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Thursday, January 18

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Anatomy of Construction Litigation from an Engineer's Perspective

Derek A. Hodgin, PE

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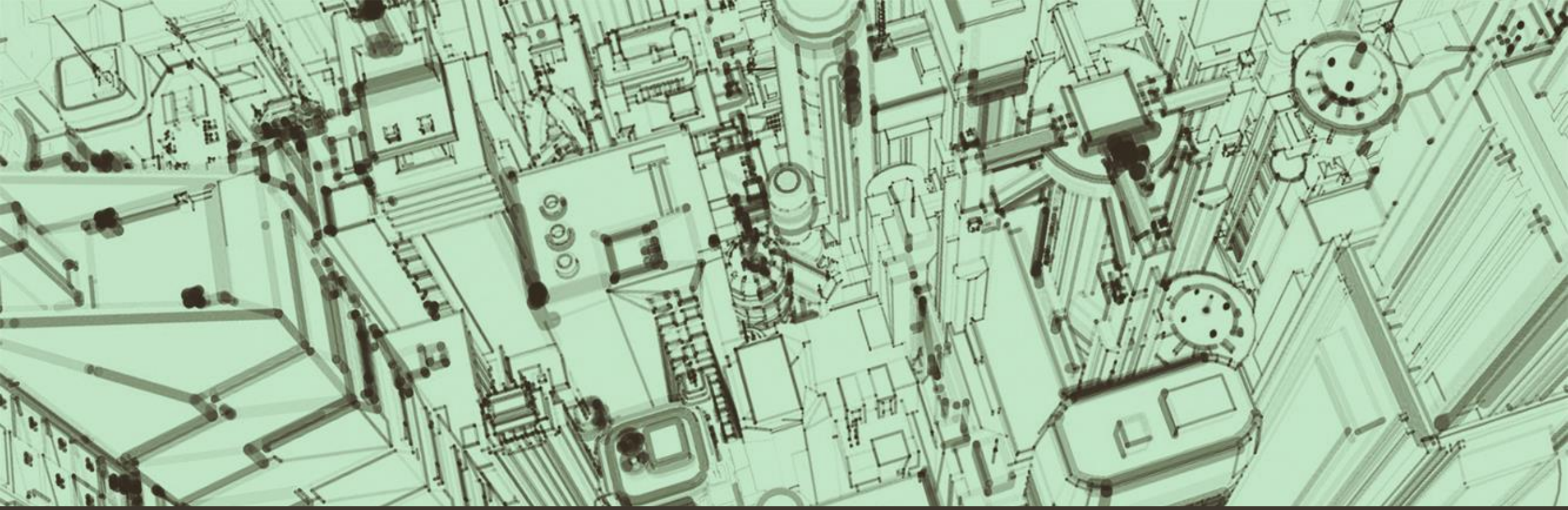
Construction Law Section

Thursday, January 18

Construction Motions and Trial Practice

The Honorable Bentley D. Price
Sarah E. Butler
Glynn L. Capell



Construction Motions and Trial Practice

Presenters

The Honorable Bentley D. Price
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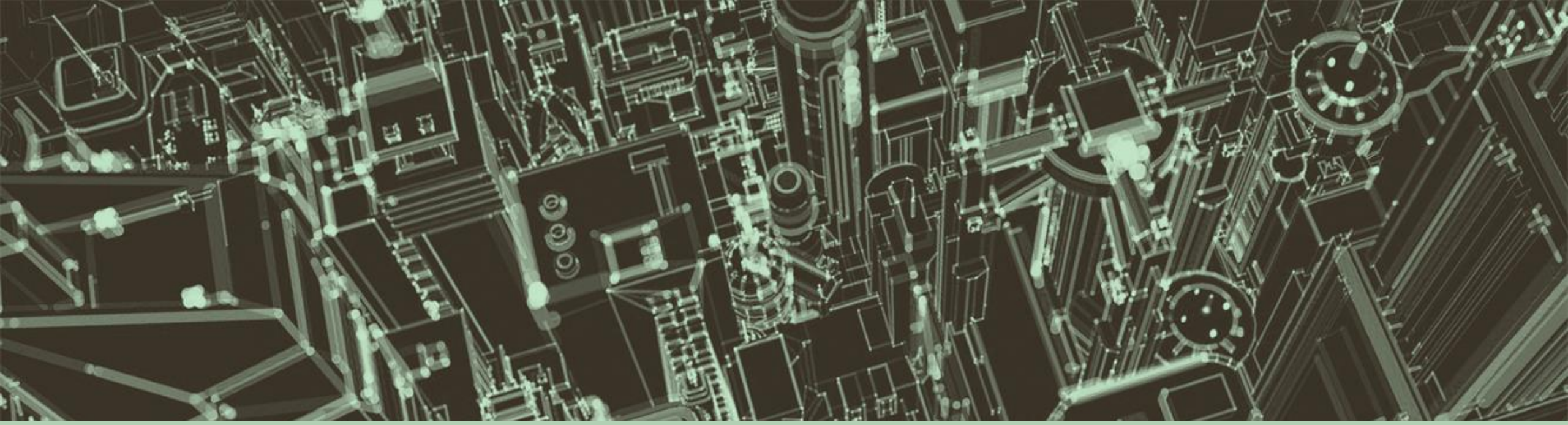

Motions Practice

Motions for Summary Judgment

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Reptile Theory Motions

Motions for Protective Order & Confidentiality Agreement

Motions to Exclude Evidence

Thank you so much!

The Honorable Bentley D. Price
S.C. Circuit Court
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2024 SC BAR CONVENTION

Construction Law Section

Thursday, January 18

Construction Law Update

Bryan P. Kelley

2024 South Carolina Bar Convention
January 18, 2024
Charleston, South Carolina

South Carolina Construction Law Update

Presented By

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South Carolina Construction Law Update – Federal and State Court Decisions

September 2022 – September 2023

ARBITRATION

A. Ambiguity in arbitration agreement differing from flow-down clause of master subcontract must be construed against the drafter.

This case arose out of a breach of contract dispute between the defendant first-tier subcontractor and its second-tier subcontractor, the plaintiff. After failing to remit payment, the plaintiff filed an action against the defendant. The defendant moved to compel arbitration. The South Carolina District Court denied the motion. The 4th Circuit Court of Appeals affirmed.

At issue in this case surrounded the arbitration agreement in the subcontract between the two subcontractors. The arbitration agreement required mutual agreement by both parties to compel arbitration. The subcontract also had a flow-down clause from the master subcontract between the defendant and the general contractor. The defendant argued that the master subcontract's arbitration clause governed as arbitration was mandatory and the subcontract contained the flow-down clause.

