THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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S.C. Supreme Court

William P. Keesley, Circuit Court Judge

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394 S.C. 519, 716 S.E.2d 678 (Ct. App. 2011)

Case Tracking No. 2011-195907

C-Sculptures, LLC, ... Respondent,

v.

Gregory A. Brown and Kerry W. Brown,. .... Petitioners.

BRIEF OF PETITIONER

John S. Nichols
SC Bar No. 4210
Bluestein, Nichols, Thompson & Delgado, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599

Attorney for Petitioners

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QUESTIONS PRESENTED FOR REVIEW

A. Did the Court of Appeals err in affirming the circuit court's order which upheld the arbitrator's decision not to dismiss the mechanic's lien action because the Court of Appeals viewed the enforcement provisions of South Carolina Code Ann. § 40-11-370(c) (2011) as not "well defined, explicit, and clearly applicable" to this case?

B. Did the Court of Appeals err in affirming the circuit court's order which erroneously upheld the arbitrator's finding that Contractor was the "prevailing party" for purposes of S.C. Code Ann. § 29-5-10(b)(2007) under the facts of this case?

STATEMENT OF THE CASE

On September 10, 2005, C-Sculptures, LLC ("Contractor") filed and served a Notice and Certificate of Mechanic's Lien against the home of Gregory A. Brown and Kerry W. Brown ("Owners"). Contractor asserted it was owed $39,357.48 for work done.

On January 20, 2006, Contractor filed a Notice and Certificate of Lis Pendens regarding foreclosure of its mechanic's lien. Contractor also filed an Amended Notice and Certificate of Mechanic's Lien asserting Owners owed Contractor $150,092.69 based upon a sworn Amended Statement of Account. That same date, Contractor filed a Complaint against Owners seeking foreclosure of its mechanic's lien. Contractor also alleged a statutory violation for failure to make undisputed payments on the claims. Contractor again alleged that Owners owed $150,092.69 for work Contractor performed on Owners' home. (Complaint, ¶ 17, R. p. 51).

On March 10, 2006, Owners moved to dismiss the civil action and submit the matter to arbitration pursuant to the parties' agreement. On June 14, 2006, the circuit court entered a consent order to stay the action pending arbitration. (R. p. 1).

On July 26, 2006, Contractor filed an Amended Complaint, and once again asserted a balance due of $150,092.69. (R. p. 138, ¶ 17).

On October 10, 2006, Owners moved to dismiss Contractor's claims for quantum meruit and violation of the South Carolina Unfair Trade Practices Act. On October 23, 2006, the arbitrator issued an order dismissing the quantum meruit claim but denying the motion to dismiss the Unfair Trade Practices claim.

On November 6, 2006, Contractor filed its Pre-Arbitration Brief in support of its claims. In the brief, Contractor again asserted Owners owed $150,092.69 for work under the contract. (R. pp. 151, 157, 161). Contractor acknowledged that Owners asserted that they were due credits based upon various factors, including $55,900 paid directly to vendors, $5,250 retainage previously billed, and other amounts not due.

On November 8, 2006, Owners filed their Prehearing Brief, outlining the credits they should receive against Contractor's claims. (R. p. 164-174). Owners also filed a Motion to Dismiss on the ground Contractor was not appropriately licensed under South Carolina law. (R. p. 175-180).

Following a week-long hearing that began November 13, 2006, the Arbitrator entered his order: (1) permitting Contractor to amend its claim to reflect the credits claimed by Owner totaling $59,845.00, reducing the "amount claimed in the arbitration" from $150,092.69 to $90,155.00 (the actual result is $90,247.69); (2) denying Owners' motion to dismiss under the licensing statutes; (3) finding the balance due to be $85,863.00; (4) denying Contractor's claim under the SC Unfair Trade Practices Act; (5) finding in favor of Owners for credits of $34,132.50; (6) finding Contractor was due

$51,730.50 under the contract; (7) awarding Contractor interest of $10,484.74 under the contract; and (8) finding Contractor to be the "prevailing party" under Sections 29-5-10 and 27-1-15 of the Code so as to support an award of attorney's fees of $24,707.00 and costs of $2,698.84. Accordingly, the arbitrator awarded Contractor $89,621.08 and ordered Owners to reimburse Contractor for their share of the administrative fees and expenses of the arbitration. (R. pp. 4-6)

On January 8, 2007, Owners filed a Motion and Petition to Vacate Arbitration Award with the circuit court. Owners asserted the arbitrator erred in denying their motion to dismiss Contractor's claim, erred in permitting Contractor to amend its demand for arbitration for purposes of § 29-5-10 (attorney fee statute), and erred in finding Contractor was the "prevailing party" for purposes of the attorney fee statute. (R. p. 216).

