

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

71047

Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc., Respondents,

v.

Professional Plastering & Stucco, Inc., Maria Arias, and Miquel Rosales, Defendants,

Of whom Professional Plastering & Stucco, Inc. is the Appellant.

v.

Maria Arias, Miquel Rosales, and APS Enterprises Unlimited, Inc., Third Party Plaintiffs,

Of whom APS Unlimited, Inc. is the Respondent.

Appellate Case No. 2011-196286

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5188
Heard October 17, 2013 – Filed January 8, 2014

PETITION FOR REHEARING

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SC Court of Appeals

TO: THE JUSTICES OF THE SOUTH CAROLINA COURT OF APPEALS

Respondent, APS Unlimited (herein after "Respondent" or "APS"), by and through its undersigned attorneys, petition the South Carolina Court of Appeals for a Rehearing in the above-captioned matter. This petition is based upon the grounds as follows:

I. MISSTATEMENT IN THE FACTS.

The Order in this matter states that "APS filed a motion for summary judgment on the basis that Professional was not a licensed stucco installer, and, therefore, Professional could not maintain these claims pursuant to statutory law." Rather, APS's argument is not based on any specific licensure. APS contends that Professional Plastering does not have any licensure in the State of South Carolina, therefore, under South Carolina law, was not (1) permitted to use unlicensed contractors pursuant to S.C. Code Ann. §40-11-270(c), or (2) authorized to bring an action either in law or in equity to enforce provisions of a contract pursuant to S.C. Code Ann. § 40-11-370(C).

II. THE ORDER MISAPPREHENDS THE FACT THAT SUMMIT DID NOT CONTRACT WITH APS TO PERFORM WORK OR AGREE TO SUPERVISE APS'S WORK ON THE PROJECT.

The order states "Summit was allowed to utilize APS's services even though it was unlicensed." That statement is correct if Summit had contracted with APS, or had undertaken the duty to supervise and to be responsible for APS's work. However, that is not what occurred in the present situation. Professional Plastering contracted with APS. Summit had no contractual relationship with APS and did not agree to supervise or be responsible for APS's work.

South Carolina Code Ann. § 40-11-270(C) explicitly states that only "(l)icensees may utilize the services of unlicensed subcontractors to perform work . . . provided the licensee

provides supervision. The licensee is fully responsible for any violations of this chapter resulting from the actions of the unlicensed subcontractors performing work for the license.”

There is no dispute that Professional was not licensed in the State of South Carolina. Second there is no evidence that can satisfy the supervision requirement of S.C. Code 40-11-270 (C). The only evidence in the record is that Summit, the licensee, was providing supervision for the work of Professional Plastering. As cited in APS’s brief, the full testimony of McGinty, one of Summit’s project managers for Fenwick, provides:

Q. And that Summit will supply all material, supervision, and will be responsible for obtaining all engineering approval of the underlying flashing system, is that correct?

A. Correct.

Q. And then Professional Plastering will install under Summit Contractors, Inc. direction and is not liable for this flashing or the installation of this flashing, correct?

A. Correct.

(R.239-246; Final Brief of Respondent APS, p.12). There is no evidence that Summit agreed to assume the duty to supervise APS, or to be responsible for the work. Even if there was, it stands to reason that Summit as the entity responsible for the work, not Professional Plastering, would retain the rights to bring the legal suit to enforce any breach or remedy any defect in the work.

The Court’s opinion, as it stands, allows Professional Plastering, and all unlicensed contractors, to avail themselves of all of the privileges of being licensed contractors while avoiding the responsibilities of supervision of the work. As such, this matter should be reheard.

III. THE ORDER MISAPPREHENDS THE APPLICATION OF S.C. CODE ANN. § 40-11-5 et. seq., IN THAT IT HOLDS THE STATUTE IS INAPPLICABLE TO A CONTRACT BETWEEN CONTRACTORS DUE TO LACK OF AFFECT ON PUBLIC INTEREST.