The 4th Circuit disagreed, finding that ambiguity was present and thus should be construed against the drafter, the defendant. The Circuit Court found that the District Court was correct in denying the defendant's motion because the plaintiff did not consent to such provisions at issue. *Greenwood, Inc. v. IES Commercial, Inc.*, No. 22-1795, 2023 WL 2758347, at *1 (4th Cir. Apr. 3, 2023).

B. Arbitration agreements must be read in isolation, with any unconscionable terms severed so long as the agreement as a whole is not invalidated.

The Court of Appeals affirmed a circuit court's order granting a defendant's motion to dismiss and compel arbitration. This case arose out of the purchase of a new home. The plaintiffs, home buyers, filed an action against the builders for breach of contract and implied covenant of good faith and fair dealing, unjust enrichment, violation of SCUPTA, and declaratory relief regarding the validity of disclaimed implied warranties in violation of South Carolina law.

Included in the purchase agreement for the home was a limited warranty provision and an arbitration agreement. At issue on appeal was whether: (1) the circuit court erred in finding the arbitration agreement to be one-sided, oppressive, and unconscionable; (2) whether the circuit court erred in considering the limited warranty provision and arbitration agreement together; and (3) whether the circuit court erred when it dismissed the plaintiffs' action that involved claims falling under the limited warranty provision.

First, the plaintiffs argued that the limited warranty provision and arbitration agreement must be read together because each cross referenced one another and were therefore intertwined. The Court disagreed by holding that a court will read an arbitration document in isolation and separate from the rest of the instrument, because the court may only inquire into its unconscionability based on the arbitration agreement itself.

Second, the plaintiffs attacked the limitations period of the arbitration agreement requiring demand for arbitration be filed within ninety days of the date of the claim or within 30 days if the claim arose from either party's termination of the Purchase Agreement or such claims would be forever barred. Here, the Court agreed with the plaintiffs in finding that this provision was one-sided and oppressive. However, the Court found that this provision is severable and does not invalidate the remaining provisions of the agreement.

Next, the court looked at the unconscionability of the entire agreement. The Court found that because the defendants were in a position of superior bargaining power, evidence supported the circuit court's finding that the plaintiffs lacked a meaningful choice when they agreed to the terms of the agreement. Additionally, the Court held that the limitations period was unconscionable. However, that provision was severable. Thus, the circuit court's order compelling arbitration was proper.

Last, because the arbitration agreement provided that all claims and disputes arising out of the purchase agreement were subject to arbitration, the Court concluded the plaintiffs' argument that their claims fell out from under the limited warranty provision was without merit. *Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 887 S.E.2d 534 (S.C. 2023)

C. Although parties cannot contract around the interstate commerce requirement of the Federal Arbitration Act, assertions that interstate commerce has been implicated must be timely raised.

This case arose out of a dispute between the plaintiff employer and the defendant uniform company, who supplied uniforms to the employer's employees. The parties to this action had agreed to settle all disputes by arbitration as governed by the Federal Arbitration Act (FAA).

The plaintiff asserted that the arbitration agreement was unenforceable because it did not comply with the notice requirements of the South Carolina Arbitration Act (SCAA). The defendant responded that it need not meet the notice requirements as the language of the agreement stated that it was governed under the FAA which preempted the SCAA. The trial court rejected the defendant's argument. However, the Court of Appeals reversed finding that the contract to supply uniforms implicated interstate commerce and thus the FAA applied and preempted any notice requirements. The South Carolina Supreme Court disagreed.

The Supreme Court first addressed the fact that the parties could not bypass the commerce requirement of 9 U.S.C. § 2 by contracting around it. Second, the court emphasized the requirement that a party seeking to compel arbitration under the FAA must show that the contract implicates interstate commerce. Here, however, the parties' contract did not involve commerce in fact because Defendant's assertions that the contract implicated interstate commerce were untimely. *Hicks Unlimited, Inc. v. UniFirst Corporation*, 889 S.E.2d 564, No. 28158 2023 WL 3987465, at *1 (S.C. July 14, 2023).

D. The *Prima Paint* Doctrine may require the arbitrator, and not the court, to decide whether an assignment of a contract to a third-party extinguishes the right to compel arbitration.

At issue in this case was whether a dispute is arbitrable after a contract subject to arbitration was assigned by Defendant to a third party. The South Carolina Supreme Court held that, under the facts of this case, the *Prima Paint* Doctrine requires the arbitrator rather than the court to decide whether the assignment of a contract by Defendant to a third party extinguished the right to arbitration.

The plaintiff Sanders ("Sanders") purchased a vehicle from the defendant Rick Hendrick Dodge ("Dodge") and executed a retail installment sales contract that contained an arbitration provision. Subsequently, Dodge fully assigned its rights under the installment contract to a third party, Santander ("Santander"). Thereafter, Santander repossessed the vehicle, because Sanders had failed to make timely payments under the installment contract.

Sanders brought an action against Dodge and Santander, among others, in circuit court. The defendants moved to compel arbitration. Sanders moved to compel discovery and argued that the defendants could not compel arbitration because of the assignment. The defendants argued that the arbitrator, not the court, is the proper venue to determine whether the arbitration provision is enforceable. Both the circuit court and Court of Appeals found in favor of Sanders. The Supreme Court disagreed.

The defendants raised two arguments in support of their position that the arbitrator must decide the enforceability of the arbitration provision. First, the *Prima Paint* Doctrine requires that the arbitrator decide Sanders' challenge. Second, the parties had contracted for the arbitrator to decide Sanders' challenge to arbitration as the agreement included a delegation clause.

Here, Sanders challenged the validity of the contract in its entirety instead of challenging the validity of the arbitration provision specifically. Although courts determine issues of contract formation, Sanders' argument was misplaced, because he did not challenge the fact that a valid contract existed, nor did he challenge the validity of the arbitration provision itself. Instead, Sanders argued that the assignment divests the Defendants of the right to compel arbitration.

The Supreme Court rejected this argument, in finding that the *Prima Paint* Doctrine requires the arbitrator to decide this question. Because of this finding, the Court declined to consider the delegation clause. *Sanders v. Savannah Highway Automotive Company*, No. 28168, 2023 WL 4752347, at *1 (S.C. July 26, 2023).

E. Separate arbitration agreement and admission agreement did not merge where one was governed by state law and the other governed by federal law.

