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May 05 2022

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 Number 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 Co., LLC,Third-Party Defendants.

RESPONDENTS/APPELANTS' PETITION FOR REHEARING

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondents/Appellants hereby file this Petition for Rehearing.

Respondents/Appellants respectfully request a rehearing of Opinion 2022-UP-175 (filed April 20, 2022) and/or the issuance of a new opinion on the issues outlined herein.

Argument

I. The Court erred in failing to conclude that the evidence supports a finding of personal liability of Jay Brown.

While the Special Referee's Order may have been lucid, it was in error with respect to Jay Brown's personal liability. The evidence in the case amply and irrefutably establishes that the damages suffered by the McMarlins were the direct and proximate result of the personal actions of Jay Brown, the sole member of Brown Constructors, LLC, who personally directed and controlled the subcontractors and was the sole signatory and architect of the defective and wrong mechanic's lien which was at the heart of this action.

As noted in the briefs, South Carolina's corporate statute provides, in relevant part, as follows: "Unless otherwise provided in the articles of incorporations, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct." *S.C. Code Ann.* 33-6-220(b), Liability of Shareholders.

The South Carolina Limited Liability Company statute "Liability of Members and Managers" *S. C. Code. Ann.* 33-44-303 contains a limitation on the protection afforded to members. This statute reads as follows:

- (a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the

company. A member or manager is not personally liable for a debt, obligation, or liability of the company **solely by reason of being or acting as a member or manager.**

However, that protection does not and was never intended to insulate a member of an LLC from his own actionable conduct. The comment to the referenced statute includes the following:

A member or manager, as an agent of the company, is not liable 161 the debts, obligations, and liabilities of the company simply because of the agency. A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity.

This proposition is recognized in numerous previously cited cases, including, *Steinke v. Beach Bungee, Inc.*, 105 F.3d 192 (4th. Cir. 1997) (holding personal liability attached to corporate members who personally contributed unsafe conditions resulting in plaintiff's death), *citing Rowe v. Hyatt*, 468 S.E.2d 649, 650 (S.C. 1996) ("An officer, director or controlling person in a corporation is not merely as a result of his or her status as such, personally liable for the torts of the corporation. To incur liability, the officer, director, or controlling person must ordinarily be shown to have in some way participated in or directed the tortious act"). *BPS, Inc., v. Worthy*, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005) (Summary judgment reversed as to corporate officer's individual liability where evidence presented to support liability based on his own conduct); *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 687 S.E.2d 714 (Ct. App. 2009)(Officer who made misrepresentations regarding proposals of the LLC was not shielded from liability by his status as a corporate officer).

In *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 687 S.E.2d 714 (Ct. App. 2009), the court found where an officer of a corporation participated in the commission of conversion and fraud, specifically in making representations regarding proposals of the LLC, he was not shielded from liability merely by his status as an officer or shareholder of a corporation by *S.C. Code Ann.* 33-6-220(b). Specifically, Gerald concealed his knowledge of foreclosure proceedings on certain property when negotiating with *Plantation, A.D.*, for development of the property.

In this case, the evidence adduced at trial, and the evidence discussed in the briefs and in oral argument, establishes irrefutably that the harm caused to the McMarlins was the direct and proximate result of the actionable conduct of Jay Brown acting in his personal capacity.

As pointed out in the briefs and at oral argument, Brown Constructors, LLC was a single member LLC where Mr. Brown had complete control of all aspects of the operation of that LLC. That included the hiring, firing, and management of all subcontractors including those subcontractors who defectively constructed the McMarlin house, which resulted in the damages awarded to the McMarlins by a Special Referee. Mr. Brown's *personal* involvement is *admitted* by Brown who, in his filings with this Court, actually argued that he, along with Vuong Nguyen, was personally on-site directing the construction of the McMarlin home. At page 18 of the Final Brief of the Appellate/Respondent, Mr. Brown admits that his subcontractor and illegitimate qualifier, Nguyen, regularly "...met and received instructions from Brown Contractors' owner, Jay Brown, including instructions to meet the highest standards of construction." Mr. Brown carefully and explicitly notes that those instructions were from Mr. Brown personally, as the owner of Brown Constructors, LLC. On page 19 of the same brief, Mr. Brown also writes as follows:

Based on the evidence adduced to the Court, thus, he [meaning Nguyen] also meets the test of a "resident licensee" and "responsible charge" under S.C. Code Ann. §

40-59-400(1) because he was assigned to the project, was there almost every day and provided direct control and personal supervision. *The fact that Jay Brown did the same thing does not in any way make Nguyen less of a "qualifier."*

Thus, Brown again distinguishes between himself and Brown Contractors, LLC and admits that he was at the project "almost every day" and provided "direct control and personal supervision" over the project. Those are Brown's own words which establish his personal involvement in the shoddy work that was performed at the McMarlin home.

As pointed out at trial and in the appellate record, there is ample other evidence which compels a finding that the damages incurred by the McMarlins are the direct and proximate result of Jay Brown's personal tortious conduct. That includes his sole authority to hire, fire and direct subcontractors and the fact that Jay Brown was *personally* paid the "project management fee" independent of the cost of construction of the house charged by Brown Contractors, LLC.

In addition, the Special Referee found that Mr. Brown was not properly licensed, having personally made misrepresentations on the licensure application, and had improperly and defectively filed a mechanic's lien against the McMarlins, for which the Special Referee awarded the McMarlins substantial attorney's fees and costs. Brown *personally* signed the relevant documentation, including the faulty and defective mechanic's lien, the dismissal of which resulted in an award of attorney's fees in favor of the McMarlins in the amount of \$133,161.00. A corporate entity cannot, of its own accord, make faulty representations and pursue inherently defective claims. That can only be done by a person or people. In this instance those actions were undertaken by Jay Brown.

All of that evidence conclusively establishes that the damages incurred by the McMarlins were the direct and proximal result of *at least* the concurrent negligence of Mr. Brown, personally. To hold otherwise is to ignore the record.

CONCLUSION

For the foregoing reasons, Respondents/Appellants respectfully request that this Court reverse the holding of the Special Referee and hold Jay Brown personally liable for all damages awarded to Respondents/Appellants.

s/Robert T. Lyles, Jr.

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

PROOF OF SERVICE

I certify that I have served a copy of the Respondents/Appellants’ Petition for Rehearing on counsel for the Appellant/Respondent by electronic mail and by depositing a copy in the United States Mail, First Class postage prepaid, this 5th day of May, 2022, addressed to the following:

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May 5, 2022

VIA E-MAIL & U.S. MAIL

V. Claire Allen, Chief Deputy Clerk
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Re: *Brown Contractors, LLC, et al. vs. Andrew Joseph McMarlin, et al.*
Appellate Case No.: 2019-000513

Dear Ms. Allen:

Enclosed please find the original and six (6) copies each of Respondents/Appellants' Petition for Rehearing and Proof of Service regarding the above-referenced matter, along with this firm's check in the amount of \$50.00 to cover the required filing fee.

With kindest regards, I am

Very truly yours,

LYLES & ASSOCIATES, LLC

Robert T. Lyles, Jr.

RTL/cw

Enclosures

cc: Robert B. Varnado, Esquire