The opinion improperly holds that the licensing statute was not applicable to a contract between contractors because it did not affect the “public interest.”¹

The Court relied on *Kennoy v. Graves*, 300 S.W.2d 568 (Ky. App 1957), a case from the Kentucky Court of Appeals, which involved a cause of action by a professional engineer to recover \$900 for services rendered to a contractor. The contractor’s only defense for failure to pay for the services rendered was the fact that the engineer was not licensed in the state. Accordingly, the Kentucky court held that this was an “arms length” transaction between professionals that did not involve the public, and as such the licensing statutes did not apply. Unlike the situation in the present case, the dispute in *Kennoy* was over a monetary fee between the two professional parties to the contract. It had no bearing whatsoever on the quality of the work or product, or structure provided, and likewise, the suit had no bearing or implications for anyone but the two individuals involved in the monetary dispute.

The present case involves allegations of improper work, negligence and failure to supervise, all of which affect the public and have broader implications that are not just limited to Professional Plastering and APS. There certainly is a public interest in ensuring that an unlicensed contractor’s work on a project is being supervised by a licensed contractor. However, as the order currently stands, an unlicensed contractor can hire another unlicensed contractor, who could hire another unlicensed contractor, and right on down the line, to perform work on a construction project, and disclaim any responsibility to supervise the work as long as the general contractor is licensed under the statute. If the unlicensed contractor, (Professional Plastering) is

¹ I note that this issue was not raised or argued by Professional Plastering.

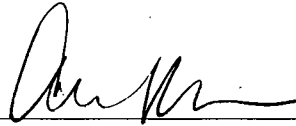
not supervising the work of its unlicensed subcontractor (APS), and the general contractor (Summit), is not supervising the work of the subcontractor (APS), who is?

Not only is there a “public interest” in ensuring unlicensed contractors are supervised by contractors licensed by the State of South Carolina, but the Court’s interpretation of the statute is in direct conflict with the statute itself and with the evidence in the record. Particularly, S.C. Code Ann. § 40-11-360, specifically provides “Exemptions from application of the chapter.” Nowhere in this section is there an exemption for contracts between contractors. If a statute’s language is plain, unambiguous, and conveys a clear meaning, then “the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation. *Catawba Indian Tribe*, 372 S.C. 519, 525-526, 642 S.E.2d 751, 754 (2007).

CONCLUSION

For the foregoing reasons, Respondent APS respectfully requests that the Court rehear this matter.

Respectfully submitted:



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Unlimited

Charleston, South Carolina

January 22, 2014

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Mark F. Teseniar and Nan M. Teseniar, on behalf of
themselves and others similarly situated, and Twelve
Oaks at Fenwick Property Owners Association, Inc.,
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v.

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing of Respondent APS Enterprises
Unlimited by depositing a copy in the U.S. Mail, postage paid on January 22, 2014 addressed to

Appellant's attorneys and Co-Counsel as set forth below:

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January 22, 2014

BY FEDERAL EXPRESS

Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29211

Re: Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc., (from December 16, 2008 to present v. Professional Plastering & Stucco, Inc., et. al. v. APS Enterprises Unlimited, Inc., et, al.
Case No. 2009-CP-10-0049
Appeal Case No.: 2011196386
Opinion No.: 5188
Claim No.: 72-1148-10
MLF File No. 104.094

Dear Ms. Kitchings:

Enclosed please find the original and (6) copies of Respondent, APS Enterprise Unlimited's Petition for Rehearing, along with the original and one copy of the Proof of Service regarding the above referenced matter. Also enclosed is our firm check in the amount of \$25.00 or the cost of the filing fee. Please file the original and return clocked copies for our file. A self-addressed, prepaid envelope is provided for this purpose.

With kind regards, I am

Yours truly,


Amanda R. Maybank

ARM/tgw
Enclosures

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JAN 23 2014

SC Court of Appeals

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2 Your Internal Billing Reference **104.094 Fenwick**

3 To Recipient's Name **Jenny Kitchings, Clerk** Phone **803-734-1060**
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FedEx Priority Overnight
FedEx Priority Overnight shipments will be delivered on Monday unless SATURDAY Delivery is selected.

FedEx 2Day
Second business shipment. Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.

FedEx Standard Overnight
Next business morning. Shipments delivered NOT available.

FedEx Express Saver
Third business day. Shipments delivered NOT available.

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Indirect Signature
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As per attached Shipper's Declaration, dangerous goods (including dry ice) cannot be shipped in FedEx packaging or placed in a FedEx Express Stop Box.

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