On March 14, 2007, the circuit court entered a brief order denying Owners' Motion to Vacate the Arbitration Award. On July 9, 2007, the circuit court entered a more complete order denying Owners' motion. (R. pp. 8-9). On July 20, 2007, Owners moved the circuit court to reconsider its ruling, to alter or amend that ruling, and to vacate the arbitration award. On January 8, 2008, the circuit court entered its order denying Owners' motion. (R. pp. 10-18).

Owners served a Notice of Appeal on February 8, 2008. Following oral argument the Court of Appeals affirmed the circuit court order. Owners sought rehearing but the Court of Appeals denied their petition in an amended opinion (the Court corrected a scrivener's error in a footnote). *C-Sculptures, LLC v. Brown*, 394 S.C. 519, 716 S.E.2d 678 (Ct. App. 2011). This petition for writ of certiorari followed.

FACTS

On January 28, 2005, the parties entered into an agreement for Contractor to complete work on Owners' home in Hopkins, South Carolina. (R. p. 55). Previously, Contractor had presented the Owners with a proposed budget for the work exceeding $800,000. The basis of payment was the cost of the work, plus a management fee, without a guaranteed maximum. (R. p. 57, § 5.1). The management fee was set at $2,500 per week. (R. pp. 57-58, § 5.2). Claims and disputes under the Agreement were to be resolved by mediation or by arbitration. (R. p. 64, § 14.6).

The Addendum to the agreement provided, in relevant part:

> 13. In the event that any party shall bring an action to enforce the terms of this Agreement or to declare rights hereunder, the **prevailing party** in any such action shall be entitled to its actual costs and reasonable attorneys' fees to be paid by the non-prevailing party as fixed by the court or arbitration panel having jurisdiction over the matter, including, but not limited to, attorneys' fees and costs incurred in courts of original jurisdiction, bankruptcy courts, or appellate courts.

(R.p. 66, ¶ 13) (bold added). "Prevailing party" is not defined in the Agreement.

Thereafter a dispute arose between the parties, and Contractor last performed any work on the property on September 13, 2005. (R.p. 49, ¶ 6). On January 18, 2006, Contractor filed an Amended Notice and Certificate of Mechanic's Lien claiming it was owed $150,092.69 for labor and materials Contractor supplied and furnished pursuant to the Agreement. (R.p. 44). At the same time Contractor filed and served an action seeking foreclosure of a mechanic's lien to collect the stated sum of $150,092.69. (R.p. 51, ¶ 17). Contractor also claimed Owners violated S.C. Code Ann. § 27-1-15, and sought an award of attorneys' fees and costs pursuant to that statute. (R.pp. 51-52, ¶¶ 18-22; prayer ¶ B).

Contractor attached an Amended Statement of Account asserting it invoiced Owners $1,032,897.41, provided credits of $882,804.72, and the total due was $150,092.69. (R.p. 80).

Owners moved the court to dismiss or stay the matter pending arbitration of all claims. On June 14, 2006, the parties entered a consent order to stay the action pending submission to arbitration. (R.p. 1). On June 16, 2006, Contractor submitted a Demand for Arbitration pursuant to an American Arbitration Association form. (R.p. 86).

On July 26, 2006, Contractor filed and served an Amended Complaint adding a claim for violation of the South Carolina Unfair Trade Practices Act. (R.p. 136). The remainder of the complaint remained the same from the original, including Contractor's assertion that it was owed $150,092.69 under the contract and attorneys' fees and costs under S.C. Code Ann. § 27-1-15. (R.p. 138)

On November 6, 2006, just prior to trial, Contractor filed its Pre-Arbitration Brief in support of its claims. In the brief, Contractor once again asserted Owners owed $150,092.69 for work under the contract. (R.p. 151, 157, 161). Contractor acknowledged Owners asserted they were due credits based upon various factors, including $55,900 paid directly to vendors, $5,250 retainage previously billed, and other amounts not due (*i.e.*, $61,150.00 in claimed offsets). (R.p. 156).

