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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Henry W. Brown
Special Referee

APPELLATE CASE NO.: 2019-000513

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

and

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

APPELLANT/RESPONDENT'S PETITION FOR REHEARING

The Appellant/Respondent Brown Contractors, LLC ("Appellant") submits this petition for rehearing pursuant to Rule 221(a), South Carolina Appellate Court Rules.

1. There most certainly is a dispute that Brown was licensed when he 'solicited' the McMarlin job – and that was through Brown-Meihaus. If the court finds that Brown-Meihaus was duly licensed builder (as it apparently does on page 4 of the opinion), then Jay Brown was part of Brown-Meihaus, as Jay Brown's testimony clearly states. (R. p. 113). Importantly, the first contract that the McMarlins were presented with (but that they did not sign) was a Brown-Meihaus

contract with 'Brown-Meihaus' printed all over it; this shows that the Respondents were, in fact, negotiating with Brown-Meihuas.

The Court of Appeals, however, defines "Brown" as "Brown Contractors" but then seems to fall into the McMarlin's trap that they thought they (the McMarlins) were dealing directly with Jay Brown. They were not.

It was the continued, licensed existence of *Brown-Meihaus* that covers Jay Brown up through his application for a COA for Brown Contractors; he submitted his COA paperwork before any work on 1805 Flag Street began.

The only reason the Court of Appeals to say "we are not persuaded by Brown's arguments that the solicitation was on behalf of Brown-Meihaus, a duly licensed builder" is to avoid the central debate in the appeal – i.e., the impact of *16 Jade Street, LLC v. R. Design Constr. Co.*, 405 S.C. 384, 747 S.E.2d 770 (2013) ("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)). This is a Supreme Court opinion and constitutionally it is one that the Court of Appeals must apply. S.C. Const. Art. V, § 9; *see also Daniels v. City of Goose Creek*, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993) (holding where the law is unmistakably clear, the decisions of the Supreme Court bind the Court of Appeals as precedents; any modification or limiting of a Supreme Court opinion must be done by the Supreme Court).

If *16 Jade Street* is applicable and a valid precedent (as the Appellant suggests), then it was up to the *McMarlins* to bring the issue of licensing before the Residential Home Builders Commission. The absence of any ruling on *16 Jade Street* is a huge hole in the opinion. Thus, for all the reasons set forth in Appellant's briefs, the Appellant submits that the Court of Appeals must rule on *16 Jade Street* and apply it to the Special Referee's ruling.

2. The Court of Appeals also ruled that "Brown waived its right to notice and opportunity to cure by failing to make a motion to stay" under S.C. Code Ann. § 40-49-830; here the Court relies on *Grazia v. S.C. State Plastering Co., LLC*, 390 S.C. 562, 569-572, 703 S.E.2d 197, 200-202 (2010). Thus, the Court of Appeals finds that Appellant's failure allows the McMarlins to keep their damages despite failing to strictly comply with the Right to Cure Act (despite the fact that the McMarlins did not even bother to outline this position – or any position for that matter – in response to Appellant's analysis of the Act).

In this case, a motion to stay would have made no difference, since the McMarlins had proceeded to go ahead and do the work anyway. A similar incident was the principal holding of *Andrew and Kimberly McIntyre v. Seaquest Development Co*., 2016-CP-10-1833 (Charleston Court of Common Pleas, 2017)(Toal, J), cited by Appellants—which the Court of Appeals ended up not reaching in 2017-001270 when it ruled on the arbitration issue instead. In that decision, former Justice Toal said that any notice or stay under the Act must be obtained before the claimants engage in work; thus, any failure to take corrective action without the homeowners giving formal notice (and the right to inspect under the Act) means that the homeowners violated the Act. Consequently, the action of commencing repairs before notice is sent/received overcomes any need to make a motion stay by the builder. Again, this is what happened here.

Second, *Grazia* does not state explicitly state that a builder "waives" its rights under the Act when it does not move to stay, particularly when the homeowners proceed with fixing the issues that should have been disclosed under the Act. Why should it be the duty of the builder to fix the homeowner's failures when case is now closed, on appeal, and the homeowners fixed the problems during the pendency of the litigation?

For these additional reasons, the Court of Appeals should reconsider its decision.

3. Finally, the Court of Appeals did not rule on issues 3, 4 and 5 of the appeal, to which the Respondents did not argue against in their brief. For this reason, the Court of Appeals should reconsider its opinion based on the grounds advanced in the Appellant's briefs.

Respectfully submitted,

/s Robert B. Varnado

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Robert B. Varnado (SC Bar # 0007085)
VARNADO LAW FIRM, LLC
P.O. Box 387
Charleston, South Carolina 29402
(843) 737-7301
Attorneys for Appellant/Respondent and Third-Party Defendants.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the corrected ***Appellant/Respondents Petition to Reconsider*** in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this date to the following or via EMAIL if so marked.

Robert T. Lyles, Jr., Esquire — VIA EMAIL
Lyles & Associates, LLC
1037 Chuck Dawley Boulevard, Suite G-100
Mt. Pleasant, SC 29464

/s Robert B. Varnado

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Robert B. Varnado (SC Bar # 0007085)
VARNADO LAW FIRM, LLC
P.O. Box 387
Charleston, South Carolina 29402
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