THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No. 2013-CP-26-0423
Appellate Case No. 2013-002186

PC Construction of Greenwood, Inc. and
Safeco Insurance Company of America, ... Respondents,

v.

Gaylor, Inc. of North Carolina and
Western Surety Company, ... Defendants,

Of Whom Gaylor, Inc. of North Carolina is the Appellant.

INITIAL BRIEF OF APPELLANT

M. Caroline Lindsey
P.O. Box 20248
Raleigh, NC 27619
Telephone: (919) 277-2541
Facsimile: (919) 277-2544
Attorney for Appellant

TABLE OF CONTENTS

C. Because Appellant's alleged technical violation of S.C.Code Ann. § 40-11-370 has not harmed Respondent PC or the public, this Court should apply the "substantial compliance" doctrine adopted in other jurisdictions and reverse the Circuit Court ruling.

5. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENT ON APPELLANT'S COUNTERCLAIMS BECAUSE THE DIFFERENCE IN APPELLANT'S NAME ON THE SUBCONTRACT AND LICENSE WAS A MERE SCRIVENER'S ERROR AND MUTUAL MISTAKE IN THE SUBCONTRACT.

6. BECAUSE RESPONDENT KNEW THAT GAYLOR, INC. OF NORTH CAROLINA AND GAYLOR, INC. WERE ONE AND SAME THE ENTITY, RESPONDENT WAIVED THE RIGHT TO RAISE S.C.CODE ANN. § 40-11-370 AS AN AFFIRMATIVE DEFENSE, AND THE CIRCUIT COURT ERRED IN ALLOWING RESPONDENT TO DO SO.

7. S.C.CODE ANN. § 11-35-25 GOVERNS THIS MATTER AND SUPERSEDES ANY CONFLICTING LAWS, AND BECAUSE S.C.CODE ANN. § 40-11-370 CONFLICTS WITH S.C.CODE ANN. § 11-35-25, S.C.CODE ANN. § 40-11-370 DOES NOT APPLY TO THIS CASE.

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. IN LIGHT OF THE STATUTORY PURPOSE OF S.C.CODE ANN. § 40-11-370, DID THE CIRCUIT COURT ERR IN INTERPRETING IT LITERALLY AND BARRING APPELLANT'S COUNTERCLAIM?

2. IS S.C.CODE ANN. § 40-11-370 AMBIGUOUS, AND IF SO, DID THE CIRCUIT COURT PROPERLY CONSTRUE IT?

3. IS S.C.CODE ANN. § 40-11-370 IS UNCONSTITUTIONALLY VAGUE, AND THEREFORE VOID AND UNENFORECABLE AGAINST APPELLANT?

4. SHOULD THIS COURT FOLLOW ANALAGOUS CASE HOLDINGS FROM OTHER JURISDICTIONS IN CONSTRUING S.C.CODE ANN. § 40-11-370?

5. WAS THE DIFFERENCE IN APPELLANT'S NAME ON THE SUBCONTRACT AND LICENSE DUE TO A MUTUAL MISTAKE IN THE SUBCONTRACT, AND IF SO, DID THE CIRCUIT COURT ERR IN GRANTING RESPONDENTS SUMMARY JUDGMENT ON APPELLANT'S COUNTERCLAIM?

6. DID RESPONDENT WAIVE THE RIGHT TO RAISE S.C.CODE ANN. § 40-11-370 AS AN AFFIRMATIVE DEFENSE?

7. DOES S.C.CODE ANN. § 11-35-25 SUPERSEDE S.C.CODE ANN. § 40-11-370?

STATEMENT OF THE CASE

Respondent PC Construction of Greenwood, Inc. (hereinafter "Respondent PC") commenced the underlying action by filing a Summons and Complaint, Case No. 2013-CP-26-0423, in Horry County on January 18, 2013. The Complaint sought damages from Appellant, Gaylor, Inc. of North Carolina (hereinafter "Appellant,") for breach of a subcontract agreement for electrical construction work (hereinafter "the subcontract") performed at Coastal Carolina University. Respondent PC filed an Amended Complaint on April 18, 2013, alleging a claim on Appellant's performance bond and adding Appellant's performance surety, Western Surety Company, as a Defendant. Appellant filed an Answer and Counterclaim on April 8, 2013 and an Amended Answer and Amended Counterclaim on May 17, 2013, claiming damages from Respondent PC in the amount of $3,075,143.68 arising from a breach of contract and, alternatively, unjust enrichment by Respondent PC, as well as making a claim against

Respondent PC's payment surety, Respondent Safeco Insurance Company of America. Respondents filed a Motion for Summary Judgment on May 2, 2013 solely on the grounds that S.C.Code Ann. § 40-11-370(C) barred Appellant's Counterclaim because Appellant's name on its South Carolina Mechanical Contractor's license differed from its name on the subcontract. The Honorable Steven H. John granted Respondents' Motion during the August 26, 2013 session of the Court of Common Pleas and issued a written Order dated September 4, 2013. Appellant received the September 4, 2013 order on September 24, 2013. Appellant then timely appealed the Summary Judgment ruling, serving its Notice of Appeal on Respondents and filing it with the South Carolina Court of Appeals on September 25, 2013. Appellant ordered a transcript of the hearing on October 2, 2013 and received the transcript on November 7, 2013.

The issue of whether S.C.Code Ann. § 40-11-370(C) bars a contractor from bringing an action to recover payment for construction work because the name on the contractor's license slightly differs from the name on the contract is an issue of first impression for South Carolina appellate courts.

FACTS

Appellant is an electrical contracting company headquartered in Indianapolis, Indiana. Affidavit of Teresa Selbo p. 2. Appellant has offices in numerous states, including South Carolina and North Carolina, and is licensed to conduct business in numerous other states where it does not have offices but where it performs construction work. Affidavit of Teresa Selbo p. 2. Despite doing

business in numerous states, Appellant is a single corporate entity having one Federal ID Number. Appellant is incorporated as and does business as "Gaylor, Inc." in South Carolina. Affidavit of Teresa Selbo p. 2-3. It does business as "Gaylor, Inc. of North Carolina" in North Carolina. Affidavit of Teresa Selbo p. 2-3. Appellant is registered to do business as "Gaylor, Inc. of North Carolina" in North Carolina because another company, which is totally unaffiliated with Gaylor, was already incorporated in North Carolina and doing business in North Carolina as Gaylor, Inc. when Appellant registered with the North Carolina Secretary of State. Affidavit of Teresa Selbo p. 2. "Gaylor, Inc. of North Carolina" and "Gaylor, Inc." are one and the same corporate entity, and Gaylor, Inc. of North Carolina is not a subsidiary, affiliate, or franchise of Gaylor, Inc. They are the same entity. Affidavit of Teresa Selbo p. 2-3.

Appellant has held an EL5 Mechanical Contractor's License (hereinafter "the License") in South Carolina since on or about April 8, 2008. The name on the license is "Gaylor, Inc.," the name Gaylor does business as in South Carolina. Affidavit of Teresa Selbo, p. 3. The License has been renewed as needed and has been in good standing since April 2008. The South Carolina Contractor's Licensing Board has never disciplined Appellant, suspended or revoked any license of Appellant, or otherwise taken action against Appellant relating to the License. Affidavit of Teresa Selbo, p. 3-4.