In a wrongful death and survival action alleging nursing home negligence, the South Carolina Court of Appeals upheld the circuit court's ruling that there was no merger of an arbitration agreement with an admissions agreement to a care facility because each agreement was governed by different laws.

The decedent was admitted to the defendant's nursing home by her son who executed the paperwork for her admission to the facility. Th decedent's son signed both an admission

agreement and an arbitration agreement. Two weeks after the decedent's admission to the nursing home, she passed away. Allegedly, her death was due to an improperly treated leg wound that ended up causing Sepsis. Her estate filed a wrongful death and survival action against the nursing home defendants. The defendants thereafter moved to compel arbitration and moved to stay the proceedings pending outcome of arbitration. The circuit court denied their motions. The defendants appealed.

The defendants asserted that the circuit court should have found that the arbitration agreement merged with the admissions agreement because, under South Carolina law, merger is presumed when documents are executed at the same time, by the same parties, for the same purpose, and during the same transaction. Thus, the doctrine of equitable estoppel would preclude a party from asserting any non-signatory status. Although this is the general rule, the Court of Appeals disagreed under the circumstances at hand.

First, the Court noted that the admissions agreement provided that it was governed by South Carolina law, while the arbitration agreement provided that it was governed by federal law. As a result, the Court looked to the fact that each instrument was independent from one another and executed separately.

Therefore, the Court found that even assuming the decedent's son had authority to enter into the admissions agreement on his mother's behalf under the Adult Health Care Consent Act, there was no agency relationship (such as power of attorney) established at the time the contracts were entered into to effectuate an arbitration agreement and bind Descendent and her beneficiaries.

Lastly, the Court went on to disagree with the nursing home defendants' request to conduct further discovery on the issue of arbitrability as well as its motion to stay as both the merger and equitable estoppel arguments were properly denied. *Est. of Solesbee v. Fundamental Clinical & Operational Servs., LLC*, 438 S.C. 639, 885 S.E.2d 144 (S.C. Ct. App. 2023).

F. Separate arbitration agreements do not marge with admissions agreement when language of admissions agreement construes admissions agreement as the "entirety of agreement."

The Court of Appeals affirmed the trial court's denial of a defendant nursing care facility's motion to enforce an agreement to arbitrate. At issue in this case was whether the admissions agreement to the care facility and the arbitration agreement merged. Both documents were executed at the same time by a representative of the facility and the plaintiff on behalf of the decedent, the plaintiff's mother. Although the general rule is that documents executed at the same time, by the same parties, for the same purpose, and in the same course of transaction merge, the Court determined that the plaintiff lacked the legal authority to act on her mother's behalf. Moreover, the admissions agreement included an "Entirety of Agreement" provision. Therefore, by their own terms the documents were to be construed independent of one another. *Clyburn-Wilson v. SSC Sumter E. Operating Co*., No. 2022-UP-438, 2022 WL 17484345, at *1 (S.C. Ct. App. Dec. 7, 2022).

In a similar decision, the Court of Appeals found that the circuit court did not err in denying a motion to compel arbitration where the admission agreement and the arbitration agreement did not merge. In this case, the Court found that the two agreements were governed by different

bodies of law, each document was separately labeled and contained its own signature page, and that both parties agreed that signing the arbitration agreement was not a prerequisite to admission. *Estate of Owens v. Fundamental Clinical & Operation Servis.*, No. 2023-UP-272, 2023 WL 4618325, at *1 (S.C. Ct. App. July 19, 2023).

G. Heathcare Power of Attorney does not give authority to execute arbitration agreement on patient's behalf.

In yet another arbitration case regarding admission to a care facility, the Court of Appeals found that health care power of attorney does not amount to adequate authority to execute an arbitration agreement on behalf of the admitted plaintiff. Here, the arbitration agreement was not a precondition of admission, it was executed prior to the plaintiff's injury to which this suit was brought, and therefore, the attorney-in-fact lacked authority at the time to bind plaintiff to the arbitration agreement. *Acevedo v. Hunt Valley Holdings*, No. 2023-UP-281, 2023 WL 4927390, at *1 (S.C. Ct. App. Aug. 2, 2023).

H. Party attacking validity of an arbitration agreement must allege defects to the arbitration agreement specifically, rather than the contract as a whole.

This action arose out of alleged defamatory statements made on the popular tv show based out of Charleston, South Carolina, *Southern Charm*.

After becoming romantically involved with a prominent cast member of the show, the plaintiff consented to make an appearance during an episode. In doing so, the plaintiff allegedly was promised by the producers that he would be portrayed in a positive light. Thereafter, the plaintiff entered a contract for his appearance on the show in consideration of this promise. Included in the contract was an arbitration agreement to arbitrate any dispute arising out of his appearance and/or consent to being portrayed on the show.

After his romantic relationship ended, defamatory statements were allegedly made and published on air during an episode of the show. The plaintiff brought an action in circuit court against the defendants based upon the alleged defamatory statements. The plaintiff contended that the entire contract was invalid and unenforceable based upon promises to portray him in good light and the pressure due to the bright lights. The circuit court agreed with the plaintiff.

On appeal, the Court of Appeals reversed finding that under the *Prima Paint* Doctrine a party attacking the validity of an arbitration agreement must allege defects specifically pertaining to the arbitration clause itself as severed from the rest of the contract. Here, the plaintiff attacked the entire document as a whole. Therefore, the Court reversed the circuit court's order and remanded for an order compelling arbitration. *Abruzzo v. Bravo Media Prods. LLC*, No. 6004, 2023 WL 4751774, at *1 (S.C. Ct. App. June 26, 2023).

I. Arbitration agreement in drop-down menu on website insufficient to bind the parties.

This case arose between a travel package broker and travel agency. The broker appealed a circuit court's order denying its motion to compel arbitration. On appeal, the broker argued that

the parties had entered a valid enforceable contract to arbitrate. The Court of Appeals disagreed and found in favor of the travel agency.

At issue in the case was whether the use of a click down tab containing the terms and conditions of an arbitration agreement on a website was sufficient to bind the parties. It was not. Here, the travel agency testified that they were never directed to view the terms and conditions and thus were never made aware of such terms and conditions. Therefore, it had no reasonable notice. *Wanderlove Travel v. Avanti Destinations*, 2023-UP-032, 2023 WL 1431409, at *1 (S.C. Ct. App. Feb. 1, 2023).

