted on the property (Tr. p. 137, lines 3-13).

I. THE TESTIMONY AND EVIDENCE AT TRIAL REASONABLY SUPPORTS THE LOWER COURT’S FINDING THAT THE APPELLANT DID NOT HAVE A RIGHT TO REASONABLY RELY ON, RESPONDENT, GREG CHILDERS MISREPRESENTATIONS.

“In an action at law, on appeal of a case tried without a jury, the finding of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge’s findings.” *Townes Associates, Ltd. V. City of Greenville*, 266 S.C. 81, 221 S.E. 2d 773 (1976). The judge’s findings are equivalent to a jury’s findings in a law action. *Chapman v. Allstate Insurance Co.*, 263 S.C. 565, 211 S.E 2d 876 (1974).

In order to establish a cause of action for fraud, nine elements must be proven. The element in question in this case is the Appellant’s right to rely on the misrepresentation of the Respondent, Greg Childers. The failure to prove any of the nine elements of fraud is fatal to a claim of fraud, *Schnellmann v. Roettger*, 373 S.C. 379, 645 S.E. 2d 239 (2007). Therefore if Appellant failed to prove she had right to rely on Respondent, Greg Childers, alleged misrepresentations then her claim of fraud must fail. If there is evidence that reasonably supports the lower Court’s finding that her reliance was not reasonable, then this Court should affirm the Trial Court.

There is evidence in the record which supports the trial judge’s finding that Appellant’s reliance was not reasonable. Appellant obtained the initial permit for the project (Tr. p. 98, lines 5-8). Appellant applied for the permit under *S.C. Code Ann. § 40-59-260. Section 40-59-260* required Appellant to sign a disclosure statement that provided in part: “You may not hire an unlicensed person as your residential builder or specialty contractor. It is your responsibility to

make sure people employed by you have licenses required by state law and by county or municipal licensing ordinances.”(S.C. Code Ann. § 40-59-260 (C)). Appellant signed the disclosure statement (Def. Exhibit D.). At trial, Appellant called Mike Nugent, Rock Hill Building Official, who testified that the disclosure statement (Def. Exhibit D-1) tells the world that she is responsible for the work (Tr. p. 185, lines 4-8). He further testified that it is up to the person who is self-contracting to check to make sure the person is licensed and to come to the City to get an amendment to the permit to include the new person (Tr. p. 186 lines 11-16). As long as the permit is on the property the person is representing that the facts of the permit are still in effect (Tr. p. 187, lines 8-12). The permit that Appellant obtained remained on her property the entire time that Respondent, Greg Childers, worked on the property (Tr. p. 139, lines 15-25). The Appellant knew the permit was on her property and knew it had not been replaced by another permit (Tr. p. 137, lines 3-13). Appellant knew her permit was still there when she paid Greg Childers \$3,500.00 in July, (Tr. 26, lines 7-8) and \$9,250.00 on September 15 (Tr. p. 26, lines 22-25). As the trial judge stated, “So any work done on the house was either done pursuant to that permit where she had an obligation to verify that everyone is licensed or it was not done pursuant to permit at all.” (Tr. Nov. 18, 2020, p. 34, lines 14-17). Appellant’s actions in failing to check whether Respondent, Greg Childers, was licensed when it was obvious he had not obtained a permit was reckless. The Appellant could have checked whether or not Greg Childers was licensed by requesting he show her the license or by checking the public records online. There is no liability when the truthfulness of the representations are easily within reach and can be ascertained by the exercise of due diligence. *Schnellmann v. Roettger*, 368 S.C. 17 627, S.E. 2d 742 (Ct. App. 2006), *O’Shields v. Southern Fountain Mobile Homes, Inc.* 262 S.C. 276, 204 S.E. 2d 50 (1974), *Founders v. Price* 190 S.C. 392, 3 S.E. 2d 38 (1939). Where there is no

confidential or fiduciary relationship in an arm's length transaction between mature, educated people, there is no right to rely. *Florentine Corporation v. Peda I, Inc.* 387 S.C. 382, 339 S.E. 2d 112 (1985). In this case no confidential or fiduciary relationship existed between the parties. This was an arm's length transaction. The Appellant is well educated. She has a bachelor's of science degree in marketing and an M.B.A (Tr. p. 130, lines 8-12). She had worked in the banking industry her entire career and is a compliance officer for Wells Fargo (Tr. p. 129, lines 16-25). Taking into consideration her education and experience she was not acting with due diligence in failing to check the truthfulness of the representations.

