THE STATE OF SOUTH CAROLINA
In the Court of Appeals

685567

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CIVIL ACTION NO.: 2009-CP-40-0179

Boykin Contracting, Inc., ... Respondent,

vs.

K. Wayne Kirby d/b/a Carolina Gold Bingo, ...Appellant,

---

APPELLANT'S PETITION FOR REHEARING

E. Wade Mullins, III, Esquire
Benjamin C. Bruner, Esquire
Bruner, Powell, Wall & Mullins, LLC
1735 St. Julian Place, Suite 200 (29204)
Post Office Box 61110
Columbia, South Carolina 29260
(P) 803-252-7693
(F) 803-753-0060

ATTORNEYS FOR APPELLANT

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

Pursuant to South Carolina Appellate Court Rules, Appellant petitions this Court to rehear this case. Appellant respectfully asserts that there are particular points which have either been overlooked or misapprehended by the Court in rendering its Decision filed May 15, 2013 (Opinion Number 5133) upon the following grounds:

I. THE COURT AFFIRMED THE TRIAL COURT'S MEASURE OF DAMAGES UPON THE MISAPPREHENSION THAT THE EVIDENCE BOYKIN PRESENTED OF ITS COSTS WAS SUFFICIENT TO SUPPORT A DAMAGES AWARD AND THAT, THEREFORE, IT WAS INCUMBENT UPON KIRBY TO PRESENT EVIDENCE THAT HE DID NOT BENEFIT AS MUCH AS BOYKIN LOST.

In order to recover in quantum meruit, it is the plaintiff's burden to prove his damages. *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 467, 684 S.E.2d 756, 764 (2009); *JASDIP Properties SC, LLC v. Estate of Richardson*, 395 S.C. 633, 640, 720 S.E.2d 485, 489 (Ct. App. 2011). In *Stringer Oil Co. v. Bobo*, 320 S.C. 369, 465 S.E.2d 366 (Ct. App. 1995), this Court held Stringer was "entitled to recover only to the extent its investment unjustly enriched Bobo to Stringer's detriment." 320 S.C. at 372, 465 S.E.2d at 368. "The Court remanded to the master 'for determination of the amount of the judgment.'" *Id.*

> Upon remand, the master again calculated Stringer's damages based upon Stringer's initial investment, awarding after appropriate credits, $74,642.58. This was error. The prior opinion issued by this Court clearly directed the master to determine damages based upon "the extent to which [Stringer's] investment unjustly enriched Bobo to Stringer's detriment." Rather than employing that measure of damages, however, the master awarded damages to Stringer based solely on Stringer's initial investment, less the pre-judgment interest previously disapproved by this Court.
>
> **If Bobo is required to pay $74,642.58, but the property is worth much less than that to him, he will be forced to suffer a major loss.**

Id. (emphasis added). "It is basic hornbook law that although the plaintiff's costs of performance might represent some evidence of value, **they do not represent a recoverable item of restitution themselves.**" 320 S.C. at 374, 465 S.E.2d at 369 (citing Dobbs, Dan B., *Remedies* § 45 at 261) (emphasis added).

In *Stringer*, the only evidence Stringer Oil Co. presented in support of its quantum meruit claim was its costs to improve Bobo's real property. Rejecting that evidence, this Court held Bobo's testimony that he received a $40,000 value from the improvements was the "**only** competent evidence offered upon remand as to the extent Bobo [was] unjustly enriched to Stringer's detriment[.]" *Id.* (emphasis added). By force of logic, the court held Stringer's evidence of its costs to improve the property was incompetent and insufficient to support an award.

This Court's holding in *Stringer* promotes the equitable underpinnings of a recovery in quantum meruit in cases like the one at bar by demanding that a contractor prove more than merely his costs to improve the property; the contractor must prove the extent to which his improvements to the property have unjustly enriched the property owner.