Respondent PC contracted with Coastal Carolina University for the construction of a Student Recreation and Convocation Center Project, State Project

#H17-9557-MJ (hereinafter "the CCU Project") and then entered the subcontract for Appellant to perform electrical construction work on the CCU project for the original price of $2,582,570.00. Amended Answer and Counterclaim p. 8-9. Respondent PC filed the underlying suit on January 18, 2013, alleging a breach of the subcontract by Appellant giving rise to unspecified damages, as well as a claim for indemnity. Amended Complaint p. 3-4. Appellant counterclaimed for breach of contract, unjust enrichment, and payment from Respondent PC's payment surety, Respondent Safeco Insurance Company of America. Amended Answer and Counterclaim p. 15-19.

Appellant bid on the CCU Project in early 2010 from its Wilmington, North Carolina office, which was Appellant's closest office to Conway, South Carolina, the CCU project site. Affidavit of Justin Baker p. 2. From the very beginning of its working relationship with Appellant, Respondent PC knew that Appellant was a single entity that operated under both the name "Gaylor, Inc." and "Gaylor, Inc. of North Carolina" and that the two names referred to a single entity. Affidavit of Justin Baker, p. 2-3. Because the CCU project owner was a state university, Appellant was required to submit documentation to prove its responsibility as a bidder in order to contract with Respondent PC. S.C.Code Ann. 11-35-1810(1); Affidavit of Justin Baker p. 2-3. The state required Appellant to submit a W-9 Form containing its Federal ID number; financial documents and affidavits; documents containing the License number, M110231; and a list of major projects completed within five years preceding the bid, among other documents. Affidavit of Justin

Baker, p. 2; Amended Answer and Counterclaim, Exhibit "A." These documents contained Appellant's corporate name, Gaylor, Inc. Appellant was also required to submit resumes for the personnel working on the project, and because these individuals worked in a North Carolina office, these documents contained the name "Gaylor, Inc. of North Carolina." Affidavit of Justin Baker p. 2-3, Exhibit 'A."

The names "Gaylor Inc." and "Gaylor, Inc. of North Carolina" were both used regularly in correspondence Appellant and Respondent PC exchanged before the contract was signed. These names were also used after the terms were finalized and during the construction process. This correspondence was sent to and received by representatives and employees of Appellant, and Respondent PC, receiving said correspondence, knew it came from Appellant. Affidavit of Justin Baker p. 3. Clearly, Respondent PC, and anyone reviewing Appellant's bid, was aware that the questionnaires, documentation, and bid package Appellant submitted to Respondent PC included documents with the name "Gaylor, Inc." and "Gaylor, Inc. of North Carolina." Additionally, Appellant's License Number, M110231, appeared on the building permit CCU furnished for the Project. Affidavit of Justin Baker p. 3. Therefore, Appellant was identifiable by Respondent, CCU, and anyone present on the CCU project site by its name and by its license number. A public search with the South Carolina Licensing Board for General Contractors using Appellant's License number, or a public search using either the name "Gaylor, Inc." or "Gaylor, Inc. of North Carolina" through the South Carolina Secretary of State or North Carolina Secretary of State would have led the public to identifying

information about Appellant including, but not limited to, the identity and address of its registered agent and the class of its license. Affidavit of Teresa Selbo p. 2.

Ultimately, however, Appellant's name was typed on the subcontract as "Gaylor, Inc. of North Carolina." This name appeared on only the first page of the subcontract. Amended Answer and Counterclaim, Exhibit "A;" Transcript p. 38-39. Respondent PC put the name "Gaylor, Inc. of North Carolina" on the subcontract. Affidavit of Justin Baker p. 3. Based on this single appearance of Appellant's name as "Gaylor, Inc. of North Carolina" on the subcontract, the Circuit Court awarded Summary Judgment to PC on Appellant's $3,075,143.68 counterclaim in its entirety. Transcript p. 40-42; Order of September 4, 2013. The court did so in spite of copious evidence in the Record tending to prove Respondent PC knew that Appellant was a single entity with two names; that identifying information on Appellant was available to the project owner and members of the public; and that Appellant's name on the subcontract was sufficiently similar to its name on the License that the public could have easily searched for Appellant and found its identifying information. Transcript p. 15-30.

STANDARD OF REVIEW

When reviewing the granting of Summary Judgment, an appellate court must apply the same standard applied by the trial court. Turner v. Milliman, 392 S.C. 116, 708 S.E.2d 766 (2011). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Id.;

Rule 56(c), SCRCP. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Fleming v. Rose, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. Hancock v. Mid–South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

ARGUMENTS

1. BECAUSE THE STATUTORY PURPOSE OF S.C.CODE ANN. § 40-11-370 DEMANDS A LIBERAL CONSTRUCTION OF THE STATUTE, THE CIRCUIT COURT ERRED BY INTERPRETING IT LITERALLY AND BARRING APPELLANT'S COUNTERCLAIM.

The statute at issue in this appeal reads in relevant part:

> It is unlawful to engage in construction under a name other than the exact name which appears on the license issued pursuant to this chapter. 'Engaging in construction' includes marketing, advertising, using site signs, and submitting contracts.
>
> An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract. An entity that enters into a contract to engage in construction in a name other than the name that appears on its license may not bring an action either at law or in equity to enforce the provisions of the contract. S.C.Code Ann. §§40-11-370(B) – (C).

As is set forth below, the Circuit Court erred in construing the above language literally and applying it to bar Appellant's Counterclaim against Respondents, and the Summary Judgment ruling should be reversed.

A. The purpose of S.C.Code Ann. § 40-11-370 and South Carolina's other licensing statutes is protecting the public welfare.

B. A proper interpretation of S.C.Code Ann. § 40-11-370 must take the statutory purpose into consideration.

C. A literal interpretation of S.C.Code Ann. § 40-11-370 in this case does not further the public interest and instead encourages unlawful, misleading conduct.

The Court of Appeals of South Carolina has held that "[t]he cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." City of Sumter Police Dept. v. One (1) 1992 Blue Mazda Truck VIN No. JM2UF1132N0294812, 330 S.C. 371, 375, 498 S.E.2d 894, 896 (1998), citing Horn v. Davis Elec. Constructors, Inc., 307 S.C. 559, 416 S.E.2d 634 (1992). Title 40, Chapter 11 of the South Carolina Code, it its first section, declares that the purpose of its establishing the South Carolina Contractor's Licensing Board is to protect the public against doing business with unlicensed entities. S.C.Code Ann. § 40-11-10. The Supreme Court of South Carolina has confirmed that the purpose of such licensing statutes is "to protect the public." W & N Constr. Co. v. Williams, 322 S.C. 448, 450; 472 S.E.2d 622, 623 (1996); Wagner v. Graham, 296 S.C. 1 (1988).