The Appellant cites *J.B. Colt, Co. v. Britt*, 129 S.C. 226, 123 S.E. 2d 845 (1924) for the proposition that reckless or conscious disregard of ones duty to protect one's own interest is the standard for failure to exercise reasonable reliance. In that case the Court noted the defendant was a successful and experienced business man, in full possession of his faculties dealing in an arm's length transaction. The Court noted the law imposed on him a duty to exercise reasonable prudence. In the present case the Appellant is a successful and experienced business person, in full possession of her faculties. She had a duty to exercise reasonable prudence to determine that Greg Childers was licensed. In *Britt*, the Supreme Court found that the Court did not err in directing a verdict against the defendant. Even if the Court had been in error in directing a verdict, it would still have been a jury issue as to whether or not the defendant acted with reckless or conscious disregard of his own interests. In the present case the trial judge's findings were the equivalent of a jury's findings. The trial judge set forth the factor he properly considered in his Order. The testimony and evidence reasonably supports the trial judge's findings.

II. APPELLANTS RELIANCE ON GREG CHILDERS MISREPRESENTATION WAS NOT JUSTIFIABLE.

As stated earlier in this brief, Appellant's reliance on Greg Childers representation that he was a licensed builder was not justifiable when she had a duty under the law to make sure the people working under her permit were licensed.

The Appellant failed to prove that Greg Childers misrepresented the status of his liability insurance. Appellant entered into evidence a notice of cancellation (Pl. Ex. 16). The notice stated that the insurance would be cancelled effective July 3, 2017. The contract between the parties was entered in June of 2017 (Tr. p. 307, line 25; p. 308 line 24). At the time the contract was entered Greg Childers had liability insurance and Appellant offered no proof that the insurance was in fact cancelled on July 3, 2017.

III. THE UNFAIR TRADE PRACTICES ACT DOES NOT APPLY TO THE FACTS OF THIS CASE.

The Appellant does not correctly state the trial court's ruling. The Appellant states that, "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 where the consumer has prepaid the builder," (Appellant's Brief Argument V). The trial judge did not rule that the UTPA prohibits a consumer from recovering damages in this situation. The Court ruled that UTPA does not apply to a cause of action under the facts of this case, not that UTPA prohibits recovery. Appellant was not prohibited from seeking recovery under other causes of action, such as breach of contract.

In order to establish a UTPA violation the Appellant must establish that Greg Childers committed an unfair or deceptive act. Appellant contends, “what makes it unfair and deceptive is he wasn’t licensed,” (Tr. of November 18, 2020 p. 26, lines 7-8). In *Lenz v. Walsh*, 362 S.C. 603, 608 S.E. 2d 471 (Ct. App. 2005) the Court held that there is no cause of action against a contractor for performing unlicensed work. As the trial judge stated, “if there is no claim under South Carolina Law for single damages, there’s no claim for single damages, there’s no claim for treble damages under an unfair trade practice,” (Tr. of November 18, 2020, p. 35, lines 10-13).

Even if there was an unfair or deceptive act the Appellant seeks damages for work done while the Plaintiff was doing work under her permit and she knew he had not obtained a permit. Appellant allowed Greg Childers to work on her home when she knew or should have known she was in violation of S.C. Code Ann. §40-59-260. Appellant should not be allowed to be compensated for her own violation of the law.

#### CONCLUSION

For the reasons stated, the decision of the Trial Court should be affirmed.

Respectfully Submitted,

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**PROOF OF SERVICE**

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I, certify that I served the Respondent’s Initial Brief and Designation of Matter to be included in the Record on Appeal via electronic mail and/or by mailing a copy of the same to them in the United States mail and/or by electronically filing via the Court’s electronic filing system, with sufficient postage affixed thereto and return address clearly marked on May 21, 2021, addressed to attorneys of Appellant and Respondent, Jeffrey Steven Childers, at the addresses listed below.

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