The matter was heard from November 13 through November 17, 2006. (R.p. 3). On the first day of the arbitration hearing, the parties stipulated Owners were entitled to receive credits totaling $59,845.00 related to Owners' payment of portions of the amounts claimed by Contractor. (R.p. 4). Contractor then moved to amend its demand in its claim

from $150,092.69 to $90,155.00. (R.p. 4). Owners objected, specifically citing the "prevailing party" procedure for the award of attorneys' fees and costs under South Carolina law, and claiming Contractor's tactic of repeatedly claiming $150,092.69 and then at the hearing acknowledging the credits Owners claimed the entire time subverted the policies underlying that procedure. The arbitrator, however, granted the motion and permitted Contractor to amend its claim from the amount in the Demand ($150,092.69) to $90,155.00.

Owners learned from the first day's testimony that Contractor was not a residential builder, but held a license as a General Contractor under a classification of "building" and in "Group Two." (R.p. 217, ¶ 12). Group Two contractors are restricted to bids and jobs not to exceed $100,000. (R.p. 175). Owners actually paid Contractor over $882,000. (R.p. 175). Owners moved to dismiss the matter, asserting that Contractor was effectively unlicensed because it had exceeded its licensing authority, and the Agreement was void and unenforceable. (R.pp. 176-180). The arbitrator, however, denied the motion to dismiss "after due consideration of all the evidence and authorities presented by the parties in the Arbitration." (R.p. 4, ¶ 2).

Thereafter the arbitrator held the actual amount due under Contractor's claim was $85,863.00 when the $59,845.00 was deducted from the Contract Balance less total paid. (R.p. 4, ¶ 3). The arbitrator then outlined credits Owners were due as offsets which totaled $34,132.50. (R.p. 5, ¶ 5). Accordingly, the arbitrator found Contractor was entitled to payment of $51,730.50. (R.p. 5, ¶ 6).

The arbitrator also found Contractor was the "prevailing party" pursuant to S.C.

Code Ann. § 29-5-10 (Supp. 2005) as well as under the parties' contract. The arbitrator therefore awarded Contractor attorney's fees and costs pursuant to § 29-5-10, in accordance with the Agreement, and in accordance with S.C. Code Ann. § 27-1-15. (R.p. 6).

Owners filed a Motion and Petition to Vacate Arbitration Award, asserting the arbitrator manifestly disregarded the law in refusing to dismiss the matter under the licensing statute, and in finding Contractor to be the "prevailing party" for purposes of awarding attorney's fees. (R.pp. 218-232). The circuit court confirmed the award. (R.pp. 10-18).

Owners appealed and the Court of Appeals affirmed. *C-Sculptures, LLC v. Brown*, 394 S.C. 519, 716 S.E.2d 678 (Ct. App. 2011). (Appx. pp. 1-9). Owners then petitioned this Court to review the Court of Appeals decision, and the Court granted the petition.

ARGUMENTS

I. THE COURT OF APPEALS SHOULD NOT HAVE AFFIRMED THE CIRCUIT COURT'S ORDER BECAUSE THE ENFORCEMENT PROVISIONS OF SOUTH CAROLINA CODE ANN. § 40-11-370(C) (2011) WERE "WELL DEFINED, EXPLICIT, AND CLEARLY APPLICABLE" TO THIS CASE

The Court of Appeals erred in finding the scope of judicial review precluded the Court from reversing the circuit court (and hence the arbitrator's) decision in this matter. The applicable law is, in fact, well-defined, explicit and clearly applicable to this case, so that the arbitrator manifestly disregarded the law in refusing to apply it to this case.

Owners learned from the first day's testimony before the arbitrator that Contractor was not a licensed residential builder, but instead held a license as a General Contractor under a classification of "building" and in "Group Two." (R.p. 217, ¶ 12). Group Two contractors are restricted to bids and jobs not to exceed $100,000. S.C. Code Ann. § 40-11-260 (1998) (Group Two general contractors limited to contracts not to exceed $100,000); S.C. Code Ann. § 40-11-270 (1998) (licensee confined to limitations of the licensee's license group and license classifications or subclassifications as provided in the chapter). Owners actually paid Contractor over $882,000 under their agreement. (R.p. 4, ¶ 3). Once Owners discovered Contractor was not properly licensed, Owners moved to dismiss the matter, asserting that Contractor was effectively unlicensed because it had exceeded its licensing authority, and the Agreement was therefore void and unenforceable. The arbitrator, however, denied the motion to dismiss "after due consideration of all the evidence and authorities presented by the parties in the Arbitration." (R.p. 4, ¶ 2).