Indeed, prior South Carolina case holdings on S.C.Code Ann. § 40-11-370 and other licensing statutes reflect the public welfare purpose of these statutes. For example, in construing S.C.Code Ann. § 40-59-130, a similar provision to S.C.Code Ann. § 40-11-370 that bars unlicensed homebuilders from enforcing construction contracts, the Supreme Court of South Carolina noted that the statutory purpose of the law was to protect the public, and the public purpose

should be taken into consideration when determining how to interpret and apply the statute. Burry & Son Homebuilders, Inc. v. Ford, 310 S.C. 529, 426 S.E.2d 313 (1992), citing Spry v. Miller, 25 Wash.App. 741, 610 P.2d 931 (1980). In Burry, the court cited a Washington case in which an unlicensed contractor substantially complied with a similar statute by hiring an independent licensed contractor who performed the work with no supervision or control by the unlicensed contractor. Id. The court in Burry ultimately found that a homebuilder's assigning a licensed hourly employee to the project in question for a two-day period of time, when the employee did not use his license to do the work, did not constitute strict or substantial compliance with the statute. In arriving at its decision, the court reasoned that "to allow recovery under these facts would fail to provide any protection to the homeowners and, therefore, undermine the purpose of the statute. Id. at 532, 315. Importantly, the court stated that the facts in Burry did not raise a colorable argument for allowing substantial compliance and left open the issue of whether the court would adopt the substantial compliance doctrine in construing licensing statutes. Id.

The absence of case holdings against parties in Appellant's position, and in favor of parties in Respondents' position, also reflects the public welfare and safety purpose behind the statute. No published South Carolina opinions have precluded a licensed contractor, such as Appellant, from recovering payment on any contract merely because the name on the contract differed from the name on a license. South Carolina case holdings on S.C.Code Ann. § 40-11-370(C) have enforced it against

contractors who, unlike Appellant, were unlicensed or under-licensed. Parties who have been allowed to assert S.C.Code Ann. § 40-11-370(C) as a defense in South Carolina's published opinions have been property owners, as opposed to other contractors such as Respondent PC. Indeed, South Carolina courts that have ruled on S.C.Code Ann. § 40-11-370 have enforced the law in favor of individual property owners who were unaware of a contractor's unlicensed status and against contractors who performed construction work without a required license, allowed the license to lapse, or who never held the required license.

For example, the most recent ruling on S.C.Code Ann. § 40-11-370(C) involved a severely under-licensed contractor who contracted to build an $800,000.00 residence while only being licensed for work up to $100,000.00. C-Sculptures, LLC v. Brown, 403 S.C. 53, 742 S.E.2d 359 (2013). The Court in C-Sculptures found that an arbitration award in favor of the contractor was unenforceable because the contractor lacked a "valid license" under S.C.Code Ann. § 40-11-370(C). In arriving at its decision, the Court cited Duckworth v. Cameron, which involved S.C.Code Ann. § 40-59-130, a similar provision that bars unlicensed homebuilders from enforcing provisions of construction contracts (but does not prohibit contracting in a name different from the name on a license. Id., citing Duckworth v. Cameron, 270 S.C. 647, 244 S.E.2d 217 (1978). Duckworth involved individual homeowners attempting to enforce the statute against a homebuilder who failed to obtain a license until the majority of work on the home was completed. Duckworth at 648, 218.

Similarly, Housing Authority of Columbia v. Cornerstone Housing, L.L.C. dealt with an allegedly *unlicensed* contractor, not a contractor who was accused of contracting in a name different from the name on its license. Id., 356 S.C. 328 (2003). The contractor in Housing Authority had allegedly performed construction work on a public housing community without a required license. This decision, like the Duckworth and C-Sculptures opinions, protected members of the public from contractors knowingly building residential structures in their entirety without licenses. The courts' history of penalizing contractors who, being unlicensed, were legally unqualified and unfit to perform the work contracted for, is consistent with the statutory purpose of protecting the public. This is consistent with the statute's underlying purpose, which is to promote public safety and welfare. Appellant urges this Court to not construe S.C.Code Ann. § 40-11-370 strictly but to instead do so in a manner that effectuates the statutory purpose of promoting public safety and welfare.

Even if Appellant is found to have technically entered into a contract in a name other than the name on the License, the Circuit Court's decision to bar Appellant's Counterclaim should still be reversed because the Circuit Court's literal interpretation does not further the statute's public safety purpose and instead encourages unlawful conduct by entities who do business in different names in different states. "Gaylor Inc." and "Gaylor Inc. of North Carolina" are very similar names, and the difference in the names in Appellant's case in this instance did not negatively affect the public welfare. Appellant's license was in good standing

from the beginning of its relationship with Respondent PC. Appellant's Mechanical License Number was posted on the CCU project site, and Respondent PC, anyone present on the CCU project site, or any member of the public, could identify Appellant by searching for Appellant's Mechanical License Number or by searching for Appellant through the North Carolina or South Carolina Secretary of State. Affidavit of Justin Baker p. 3; Affidavit of Teresa Selbo p. 2-3. Should Respondents prevail, Appellant will be punished for correctly identifying itself the location from which it was contracting and stating its North Carolina name despite the fact that Appellant's Mechanical License is in good standing. The name on the subcontract reading "Gaylor, Inc. of North Carolina" and the name on the License reading "Gaylor, Inc." had no negative impact on the public safety or welfare.

Placing the words "Gaylor, Inc." on the subcontract would not only have been inaccurate, but also unlawful because Appellant's employees who bid, negotiated, and signed the subcontract worked from North Carolina, where the name "Gaylor, Inc." belongs to an entirely different entity having no relationship with Appellant. Affidavit of Teresa Selbo p. 2-3. Nothing in the Record shows this entity ever authorized Gaylor personnel to sign contracts on its behalf.

Notably, the South Carolina Department of Labor, Licensing, and Regulation – Contractor's Licensing Board has promulgated regulations dictating Administrative Penalties that can affect the licensure status of a contractor for certain conduct. 29 S.C.Code Ann. Regs. 8 (1976). Nothing in these regulations penalizes contractors for signing a contract in a name other than the name on the

contractor's license. Rather, conduct giving rise to administrative penalties includes:

> (1) entering into a contract with an unlicensed contractor for work to be performed for which a license is required; or
>
> (2) failure to obtain a building permit as required by a local or state government before engaging in construction; or
>
> (3) failure to provide information, records, or documents as requested by the department; or
>
> (4) failure to notify the department of changes in information required in an original or renewal application; or
>
> (5) contracting or offering to contract for construction work exceeding the limitations of a license group or outside the classification or subclassification of a license; or
>
> (6) engaging or offering to engage in contracting without a valid license as required under this chapter; or
>
> (7) submitting a bid without a valid license when one is required by law; or
>
> (8) awarding or accepting a bid or signing a contract for a project when the contractor is not properly licensed; or
>
> (9) failure to timely notify the department of changes in the licensee's current mailing address, home address, home and office telephone number. Id.

The above conduct penalizes contractors for conduct that implicates the public's interest and safety. Appellant's conduct in this case does not. Appellant's name appearing on the subcontract as "Gaylor, Inc.," would not have protected, served, or furthered the public interest and welfare any more so than the name on the subcontract agreement reading "Gaylor, Inc. of North Carolina" would have. However, had Michael Chapman, the regional manager of Gaylor's Raleigh, North

Carolina office signed a contract reading "Gaylor, Inc.," he would have been binding an entirely different entity – the other "Gaylor, Inc." – in a contract when he had no authority to do so. Affidavit of Justin Baker p. 3, Affidavit of Teresa Selbo p. 2-3.

