

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Charleston County
Court of Common Pleas
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5188
Heard October 17, 2013 – Filed January 8, 2014
Appellate Case No. 2011-196286

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

v.

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

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

v.

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

Of whom APS Unlimited, Inc. is the Petitioner.

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S.C. Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February, 2014.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in reversing the circuit court's order which granted summary judgment to Petitioner because Respondent was not a licensed South Carolina contractor pursuant to S. C. Code Ann. § 40-11-270 and § 40-11-370.
2. Did the Court of Appeals err in holding that the licensing statutes contained in S.C. Code Ann. § 40-11-15 *et seq.* are inapplicable to contracts between contractors because it does not affect public interest?

STATEMENT OF THE CASE

This appeal stems from alleged construction defects at the Twelve Oaks at Fenwick Plantation condominiums located on Johns Island, South Carolina. The buildings, (hereinafter referred to as the Fenwick project), were originally constructed as apartments and completed in 2002. In 2006, they were converted into condominiums, and sold as such. On or about January 4, 2008, Respondents Mark R. and Nan M. Teseniar, on behalf of themselves and others similarly situated, filed suit against the developers alleging design and construction defects and damages related to the buildings. The suit was later amended to include numerous other parties including Summit Contractors, the general contractor, the architect and various subcontractors related to both original construction and repairs conducted during the conversion to condominiums. Likewise, on March 28, 2008 the Twelve Oaks at Fenwick Plantation Property Owners Association, ("the POA"), filed a separate lawsuit alleging damages to the commonly owned areas as a result of design and construction defects. The suits by Tesenair and the POA were consolidated by court order on

October 10, 2008. (Hereinafter the Tesenair and Fenwick POA respondents are referred to collectively as “Homeowner Petitioners”).

Both Respondent Professional Plastering, (“hereinafter Professional Plastering”), and Petitioner APS Enterprises Unlimited, Inc., (hereinafter “APS”), were both named as direct defendants in the law suit. Professional Plastering was a stucco subcontractor based out of Florida, hired by the general contractor to performed stucco work during original construction as well as to conduct stucco repairs during the period when the apartments were being converted to condominiums. APS, on the other hand, was a sub-subcontractor hired by Professional Plastering during the conversion period to perform stucco repairs in the breezeways of the buildings.

On April 1, 2010, Professional Plastering filed a cross-claim against APS. Likewise, on May 20, 2010, APS filed a third party complaint against C&N Stucco and Plastering Inc, also a Florida corporation who also performed stucco repairs in the breezeways.

On April 15, 2011, APS filed a motion for summary judgment as to Professional Plastering’s cross claims based on the fact that Professional Plastering was not a licensed contractor in the state of South Carolina and therefore, was prevented by S.C. Code Ann. 40-11-370(c) from bringing any action at law or in equity. Following oral argument, on April 15, 2011, the circuit court issued an order granting APS’s motion for summary judgment.¹

Prior to the May 9, 2011 start of trial of this case, APS settled with the Homeowner Respondents in exchange for payment of \$100,000. At the time of trial Professional Plastering was the only remaining defendant. The notice of dismissal of the Petitioner Homeowners’ claims against

¹ C&N Stucco also filed a motion for summary judgment as to APS third party complaint based on the same reasoning, which was also granted by the circuit court. Out of an abundance of caution, APS filed a motion to alter or amend which is still pending.

APS was filed with the circuit court on August 8, 2011.

On July 22, 2011, Professional Plastering filed a notice of appeal as to various trial issues, and as to the circuit court's order granting APS's motion for summary judgment on Professional Plastering's cross-claims. This appeal followed.

On October 2013, the Court of Appeals heard oral arguments. On January 2014, the Court of Appeals issued an order among other issues reversing the circuit court's order which granted summary judgment to Petitioner. The Petition for Rehearing was denied on February 20, 2014.

STATEMENT OF THE FACTS

As APS settled with the Petitioner Homeowners, it was not involved in the trial of this matter. Therefore, APS's involvement in the appeal, and this petition for certiorari is limited to the issue of whether S.C. Code Ann. § 40-11-270, prevents an unlicensed contractor from utilizing another unlicensed contractor on a project, and, secondly, whether S.C. Code Ann. § 40-11-370(c), prevents an unlicensed subcontractor from "bring[ing] an action either at law or in equity to enforce the provision of a contract."

As stated above, Professional Plastering was a stucco contractor hired by the general contractor responsible for the project, to perform stucco work during the original construction and stucco repairs during the conversion period of the Fenwick condominiums. (App. 1634, lines 13-25). APS was then hired by Professional Plastering as its subcontractor to perform limited stucco repairs in the breezeways of the buildings during the conversion period. (App.1634, lines 13-25).