The Court of Appeals noted that the Owners' contention about the invalidity of

the Contractor's license "may be correct," but held the law on the issue was not "perfectly clear" because "no cases are directly on point...." *C-Sculptures*, at 525, 716 S.E.2d at 681 (Appx. p. 7). Thus, the Court found the arbitrator did not manifestly disregard the law since there was no "governing" principle the arbitrator refused to apply. *Id.*, at 525-526, 716 S.E.2d at 681 (Appx. p. 7). This holding is contrary to the plain language of the applicable statute as well as the jurisprudence from this Court and from the Court of Appeals.

The statute itself, S.C. Code Ann. § 40-11-370 (C), instructs "[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." (Emphasis added). The code section therefore plainly provides a statutory prohibition against the enforcement of contracts and mechanic's liens by a non-complying contractor. *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 703 S.E.2d 221 (2010).

This Court has held that these licensing door-closing statutes are plain and unambiguous and should be applied literally. *Duckworth v. Cameron*, 270 S.C. 647, 244 S.E.2d 217 (1978) (construing predecessor to current S.C. Code Ann. § 40-59-30(B) (2011)); *See also Lenz v. Walsh*, 362 S.C. 603, 607, 608 S.E.2d 471, 472-473 (Ct. App. 2005) ("Our supreme court has stated that, because the statute is plain and unambiguous, it should be applied literally..."). In *Duckworth*, this Court stated, "[i]t is our opinion that § 40-59-130 [now § 40-59-30(B)] is clear and unambiguous. Any builder who violates the chapter by entering into a contract for home construction without obtaining *the required license* simply cannot enforce the contract."270 S.C. at 649, 244 S.E.2d at 218

(emphasis added). *See also Skiba v. Gessner*, 374 S.C. 208, 648 S.E.2d 605 (2007) (noting trial court "correctly dismissed" contractor's action pursuant to S.C. Code Ann. 40-11-370 because contractor did not have a *valid* license at the time work was performed so that contract was illegal).

This Court has indicated that "substantial compliance" with these statutes is not sufficient. *See Burry & Son Homebuilders, Inc. v. Ford*, 310 S.C. 529, 532, 426 S.E.2d 313, 315 (1992) (Court declined to address "substantial compliance" argument, finding the facts of the case would not "raise even a colorable argument for substantial compliance"; Court added that the mandate of § 40-59-130 [now § 40-59-30(B)] was "clear and unambiguous"). *But see Costa and Sons Construction Co., Inc. v. Long*, 306 S.C. 465, 412 S.E.2d 450 (Ct. App. 1991) (Court of Appeals agreed with circuit court that where owner of company maintained general contractor's license, the company demonstrated "sufficient compliance" with S.C. Code Ann. § 40-59-140 (exempting any person licensed as a general contractor from the requirements of the residential home builders statutes)).

Settled law in South Carolina also provides that contracts entered in violation of South Carolina law are illegal, void, and unenforceable. *See, e.g.*, *Ward v. West Oil Co., Inc.*, 387 S.C. 268, 274, 692 S.E.2d 516, 519-520 (2010) (Supreme Court noted that an appellate court takes its own notice of anything contrary to public policy if it appears from the pleadings or evidence, and that a plaintiff will be denied relief "for to hold otherwise would be to enforce inappropriately an illegal agreement"); *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004) ("The general

rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions."); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002) (holding that illegal contracts are void and unenforceable, such that actions for its breach may not be maintained). As Chief Justice Toal stated recently:

> It is a well-settled principle of contract law that "a contract to do an act which is prohibited by statute, or which is contrary to public policy, is void, and cannot be enforced in a court of justice." *McConnell v. Kitchens*, 20 S.C. 430, 437-38 (1884); *see also Pendarvis v. Berry*, 214 S.C. 363, 369, 52 S.E.2d 705, 707 (1949) ("'Men may enter into any agreements they please and, as between themselves, may either respect or disregard them. When, however, they are submitted to the courts for adjudication, they must be tested and governed by the law.'") (quoting *Gilliland v. Phillips*, 1 S.C. 152 (1869)). [Where a contract is illegal and wholly unenforceable] the parties must be left as the court found them. *See* 17A C.J.S Contracts § 362 (2011) ("As a general rule, both at law and in equity, a court will not aid either party to an illegal contract ... but leaves the parties where it finds them.").