2. BECAUSE S.C.CODE ANN. § 40-11-370 IS AMBIGUOUS, THE CIRCUIT COURT SHOULD HAVE CONSTRUED IT CONSISTENTLY WITH THE STATUTORY PURPOSE OF PROTECTING PUBLIC, AND THE COURT ERRED IN CONSTRUING IT LITERALLY.

South Carolina case law holds that if a statute contains no ambiguity, a court should give the words their plain meaning, but if a statute is ambiguous, courts must construe the terms of the statute. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011), citing Lester v. S.C. Workers' Comp. Comm'n, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." Id. citing Sloan v. S.C. Bd. Of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606-7 (2006). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. City of Sumter Police Dept. v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 376, 498 S.E.2d 894, 896 (1998), citing Bennett v. Sullivan's Island Bd. of Adjustment, 313 S.C. 455, 438 S.E.2d 273 (Ct.App. 1993).

S.C.Code Ann. § 40-11-370 is ambiguous. South Carolina Code Ann. § 40-11-370(B) states that:

> [i]t is unlawful to engage in construction under a name other than the exact name which appears on the license issued

> pursuant to this chapter. 'Engaging in construction' includes marketing, advertising, using site signs, and *submitting contracts*. (Emphasis added.)
>
> South Carolina Code Ann. §40-11-370(C) states that:
>
> An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract. An entity that enters into a contract to engage in construction in a name other than the name that appears on its license may not bring an action either at law or in equity to enforce the provisions of the contract.

S.C.Code Ann. §§ 40-11-370(B) and 40-11-370(C) both contain provisions on entity names, but they are worded differently. S.C.Code Ann. § 40-11-370(B) prohibits "engaging in construction" in a name other than the "*exact name*" which appears on the entity's license, while S.C.Code Ann. § 40-11-370(C), the section Respondents aim to enforce, holds that an entity that "enters into a contract to engage in construction in a name other than the name" that appears on its license may not bring an action at law or in equity to enforce the contract provisions.

Therefore, two ambiguities exist in S.C.Code Ann. § 40-11-370(C). First, it is unclear whether "a name other than the name" that appears on a license is the same as "a name other than the exact name" on a license. The legislature did not include the phrase "exact name" in S.C.Code Ann. § 40-11-370(C). The lack of the phrase "exact name" creates ambiguity because it is unclear whether "a name other than the name" means the exact name without any variations whatsoever, or if it means a different name entirely. Appellant's name on the subcontract was "Gaylor, Inc. of North Carolina," the same name that is on the License, but it also contains the words "of North Carolina" to specify the location from which

Appellant bid, negotiated, and signed the contract. These also distinguished Appellant from the other, unrelated entity named "Gaylor, Inc." in North Carolina. In order to give a just, equitable operation of the law as Sloan and City of Sumter require, this Court should find that "Gaylor, Inc. of North Carolina" is not a name other than "Gaylor, Inc." under S.C.Code Ann. § 40-11-370(C) and that Appellant complied with the statute by providing its name, as well as additional wording to indicate the office and state from which it contracted. Construing the statute literally will result in Appellant losing its rights to payment for its work despite being a duly licensed contractor who made its identity known to Respondents and the public.

Secondly, the statute is ambiguous as to what constitutes "enter[ing] into a contract" to engage in construction under S.C.Code Ann. § 40-11-370(C). S.C.Code Ann. § 40-11-370(B) prohibits parties from "engaging in construction" and defines 'engaging in construction' to include "marketing, advertising, using site signs, and submitting contracts." S.C.Code Ann. § 40-11-370(B) does not mention signing a contract or "entering into" a contract. S.C.Code Ann. § 40-11-370(C) then states only that an entity that "enters into a contract" to engage in construction in a name other than the name on its license is barred from bringing an action to enforce said contract. However, S.C.Code Ann. § 40-11-370(C) does not define "enter[ing] into a contract" for purposes of the statute and does not define "entering into a contract" in the amount of detail that S.C.Code Ann. § 40-11-370(B) defines "engaging in construction," or, for that matter, any detail.

This creates an ambiguity because "entering into a contract" could mean the mere signing of a contract, or it could also include bidding, correspondence between the parties to negotiate terms, providing pre-qualification information, completing questionnaires, and other activities that fall within the definition of "engaging in construction" set forth in S.C.Code Ann. § 40-11-370(B).

This ambiguity is particularly problematic in this case because the subcontract was for state construction work. S.C.Code Ann. §11-35-1810(1) mandates that:

> [R]esponsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts. The board shall by regulation establish standards of responsibility that shall be enforced in all state contracts. Id.

The above statute makes standards of responsibility a material, enforceable term in all state construction contracts. Appellant was required to submit ample documentation and information about itself in order to comply with the statute and so that the state could implement these requirements. As a result, Appellant's process of "entering into" the contract spanned several months and required Appellant to submit numerous documents. Affidavit of Justin Baker p. 2-3. Many of the documents pertained to Appellant's corporate finances, such as Gaylor's W-9 documents and financial affidavits, and therefore came from Appellant's headquarters and bore the name "Gaylor, Inc." However, many of the required documents pertained to individual personnel who would be managing and working on the Project, and because these individuals were from a North Carolina office of

Appellant, they bore the name "Gaylor, Inc. of North Carolina." Affidavit of Justin Baker p. 2-3. If "enter[ing] into a contract" includes all the required stages in contracting for work with the state of South Carolina, S.C.Code Ann. § 40-11-370's wording made it impossible for Appellant to comply with it and meet the state construction requirements when read as a whole because Appellant's name was different in North Carolina and South Carolina.

Therefore, although Appellant ultimately signed the subcontract in the name "Gaylor, Inc. of North Carolina," the process of its entering into the subcontract began long before the date it signed the subcontract. Whether Appellant entered into the contract in the name "Gaylor, Inc." or "Gaylor, Inc. of North Carolina" – or even in both names – depends on how the statute is construed. In keeping with the holdings in Sloan and City of Sumter, this Court should find that "Gaylor, Inc. of North Carolina" is not a name other than the name on the License. Additionally, this Court should construe the words "enters into a contract" in 40-11-370(C) to encompass the correspondence, negotiation, and meeting of the minds of the parties, as well as the act of engaging in construction that necessarily make up the contracting process for state projects. With this interpretation, evidence in the Record tending to prove Gaylor entered into the contract in the name "Gaylor, Inc." would at the very least have raised a genuine issue of material fact as to whether Gaylor violated the statute, and the Circuit Court decision should be reversed.

3. BECAUSE S.C.CODE ANN. § 40-11-370 IS UNCONSTITUTIONALLY VAGUE, THIS COURT SHOULD FIND

THE STATUTE IS VOID AND UNENFORCEABLE AS TO APPELLANT.

Under South Carolina law, a statute is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. In re Anonymous Member of South Carolina Bar, 392 S.C. 328, 335 709 S.E.2d 633, 637 (2011). S.C.Code Ann. § 40-11-370 is unconstitutionally vague because reasonably intelligent people could disagree on how to comply with it.