In response to the lawsuit filed by the Homeowner Respondents, Professional Plastering

¹ The circuit court also granted third-party defendant C&N Stucco's motion for summary judgment as to APS's claims based on the same reasoning. Out of an abundance of caution, APs filed a Rule 59 motion to alter or amend, which is still pending.

asserted cross claims against APS relating to the work Professional Plastering had hired APS to perform. (App. 214-220). During the course of the litigation, APS filed a motion for summary as to Professional Plastering's cross claims. (App. 227-229).

APS's argument was two-fold, beginning with the basic premise that South Carolina Code Ann. § 40-11-5 et al, governs the profession and occupation of contractors. First, pursuant to the Code, specifically, Section 40-11-270(c), as an unlicensed contractor in the State of South Carolina, Professional Plastering was not authorized to use unlicensed subcontractors to perform work. (App.1636, lines 1-7). Second, as an unlicensed contractor, pursuant to S.C. Code Ann. § 40-11-370, Professional Plastering "may not bring an action either at law or in equity to enforce the provision of a contract." (App.1636, lines 1-7). Following oral argument, the circuit court, granted APS's motion for summary judgment.

The Court of Appeals reversed the order. The Court of Appeals held that because Professional Plastering was not the general contractor for the overall project, it was not subject to the licensing requirements of this State when hiring subcontractors to perform work. Citing Kentucky law, the Court of Appeals further held that the licensing statutes were not applicable to the contract between Professional Plastering and APS because it did not affect public interest.

The Court of Appeals opinion does not recognize the fact that APS had no contractual relationship with Summit, the licensed general contractor for the project. Further, the opinion overlooks the fact that there is no evidence in the record the Summit ever agreed to supervise APS's work for Professional Plastering, let alone, assume responsibility for APS's work. South Carolina Code Ann.§ 40-11-270(c) clearly states that the licensed contractor must not only supervise the unlicensed contractor's work but also requires that the licensed contractor assume responsibility for

any violations of the unlicensed contractor's work.

The Court of Appeals opinion allows a situation in which an unlicensed subcontractor can hire and bring to a job, another unlicensed subcontractor without the knowledge or permission of the licensed general contractor, and disavow any duty to supervise the work. Under the Court of Appeals opinion, the licensed general contractor would be responsible for the work of another to which he did not hire for the project and with whom he had no contractual relationship.

I. ARGUMENT

1. **THE COURT OF APPEALS SHOULD HAVE AFFIRMED THE CIRCUIT COURT'S RULING GRANTING PETITIONOR SUMMARY JUDGMENT BASED ON SC CODE ANN §40-11-270 AND §40-11-370, WHICH PREVENTS UNLICENSED CONTRACTORS FROM UTILIZING OTHER UNLICENSED CONTRACTORS AND FURTHER PREVENTS UNLICENSED CONTRACTORS FROM BRINGING SUIT TO ENFORCE THE PROVISIONS OF THE CONTRACT**

A. **Standard of Review**

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the circuit court under Rule 56, SCRPC. *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Pringle v. SLR, Inc.*, 382 S.C. 397, 403 (S.C. Ct. App. 2009). Rule 56(c), SCRPC. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

However, the issue of interpretation of a statute is a question of law for the court. *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (S.C. 2007) citing *Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) ("The determination of legislative intent is a matter of law."). As such, the Court is "free to decide a question of law with no particular deference to the circuit court." *Id.*

There is no South Carolina case law interpreting the S.C. Code Ann. 40-11-270 and 370 in the context of large construction project in which multiple layers subcontractors are involved. As such, it is necessary to look to the statutes themselves.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989).

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 578, 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*, *supra* at 525-526, 642 S.E.2d at 754. In its interpretation, the Court of Appeals ignored the

South Carolina Code Ann. § 40-11-20 et al, governs the profession and occupation of contractors. At the onset of the chapter, in creating the South Carolina Contractor's licensing Board to oversee the administration of the chapter, the code states,

The purpose of this board is to protect the health, safety and welfare of the public through the regulation of businesses and individuals who identify, assess, and provide contract work to individuals or other legal entities through the administration and enforcement of this chapter and any regulation promulgated under this chapter

As such, in our state, “[n]o entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting² or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.” S.C. Code § 40-11-30 (2011). “General Contractor is defined as “an entity which performs or supervises or offers to perform or supervise general construction.” S.C. Code Ann. § 40-11-20(9). “General construction is further defined as “the installation, replacement, or repair of a building, structure, highway, sewer, grading, asphalt or concrete paving or improvement of any kind to real property.”