Atlantic Coast Builders and Contractors, LLC v. Lewis, Op. No. 27044 (S.C. Sup. Ct. filed May 16, 2012) (Shearouse Adv. Sh. No. 17 at 15, 26) (Toal, CJ, concurring and dissenting). *See also W&N Construction Co., Inc. v. Williams*, 322 S.C. 448, 472 S.E.2d 622 (1996) (no person should be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act); *Wagner v. Graham*, 296 S.C. 1, 370 S.E.2d 95 (Ct. App. 1988) (applying bar to recovery even though homeowner knew contractor was not licensed). Cf. *McMullen v. Hoffman*, 174 U.S. 639, 654 (1899) ("The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards

carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract."). Contractor entered into the agreement in violation of statutory law as well as public policy and should not have recovered damages as a consequence of that act.

Also, the fact that Contractor may be subject to civil or criminal penalties for its violation of the statute should not control. To permit an unlicensed contractor to circumvent licensing requirements by payment of a small fine would defeat the legislative intent and not serve the policy of protecting the public. *W&N Construction Co., Inc. v. Williams*, 322 S.C. at 450, 472 S.E.2d at 623 (the licensing statutes protect the public and to permit unlicensed contractors to circumvent licensing requirements by payment of a small fine would defeat legislative intent); *Watson v. Harmon*, 280 S.C. 214, 312 S.E.2d 8 (Ct. App. 1984) (a purpose of the statute and regulations governing the licensing of residential home builders is "to protect the home-buying public from financially irresponsible builders").

Furthermore, published decisions of the South Carolina Chief Procurement Officer hold that subcontractors who are not properly licensed in South Carolina are "unqualified subcontractors" for purposes of invitations for competitive bidding. (R. pp. 23-40). These decisions demonstrate that a contractor who is not properly licensed pursuant to Chapter 11 of Title 40 is not considered a qualifying contractor, *i.e.*, is considered "unlicensed" in South Carolina.

There is no dispute that Contractor did not have a *valid* license as required by

Chapter 11 of Title 40. Contractor was "under-licensed," and was not authorized to perform the work that Contractor agreed to perform. Therefore Contractor did not have a "valid" license as required by Chapter 11. The language of the statute is perfectly clear: Contractor may not bring any action to enforce its contract because it did not have a valid license as required by South Carolina law. The contract was illegal and not enforceable under South Carolina statutory and case law.

This Court has long announced that it will not "lend its assistance" to carry out the terms of a contract that violates statutory law or public policy. *Ward v. West Oil Co., Inc.*, at 274, 692 S.E.2d at 519-520, citing *McMullen v. Hoffman*, 174 U.S. at 654 ("The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract."); *White v. J.M. Brown Amusement Co.*, at 371, 601 S.E.2d at 345 ("The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions."); *Beach Co. v. Twillman, Ltd.*, at 64, 566 S.E.2d at 866 (holding that illegal contracts are void and unenforceable, such that actions for its breach may not be maintained). *Accord Jackson v. Bi–Lo Stores, Inc.*, 313 S.C. 272, 276, 437 S.E.2d 168, 170 (Ct. App.1993) (quoting *McMullen*). See also *Berkebile v. Outen*, 311 S.C. 50, 54 n. 2, 426 S.E.2d 760, 762 n. 2 (1993) (recognizing that an illegal contract has

always been unenforceable and that South Carolina courts will not enforce a contract which is violative of public policy, statutory law or provisions of the constitution).

The fact that this particular situation – the arbitration of an invalid contract that was entered in violation of statutory law – has never been addressed by an appellate court does not render the applicable law unsettled, lacking in clarity, or lacking definition. The statute in and of itself is clear, defined, explicit and unquestionably applicable. The arbitrator simply chose not to apply the plain language of the statute, and that decision demonstrates a manifest disregard of the express, clear and unequivocal language of the law. The arbitrator, for reasons known only to the arbitrator, decided to ignore the statute and refused to apply its plain language to this case.

Refusing to apply the clear and correct law is equal to a manifest disregard of the law. *Gissel v. Hart*, 382 S.C. 235, 676 S.E.2d 320 (2009) (an arbitrator's "manifest disregard of the law," as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it). *Cf. Young v. Hyman Motors*, 199 S.C. 233, 19 S.E.2d 109 (1942) (a conclusion of fact which has no reasonable basis in the evidence is an error of law); *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986) (a trial court abuses its discretion when its decision is controlled by an error of law or, if based on factual conclusions, is without evidentiary support). The arbitrator in this case was made aware of the applicable law and acknowledged as much; he simply chose not to apply it. There can be no clearer "manifest disregard of the law" than occurred in this case.

