

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Joseph M. Strickland, Master in Equity

Case Tracking #: 2012-210746
Civil Docket No. 2009-CP-40-64

F.M. Haynie d/b/a Docwild's General Contractor, Appellant

v.

Paul E. Cash and Carole S. Cash, Respondent

PETITION FOR REHEARING

F. M. Haynie
1469 Florawood Drive
Columbia, South Carolina 29204
(803) 238-0757

APPELLANT
Pro Se

RECEIVED

JAN 06 2014

SC Court of Appeals

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You will please take notice that, pursuant to SCACR 221, the Appellant, FM Haynie, petitions the court for a rehearing of this matter. It seems in the Christmas rush the court has rendered an affirmation of expediency (note the opinion was filed 12/23 and mailed 12/27). The 19th century US Navy oceanographer Matthew Fontaine rightly exhorted us that "where principle is involved, be deaf to expediency." In the instant opinion the interest of expediency has taken the place of common sense in that it appears not an ounce of weight was given to any of Haynie's argument, testimony, evidence or average insight. To affirm required no effort:

1. The court's inference that a sum certain contract for \$35,000 existed is in fact a reformation of the existing contract. By definition reformation is the correction or change of an existing document by court order upon petition of one of the parties to the document. Reformation will be ordered if there is proof that the parties did not intend the language as written or there was an omission due to mistake or misunderstanding. Reformation is a remedy that is granted at the discretion of the court only where the facts and circumstances of a particular case warrant it. It will not be granted where an entirely new agreement would result between the parties or where unwarranted hardships would be imposed upon them. Only an individual who has acted in Good Faith can apply to the court to have an instrument reformed. Reformation requires "clear and convincing" evidence of the parties' true intentions. The courts inference transforming a cost plus to a sum certain contract is refuted by the first billing statement presented the same day Cash, Respondent, accepted the cost plus contract by payment of the \$6,000 consideration, 4 days after the offer. That billing statement and every succeeding billing statement was formatted as cost plus, in compliance with the only contract that ever existed. "Any modification of a written contract must satisfy all fundamental elements of a valid contract in order for it to be enforceable, including a meeting of the minds between the parties with regard to all essential terms of the agreement. Player v. Chandler, 299 S.C. 101, 104-05, 382 S.E.2d 891, 893 (1989). Thus, "while a written contract can be orally modified, there must be a meeting of the minds as to the modification." First Union Mortgage Corp. v. Thomas, 317 S.C. 63, 70, 451

S.E.2d 907, 912 (Ct.App.1994).” US Bank Trust Nat. Ass’n v. Bell, 684 SE 2d 199 - SC: Court of Appeals 2009 - Google Scholar. There is no evidence of any discussions, negotiations or change orders much less any implied meeting of the minds. When interpreting an oral contract, a court must give effect to the intentions of the parties. Keith v. River Consulting, Inc., 365 S.C. 500, 506, 618 S.E.2d 302, 305 (Ct.App.2005) (citing Columbia E. Assoc. v. Bi-Lo, Inc., 299 S.C. 515, 519, 386 S.E.2d 259, 261 (1989)). The determination of the parties' intent is a question of fact. S. Atl. Fin. Servs., Inc. v. Middleton, 349 S.C. 77, 81, 562 S.E.2d 482, 485 (Ct.App.2002). To give effect to the parties' intentions, the court will endeavor to determine the situation of the parties and their purposes at the time the contract was entered. Keith, 365 S.C. at 506, 618 S.E.2d at 305 (quoting Columbia E. Assoc., 299 S.C. at 519, 386 S.E.2d at 261). At the time of the contract agreement the scope and design of the project were undecided, a moving target impossible to attach a fixed price to. There is nothing that suggests anything other than an intent to proceed based solely on the existing cost plus contract. Relative to the court's referenced "any evidence" standard of review, a far cry from clear & convincing, there is no evidence whatsoever other than Haynie’s incidental erroneous palm pilot notation, “contract,” that was included when the his job cost spreadsheet was created in February 2007 (parol evidence), before the Cost plus contract was offered the next month. That notation was never again used or referenced in any document, correspondence or conversation. The spreadsheet printouts and receipts given with each billing were supporting documents only and it is obvious from the context that the notation was irrelevant. The June 10, 2007 billing statement presented when the project was approximately 60% complete was for \$51,571 making that fact crystal clear. As set forth in the appellate brief, it is inconsistent with the law to reform an express contract to an implied contract designed by the court for expediency. Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible. Maners, 199 S.E. (2d) at 722. Perhaps an equitable standard of review would be more appropriate in the interest of justice.