In furtherance of this mission of “protect[ing] the health, safety and welfare of the public,” the code specifically provides that only licensed contractors in the State may hire unlicensed subcontractors. Section § 40-11-270(c), states,

Licensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee’s license group and license classification or sub classification; provided, the licensee provides supervision. The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the license.

As the code states, the reasoning for allowing the use of these unlicensed contractors is because “[t]he licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the license.” *Id.*

A contractor who chooses not to become licensed in this state, proceeds at its own peril. S.C. Code Ann. § 40-11-370(C), specifically, unambiguously states, “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.”

There is no dispute that Professional Plastering is not a licensed South Carolina Contractor.

As such, the plain, unambiguous language of S.C. Code Ann. § 40-11-370(C), should prevent Professional Plastering from asserting cross claims against APS.

However, the Court of Appeals held that S.C. Code Ann. § 40-11-270 and 40-11-370(C), were not applicable, because Professional Plastering was not the general contractor for the Fenwick project; therefore, it was not required to obtain a license in the State of South Carolina in order to hire an unlicensed subcontractor. In so holding, the Court of Appeals overlooked two key provisions; first the fact that only licensed contractors may utilize unlicensed contractors and second, that the licensed contractor oversee and assume responsibility for the work of the unlicensed contractor.

Summit was the general contractor for the Fenwick project and was licensed in the State of South Carolina pursuant to S.C. Code Ann. § 40-11-5 et seq. Pursuant to Section §40-11-270, as a “licensee,” Summit was authorized to hire unlicensed subcontractors such as Professional Plastering. Under this scenario, Professional Plastering would not be required to become licensed in South Carolina to perform work on the project. Summit as the license holder and entity with the contractual relationship with Professional Plastering would be responsible for the work.

However, when Professional Plastering made the decision to hire its own subcontractor to perform the stucco repairs and entered into a contract with APS, its role expanded to that of “general contractor” defined by the code. *See* S.C. Code Ann. § 40-11-20(8) and (9). In this situation,

² There is no dispute that the cost of the work was greater than \$5,000.

Professional Plastering was required to become licensed not only to hire an unlicensed contractor, (such as APS), but also to avail itself of the privilege of utilizing the South Carolina court system to enforce any contracts in which it entered. Professional Plastering cannot shield itself from the licensing requirements of this State, and its responsibility to oversee its subcontractor by relying on the license of Summit, an entity that has no contractual relationship with APS.

The Court of Appeals held that “Summit was allowed to utilize APS’s services even though it was unlicensed.” However, that is not the issue in the case nor factually correct. Summit did not bring APS to the job or enter into a contract with APS.

The Court of Appeals holding is seemingly based on the mistaken believe that Summit, the licensed general contractor agreed to supervise APS’s work. In the opinion, the court cites to an excerpt of testimony of Tacy McGinty, to support its holding that “Summit would provide materials and supervise the work at the breezeway.” However, a full reading the testimony, reveals that Summit’s responsibility only extended to Professional Plastering.

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.

(App. 243-250) (emphasis added).

There is no evidence that Summit Contractors hired APS, entered into a contractual relationship with APS or agreed to relieve Professional Plastering of the duty and responsibility

to supervise its subcontractor. Moreover, the full reading of McGinty's testimony demonstrates that Summit was supervising Professional Plastering, the entity which it had a contractual relationship to do the work.

The Court of Appeals opinion creates a situation which allows unlicensed contractors who are properly employed by the licensed general contractor, to enter into separate contracts with other unlicensed contractors absent the consent or knowledge of the licensed general contractor. The opinion further allows that unlicensed contractor to disclaim any responsibility to supervise its subcontractors work.

2. THE COURT OF APPEALS' 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 Court of Appeals' opinion improperly holds that the licensing statute was not applicable to a contract between contractors because it did not affect the "public interest."³

The Court relied on *Kenroy 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 *Kenroy* was over a monetary fee between the two professional parties to

³ I note that this issue was not raised or argued by Professional Plastering.

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 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?

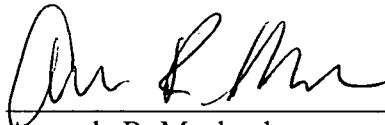
Not only is there a "public interest" in ensuring unlicensed contractors are supervised by contractors licensed by the State of South Carolina, but the Court's interpretation of the statute is in direct conflict with the statute itself and with the evidence in the record. Particularly, S.C. Code Ann. § 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 reasons stated above, APS respectfully requests the Court to grant the petition for a writ of certiorari.

Respectfully submitted,



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Of whom APS Unlimited, Inc. is the Petitioner.

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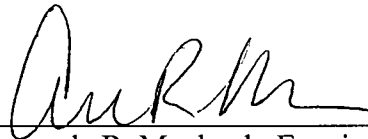
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