Respectfully, the Court's opinion in this appeal suggests the outcome in *Stringer* would have been different had Bobo not offered testimony as to the extent he was unjustly enriched to Stringer's detriment. However, nothing in *Stringer* suggests Bobo's testimony was *necessary* to controvert or rebut the evidence of Stringer's costs. Rather, the Court's holding that Bobo's testimony was the *only* competent evidence on Stringer's damages underscores that Stringer failed to present evidence to support an award. *See id.*

Had Bobo not offered testimony on the value he received, the record would have lacked any evidence of the value Bobo received.

In the immediate appeal, this Court held that because Boykin presented evidence of its labor and material costs, it was incumbent upon Kirby to prove the value he received was less than Boykin's costs. This holding is premised on the notion that unlike the evidence of Stringer's costs, the evidence of Boykin's costs is competent to support an award. Not only is this holding contrary to the Court's reasoning in Stringer, it shifts Boykin's burden of proof onto Kirby.

By holding that is was incumbent upon Kirby to present evidence of the value he received—rather than demanding that Boykin prove the value Kirby received—this Court has held in essence that a contractor can establish a prima facie claim to recover in quantum meruit based on evidence of his costs alone, regardless of who benefitted from the work. That holding is precisely what the *Stringer* Court declined to adopt, for it dilutes the plaintiff's burden of proof and undermines the equitable principles that give breath to a quantum meruit claim. Boykin's expenses are only half of the equation. The purpose of recovery under a theory of quantum meruit is not to reimburse the plaintiff for all his costs. Rather, a plaintiff may only recover to the extent his work unjustly enriched the property owner, i.e., increased the value of the real property. *See Stringer*, 320 S.C. at 372, 465 S.E.2d at 369; *see also Atl. Coast Builders & Contractors, LLC v. Lewis, 398* S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in result in part and dissenting in part) (citing *Stringer,* 320 S.C. at 372-73,465 S.E.2d at 368-69).

Therefore, the Court's holding allowing Boykin to recover based solely on evidence of its costs is contrary to both *Stringer* and the touchstone of recovery under a theory of quantum meruit.

II. THE COURT AFFIRMED THE TRIAL COURT'S MEASURE OF DAMAGES UPON THE MISAPPREHENSION THAT THERE WAS NO COMPETENT EVIDENCE IN THE RECORD THAT KIRBY DID NOT BENEFIT AS MUCH AS BOYKIN LOST.

The Court's holding that Kirby failed to highlight any evidence in the record to refute Boykin's evidence of labor and material costs overlooks the testimony by Boykin's employees that its work improved the entire building, not only the space designated for Carolina Gold Bingo. The building in this case was divided into three suites, one of which housed the Comedy Club, a business unrelated to Carolina Gold Bingo or Kirby. Boykin's employees who worked on site testified unequivocally that their work benefitted the entire building, not just the bingo space, and that they performed work that was completely unrelated to the bingo business. Both the trial court's order of judgment and this Court's opinion recognized that Boykin performed work entirely unrelated to the main bingo floor. What benefit did Kirby receive from the work Boykin performed to non-bingo areas of the building?

The evidence in the record demonstrates, therefore, that Boykin's labor and material costs benefitted others, not just Kirby or the bingo business. It can only follow that Kirby could not possibly have received 100% of the benefit from Boykin's improvements to the building. Accordingly, Kirby respectfully contends the Court overlooked or misapprehended the evidence when it held the record lacked any competent evidence that Kirby did not benefit as much as Boykin lost.

III. THE COURT AFFIRMED THE TRIAL COURT'S AWARD OF PREJUDGMENT INTEREST UPON THE MISAPPREHENSION THAT BOYKIN'S CLAIM WAS FOR AN ASCERTAINABLE SUM.