The construction of a clear and unambiguous contract presents a question of law for the court. Ward v. West Oil Co., 379 S.C. 225, 238, 665 S.E.2d 618, 625 (Ct.App.2008); see also Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). We are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988). "A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct.App.2008). From this court's affirmation of the Master's inferences for which not one piece of contemporaneous evidence was presented by the respondent, the court has passed down an opinion that implies that Haynie, a contractor of 40 years, is ignorant having entered into a contract to build a house for \$50 per square foot.

Notwithstanding the aforesaid, the appellant has no need for the court's help in construing the contract because it is unambiguous. Common sense and good faith are the leading touch-stones of construction of the provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail. Farr v. Duke Power Co., 265 S.C. 356, 360 218 S.E. (2d) 431, 434 (1975). In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties. Superior Automobile Insurance Co. v. Maners, 261 S.C. 257, 263, 199 S.E. (2d) 719, 722 (1973).

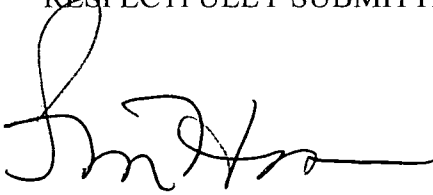
2. An express contract is one in which all elements of a contract are specifically stated (offer, acceptance, consideration), and the terms are stated, as compared to an "implied" contract in which the existence of the contract is assumed by the circumstances. It is illogical for the court to imply a contract existed (argument 1) then transform it to an "express contract" for the purpose of denying recovery under

quantum meruit. The point of the Supreme Court's decision in *Earthscapes Unlimited v. Ulbrich* was to establish that either Mechanic's Lien Law or quantum meruit were viable remedies for contractors adding permanent value to the property of another. As far as proof of a benefit conferred is concerned, if the court chooses to dispute a nationally recognized authority on cost of construction, *Craftsman 2008 National Building Cost Manual* (which has nothing to do with use), may we instead review the only evidence of any consequence offered by the respondent which was a competing bid for the project (Record p.411 l.23-p.419 l.5) for a 14x28 (392sf) shed by Palmetto Construction for \$39,483. Palmetto offered a true "shed" 40% smaller than the structure Haynie provided that was a single story with a low pitched simple roof without vaulting; there was no interior finish (exposed framing); minimal electrical service; no plumbing; no HVAC; no bathroom; no wet bar; no cable or network connection; and no workbench, loft, stairs, expensive glass entry or 100sf tool shed as built by Haynie for the respondent. As previously stated, common sense dictates the respondent unjustly retained a benefit well in excess of Haynie's quantum meruit claim.