If the decision in this case is permitted to stand, an arbitrator could decide that he

or she will not apply the applicable law and the courts would be powerless to modify that decision. For instance, if an arbitrator decided the applicable statute of limitations was unfair and decided to ignore it, the courts could not remedy the situation. An arbitrator might also decide that a legislatively imposed limitation on recovery (including a cap on damages) should not apply, and so long as there was no case on point, the courts would have to permit the erroneous application of the law to stand. This cannot be correct. Even in arbitration, litigants have to be able to expect that the law is the law, and that where the law is clear, the law will be properly applied in a predictable manner. *Cf. Doe v. Howe*, 367 S.C. 432, 441, 626 S.E.2d 25, 29 (Ct. App. 2005) ("What every litigant has a right to expect from a judge is that he or she be fair and...he or she give the litigant his or her due, no more and no less."). *See also Aurora v. Belinger*, 180 Ohio App.3d 178, 189, 904 N.E.2d 916, 924 (Ohio App. 11 Dist. 2008) ("The public and the litigants have a right to expect impartial disposition of cases in accord with the constitution, laws, and rules of court"); *Dietrich v. Texas Nat. Petroleum Co.*, 6 Storey 435, 459, 193 A.2d 579, 591 (Del. Super. 1963) ("Litigants in a Court of law have the right to expect some certainty in the legal principles which can apply to and control their cases.").

Owners advised the arbitrator of the applicable law and had a right to expect the arbitrator to follow it. The arbitrator manifestly disregarded that law, and both the circuit court and the Court of Appeals sanctioned that decision. This Court should reverse the Court of Appeals' decision and remand the matter with instructions to the circuit court to reverse the arbitrator's decision and dismiss Contractor's claims with prejudice.

II. Under the facts of this case, the Court of Appeals erroneously upheld the circuit court's order which upheld the arbitrator's finding that C-Sculptures was the prevailing party for purposes of S.C. Code Ann. § 29-5-10(B)(2007), the mechanic's lien attorney fee statute

The Court of Appeals ruled that the arbitrator acted within his discretion in permitting the Contractor to delay its "offer" (asserted by pleading only) until the day of the arbitration hearing and then amend its pleading at trial so that it could serve as the offer under S.C. Code Ann. § 29-5-10(B) (2007), the mechanic's lien attorney fee statute. Under the facts and circumstances of this case, the Court should find that what the Contractor did here was fundamentally unfair and not in accord with the purposes and procedures set forth in the applicable statute, and that the arbitrator erred in permitting the procedure.

The facts of this case are telling. To begin with, this is not a matter where Owners are trying to get something for nothing or are trying to avoid paying anything on the contract. Owners paid Contractor $882,804.72 directly. (R. p. 47). Owners also received other credits for nearly $100,000.00, so that the arbitrator concluded Contractor was due only $51,730.50 on this contract whose value exceeded one million dollars. There were numerous deficiencies in the workmanship and failure to meet deadlines under the agreement, and Contractor essentially abandoned the contract and sought recovery in this action. (R. pp. 164-174). The Court should not get the impression that this case involves a property owner who is trying to avoid any payment for a benefit the owner received.

As for the facts relevant to the "prevailing party" analysis, on January 18, 2006, Contractor filed its Amended Notice and Certificate of Mechanic's Lien claiming it was

owed $150,092.69 for labor and materials that Contractor supplied and furnished pursuant to the Agreement. (R. p. 77). At the same time, Contractor filed and served an action seeking foreclosure of a mechanic's lien to collect the stated sum of $150,092.69. (R. p. 51, ¶ 17). Contractor attached an Amended Statement of Account asserting it invoiced Owners $1,032,897.41, provided credits of $882,804.72, and the total due was $150,092.69. (R. p. 80). These were Contractor's **first** assertion that $150,092.69 was the amount owed to it (Contractor asserted it three separate times in these filings).

Six (6) months later, on July 26, 2006, Contractor filed and served an Amended Complaint adding a claim for violation of the South Carolina Unfair Trade Practices Act. The remainder of the complaint remained the same from the original, including Contractor's assertion that it was owed $150,092.69 under the contract (the **second** assertion that $150,092.69 was owed).