The vagueness is first evident because the phrase "exact name" appears in S.C.Code Ann. § 40-11-370(B) but not in S.C.Code Ann. § 40-11-370(C), and the statute is silent on whether slight differences in corporate entities' names constitute different names entirely. Reasonably intelligent individuals could read S.C.Code Ann. § 40-11-370 and disagree on what constitutes "a name other than the name," whether slight differences in corporate entities' names constitute different names entirely, and whether the addition or deletion of a comma, the spelling or abbreviation of words, such as "Inc." for incorporated or "&" for and, or the addition of information specifying a particular location constitute "a name other than the name" that appears on a license. The statute is also silent as to whether putting both Appellant's corporate name, "Gaylor, Inc." and the name Appellant does business as in North Carolina, "Gaylor, Inc. of North Carolina" on the subcontract would have constituted a violation. To some interpreting the statute, such details would be inconsequential, but for those interpreting the statute strictly, as the Circuit Court did, these details have great meaning and, in this case, have

denied Appellant the right to seek the $3,075,143.68 it contends Respondents owe Appellant under the contract. Amended Answer and Counterclaim p. 16. As stated above, Appellant could not sign the contract from its North Carolina office in the name "Gaylor, Inc." because in North Carolina, the name "Gaylor, Inc." belongs to another entity.

Furthermore, the statute fails to define "entering into a contract" with sufficient specificity for a party such as Appellant to know to which acts the statute applies. As a result, for Appellant and, potentially, other out-of-state entities that contract for work in South Carolina, it is impossible to strictly comply with S.C.Code Ann. § 40-11-370(C) without violating another law. See, supra, Section 1 p. 16-17. As discussed above, the law governing contracts for state construction work mandates that responsibility of bidders is an enforceable term of contracts and required Appellant to submit copious documentation to enable the state to enforce these rules. See, supra, Section 2, p. 21-22. Reasonably intelligent parties could disagree as to whether Appellant's entering into a contract for state construction work includes the bidding, pre-qualification, and submission of affidavits and financial information that S.C.Code Ann. § 11-35-1810(1) requires for state construction work. Because the statute fails to define "a name other than the name" on a license and "entering into a contract," and otherwise fails to define what conduct is prohibited with sufficient particularity, this Court should find it void due to its vagueness and therefore unenforceable against Appellant.

4. THIS COURT SHOULD FOLLOW ANALAGOUS CASE HOLDINGS FROM OTHER JURISDICTIONS AND REVERSE THE

CIRCUIT COURT'S RULING.

No published South Carolina opinions have construed §40-11-370(C)'s provision barring entities from enforcing a contract entered into in a name other than the name on the entity's license. Because this is an issue of first impression for South Carolina courts, rulings on similar statutes in other jurisdictions are persuasive authority for this Court. While South Carolina appears to be the only state in the United States with a licensing provision barring enforcement of a contract by a licensed contractor whose name is different on the contract and the license, numerous states prohibit *unlicensed* contractors from taking legal action to recover payment for unlicensed work. Courts in states with a statutory bar on such suits overwhelming cite the public safety purpose of such laws in construing them. Furthermore, many courts have decided cases similar to Appellant's on their individual facts and have relaxed statutory rules to avoid harsh results for parties who acted in good faith and substantially complied with statutory requirements when neither the public nor the opposing party were harmed. Appellant urges this Court consider the statutory purpose of S.C.Code Ann. § 40-11-370, as well as distinguishing facts and public policy factors, in keeping with the following persuasive authority, and reverse the Circuit Court decision.

A. This Court should follow decisions of neighboring state appellate courts that have interpreted licensing statutes consistently with the statutory purpose of protecting the public.

Arkansas law bars contractors from bringing suits to enforce contracts for construction work when they have failed to obtain a required license. Arkansas law mandates that:

> No action may be brought either at law or in equity to enforce any provision of any contract entered into *in violation of this chapter.* No action may be brought either at law or in equity for quantum meruit by any contractor *in violation of this chapter.*" Ark. Code Ann. §17-25-103(d). (Emphasis added.)

Although the Arkansas statute does not specifically ban contracting in a name other than the name on a license, it does appear that a contractor violating *any* provision of the chapter on licensing would be banned from bringing an action to enforce the terms of a contract. Id. In construing this provision, the Arkansas Court of Appeals considered the statutory purpose of "requir[ing] contractors who desire to engage in particular types of construction work to meet standards of responsibility such as experience, ability, and financial condition." Forever Green Athletic Fields, Inc. d/b/a ProGreen, et al v. Lasiter Constr., Inc., 384 S.W.3d 540, 548 (2011). Accordingly, the court in Forever Green Athletic Fields declined to enforce Ark. Code Ann. § 17-25-103(d) on a general contractor, Lasiter Construction, which was duly licensed but which allegedly violated Ark. Code Ann. § 17-25-101(a)(1) by instructing a subcontractor to do certain work without a license when a license was required for the work, knowing that the subcontractor lacked the required license. The Court allowed Lasiter to pursue a claim to enforce the terms of its contract on the grounds that Lasiter had a valid contractor's license and "was not attempting to do any of the activities prohibited by section 17-25-103(a)(2) through

(a)(5)." Forever Green Athletic Fields at 549, 10-11. Essentially, even though Ark. Code Ann. § 17-25-103(d) banned contractors from bringing suits if they violated "the chapter," which included Ark. Code Ann. § 17-25-101(a)(1), the Court did not interpret it literally against Lasiter, which, having a valid license, had met the standards of responsibility integral to the statutory purpose. Id.

Similarly, the Supreme Court of New Mexico considered the legislative intent behind a statute precluding unlicensed contractors from filing suits for compensation for unlicensed work. N.M. Stat. Ann. 1978, § 60-13-30. The Defendant-Appellant in Koehler v. Donnelly, Patrick Donnelly, was a roofing contractor who inadvertently let his license and financial responsibility bond lapse before entering into and performing a contract for roofing work, but who took steps to renew the license and bond immediately upon discovering the lapse. The court in Koehler held that despite the statute's clear language and harsh penalization of unlicensed contractors in the statute, strict enforcement of the statute did not always effectuate the statutory purpose of accomplishing:

> a healthy, ordered market in which consumers may contract with competent, reliable construction contractors who have passed the scrutiny of a licensing division. The wrong to be remedied is the exploitation of the public by incompetent and unscrupulous contractors who are unable or unwilling to obtain a license. Koehler v. Donnelly, 114 N.M. 363, 365 (1992).

It was important to the court that Koehler, the party indebted to Donnelly for the roofing work, was not prejudiced by the lapse in Donnelly's license and that no harm was done to the public. "[W]e do not insist on literal compliance in a situation where the party seeking to escape his obligation has received the full protection

contemplated by the statute," the court reasoned. Id. Respondent PC, like Koehler, benefited from construction work completed by Appellant, a duly licensed contractor, and was always aware that "Gaylor, Inc." and "Gaylor, Inc. of North Carolina" were names referring to one and the same entity. It follows that like Koehler, Respondents should not be allowed to avoid their obligation to pay Appellant for its work completed under the contract because Respondents have been afforded the protection contemplated by the statute.

B. This Court should consider the professional relationship between Appellant and Respondent PC as a distinguishing factor as courts in Florida, Kentucky, and Maryland have done and reverse the Circuit Court's holding.

Courts in Florida, New Mexico, Kentucky, and Maryland have noted the important difference between contractors and owners who are attempting to enforce licensing statutes similar to S.C.Code Ann. § 40-11-370. In these jurisdictions, courts have held that state statutes or case law barring unlicensed contractors from recovery in contracts do not necessarily bar contractors from bringing claims of nonpayment against *another contractor*. Courts have instead made an exception for these types of claims even when no exception exists in the statute.