J. Designation of arbitral forum is material and integral to an arbitration agreement.

The Court of Appeals upheld the trial court's denial of a motion to compel arbitration and stay proceedings where the arbitration agreement provided that the National Arbitration Forum was to be used. This case arose out of a wrongful death suit in an assisted living facility. At the time of this action, the National Arbitration Forum had ceased to perform pre-dispute consumer cases and was thus unable to administer the arbitration of this case. Because the provision designating the National Arbitration Forum was both material and integral to the arbitration agreement, arbitration could not be compelled. Based upon this holding, the Court rejected the appellants argument that the provision naming the National Arbitration Forum as the arbitral forum was severable. *Peele v. Greenville Ret. Props.*, No. 2023-UP-106, 2023 WL 2520133, at *1 (S.C. Ct. App. Mar. 15, 2023).

CIVIL PRACTICE

A. Party must raise issues of trial court's denial of fee shifting in Rule 59(e) motion to preserve for appeal.

This action arose out of alleged wrongful termination and breach of contract by an employee against her former employer. Following the trial court's grant of the employer's directed verdict at the close of evidence during trial, the employer requested attorney's fees and costs as provided for in a fee shifting provision of the employment agreement signed by the parties. The trial court denied the employer's motion for attorney's fees and costs on two separate grounds. First the trial court found that the employer had failed to plead allegations supporting its basis for fees and costs. Second, the trial court determined that the authenticity of the employment agreement was in dispute and therefore the employer had failed to authenticate it. The employer failed to file a Rule 59(e), SCRCP, motion to alter or amend the judgment.

On appeal, the employer made numerous arguments as to why the trial court erred in finding that it failed to authenticate the agreement, including that it presented it to the court as attached to a motion for summary judgment, it showed the employee had signed it, and the employee did not dispute the authenticity in her deposition.

However, in foregoing a Rule 59(e) motion, the defendant failed to preserve the issue for appeal of whether the trial court erred in finding that it did not authenticate the employment

agreement. Therefore, because the trial court's ruling was on two separate grounds, pursuant to the two-issue rule, the Court of Appeals affirmed and did not address whether the employer was required to plead allegations supporting its basis for attorney's fees and costs. *Gibbons v. Aerotek, Inc.*, No. 6006, 2023 WL 4919523, at *1 (S.C. Ct. App. August 2, 2023).

B. Plaintiff is entitled to allocate setoff as they see fit; post-trial setoff must purport to issues relating to injuries brought out during trial.

This action arose out of a condominium construction defect. The property owner's association filed actions against numerous defendants alleging negligence, gross negligence, and breach of implied warranties. Subsequently, the association settled and released claims against many of the parties. The case proceeded to trial against the remaining defendants CBC (general contractor), TCR (subcontractor), Vasquez (TCR's second-tier subcontractor) and Miracle (TCR's second-tier subcontractor).

Following a jury trial, the jury awarded a $6.5 million verdict for actual damages in favor of the association. The jury found defendants Vasquez and Miracle each responsible for 5% of the damages, and defendants CBC and TCR jointly and severally liable for the remaining 90%. Additionally, the jury found CBC and TCR each individually grossly negligent and awarded two separate punitive damage awards of $500,000 against each defendant respectively.

Prior to a hearing on post-trial motions, CBC settled with the association for $2,137,500. The parties allocated (1) $1 million in insurance proceeds for items that were not brought up in trial, (2) $500,000 for punitive damages, and (3) the remaining $637,500 for items that were brought up in trial. The trial court denied TCR any setoff to each of these three amounts.

On appeal, the Court found that the trial court did not err in denying a setoff for the $1 million insurance payment because these damages did not represent the same injury represented by the verdict in the case. The Court also found that TCR was not entitled to a setoff regarding the $500,000 punitive damages because the jury had awarded independent punitive against both CBC and TCR.

However, the Court found that $500,000 of the remaining $637,500 should be set off because the issues were brought out relating to the injury during trial. Additionally, the parties stipulated that $137,500 of the remaining $637,500 should be setoff. Therefore, the Court conclude that the trial court erred in denying a setoff for these items in the amount of $637,500.

Lastly, in addressing TCR's argument that the trial court erred in failing to set off the full amount of pretrial settlements, the Court found that the trial court did not abuse its discretion in refusing to set off the entirety of the pretrial settlements because the record was insufficient to show others responsibility for the alleged injuries. *Palmetto Pointe at Peas Island Condo. Prop. Owners Ass'n, Inc. v. Island Pointe, LLC*, No. 2019-001790, 2023 WL 4222127, at *1 (S.C. Ct. App. June 28, 2023).

C. Trial court must review settlement documents for setoff in complex cases.

Following a jury trial in this complex asbestos case, the defendant sought review of the trial court's denial of its motion for a judgment notwithstanding the verdict, denial of its motion for

a new trial, denial of its motion for setoff, and imposition of discovery sanctions. On appeal, the Court of Appeals affirmed the trial court's rulings in all respects except for the defendant's motion for setoff against the compensatory damages awarded by the jury.

This action arose following the plaintiff's husband's death from mesothelioma as a result of exposure to asbestos and products containing asbestos for three decades while working for Duke Power's Nuclear Station in Oconee County. The plaintiff filed an action against numerous defendants, one of whom is defendant Fisher who manufactured asbestos gaskets for valves' external pipe flanges at the Station. The plaintiff asserted claims for wrongful death, survival, and loss of consortium based upon theories of negligence, strict liability, and breach of warranty against the defendants.

Prior to trial, the plaintiff settled her actions against many of the defendants. However, the action against the defendant Fisher proceeded to trial, and the jury returned a sizeable verdict against Fisher under theories of negligence and breach of warranty. The trial court denied all post-trial motions, and Fisher appealed raising six issues.

First, Fisher asserted that it was entitled to a new trial based upon the jury's inconsistent verdicts regarding strict liability and negligence because the jury found in favor of Fisher for strict liability and against Fisher for negligence. Fisher argued that the elements of strict liability were incorporated within the elements of negligence and thus the jury should have been instructed to correct this inconsistency. The Court rejected this argument, finding that the trial court did not err because strict liability and negligence differ as one relates to the product while the other relates to conduct.

Second, Fisher asserted that it was reversible error to admit the plaintiff's expert medical witnesses because they substituted their opinions for the legal standard of causation, and therefore, in the absence of the expert's testimony there was insufficient evidence of causation to prove causation. The Court disagreed. Here, the Court found that the trial court did not err in admitting the expert testimony because the testimony reliably established medical causation and the lay testimony was sufficient to meet the substantial factor test. Furthermore, it rejected Fisher's argument that the expert's testimony should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE.