3. If the appellant has not gotten the courts attention yet, the counter to this opinion is moot.
4. It is impossible to raise this issue before the ruling since the ruling is the issue. To bring the issue before the Master would be an insult to the court. In *TW Morton Builders v. Von Buedingen*, 450 SE 2d 87 - SC: Court of Appeals 1994 - Google Scholar, a very similar cost plus contract case (but much more complex), *Skiba v. Gessner*, 374 S.C. 208, 648 S.E.2d 605 (2007), & *Earthscapes Unlimited, Inc. v. Ulbrich*, 703 SE 2d 221 - SC: Supreme Court 2010 - Google Scholar, All were tried by a Master in Equity and a judgment rendered within weeks or days of the trial. In the instant case the Master handed down a decision, by simply striking through the date and adding his signature to the defendants proposed order 6 months after the trial. It is quite possible (and apparent at the 15 minute post trial hearing/meeting) that the Master simple could not recall details of the trial since he did not have benefit of the transcript and took few notes at

trial. Perhaps the court could provide some sort of standard to guard against plaintiffs falling out of sight & mind.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read 'F.M. Haynie', with a long horizontal flourish extending to the right.

F.M. Haynie

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January 6, 2013

Copies

Haynie v. Cash

HEARING TRANSCRIPT

Pages 411-419

1 **MR. TRUSLOW:** Your Honor, I was not offering this for the
2 truth of the matter asserted. What I'm doing is
3 offering this to show what ... that Mr. Cash had
4 gotten a bid for a job to build approximately a 390
5 square foot ... a 392 square foot building that was
6 far ... it was more than what my client had quoted
7 for 390 square feet, with far less in it. Such as
8 it had plywood floors. It had hanging down using
9 the florescent lights, shop lights. It had
10 unpainted ... the inside wasn't going to be at all
11 completed, no sheetrock and that sort of thing. And
12 I was ... I was going to ... so I'm not offering it
13 for the truth of the matter asserted. And under
14 Rule 803, I'm offering it to show the impact. This
15 man got a bid, that was more than what my client had
16 originally bid, for far less. And to question him
17 ... again, we have a quantum meruit claim in here.
18 So that's the purpose.

19 **THE COURT:** Objection overruled.

20 **Q:** You've heard what my argument is. Didn't you get a
21 bid from Palmetto Construction for a 390 square foot
22 exterior garage?

23 **A:** I don't know if it says 390 square feet. I did get
24 a bid from Palmetto.

25 **Q:** Okay. You got a bid from ...

1 A: Yes, sir.

2 Q: And was it for a building approximately 28 times 14?

3 A: If that's what it says on there. I don't have it in
4 front of me, sir.

5 Q: All right. Does it say 28 feet by 14?

6 A: It says 28 by 14. Yes, sir.

7 Q: All right. We can multiply that and come out to
8 392, can't we? You would agree with that?

9 A: Yeah.

10 Q: And this was going to have a ... just ... it wasn't
11 going to have the fancy sidewalls, as shown in
12 Plaintiff's Exhibit Number One. It was just going
13 to have concrete bricks on the side.

14 A: Well, but it was going to have ...

15 Q: And a plywood floor.

16 **THE COURT:** Hold on a second, Mr. Truslow.

17 **MR. TRUSLOW:** Okay.

18 **THE COURT:** Mr. Cash, you were about to say something?

19 A: Yes, sir. I did. One of the things that all the
20 contractors had to address was the moisture problem.
21 His solution to the moisture problem was to do a
22 traditional ...

23 **MR. TRUSLOW:** Your Honor, that's not in response to my
24 question. My question was whether it was to put
25 concrete ... use just cinder block.

1 A: You said fancy ...

2 **THE COURT:** Hold on one second. I don't know what he was
3 about to say, so ...

4 **MR. TRUSLOW:** My question was, was your bid from Palmetto
5 for just concrete cinder block. Cinder block, if
6 you will.

7 **THE COURT:** All right. So let him finish his answer,
8 please.

9 A: All right. To address his issue, he was going to
10 use cinder block and then brick up on the outside,
11 similar to what the house is where you do cinder
12 block foundation. You have to do brick up to a
13 certain point, and then he was going to use
14 Hardiplank wood from up there.

15 Q: And were you ... rather than having ... having a
16 scored concrete floor that looked like tile,
17 architecturally painted, was he simply going to put
18 plywood or particle board flooring down?