For example, Florida has a statute explicitly banning unlicensed contractors from taking legal action to recover payment for their work. Fla. Stat. Ch. 489.128 (2009). Nevertheless, the District Court of Appeal for Florida, Third District allowed an unlicensed subcontractor's claim for money owed by another contractor, relying, in part, on "public policy considerations favoring

non-enforcement." MGM Constr. Servs. Corp. v. Travelers Casualty & Sur. Co. of America, 57 So.3d 884, 890 (2011). In reaching its decision, the court reasoned that:

> The actual property owners involved in this case conducted their business with the Contractor, a business which as far as this Court can discern, was fully licensed, insured, and complied with the law. Surely, this fact afforded the general public some protection. When the Contractor reached an agreement with the Subcontractor, presumably, it did so with some knowledge of the Subcontractor's reputation and ability. Thus, we conclude that the trial court erred in failing to consider the arms length, professional nature of the relationship between the Contractor and the Subcontractor ... ." MGM Constr. Servs. Corp. v. Travelers Casualty & Sur. Co. of America at 890-891.

Similarly, in Maryland, a state statute prohibits unlicensed contractors from engaging in construction, and state case law prohibits wrongly unlicensed contractors from recovering payment for their work. Md. Code Ann., Bus. Reg., § 8-301; Harry Berenter, Inc. v. Berman, 258 Md. 290, 265 A.2d 759 (1970). However, in 2010, the Court of Special Appeals of Maryland held that an unlicensed concrete and masonry contractor was entitled to recover payment pursuant to a construction contract with a general contractor, reasoning that, "[w]e find no indication in the Act or in the Maryland cases that a policy of the Act is to protect general contractors from unlicensed subcontractors." Alcoa Concrete & Masonry, Inc. v. Stalker Bros., Inc. et al, 191 Md.App. 596, 609 (2010).

The Court of Appeals of Kentucky construed Kentucky's long-standing rule similarly in Kennoy v. Graves, 300 S.W.2d 568 (1957). Ky. Rev. Stat. Ann. § 322.020 (1998) requires land surveyors and engineers to be licensed, and Kentucky

courts have long held that when a statute requires a license in order to practice a particular profession, a contract for those professional services entered into with one not licensed is void and unenforceable. See, e.g., Bd. of Educ. of Ferguson Indep. Graded School Dist. v. Elliott, 276 Ky. 790, 125 S.W.2d 733 (1939). However, in Kennoy, the court allowed an unlicensed consulting engineer to recover payment for services provided because the defendant asserting the rule as a defense to payment also was a licensed consulting engineer. The court held that an exception to the rule exists when the contract is between a licensed and an unlicensed member of the same profession or trade. Kennoy at 569.

> The statute involved, and similar ones, are designed to protect the public from being imposed upon by persons not qualified to render a professional service. The reason for the rule denying enforceability does not exist when persons engaged in the same business or profession are dealing at arms length with each other. In the case before us appellant was in a position to know, and did know, the qualifications of appellee." Id.

This Court should follow the holdings discussed above and reverse the Circuit Court ruling. Like the construction professionals in Alcoa, Kennoy, and MGM Construction, Appellant and Respondent PC were both members of the same profession who engaged in an arms' length business transaction. Amended Answer and Counterclaim p. 7-8. Respondents should not be allowed to use a statute intended to protect the public in order to avoid their contractual obligation to pay Appellant for its work under the subcontract. Absolutely nothing in S.C.Code Ann. § 40-11-370(C), or the South Carolina case law interpreting it, indicates it was implemented to shield contractors from their contractual duty to pay their peers.

This case involves two licensed members of the contracting profession. By contrast, other South Carolina cases where courts have enforced the statute harshly involved unlicensed contractors who were attempting to enforce the statute against innocent property owners. Following decisions in Florida, Maryland, and Kentucky and reversing the Summary Judgment ruling will be consistent with the statutory purpose of protecting the public.

C. Because Appellant's alleged technical violation of S.C.Code Ann. § 40-11-370 has not harmed Respondent PC or the public, this Court should apply the "substantial compliance" doctrine adopted in other jurisdictions and reverse the Circuit Court ruling.

Courts in Alaska, Georgia, and Washington have applied the doctrine of "substantial compliance" to statutes barring contractors who failed to comply with licensing or registration statutes from bringing suits to enforce contracts. Appellant urges this Court to apply the substantial compliance doctrine to the facts in the Record indicating that Gaylor substantially complied with S.C.Code Ann. § 40-11-370 and reverse the Circuit Court's ruling.

Courts in Alaska have applied the substantial compliance doctrine to a similar statute in situations when doing so was consistent with the statutory purpose. Alaska law mandates that:

> a person acting in the capacity of a contractor ... may not bring an action in a court of this state for the collection of compensation for the performance of work or for breach of a contract for which registration is required under this chapter without alleging and proving that the contractor ... was a registered contractor ... at the time of contracting for the performance of work. Alaska Stat. § 08.18.151 (2003).

The statute's purpose is to protect the public by making contractors' insurance and

identifying information readily available to the public and requiring contractors to be bonded and insured. Jones v. Short, 696 P.2d 665, 668 (1985).

In Jones, Appellant Frank Jones entered into a contract for construction work during a time period in which his registration had lapsed due to an error beyond his control. Id. at 666. In allowing Jones to recover payment for his work despite having violated the state statute, the Supreme Court of Alaska emphasized the importance of construing the registration statute in a manner consistent with its purpose:

> The proper interpretation of the registration provisions is one which carries out the legislative intent and gives meaning to every part of the statute without producing harsh and unrealistic results. ... We conclude that the statutory bar of AS 08.18.151 may be abrogated by a general contractor's substantial compliance with 08.18.011. If the landowner has ready access to information that would lead to discovery of the identity of the contractor's apparent insurer, and the contractor is in fact insured, the legislative intent is effectuated." Id., 667 - 668.

Alaska's highest court reaffirmed this holding in McCormick v. Reliance Ins. Co., 46 P.3d 1009 (2002), finding that contractor John McCormick's prior compliance with 08.18.011; his obtaining a valid municipal license; and his obtaining a state business license raise a genuine issue of material fact as to whether he provided the public with sufficient information on his bonding and insurance for him to have substantially complied with the statute. Id. at 1013. "Substantial compliance involves conduct which falls short of strict compliance with the statutory registration requirements, but which affords the public the same protection that strict compliance would offer." Id. at 1012. Because McCormick

raised a sufficient issue of fact as to whether his substantial compliance effectuated the statutory purpose, the court reversed the trial court's summary judgment holding on his claims in favor of the Appellee, Reliance Insurance Co. Id. at 1010.

Like Frank Jones', Appellant's alleged violation of S.C.Code Ann. § 40-11-370 did not prejudice Respondents or deny the public the protection South Carolina's licensing statute aims to provide. Respondent PC was aware of Appellant's identity and license number during all stages of the contracting and construction project, and Appellant's License number was posted publicly on the project site. Affidavit of Justin Baker p. 3. Additionally, Appellant's address and identifying information were publicly searchable through the North Carolina Secretary of State, the South Carolina Secretary of State, and the South Carolina General Contractor's Licensing Board at all times the parties were negotiating the subcontract and working on the CCU project. Affidavit of Teresa Selbo p. 2-4. Nothing in the Record shows any harm or prejudice to Respondent, to Coastal Carolina University, or to any member of the public, arising from Appellant's name reading "Gaylor, Inc." on the License and "Gaylor, Inc. of North Carolina" on the subcontract. Because Appellant's name on the subcontract was so similar to its name on the License and merely added words to indicate the location from which it contracted, this Court should find Appellant substantially complied with the statute.