Third, the Court rejected Fisher's three arguments that the trial court abused its discretion by failing to instruct the jury on the Sophisticated Intermediary Doctrine, superseding cause, and no punitive damages for breach of warranty. Here, the Court found that Fisher failed to carry its burden in showing that the trial court should have instructed the jury on these issues.

Fourth, the Court then went on to reject Fisher's argument regarding apportionment of damages with settling defendants, as the joint tortfeasor act provides joint and several liability to all tortfeasors and the other public policy concerns should be taken up with the legislature.

Fifth, the Court agreed with Fisher that the trial court erred in failing to review the settlement docs and to consider the respective amounts to be set off against the compensatory damage awards.

Lastly, the Court rejected Fisher's argument that it had acted in good faith and discovery sanctions should not have been imposed. The Court found that the trial judge did not abuse its

discretion in imposing sanctions. *Glenn v. 3M Co.*, 440 S.C. 43, No. 5975, 2023 WL 2778309, at *1 (S.C. Ct. App. Apr. 5, 2023).

D. Offensive collateral estoppel may bar party from relitigating an issue in a subsequent action where party failed to properly join third parties in previous action pursuant to Rule 19.

The Court of Appeals determined that the trial court did not err in finding that a plaintiff was collaterally estopped from suing defendants based upon counterclaims the plaintiff raised against a non-party during prior litigation.

In 2016, the plaintiff, Brock, was sued by Johnson for breach of contract in relation to unpaid wages (the "Johnson Suit"). Brock counterclaimed in alleging that Johnson with the help of the defendants were cohorts in acting to interfere with his business. Although Brock attempted to add the defendants as third-party defendants to the Johnson Suit, he failed to sufficiently do so.

Thereafter, Brock as plaintiff to this action, sued the defendants for civil conspiracy. The court determined that the defendants were indispensable parties to the first action. Even though the causes of action differed from Brock's counterclaims raised against Johnson in the Johnson Suit, the causes of action, here, were based upon the same transaction or occurrence. Thus, the defendants could properly raise the offensive use of issue preclusion. *Brock v. Langville*, No. 2023-UP-025, 2023 WL 395651, at *1 (S.C. Ct. App. Jan. 25, 2023).

CRIMINAL

A. Supreme Court affirms last year's Court of Appeals ruling that Town ordinance was unconstitutionally vague so as to impose criminal liability for construction of docks on the Intercoastal Waterway.

This case arose out of a criminal conviction where a licensed marine contractor was arrested and subsequently fined for an alleged violation of a town ordinance while undertaking the construction of a dock on the coast of South Carolina. The underlying issue in this case relates to language in the ordinance which prohibits a dock to be constructed as to interfere with navigation a body of water's channel. The building permit issued for the construction had a condition which limited the dock to extend no further than adjacent docks. Furthermore, town representatives informed the contractor of this requirement. The contractor allegedly initiated construction of the end of the dock at low tide when no water was present. This area extended past adjacent docks. The municipal court and Circuit Court found that these circumstances warranted confirmation of the contractor's conviction. The South Carolina Court of Appeals disagreed, and the South Carolina Supreme Court recently affirmed.

The Court of Appeals concluded that nowhere in the town ordinances prohibited the dock from extending further than adjacent docks into the channel as to provide the

contractor with fair warning of potential criminal liability. The town's justification for arresting the contractor was predicated upon an unpromulgated and noncodified condition. Therefore, the Court reversed the contractor's conviction on the grounds that the town ordinance failed to provide fair warning of a criminal violation where a contractor exceeds the scope of the building permit. *Town of Sullivan's Island v. Murray*, 439 S.C. 352, 887 S.E.2d 533 (S.C. 2023).

EMINENT DOMAIN

A. Court examines the "investment-backed expectations" factor for unconstitutional regulatory takings.

After the City of Folly Beach amended an ordinance to require certain contiguous properties owned under common ownership to be merged into a single property, the plaintiff brought an action against the City alleging that the ordinance amounted to an unconstitutional regulatory taking. The plaintiff was an owner of an A and B lot (discussed below), which consisted of two small, contiguous, developed lots. The plaintiff alleges that his investment-backed expectation with regards to the two developed lots was hindered by the ordinance and thus amounted to a taking. The South Carolina Supreme Court disagreed.

In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the United States Supreme Court determined that a court must examine three factors under a regulatory taking analysis. These include: (1) the economic impact of the government action, (2) the extent to which the governmental action interferes with distinct investment-backed expectations, and (3) the character of the action. Here, the Supreme Court determined that first and second factors weighed in favor of the ordinance, while the third factor, investment backed expectation, had no weight in favor of either party.

In its analysis, the Court first noted the history behind the United States Army Corps of Engineers construction of jetties throughout Charleston harbor, over the past one-hundred and twenty-five years, to protect oceanic shipping channels. As a result of the Army Corps construction, sand migration has caused Folly Beach to erode rapidly. In response the federal government began to fund beach renourishment projects, although the Army Corp refused to renourish privately owned property.

Thereafter, Folly Beach was granted perpetual easements for all oceanfront property owners in consideration for the existing property owners to permanently give up their rights to build oceanward of the perpetual easement running through their properties.

At the same time, the General Assembly exempted Folly Beach from the requirements of the South Carolina Beachfront Management Act. S.C. Code Ann. § 48-39-10, *et seq.* In particular, the South Carolina Department of health and Environmental control redraws the baseline for the perpetual easement every seven to ten years based upon existing erosion. Next, oceanfront development within this area is strictly regulated by our legislative bodies. Additionally, oceanfront property owners can build new seawalls or repair existing ones up to the baseline if plans are

approved by the city, however they cannot build on the seaward lot if an existing structure is more than 50% destroyed.

By way of reference, these oceanfront lots were historically divided into A lots and B lots and owned under common ownership. When land was conveyed, both contiguous lots were transferred together. The B lots that were closer to the ocean were undeveloped because many of them were either submerged or on active beaches.

After the renourishment projects, some B lots became developable and were in fact developed. However, these lots were quickly eroded by the ocean. Thus, the Army Corp threatened to cut off renourishment funding unless the City quit allowing B lots to be developed. The City agreed and began efforts of their own to mitigate erosion.