19 A: They were going to have to frame up a floor.

20 Q: Is your answer yes or no?

21 A: They were going to have to frame up the floor, yes.

22 Q: Is your answer yes or no?

23 A: Yes, sir.

24 Q: Were you going to use simple plywood?

25 A: You were going to have plywood ... yes.

- 1 Q: And it was going to have a typical roof system. Not
2 a vaulted ceiling, but a typical roof ceiling ...
- 3 A: It was going to ...
- 4 Q: ... isn't that correct?
- 5 A: It was asked to have a vaulted ceiling.
- 6 Q: No. What ... read what's here. Doesn't it say ...
7 doesn't it say that it was for a typical roof
8 system? Typical, where I've got it checked. A
9 typical roof system, not a vaulted?
- 10 A: Vaulting would be a ceiling. But the typical roof
11 system was the A-frame. He had the same drawing.
- 12 Q: Okay. Now, do you have the drawing?
- 13 A: It's what ended up here. But I don't think I have
14 my ... I don't think I have my pencil drawing that I
15 had done or the magazine that ...
- 16 Q: Was it to have, on the front was it to have only one
17 double exterior door?
- 18 A: It was going to have one set of double exterior door
19 and a single door, yes, sir.
- 20 Q: And was it going to have four, and only four, tube
21 florescent lights?
- 22 A: It was ... over the shop part, yes, sir, it was
23 going to have florescent lights.
- 24 Q: And it wasn't going to be electrical work for cable
25 and ... for a cable TV, computer capabilities, it

1 wasn't going to have that, was it?
2 A: I have Ethernet, so I don't need cable for ...
3 Q: Pardon me?
4 A: I have the Ethernet thing ...
5 Q: I couldn't hear you.
6 A: I have Ethernet. I don't need cable for Internet.
7 Q: Okay. The back ... the interior, the whole inside,
8 wasn't it going to be unfinished, no ... it was
9 insulation and exposed walls without sheetrock?
10 A: No, sir, it was going to have ... it was going to
11 have sheetrock or a T-111.
12 Q: All right. Well, if you can look at your report
13 where I have a check, the interior was to remain
14 unfinished; isn't that correct?
15 A: That's what it says there, yes, sir.
16 Q: All right. And that bid from Palmetto was more than
17 ... was more than \$40,000?
18 A: It was \$39,000.
19 Q: I'm sorry, \$39,843. More than ... more than Mr.
20 Haynie, for an interior that was unfinished,
21 unpainted, correct?
22 A: For what that says, yes, sir.
23 Q: Okay. And what Mr. Haynie provided you had
24 insulation, and it had sheetrock, and it had room
25 for your ... for a cable TV, correct?

1 A: The cable TV was not even a part of his quote. He
2 ...
3 Q: But it's in there, isn't it?
4 A: There's cable in there but it doesn't work. But,
5 yes, there is cable. But we don't have any TV in
6 there.
7 Q: And you were going to have on ... instead of having
8 what you ... let me see if I can cut to the chase
9 and move on. Wasn't what you got from Mr. Haynie a
10 lot nicer than what was being proposed here for more
11 money?
12 A: It was somewhat nicer, and I paid Mr. Haynie more
13 money than what was done, what was originally quoted
14 for.
15 Q: Well, you had ... I'm going to argue with you now.
16 You had extra work done because you had, I think ...
17 by my count you had at least four trees taken out,
18 one of which was a large hackberry?
19 A: Yes, sir.
20 Q: Would you agree that the hackberry was more than a
21 16-ton item?
22 A: I don't know what the weight of that was.
23 Q: Would you agree that it was difficult to get out?
24 A: I mean, he got it out with the Bobcat. I don't know
25 if ... I don't know. I'm not a tree person, so I

