

THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court Of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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Case No. 2009-CP-40-0179

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Boykin Contracting, Inc., ..... Respondent,

v.

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

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**RESPONDENT'S RETURN TO PETITION FOR REHEARING**

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Counsel for Respondent

Respondent Boykin Contracting, Inc. ("Boykin") submits this Return to Appellant's Petition for Rehearing in this matter. Because the Appellant has failed to demonstrate that this Court has overlooked or misapprehended any matters of fact or law warranting rehearing of this matter, the petition should be denied.

### DISCUSSION

**I. This Court correctly found that the measure of damages in this instance was Boykin's reasonable costs of labor and materials.**

In determining how to measure Boykin's recovery on its claim for *quantum meruit*, this Court properly found that the measure of recovery was the reasonable value of the labor and materials furnished by Boykin. This has long been the measure of recovery used by South Carolina courts in cases such as this. See e.g. *Braswell v. Heart of Spartanburg Motel*, 251 S.C. 14, 159 S.E.2d 848 (1968).

When faced with facts very similar to those of this case, the South Carolina Supreme Court held in *Braswell v. Heart of Spartanburg Motel*, that the party that rendered services at the request of the project owner was "entitled to recover . . . the reasonable value of the services rendered by him." *Id.* at 18-19, 159 S.E.2d at 850. In *Braswell*, a termite exterminator claimed that the owner of the motel project engaged his services directly for termite treatment. The owner denied engaging the services of the termite exterminator claiming instead that he merely introduced him to the prime contractor on the project with whom the exterminator made an agreement to provide services. The exterminator adamantly denied making an agreement with the contractor and insisted his agreement was directly with the owner. The court held that a question of fact was presented as to whether the exterminator was entitled to recover against the

property owner in quasi-contract and further held that the reasonable value of services rendered by the exterminator, measured by the exterminator's cost of the work, would be an appropriate measure of recovery. *See Braswell, supra.*

Later, in the case of *Costa & Sons Const. Co., Inc. v. Long*, 306 S.C. 465, 412 S.E.2d 450 (Ct. App. 1991), this Court relied on *Braswell* in finding that the measure of recovery for a contractor under a quasi-contract theory was the reasonable value of labor and materials furnished by the contractor. As was the case here, in *Costa & Sons*, the reasonable value of the contractor's labor and materials came down to a question of the credibility of the witnesses. *See Costa & Sons*, 306 S.C. at 468, 412 S.E.2d at 452. This Court properly deferred to the trial court's findings on the reasonable value of Boykin's labor and materials which turned heavily on the credibility of the witnesses and, in particular, the lack of credibility of the testimony of Kirby. Accordingly, this Court did not err in finding that the measure of Boykin's recovery in this instance is the reasonable value of the labor and materials furnished by Boykin nor did this Court err in affirming the finding of the trial court as to the amount due Boykin for same.

In support of its Petition for Rehearing, Kirby relies upon other *quantum meruit* or *quasi contract* cases dealing with different circumstances and relationships. For instance, in *Stringer Oil Co. v. Bobo*, 320 S.C. 369, 465 S.E.2d 366 (Ct. App. 1995), the case involved an effort by a wholesale distributor of gasoline to recover against the owner of a service station for the value of the improvements that the distributor had made to the real property. Importantly, in *Stringer Oil*, the plaintiff made the improvements to the real property with no expectation of being paid for the costs of such improvements. Rather, the expectation was that the service station owner would continue to buy gasoline from

the distributor over an extended period of time. In such a case, the cost of performance of the work would not necessarily be the appropriate measure of recovery. However, in cases such as this, where there has not been a meeting of the minds on the measure or amount of payment, but where the facts establish that the recipient of a contractor's services has materially benefitted from same, the appropriate measure of recovery is the reasonable value of such services. *See Costa & Sons, supra*. Moreover, using the reasonable value of the labor and materials furnished by the contractor is an accepted means of determining such reasonable value. *See id.*

Kirby further contends that because Boykin performed work in areas of the building or property not directly part of the leased premises, Kirby could not have benefitted from such work. Kirby asks the question in his Petition for Rehearing: What benefit did Kirby receive from the work Boykin performed to non-bingo areas of the building? The record contains substantial evidence of such benefit. For example: (1) restoring exterior lighting to the parking lot and surrounding areas for the safety and security of the patrons of Kirby's bingo enterprise; (2) wiring the roof top heating and cooling units to provide heating and cooling for the comfort and benefit of the patrons of Kirby's bingo enterprise; and (3) making sure that the power source for the leased space is safely and properly tied into the building's overall electrical panels. (R. p. 95, line 14- p. 102, line 21; R. p. 207 [Ex. 10]) Therefore, this Court did not err by affirming the trial court's finding as to the reasonable value of the labor and materials for such work in Boykin's recovery.

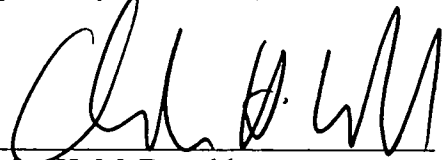
**II. This Court properly concluded that Boykin Contracting was entitled to pre-judgment interest on its *quantum meruit* claim.**

In *QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 204-05, 600 S.E.2d 105, 109 (Ct. App. 2004), this Court held that an award of prejudgment interest is permissible in an action to recover under the theory of *quantum meruit*, which is the basis for Boykin's recovery in this case. Moreover, with respect to Boykin's entitlement to pre-judgment interest, this Court properly applied the analysis set forth in *Smith-Hunger Constr. Co. v. Hopson*, 365 S.C. 125, 616 S.E.2d 419 (2005), to the facts in this case, which are very similar to those in *Smith-Hunger Constr.*, in finding that an award of pre-judgment interest to Boykin was proper.

**CONCLUSION**

For the reasons set forth above, the opinion of this Court affirming the judgment of the trial judge is legally and factually correct. The Petition for Rehearing should be denied.

Respectfully Submitted,



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June 14, 2013

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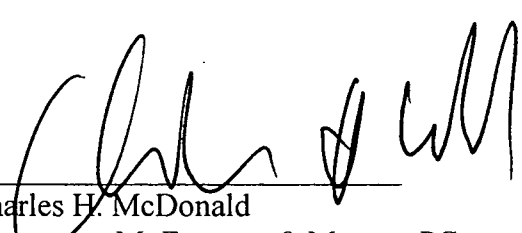
K. Wayne Kirby d/b/a Carolina Gold Bingo, ..... Appellant.

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**PROOF OF SERVICE**

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I certify that I have served the Respondent's Return to Petition for Rehearing by having hand-delivered a copy of same to the Appellant's attorney of record, E. Wade Mullins, III, Bruner, Powell, Wall & Mullins, LLC, 1735 St. Julian Place, Suite 200, Columbia, SC 29204.



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**Via Hand Delivery**

The Honorable Jenny Abbott Kitchings, Clerk of Court  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, SC 29201

**Re: Boykin Contracting, Inc. v. K. Wayne Kirby d/b/a Carolina Gold Bingo  
Case No. 2009-CP-40-0179  
Case Tracking No. 2012209067**

Dear Ms. Kitchings:

Enclosed for filing are an original and seven (7) copies of Respondent's Return to Petition for Rehearing and Proof of Service. Please file the original and return one copy back with our courier.

A copy is also being served upon E. Wade Mullins, III, attorney for the Appellant, by hand-delivery today.

Very truly yours,

ROBINSON, MCFADDEN & MOORE, P.C.

Charles H. McDonald

CHM/rhs

Enclosures

cc: E. Wade Mullins, III, Esq. – w/encl.