The Court accurately noted in its opinion that a disagreement between two parties over the amount due does not preclude an award of prejudgment interest. However, when a contractor's measure of damages is not fixed at the time his claim arises, then his claim is not for a liquidated amount, and he is not entitled to recover prejudgment interest. *See Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006). Boykin performed work on the building completely unrelated to Carolina Gold Bingo. Some of Boykin's charges did not even relate to the project at all. Based on these facts, which were revealed during discovery and after Boykin filed suit, the reasonable value of Boykin's services was no longer an acceptable measure of damages. Rather, Boykin's claim should be measured by the extent to which Boykin's work increased the value of the property. Therefore, the measure of damages was not fixed at the time Boykin's claim arose.

Applying Judge Anderson's reasoning from *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 656 S.E.2d 765 (Ct. App. 2007), *rehearing denied* February 14, 2008, *cert. denied* June 10, 2009, (1) the parties had no agreement on price, (2) the benefit Boykin conferred could not be reduced to a sum certain by computation or formula, (3) the value of the benefit was not contractually stipulated, (4) the benefit is not reduced to a sum certain by operation of law or a controlling statute, and (5) the value of the benefit Bokyin conferred on the bingo space could only be reduced to certainty by a fact-finder.

Accordingly, Boykin is not entitled to recover prejudgment interest.

[SIGNATURE ON FOLLOWING PAGE]

May 30, 2013

E. Wade Mullins, III
Benjamin C. Bruner
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, South Carolina 29260
(P) 803-252-7693
(F) 803-753-0060

Attorneys for the Appellant

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE RICHLAND COUNTY
Court Of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CIVIL ACTION NO.: 2009-CP-40-0179

Boykin Contracting, Inc., ... Respondent,

vs.

K. Wayne Kirby d/b/a Carolina Gold Bingo, ... Appellant.

PROOF OF SERVICE

I certify that I have served the *Appellant's Petition for Rehearing* on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on May 30, 2013, addressed to his attorney of record, Charles H. McDonald, Esquire at Robinson, McFadden & Moore, PC, 1901 Main Street, Suite 1200, Columbia, South Carolina 29201.

May 30, 2013

E. Wade Mullins, III
Benjamin C. Bruner
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, South Carolina 29260
(803) 252-7693
Attorneys for Appellant

BRUNER, POWELL, WALL & MULLINS, LLC

ATTORNEYS AND COUNSELORS AT LAW
1735 ST. JULIAN PLACE, SUITE 200
POST OFFICE BOX 61110
COLUMBIA, SOUTH CAROLINA 29260-1110
TELEPHONE 803-252-7693
FAX 803-753-0060
WWW.BRUNERPOWELL.COM

JAMES L. BRUNER, P.A.
WARREN C. POWELL, JR., P.A.*
HENRY P. WALL
E. WADE MULLINS, III, P.A.
BRIAN P. ROBINSON, P.A.

WESLEY D. PEEL, P.A.
JOEY R. FLOYD, P.A.
WILLIAM D. BRITT, JR., P.A.

BENJAMIN C. BRUNER
MATTHEW H. STABLER

* Also Admitted in District of Columbia

AUTHOR'S E-MAIL: BBRUNER@brunerpowell.com

May 30, 2013

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals Clerk of Court
P.O. Box 11629
Columbia, South Carolina 29211

Re: ***K. Wayne Kirby d/b/a Carolina Gold Bingo, Appellant vs. Boykin Contracting, Inc., Respondent***
Richland County C/A No.: 2009-CP-40-00179
Appellate Case No: 2012-209067
BPWM File No.: 7-1929.100

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of the Appellant's Petition for Rehearing in the above-referenced matter. Also enclosed is a check in the amount of $25.00 for the filing fee. Please file the original in accordance with your procedures and ask that you return one copy back to me via our courier.

By copy of this letter, I am serving opposing counsel with a copy of the same.

With my kindest regards, I am,

Sincerely,

Benjamin C. Bruner

BCB/nys

/Enclosures

cc: Mr. Wayne Kirby (w/ enclosure)
Charles H. McDonald, Esquire (w/ enclosure)