On November 6, 2006 – eleven (11) months after initiating this action – Contractor filed its Pre-Arbitration Brief in support of its claims. In the brief, Contractor once again asserted Owners owed $150,092.69 for work under the contract. (R. p. 151, 157, 161). Contractor acknowledged Owners were claiming they were due credits based upon various factors, including $55,900 paid directly to vendors, $5,250 retainage previously billed, and other amounts not due (i.e., $61,150.00 in claimed offsets). This was Contractor's **third** assertion that $150,092.69 was owed, and was made on the eve of the arbitration hearing.

The matter was heard from November 13 through November 17, 2006. (R.p. 3). On the first day of the arbitration hearing, the parties stipulated Owners were entitled to

receive credits totaling $59,845.00 related to Owners' payment of portions of the amounts claimed by Contractor. Contractor then moved to amend its demand in its claim from $150,092.69 to $90,155.00 to acknowledge those credits. Owners objected, specifically citing the "prevailing party" procedure for the award of attorneys' fees and costs under South Carolina law. Owners claimed Contractor's tactic of repeatedly claiming $150,092.69 and then at the hearing acknowledging at last the credits Owners claimed the entire time subverted the policies underlying that attorney fee procedure. The arbitrator, however, granted Contractor's motion and permitted Contractor to amend its claim from the amount Contractor had repeatedly stated in the pleadings ($150,092.69) to $90,155.00. (R. p. 4, ¶ 1).

The arbitrator ultimately held the actual amount due under Contractor's claim was $85,863.00. He arrived at that figure by deducting $59,845.00 from the Contract Balance, less the total Owners had previously paid. (R. p. 4, ¶ 3). The arbitrator then outlined credits Owners were due as offsets which totaled an additional $34,132.50, and offset that amount from the total Contractor claimed was due. (R. p. 5, ¶ 5). Accordingly, the arbitrator found Contractor was entitled to payment of only $51,730.50. (R. p. 5, ¶ 6).

The arbitrator then found that because $51,730.50 was closer to Contractor's claim in its Complaint as amended on the first day of the hearing than the offer Owners made (deemed to be "zero"), Contractor was the "prevailing party" pursuant to S.C. Code Ann. § 29-5-10 (Supp. 2005) as well as under the parties' contract. The arbitrator therefore awarded Contractor attorney's fees and costs pursuant to Section 29-5-10, in

accordance with the Agreement, and in accordance with S.C. Code Ann. § 27-1-15.[1]

Contractor should be bound by the amount it claimed was due continuously and repeatedly up until the first day of the arbitration hearing. Section 29-5-10 provides, in part:

> (b) Not less than fifteen days before the first term of court at which the trial is set, either party may file and serve on the other party an offer of settlement, and within ten days thereafter the party served may respond by filing and serving his offer of settlement. The offer shall state that it is made under this section and specify the amount, exclusive of interest and costs, which the party serving the offer is willing to agree constitutes a settlement of the lien. If the action is not reached for trial, then not less than fifteen days before the next term of court and subsequent terms of court at which the trial is set, either party may file and serve on the other party an offer of settlement or an amendment of a prior offer of settlement and, within ten days after that, the party served may respond by filing and serving his offer or amended offer of settlement. The offer or amended offer supersedes any offer previously made under this section by the same party.

(emphasis added). Furthermore, Section 29-5-10(b) provides:

> An offer of settlement is considered rejected unless an acceptance in writing is filed and served on the party making the offer, five days before the commencement of the term.
>
> If the offer is rejected it may not be referred to for any purpose at the trial, but may be considered solely for the purpose of awarding costs and litigation expenses under this section.
>
> For purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action. One verdict assumes some entitlement to the mechanic's lien and the consideration of compulsory counterclaims. The party whose offer is closer to the verdict reached is considered the prevailing party in the action. If the difference between both offers and the verdict is equal, neither party is considered to

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[1] Owners challenged these separate foundations for the award before the circuit court and the Court of Appeals. However, the only ground addressed in both courts was the award under the mechanic's lien statute.

> be the prevailing party for purposes of determining the award of costs and attorney's fees.
>
> If the plaintiff makes no written offer of settlement, the amount prayed for in his complaint is considered to be his final offer of settlement.
>
> If the defendant makes no written offer of settlement, the value of his counterclaim is considered to be his negative offer of settlement. If the defendant has not asserted a counterclaim, his offer of settlement is considered to be zero.

