

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2014-000615

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

v.

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

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

Professional Plastering & Stucco, Inc., Respondent

v.

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

Of whom APS Unlimited, Inc. is the Petitioner.

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S.C. SUPREME COURT

**RESPONDENT'S RETURN TO APS UNLIMITED, INC.'S
PETITION FOR WRIT OF CERTIORARI**

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STATEMENT OF FACTS

This is a construction defects lawsuit involving the Twelve Oaks at Fenwick Plantation condominium complex located on Johns Island, South Carolina. Professional Plastering served as a stucco subcontractor during the construction of the project as apartments. The apartments were completed in 2002, and then converted to condominiums in 2006. On or about January 4, 2008, Mark F. and Nan M. Teseniar, on behalf of themselves and others similarly situated, (“Teseniar”) filed a civil action alleging design and construction defects, and resulting water intrusion damages, within the buildings comprising the Twelve Oaks at Fenwick Plantation Horizontal Property Regime (“the project”) (App. p. 79). Teseniar filed the civil action initially against the developers but thereafter amended their complaint to include numerous other parties involved in the design and construction of the buildings, including the architect, general contractor, Summit Contractors, Inc.(“Summit”) and subcontractors, including Professional Plastering & Stucco, Inc. (“Professional Plastering”) On March 28, 2008 the Twelve Oaks Property Owners Association (the “POA”) filed a separate lawsuit alleging design and construction defects, and resulting water intrusion damages to the buildings commonly held areas. The two suits by Teseniar and the POA were consolidated on October 10, 2008. (App. p. 8).

On April 1, 2010, Professional Plastering filed a Cross-Claim against its subcontractor APS Enterprises Unlimited, Inc. (hereinafter “APS”) asserting claims for negligence, breach of warranties, breach of contract, and indemnity. Professional Plastering hired APS to provide additional labor for the stucco installation during the repairs of the breezeways in 2003-2004. APS filed a motion for Summary Judgment

against Professional Plastering on the basis that Professional Plastering was not a licensed stucco installer, and therefore could not maintain an action against APS. (App. p. 227-229, APS' Motion for Summary Judgment). APS cited §§40-11-270 and 40-11-370 of the S.C. Code of Laws in support of its motion. Professional Plastering's position in opposition to the motion was that the licensing requirements under the statute only applies to general or mechanical contractors, which Professional Plastering was not, and therefore Professional Plastering was not required to hold a license. (App. p. 230-250; Transcript of Hearing to Reconstruct the Record p. 17:9 – 18:24). However, the trial court ruled that because Professional Plastering does not have a license, it may not maintain its claims against APS and summary judgment should be granted. (App. p. 68, Order Granting APS' Motion for Summary Judgment). Professional Plastering subsequently filed a Motion to Alter or Amend the Judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. This motion was denied by Judge Harrington on July 19, 2011 (App. p. 73, Order Denying 59(e) Motions). Professional Plastering appealed the order granting APS's Motion for Summary Judgment and the order denying Professional Plastering's Rule 59(e) Motion to Alter or Amend the Judgment. Oral arguments were held on this matter on October 17, 2013. In its Order of January 8, 2014, the Court of Appeals reversed the trial court's grant of summary judgment finding that Professional Plastering was not required to have a license under the statute, and therefore they were not precluded from bringing a claim against APS. APS subsequently filed this petition for writ of certiorari.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY REVERSED THE DECISION OF THE TRIAL COURT TO GRANT PETITIONER'S MOTION FOR SUMMARY JUDGMENT.

In reviewing the grant of a summary judgment motion, the appellate court applies “the same standard which governs the trial court under Rule 56(c), SCRPC: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319 (2001) (quoting *Baughman v. America Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537 (1991)). Where a question of law is involved, the Court is free to decide the question of law with no particular deference to the trial court. *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 524, 642 S.E.2d. 751 (2007). The interpretation of a statute is a question of law. *Id.*

“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993)). “A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute.” *Liberty Mut. Ins. Co. v. S. Carolina Second Injury Fund*, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005). “Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.” *Hodges*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) “Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.*

Chapter 11 of Title 40, South Carolina Code of Laws governs the issue of whether Professional Plastering may maintain a cross-claim against APS if they are not licensed. The meaning of this statute, on its face, is clear and unambiguous. The Court of Appeals properly applied the statute and determined that Professional Plastering was not barred from bringing an action at law or in equity against APS.

S.C. Code § 40-11-370(c) provides that “[a]n 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...” S.C. Code § 40-11-370(c)(emphasis added). Under the clear and unambiguous language of the statute, S.C. Code § 40-11-370(c) does not apply to Respondent because Respondent was not required by Chapter 11 of Title 40, South Carolina Code of Laws to have a license.

Under the “Definitions” section of this statute, “contractor” is defined as “a general or mechanical contractor regulated under this chapter.” S.C. Code Ann. § 40-11-20(4) (2011). S.C. Code Ann. § 40-11-20(9) defines “general contractor” 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 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.” S.C. Code Ann. § 40-11-20(8).