In identifying the first *Penn Central* factor, the Court next analyzed the *Murr* factors, an offshoot of *Penn*. *See Murr v. Wisconsin*, 582 U.S. 383 (2017). First, the Supreme Court held that the treatment of the land factor weighed in favor of identifying the relevant parcel as both lots combined, because the plaintiff is prohibited from selling the lots separately or building separate developments if the B lot development is more than 50% destroyed. Next, the Court found that the second *Murr* factor weighed in favor of the ordinance as the lots are located on the beach and are susceptible to additional environmental takings. As to the third factor, the Court that the value of the property factor weighed in favor of identifying the relevant parcel as both lots combined because A Lot could enjoy beach access on B Lot and should B Lot development get destroyed by over 50% then no one could rebuild on B Lot. Moreover, an appraisal's reduction of 23% of the value of the land after merger was not unconstitutional in proportion to other regulations that have been upheld as constitutional.

In identifying the second *Penn Central* factor, the sub factors in the Supreme Court's analysis were split. First, the Court found that the "primary expectation", i.e., continued use of family vacation and rental properties, leaned in favor of the plaintiff. Second, as against The plaintiff, the plaintiff made little to no effort to sell either property. Third, the government must be able to regulate local properties without being held hostage by the property owner's expectations. Fourth, the perpetual easement weighed against the plaintiff. Lastly, the size, shape, and orientation of the Lots made the plaintiff's expectation to develop lot B unreasonable. Therefore, the second *Penn Central* factor did not weigh in favor of either party.

As to the third *Penn Central* factor, the Court determined that the character of the ordinance was not akin to a typical eminent domain action in light of public considerations and potential public costs of maintaining beachfront that is susceptible to continued erosion.

Therefore, the Court found that Folly Beach's ordinance is a reasonable land-use regulation. *Braden's Folly, LLC v. City of Folly Beach*, 439 S.C. 171, 886 S.E.2d 674 (S.C. 2023).

In a related action, the Court of Appeals, overturned a Master-in-Equity's dismissal of a declaratory action brought by certain owners of the super-beachfront lots (i.e., B lots) seeking a determination that the boundary between public and private property on oceanfront property on Folly Beach is the high waterline that existed before the 2018 beach renourishment project.

The Master dismissed the action for lack of standing, failure to state a claim, and failure to name indispensable parties. The Court of Appeals, reversed and remanded, finding that: (1) the owners had constitutional standing as they had shown injury in fact, causation and

redressability; (2) that their complaint supported a claim because portions of their super-beachfront property are now public trust property and they had paid for renourishment with their own funds; and (3) if all super-beachfront lot owners were in fact indispensable, the proper remedy was to make them parties rather than dismissing the action. *City of Folly Beach v. State*, 2023-UP-284, 2023 WL 4925968, at *1 (S.C. Ct. App. Aug. 2, 2023).

SURETY

A. Fourth Circuit clarifies the definition of "labor" for purposes of the Miller Act.

The Circuit Court recently defined what qualifies as "labor" for purposes of the Miller Act, 40 U.S.C. §§ 3131-34.

This case arose out of the renovation of several staircases at the Pentagon. The plaintiff was involved in the renovation as an engineer who mostly provided supervisory work of the manual labor that was going on during the renovation. After the general contractor was terminated by the government for failure to prosecute the work with diligence, the plaintiff subcontractor sought payment under the general contractor's surety bonds for the plaintiff's work on the project. The plaintiff alleged all his work constituted labor. However, in good faith, the defendant, surety, denied the plaintiff's claim for failure to provide evidence that his work constituted "labor" under the Miller Act, as opposed to clerical or administrative tasks. The defendant told the plaintiff they were willing to work with him but to resubmit his proof of claim to adhere to these changes. The plaintiff failed to do so, and instead, within one month, filed suit against the defendant.

The district court rejected the plaintiff's claim that his supervisory work constituted labor. However, the Fourth Circuit disagreed. The Circuit Court looked to the predecessor to the Miller Act, the Heard Act, to determine that labor under the Heard Act must be physical. However, the Court noted that our courts interpreting this statute have held for decades that supervisory work fits in this definition of physical labor. Yet, mere mental labor such as clerical or administrative tasks do not apply. Therefore, most of the work performed by the plaintiff fell under the definition of labor for purposes of the Miller Act.

Nevertheless, under the Miller Act, the statute of limitations runs one year from the day on which the last of the labor was performed. Here, that year had passed. The only work the subcontractor did after that date was taking inventory which would not constitute labor. Therefore, the defendant issuer was not estopped from asserting the statute of limitations as a defense. *United States ex rel. Dickson v. Fid. & Deposit Co. of Maryland*, 67 F.4th 182 (4th Cir. 2023).

TORTS

A. South Carolina Supreme Court recognizes negligent hiring theory for physical harm caused by negligent selection of an independent contractor.

On a certified question from the Fourth Circuit, the South Carolina Supreme Court held that a principal may be subject to liability for physical harm proximately caused by the principal's negligence in selecting its independent contractors.

This case arose out of a trucking accident when the defendant's independent contractor struck and injured the plaintiff while driving. The plaintiff originally asserted a claim against the defendant in state court. However, the defendant removed the case to federal court. There, the district court granted the defendant's motion to dismiss for failing to allege an employer-employee relationship between the defendant and its independent contractor. However, the district court allowed the plaintiff to amend its complaint prior to the entry of judgment for the defendant. The plaintiff amended the complaint to assert a new theory of negligence regarding the negligent hiring of the defendant's independent contractor. Yet, the district court found the amended complaint to be adequate, denied the plaintiff's motion, and entered judgment for the defendant. The plaintiff appealed. On appeal the Fourth Circuit asked the South Carolina Supreme Court whether South Carolina recognizes a cause of action for negligent selection of an independent contractor.

In answering in the affirmative—while not adopting the Restatement—the Court looked to four key features of the Restatement (Second) of Torts § 411: first, a plaintiff must show that a defendant did not exercise reasonable care in their selection of the independent contractor; second, the standard of reasonable care differs depending upon the skill and care required of the work involving risk of physical harm; third, reasonable care only relates to selection of the competent and careful contractor; and fourth, the plaintiff must establish the negligence of the principal was the proximate cause of the physical harm to the plaintiff.

As a result of this decision, the South Carolina Supreme Court, like most other states in the union, have now adopted an independent cause of action based upon negligence, when no vicarious liability can be established as a result of the lack of an agency relationship between a principal and its independent contractor. *Ruh v. Metal Recycling Services, LLC*, 889 S.E.2d 577, No. 28163, 2023 WL 4096213, at *1 (S.C. June 21, 2023).