- 1 don't know what the difficulty is.
- 2 Q: And you would agree with me that this proposal by
- 3 Palmetto doesn't say anywhere anything about a
- 4 vaulted ceiling?
- 5 A: He was given the same list as everybody else. In
- 6 that proposal it doesn't say it. Yes, sir.
- 7 Q: It does not say vaulted ceiling?
- 8 A: I'd have to read it again, but I'm taking your word
- 9 for it.
- 10 Q: Read it. Read it and tell me ... you can look here
- 11 and see if that ever says vaulted ceiling. I don't
- 12 think you'll find it, but you can go ahead and try.
- 13 Does it say vaulted ceiling?
- 14 A: I'm not a speed reader, so give me a few minutes and
- 15 I'll read the thing.
- 16 Q: I know you're not a speed reader. I'm sure your
- 17 attorney ... you have a very good attorney. I'm
- 18 sure she's been over this with you before. This is
- 19 not the first time you've seen it. Does it ever say
- 20 vaulted ceiling?
- 21 A: It doesn't say vaulted ceiling, but it says install
- 22 two ceiling fans, so.
- 23 Q: Does it say bathroom?
- 24 A: No. He did not quote a bathroom, that I know.
- 25 Q: Okay. So you got ... at least you ... whether you

1 like it or not, or whether it's finished, you at
2 least got a bathroom in there. Plumbed for a
3 bathroom.
4 A: And he said he was able to do that for his quote.
5 Q: And this is not in here, is it?
6 A: That is correct.
7 Q: A wet bar is not in here, is it?
8 A: Never was quoted by him or in there, yes, sir.
9 Q: Okay. Well, I'm going to come to that in a minute.
10 And what's ended up being a tool bench in one of
11 your photographs, that wasn't quoted in the Palmetto
12 bill either?
13 A: That is correct.
14 Q: Stairs going up to the loft wasn't quoted?
15 A: That is correct.
16 Q: Stair railing wasn't quoted?
17 A: That is correct.
18 Q: So really what you ended up with Mr. Haynie was a
19 lot nicer than the Palmetto quote for more money?
20 A: It was what he quoted to be able to do the job, sir.
21 Q: But it was more money?
22 A: It was what he quoted to be able to do the job.
23 Q: It was more money, correct? Yes or no?
24 A: What was more money?
25 Q: Palmetto was quoting more money for something not as

1 ... not as good ...

2 A: I think about \$1000 more. Yes, sir.

3 Q: For not as good?

4 A: I don't know if I would say not as good, because the

5 product never got built.

6 Q: Let me go on to something else and see ... you

7 talked about some changes that were made, and a lot

8 of that was verbal, wasn't it, between you and Mr.

9 Haynie?

10 A: Yes, sir. Verbal agreement.

11 Q: In fact, if I understand you, almost all of it was

12 verbal?

13 A: He would call me up. I was busy at work, so I

14 couldn't just run home.

15 Q: So a lot of it ... was a lot of it ...

16 A: Yes, sir.

17 Q: Almost all of it was verbal?

18 A: Yes, sir.

19 Q: Okay. Now, I want to move on to something more

20 positive and see if you can agree with me. You've

21 heard Mr. Haynie testify that he thought that he had

22 a cost plus. And I think I heard you say that you

23 thought that you had a sum certain. Is that a fair

24 assessment?

25 A: Yes, sir.

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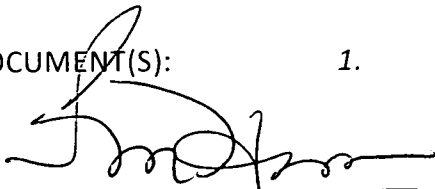
Paul E. Cash and Carole S. Cash,..... Respondent

CERTIFICATE OF SERVICE

I, Frank M. Haynie, Appellant, certify I have this date served the foregoing document(s) on the individual(s) listed below by placing a copy in the United States Mail, postage prepaid to the following address:

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DOCUMENT(S): 1. *Petition for Rehearing*



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January 7, 2014

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SC Court of Appeals