The statute defines a "licensed contractor" as “an entity that is licensed by the South Carolina Contractor's Licensing Board to engage in general or mechanical contracting within the State.” S.C. Code Ann. § 40-11-20 (13). An “unlicensed

contractor” is defined as “an entity performing or overseeing general or mechanical construction without a license.” S.C. Code Ann. § 40-11-20 (24).

S.C. Code Ann. § 40-11-270(C) provides:

Licensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee's license group and license classification or subclassification; 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 licensee.

S.C. Code Ann. § 40-11-270(C). Summit, acting as general contractor, was the license holder for the Twelve Oaks project. The Court of Appeals properly determined that Professional Plastering was not required to have a license because it lawfully performed work at the project as an “unlicensed subcontractor” as permitted under S.C. Code Ann. § 40-11-270(C).

APS agrees that Professional Plastering was not required to have a license to work as a subcontractor of Summit under their supervision but argues that the scenario changed when Professional Plastering hired APS as a subcontractor. APS argues that Professional Plastering then somehow became a general contractor. However, this is not the case. Under the statute, subcontractor includes both those hired by the general contractor and the subcontractors hired by the subcontractors. S.C. Code Ann. § 40-11-20(22) defines subcontract as an “entity who contracts to perform construction services for a prime contractor or another subcontractor.” S.C. Code Ann. § 40-11-20(22). Therefore, Professional Plastering would not fall under the definition of general contractor. They are still classified as a subcontractor. *See* S.C. Code Ann. § 40-11-20(22). Furthermore, supervision of the work performed by APS remained the responsibility of Summit. APS

provided labor for work performed on the stucco in the breezeways. Tacy McGinty, the 30(b)(6) representative of Summit, admitted that Summit had agreed to provide material and supervision for work done at the breezeway, and to accept responsibility for obtaining engineering approval for the work. McGinty testified:

Q. Okay. Now, in the fax that you wrote you have that the installation of flashing under the Magna Wall stucco and paper backed lath at the breezeway bottom edges will be the responsibility of Summit Contractors, Inc., correct?

A. Correct.

Q. And then you go on to state that you are requesting the use of labor only from your company, Professional Plastering, correct?

A. Correct.

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.

(App. p. 249:17 – 250:6).

The actual labor for the work referenced by McGinty was performed by APS under Summit's supervision. APS was hired by Professional Plastering to provide labor for Summit. The supervision by Summit encompassed the work performed by APS or any other personnel provided by Professional for the job. APS argues that McGinty's testimony does not include supervision of APS. However, McGinty's testimony does not limit Summit's supervision of the work at the breezeways to Professional Plastering. The supervision would encompass APS as well because Summit was requesting **labor only**. The Court of Appeals correctly determined Summit, the general contractor, was

responsible for the supervision of the repairs at the breezeways not Professional Plastering.

Under a clear reading of the statute, Professional Plastering was not required to have a license in order to maintain its claims against APS. The Court of Appeals properly determined that Professional Plastering was not barred from bringing claims against APS. Professional Plastering respectfully requests APS' petition for certiorari be denied.

II. THE COURT OF APPEALS ORDER DOES NOT MISAPPREHEND THE APPLICATION OF S.C. CODE ANN. 40-11-5 *et seq.* BY HOLDING THAT THE STATUTE IS INAPPLICABLE TO A CONTRACT BETWEEN CONTRACTORS DUE TO LACK OF EFFECT ON PUBLIC INTEREST.

Even though an analysis of public policy is not necessary given the Court of Appeals determination that under the plain language of the statute Professional Plastering was not required to hold a license, we will address it since the Court of Appeals did provide comments regarding public policy in its order. The Court of Appeals citing *Kennoy v. Graves*, 300 S.W.2d568 (Ky. App. 1957) properly noted that the licensing statutes at issue are intended to protect the public interest, and the public interest is not affected by denying enforceability of claims between contractors. *See* S.C. Code Ann. § 40-1-10(A)-(B) (2011). "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 arm's length with each other." *Kennoy v. Graves*, 300 S.W.2d 568, 570 (Ky. App. 1957). Similar to *Kennoy v. Graves*, APS' sole basis for denying liability was that Professional Plastering was unlicensed and


therefore should not be able to recover against APS. The public interest is not affected by this claim. This claim does not involve one between a homeowner or other member of the public and a contractor. The only two parties affected are two contractors, APS and Professional Plastering, who are on equal footing. Similarly to Professional Plastering, APS also was unlicensed and hired a subcontractor to perform work for it. APS did not place any reliance on Professional Plastering being a licensed contractor. The Court of Appeals properly determined that the purpose of protecting the public interest does not exist when dealing with claims between contractors.

CONCLUSION

For the reasons set forth above, Professional Plastering respectfully requests APS' petition for writ of certiorari be denied.

Respectfully submitted,

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I certify that I have served Respondent's Return to APS Unlimited, Inc.'s Petition for Writ of Certiorari on this date to the following counsel of record in the manner specified below:

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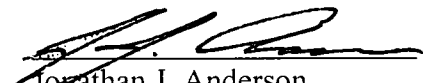
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