B. Willful and wanton conduct may be enough to support amalgamation of interest theory/single business enterprise theory.

This case arose out of broken promises to convey community amenities from a property developer and its affiliated entities to homeowners and a homeowners' association. The plaintiff homeowners and homeowners' association brought an action against the defendant developers for causes of actions relating to the defendants breach of their promise to convey certain real property community amenities to the homeowners' association. Following trial, the jury awarded damages to the plaintiffs on numerous theories. However, on appeal, the Court of Appeals essentially nullified the jury's finding and found that the trial court's amalgamation ruling regarding the defendant developer and its affiliates was erroneous. The South Carolina Supreme Court disagreed.

The main issue on appeal was whether the plaintiffs could proceed under an amalgamation of interests' theory, i.e., single business enterprise theory, or if Plaintiffs must prove liability of each defendant independently. The Court held that amalgamation requires a showing that the entities were intertwined as well as a showing of either bad faith, abuse, wrongdoing, or injustice resulting from blurring of the entities legal distinctions.

Here, the Court found that while courts should be hesitant to ignore corporate formalities, the jury's finding that Defendants' conduct was "willful and wanton," support an amalgamation theory even absence of punitive damage awards as there was sufficient evidence to show bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions. *Walbeck v. I'On Company, LLC*, 889 S.E.2d 537, No. 28134, 2023 WL 1809318, at *1 (S.C. Feb. 8, 2023).

OTHER

A. Building inspector's certification that unit is fit for occupancy may provide inference of compliance with building codes.

In this construction defect case[1], the plaintiff, property owner's association, appealed the trial court's decision regarding its denial of their motion for directed verdict, motion for judgment notwithstanding the verdict, and motion for a new trial against based upon its claims against the only defendant, WCS, that resulted in in a defense verdict. The plaintiff also alleged that the trial court abused its discretion in refusing to give two of its requested jury charges. Moreover, the plaintiff alleged admission of certain inadmissible hearsay was reversible error. The South Carolina Court of Appeals disagreed.

First the Court addressed the Rule 50 and Rule 59, SCRCP motions as it related to installation of sprinklers systems. The plaintiff argued that it was entitled to a directed verdict because (1) WCS violated building codes in failing to install sprinklers in the attics of each unit, (2) WCS violated building codes in failing to comply with the plans as approved by the fire prevention engineer, and (3) the sprinkler system was installed with defective parts.

In addressing each issue, the Court determined that there was reasonable inference that sprinklers were not needed in the attics and additionally the building inspectors certified the units as fit for occupancy. Next, the Court determined that the trial court did not err in letting the issue of whether there was only one set of approved plans or whether the design plans had changed during construction. Third, there was competing evidence regarding improper defective parts, and thus the trial court properly allowed this issue to go to the jury as well.

The Court found that the trial court properly instructed the jury. Lastly, the Court found that any error in admitting the hearsay evidence did not prejudice the plaintiff, and thus was not a reversible error. *Palmetto Pointe at Peas Island Condo. Prop. Owners Ass'n, Inc. v. Island Pointe, LLC*, No. 2023-UP-014, 2023 WL 155074, at *1 (S.C. Ct. App. Jan. 11, 2023).

[1] Related proceeding at *Palmetto Pointe at Peas Island Condo. Prop. Owners Ass'n, Inc. v. Island Pointe, LLC*, No. 2019-001790, 2023 WL 4222127, at *1 (S.C. Ct. App. June 28, 2023) (discussed above).

B. Foam insulation contractor may not need license.

The Court of Appeals affirmed a circuit court's award of money judgment in favor of an unlicensed contractor and awarding attorney's fees and costs. Here, the Court found that the trial court correctly determined that a subcontractor, waterproofing company's installation of foam to fill a void rather than attaching to or modifying any existing structural elements does not fit under any classification that requires a license. Moreover, mixing up a couple of bags of concrete did not amount to $5,000 worth of work to existing structural elements. Therefore, the subcontractor was entitled to claim a mechanic's lien to secure debt owed to him. *Marsh Waterproofing v. Steeple Dorchester*, No. 2023-UP-210, 2023 WL 3614306 (S.C. Ct. App. May 24, 2023).

C. Minor discovery of undisclosed termite damage puts purchaser on notice of potential for more extensive damage.

This case arose out of the sale of a residential home. At issue was whether the buyer was on notice of undisclosed termite damage. In 2008, the seller contracted with the buyer for the sale of a residential home. The seller's disclosure statement did not make any reference to termite damage or a termite bond. During inspections, the CL-100 Wood Infestation Report indicated that there were signs of past terminate infestation and treatment based upon areas that were accessible during the inspection. The report also informed the buyer that he should seek further investigation from a qualified expert. Yet, the buyer took no action.

Four years later, in 2012, the buyer found extensive damage while renovating a bedroom in the house. Thereafter, the buyer sent a demand letter to the defendant real estate agency demanding reimbursement for the failure to disclose and for completion of necessary repairs. The defendants denied knowledge of the damage and declined to reimburse the buyer.

Six years later, in 2018, the buyer was renovating a bathroom when he discovered termite damage of more than $100,000. Thereafter, he brought suit.

Both the seller and real estate agency defendants moved for summary judgment on the grounds that the buyer's claims were barred by the three-year statute of limitations. The circuit court granted the defendants' motion. On appeal, the Court declined to inquire into whether the buyer was on notice in 2008 based upon the CL-100 report, however, they determined that there was no conflicting evidence due to the 2012 discovery. The undisputed record showed that the buyer had notice, even though the 2018 renovation uncovered tremendous damage, and the buyer did not act with promptness by failing to file suit until three years after the statute of limitations had run.

Furthermore, even assuming the seller had attempted to deceive the buyer by placing a "band aid" on the termite problem in covering up the extensiveness of the damage, the Court held that this is not enough to justify equitable tolling of the statute. Therefore, summary judgment was appropriate. *Hine v. McCrory*, No. 2023-UP-241, 2023 WL 3994467, at *1 (Ct. App. June 14, 2023).

D. Evidence of knowledge of past CL-100 report from potential buyers that backed out of sale due to presence of terminate damage bay be enough to overcome Realtor's motion for summary judgment for violation of Residential Property Disclosure Act.

At issue in this case is whether a buyer can survive summary judgment in attempting to hold a real estate agent liable for violation of a Residential Property Condition Disclosure Statement. Under the circumstances of this case, the South Carolina Court of Appeals found that summary judgment was not warranted on the on the plaintiff's causes of action against the realtor for alleged violation of the Residential Property Condition Disclosure Act, S.C. Code Ann. § 27-50-70, and negligent misrepresentation.