Georgia's highest court has also recognized the doctrine of substantial compliance. In Georgia, the Nonresident Contractors Act requires out-of-state contractors to register with the state revenue commissioner each time they wish to

contract for construction work with revenue exceeding $10,000.00. Ga. Code Ann. § 48-13-31. The Act further states that contractors who fail to register for a contract or otherwise violate the Act are precluded from maintaining an action to recover payment for work performed on the contract. Ga. Code Ann. § 48-13-37. Despite the statute's clear language, the Supreme Court of Georgia allowed a nonresident subcontractor, Clover Cable of Ohio, Inc., to proceed with a claim for payment against another contractor although Clover had failed to register as required by Ga. Code Ann. § 48-13-31 before entering the contract. Clover Cable of Ohio, Inc. v. Heywood, et al Burnup & Sims Telcom, Inc. 260 Ga. 341, 392 S.E.2d 855 (1990). The court found Clover's substantial compliance with the statute – by registering with the revenue commissioner after it became aware it had violated the statute – was sufficient to allow Clover to maintain its suit because substantial compliance effectuated the statutory purpose of collecting tax revenue accruing as a result of the nonresident contractor's activities.

> [T]he permanent forfeiture of the nonresident contractor's claim against another private party because of the contractor's failure to register and bond the parties' contract is a draconian penalty which the courts incline against. Id. at 343, 859.

Finally, Washington courts have held that contractors' good-faith efforts to comply with the state licensing statute constitutes substantial compliance and that these contractors may bring actions to seek payment for their work. Washington state law explicitly prohibits contractors from bringing or maintaining actions seeking compensation for the performance of any work or for breach of any contract for which registration is required by law without alleging and proving that

he or she was a duly registered contractor at the time of contracting for the work. Wash. Rev. Code § 18.27.080. In Spry v. Miller, a Washington appellate court allowed Dale Spry, a well driller, to proceed with an action to foreclose on a mechanic's lien despite his failure to ever register as a contractor as required by state law. The court found that because Spry hired a licensed contractor to carry out the actual work required under the contract, he substantially complied with state licensing requirements. The court noted that a determination of whether a contractor has substantially complied depends on each case's particular facts and that the legislative purpose of protecting the public had been served in Spry's case. Spry v. Miller, 25 Wash.App. 741, 744, 610 P.2d 931, 933 (1980). "Courts have not insisted on literal compliance with a contractor registration law where the party seeking to escape his obligation has received the full protection which the statute contemplates. Id. at 746, 934, citing Andrews Fixture Co. v. Olin, 2 Wash.App. 744, 749, 472 P.2d 420 (1970).

Gaylor therefore urges this Court consider the important distinction between licensed general contractors participating in professional, arms-length transactions with peer members of the same profession, and contractors concealing their identity and licensure status from members of the public or knowingly doing construction work without a required license. This distinction, combined with the statutory purpose of protecting the public, weighs strongly in favor of allowing Appellant to proceed with its Counterclaims against Respondent.

5. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENT ON APPELLANT'S

COUNTERCLAIM BECAUSE THE DIFFERENCE IN APPELLANT'S NAME ON THE SUBCONTRACT AND LICENSE WAS A MERE SCRIVENER'S ERROR AND MUTUAL MISTAKE IN THE SUBCONTRACT.

Under South Carolina law, a contract may be reformed on the ground of mistake when the mistake is mutual and consists of the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it. A mistake is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended. Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 51, 747 S.E.2d 178, 186 (2013), citing Crosby v. Protective Life Ins. Co., 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct. App. 1987). At the summary judgment hearing, Appellant introduced evidence into the record tending to prove the parties intended for Appellant's name on the subcontract to read "Gaylor, Inc." or otherwise for "Gaylor, Inc." and "Gaylor, Inc. of North Carolina" to be used interchangeably. Affidavit of Justin Baker, Exhibit "B." Before Respondent's summary judgment motion was heard, Appellant filed a motion for leave to amend its Answer and Counterclaim and for reformation of the subcontract to reflect the intention of the parties. Motion for Leave to Amend. Judge John denied Appellant's request to continue the summary judgment hearing until after the motion to amend and to reform the subcontract was heard and held the summary judgment hearing as scheduled, so Appellant's motion was not heard. Order of September 4, 2013 p. 4. Appellant withdrew the motion after filing this Notice of Appeal to allow for stay of the case and reserved the right to re-file it.

Notice of Withdrawal p. 1.

The Circuit Court's summary judgment ruling disregarded the parties' intentions as to the subcontract. Appellant provided evidence at the hearing tending to prove that Respondent PC knew Appellant's identity; that it was contracting with a single entity, Gaylor, Inc.; that Gaylor, Inc. and Gaylor, Inc. of North Carolina were the same entity; and that Respondent PC and Appellant both intended for the contract to be enforceable by both parties. Affidavit of Justin Baker, p. 3, Exhibit "B." This Court should reverse the summary judgment ruling and give Appellant the opportunity to re-file its motion to amend the pleadings and to reform the contract.

6. BECAUSE RESPONDENT KNEW THAT GAYLOR, INC. OF NORTH CAROLINA AND GAYLOR, INC. WERE ONE AND SAME THE ENTITY, RESPONDENT WAIVED THE RIGHT TO RAISE S.C.CODE ANN. § 40-11-370 AS AN AFFIRMATIVE DEFENSE, AND THE CIRCUIT COURT ERRED IN ALLOWING RESPONDENT TO DO SO.

Respondent PC waived its right to assert S.C.Code Ann. § 40-11-370(C) as a defense to payment years ago when it contracted with Appellant, and Respondent PC should therefore be estopped from asserting the defense. This Court declined to apply the doctrine of waiver and estoppel to the homebuilder's licensing statute in 1988 on the grounds that this was inconsistent with the public welfare purpose of the statute and could encourage parties to contract for unlicensed construction work. Wagner v. Graham, 296 S.C. 1, 3, 370 S.E.2d 95, 96 (1988). However, this case is easily distinguished from Wagner because the difference in the name on the subcontract and the License did not harm the public or implicate the public welfare.

Respondent PC has known that "Gaylor Inc. of North Carolina" and "Gaylor Inc." refer to the same entity and that Appellant does business as both names since the very beginning of their relationship and long before the parties reduced their agreement to writing in 2010. Affidavit of Justin Baker, p. 2-3. As discussed above, Appellant was required to submit its Federal ID Number, a W-9, a Financial Affidavit, and its Mechanical License number to Respondent PC in order to contract for public construction work, and Responsibility was a material term of the public subcontract. See supra Section 1; Affidavit of Justin Baker p. 2-3. The above documents clearly identified "Gaylor Inc." and "Gaylor Inc. of North Carolina" as the same entity. Respondent PC unquestionably was aware of Appellant's identity. Furthermore, not only did Respondent PC willfully contract with Appellant, but Respondent PC benefited from Appellant's construction work for a number of years, and, to date, has paid Appellant more than $2 million for said work. Gaylor's Amended Answer and Counterclaim p. 15 Exhibit "A." Respondent PC should not be allowed to withhold payment from Appellant when it has always known Appellant's name and identity and, until this dispute arose, was paying Gaylor pursuant to the terms of the subcontract.

7. S.C.CODE ANN. § 11-35-25 GOVERNS THIS MATTER AND SUPERSEDES ANY CONFLICTING LAWS, AND BECAUSE S.C.CODE ANN. § 40-11-370 CONFLICTS WITH S.C.CODE ANN. § 11-35-25, S.C.CODE ANN. § 40-11-370 DOES NOT APPLY TO THIS CASE.

Gaylor's Counterclaim should be allowed because S.C.Code Ann. § 40-11-370(C) does not apply to the set of facts before the court today. Indeed,

"40-11-370(C) only applies to certain construction contracts and does not govern contracts generally." Housing Auth. of City of Columbia v. Cornerstone Housing, LLC, 356 S.C. 328 (2003). The subcontract was for construction labor and materials at a public university and is governed by S.C.Code Ann. § 11-35-10 et seq., the South Carolina Consolidated Procurement Code ("CPC.") The CPC governs the subcontract and supersedes all laws conflicting with its provisions on procurement. S.C.Code Ann. § 11-35-25. The statute clearly provides for bidding and contracting by parties such as Appellant and for those parties to have legally enforceable rights to payment for their construction work under public contracts and subcontracts. S.C.Code Ann. §§ 11-35-1520, 11-35-3030. Therefore, even if S.C.Code Ann. § 40-11-370 technically bars Appellant's right to payment pursuant to its subcontract with Respondent PC, which Appellant denies, S.C.Code Ann. § 11-35-25 supersedes it. The Circuit Court therefore erred in applying S.C.Code Ann. § 40-11-370 to bar Appellant's Counterclaim.

In order to effectuate the public welfare statutory purpose of S.C.Code Ann. § 40-11-370, this Court should reverse the Circuit Court's granting of summary judgment to Respondents on Appellant's Counterclaims. The Court must construe the statute in a just, equitable manner and consistently with the legislative intent, especially in light of the ambiguity in the statute. Furthermore, because reasonably intelligent individuals could disagree on what the statute requires and how to comply with it, grounds exist to support a finding that the statute is unconstitutionally vague and void as to Appellant. Rulings on similar statutes in

other jurisdictions should also persuade this Court to find that the distinguishing factors of this case – particularly, Appellant's and Respondent's status as licensed members of the same profession, and the lack of prejudice to Respondents or the public – support reversal of the Circuit Court's decision. Additionally, even it is found that Gaylor did enter a contract to engage in construction in a name other than the name appearing on its license, Gaylor's Counterclaim should not be barred. Respondent PC has waived its right to assert S.C.Code Ann. §40-11-370(C) as a defense to payment to Gaylor, and as such, should be estopped from asserting the defense. Furthermore, the Consolidated Procurement Code supersedes S.C.Code Ann. §40-11-370(C) and voids its application to this case.

For the reasons stated, this Court should reverse the judgment of the circuit court.

December 5th, 2013

Respectfully submitted,

M. Caroline Lindsey

M. Caroline Lindsey
P.O. Box 20248
Raleigh, NC 27609
Telephone: (919) 277-2541
Facsimile: (919) 277-2544
Attorney for Appellant

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No. 2013-CP-26-0423
Appellate Case No. 2013-002186

PC Construction of Greenwood, Inc. and
Safeco Insurance Company of America,.....
Respondents,

v.

Gaylor, Inc. of North Carolina and
Western Surety Company, ... Defendants,

Of Whom Gaylor, Inc. of North Carolina is the Appellant.

PROOF OF SERVICE OF APPELLANT'S INITIAL BRIEF

I certify that I have served the Initial Brief of Appellant on PC Construction of Greenwood, Inc. and Safeco Insurance Company of America by depositing a copy of it in the United States Mail, postage prepaid, on December 5, 2013, addressed to their attorneys of record, Matthew Stabler, Esq. & E. Wade Mullins, Esq., at their office at Bruner Powell Wall & Mullins, LLC, 1735 St. Julian Place, Suite 200, Columbia, SC 29204 on December 5, 2013.

This the 5th day of December, 2013.

ANDERSON JONES, PLLC

M. Caroline Lindsey

M. Caroline Lindsey
P.O. Box 20248
Raleigh, NC 27619
(919) 277-2541
Attorney for Appellant

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No. 2013-CP-26-0423
Appellate Case No. 2013-002186

PC Construction of Greenwood, Inc. and
Safeco Insurance Company of America,..... Respondents,

v.

Gaylor, Inc. of North Carolina and
Western Surety Company, ... Defendants,

Of Whom Gaylor, Inc. of North Carolina is the Appellant.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Order of September 4, 2013;
2. Amended Complaint of PC Construction of Greenwood, Inc.;
3. Amended Answer and Counterclaim of Gaylor, Inc. of North Carolina;
4. Transcript of Hearing on PC Construction of Greenwood, Inc.'s Motion for Summary Judgment as to the Counterclaims of Gaylor, Inc. of North Carolina;
5. Affidavit of Justin Baker;
6. Affidavit of Teresa Selbo;
7. Gaylor, Inc. of North Carolina's Memorandum in Opposition to PC Construction of Greenwood's Motion for Summary Judgment;
8. PC Construction of Greenwood, Inc. and Safeco Insurance Company of America's Memorandum in Support of Motion for Summary Judgment as to Gaylor, Inc. of North Carolina's Counterclaims;

9. Gaylor, Inc. of North Carolina's Motion for Leave to Amend and to Reform Contract.
10. Notice of Withdrawal of Motion for Leave to Amend and to Reform Contract.

I certify that this designation contains no matter which is irrelevant to this appeal.

December 5th 2013

M. Caroline Lindsey

M. Caroline Lindsey
P.O. Box 20248
Raleigh, NC 27609
Telephone: (919) 277-2541
Facsimile: (919) 277-2544
Attorney for Appellant

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No. 2013-CP-26-0423
Appellate Case No. 2013-002186

PC Construction of Greenwood, Inc. and
Safeco Insurance Company of America,..... Respondents,

v.

Gaylor, Inc. of North Carolina and
Western Surety Company, ... Defendants,

Of Whom Gaylor, Inc. of North Carolina is the Appellant.

PROOF OF SERVICE OF DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

I certify that I have served the Designation of Matter to Be Included in the Record on Appeal on PC Construction of Greenwood, Inc. and Safeco Insurance Company of America by depositing a copy of it in the United States Mail, postage prepaid, on December 5, 2013, addressed to their attorneys of record, Matthew Stabler, Esq. & E. Wade Mullins, Esq., at their office at Bruner Powell Wall & Mullins, LLC, 1735 St. Julian Place, Suite 200, Columbia, SC 29204 on December 5, 2013.

This the 5th day of December, 2013.

ANDERSON JONES, PLLC

M. Caroline Lindsey

M. Caroline Lindsey
P.O. Box 20248
Raleigh, NC 27619
919-277-2541
Attorney for Appellant