While attempting to sell their home, the sellers contacted their friend, a real estate agent, to handle the sale. The sellers entered a contract with potential buyers. However, prior to closing on the property, an inspection was done to the home that revealed moisture issues, but the problems remained and the sellers and potential buyers executed a release from their contract. Thereafter, the sellers sought to fix the issue and hired a repairman.

Then, the plaintiff buyer sought to purchase the home and was informed by the realtor that the CL-100 report was good, when in fact it was not. The realtor also provided the sellers with a Residential Property Condition Disclosure Statement, in which the seller's answered, "NONE" when asked to describe any present wood problems caused by termites, dry rot, etc.

Two days after closing on the property, during a heavy rainstorm, the home flooded. The plaintiff conducted their own CL-100 report and discovered wood-destroying fungi. Thereafter the plaintiff commenced an action against the sellers, the realtor, and the pest control company. The plaintiff brought causes of action for fraud, conspiracy, negligent misrepresentation, and violation of the Residential Property Disclosure Act.

There was competing evidence as to the extent of what the realtor was made aware of, such as the CL-100 reports and flooding, however, the Court determined that the facts were sufficient to survive summary judgment against the realtor for negligent misrepresentation and violation of the Residential Property Disclosure Act. However, the causes of action for fraud and conspiracy required a heightened pleading standard under Rule 9, SCRCP, and thus more than a scintilla of evidence must have been shown to defeat realtor's motion. Here, the plaintiff failed to carry that burden. *Isaac v. Onions*, No. 2023-UP-263, 2023 WL 4489444, at *1 (S.C. Ct. App. July, 12, 2023).

E. Contract to provide services to Town under mandatory state tourism tax law does not amount to "services" under municipal procurement code.

The Town of Hilton Head entered a contract with the Chamber of Commerce entitled "Contract for Professional Services," in which the Chamber would provide certain services relating to tourism. An owner of a tourism business filed suit against the Town alleging violation of the Town's Procurement Code due to the Town's failure to publicly bid or subject the contract to the code and that the Procurement Code did not exempt certain contracts or other expenditures of public money from it. The Town of Hilton head argued that the special fund for tourism, outlaid in The Accommodations Tax Act, in S.C. Code Ann. § 6-4-10 was a specific state statute that applied over the general municipal procurement code. The master granted the Town's motion for

summary judgment finding that the Town's Procurement Code did not apply to the Contract because the Contract was not one for services to benefit the Town but rather services of reporting requirements under the Accommodations Tax Act as required by S.C. Code Ann. § 6-4-10.

The Court of Appeals agreed by looking to the language of the statutes and Town ordinance in holding that the intent of the Town in enacting the Procurement Code was to enable a bidding process for the receipt of funds in exchange for services to the Town. While the contract at issue was entered into not to obtain services for the Town itself, but rather that to formalize the existing duties of the Town under S.C. Code Ann. § 6-4-10(3). Therefore, the master did not err in granting summary judgment in favor of the Town of Hilton Head. *Buonaiuto v. Town of Hilton Head Island*, 889 S.E.2d 625, No. 5990, 2023 WL 3985220, at *1 (S.C. Ct. App. Jun. 14, 2023).

F. Reliance on "pay when paid" language violates S.C. Code Ann. § 27-1-15.

This case arose out of a payment dispute between the general contractor, Clayton Construction Company ("CCC"), and its subcontractor, J&H Grading & Paving, Inc. ("J&H").

During the construction of a car dealership, J&H entered a subcontract with CCC that contained a "pay when paid" provision. While construction of the dealership was ongoing, J&H submitted its last pay application to CCC. Although CCC did not dispute the amount due or its satisfaction of J&H Grading's work, CCC withheld payment by reasoning that payment was not yet due because the owner had not yet tendered retainage to CCC under the master contract. After numerous payment requests over several months, J&H filed its notice of mechanic's lien on the property. Thereafter, J&H made a formal demand under S.C. Code Ann. § 27-1-15. In response, CCC pointed to the "pay when paid" provision of the subcontract while again refusing to tender retainage and payment.

Over a year after it had first submitted its final pay application, J&H filed suit to foreclose on the lien and assert causes of action for breach of contract and quantum meruit against CCC. Subsequently, the owner settled and was dismissed from the suit.

The circuit court held a bench trial addressing only the question of attorney's fees and interests under § 27-1-15. At trial, CCC argued that under *Elk & Jacobs Drywall v. Town Contractors, Inc.*, "pay when paid" provisions are not conditions precedent such that they violate the Subcontractors' and Suppliers' Payment Protection Act (the "Act"), S.C. Code Ann. § 29-6-210, *et seq*. 267 S.C. 412, 229 S.E.2d 260 (S.C. 1976). In its order the trial court rejected CCC's contention and found that J&H was entitled to attorney's fees under § 27-1-15. The court determined that any "pay when paid" provisions are unenforceable under the plain language of the Act, and therefore CCC's refusal to pay J&H was unreasonable on its face as CCC delayed payment for over ninety days.

On appeal, CCC argued that the trial court erred by finding: (1) it had failed to make a reasonable and fair investigation under S.C. Code Ann. § 27-1-15; (2) that the "pay when paid" provision in the subcontract created a condition precedent; (3) the "pay when paid provision was unenforceable under the Act; and (4) that any delay in payment beyond ninety days was unreasonable. The South Carolina Court of Appeals disagreed.

The Court upheld the circuit court's order holding CCC liable to J&H under South Carolina's statutory payment protection for the recovery of attorney's fees and interests related to unpaid amounts. First, the Court noted that CCC's reliance upon the antiquated holding in *Elk*,

which states that “pay when paid” provisions are not condition precedents, was misplaced because the express language of the Act § 29-6-230 renders these provisions unenforceable and thus *Elk* obsolete. Second, the Court found that the record supported the award of attorney’s fees under § 27-1-15. Lastly, the Court rejected CCC’s contention that *Elk* provides that a general contractor must be given a reasonable time to allow it to obtain payment from the owner based upon the facts of this case where J&H had made a demand under § 27-1-15. The Court found that the record supported the trial court’s determination that a delay of more than ninety days was per se unreasonable as the reasonable time to pay a demand made under § 27-1-15 is forty-five days. *J&H Grading & Paving, Inc. v. Clayton Constr. Co.*, 2023 WL 5598697, No. 6022 (S.C. Ct. App. August 30, 2023).