(Emphasis added). Under this statutory scheme the legislature has carefully crafted a procedure which forces each party to adequately and efficiently evaluate the claims and defenses in advance of the hearing and make an offer or demand in good faith to obtain an award of fees and costs. The essential purpose is to promote early resolution of claims, to reward good faith demands or offers, and to penalize those who refuse to bargain in a reasonable manner. The reason time limits exist in the statute is to allow the parties time to negotiate from the offers before getting to trial.

In allowing Contractor to drop his amount claimed in the Complaint on the morning of the first day of the arbitration hearing, the arbitrator permitted Contractor to ambush Owners. This last-minute gamesmanship took away Owners' ability to respond to the "offer" under the plain language of the statute. The procedure used in this case did not adhere to the "not less than 15 days" limit for making an offer of judgment under the statute and deprived Owners of any time, much less the 10 days, to respond to the offer.

In ruling that the Arbitrator acted within his discretion in permitting the Contractor to delay its offer until the day of the hearing and amend its pleading so that the pleading could serve as the offer, the Court of Appeals overlooked or misapprehended that Contractor never made an offer under the statutory scheme, but simply relied upon

the amount it claimed, repeatedly, to be due: $150,092.69. This was deemed to be the demand going into trial. By permitting Contractor to amend its demand at the hearing, the Arbitrator permitted Contractor to adhere to a position throughout the pretrial period that Owners knew and repeatedly told Contractor was false, but then to avoid the consequences of that decision by allowing Contractor to adjust its claim at trial. This procedure did not allow Owners any reasonable time to respond, much less the ten days outlined in the statute.

The Court of Appeals chastised Owners for not responding immediately based upon Contractor's "concession" that Owners were due nearly $60,000 in credits. However, this was information Owners had been telling Contractor all along. The Court of Appeals was correct, however, that Owners were complaining that the arbitrator permitted Contractor to manipulate "the range of the possible award to increase [Contractor's] odds of 'being closest to the pin.'" *C-Sculptures*, at 527, 716 S.E.2d at 682. What happened here is, in fact, fundamentally unfair, and should not be allowed to occur. It certainly should not form the basis for an award of fees and costs under the plain language of the "prevailing party" statute. The statute creates a procedure that gives parties a period of time – before trial – to make demands and adjust demands. This is not a process where parties should be allowed to place new bets while walking in the courthouse door.

This Court should reverse the Court of Appeals' decision on this point. The Court should hold that under the policies reflected by the language contained in Section 29-5-10(b), it was error for the Arbitrator to permit Contractor to maintain its false claim for

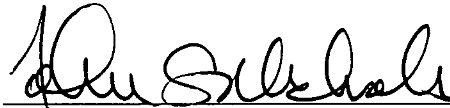
$150,092 until the day of trial and then have a late-in-the-day conversion in order to manipulate its ability to recover fees and costs. The Court should conclude that Owners' figure (zero) was closer to the award ($51,730.50) than Contractor's demand ($150,092.69), thus rendering Owners the prevailing parties for purposes of Section 29-5-10. The Court should remand the matter to the tribunal below to make an award of fees and costs to Owners and to enter judgment accordingly.

Finally, should this Court agree with Owners that the arbitrator should have dismissed Contractor's claim for violating the licensing statute, then Owners' offer of "zero" would necessarily be closest to the recovery (zero) and an award of fees and costs to them would be appropriate.

CONCLUSION

For the reasons stated this Court should reverse the Court of Appeals' decision and remand the matter to the circuit court to dismiss Contractor's claim with prejudice. Further, the Court should order that for purposes of the "prevailing party" statute Owners were entitled to an award of fees and costs and should order the circuit court to enter an order accordingly.

Respectfully submitted,



John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(800) 779-8995 facsimile
jsnichols@bntdlaw.com

Attorney for Petitioners

July 16, 2012

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

394 S.C. 519, 716 S.E.2d 678 (Ct. App. 2011)

Case Tracking No. 2011-195907

RECEIVED
JUL 20 2012
S.C. Supreme Court

C-Sculptures, LLC, ... Respondent,

v.

Gregory A. Brown and Kerry W. Brown,. .... Petitioners.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Brief of Petitioner* and *Appendix* by depositing a copy in the United States Mail, postage prepaid to the following addresses:

Donald Ryan McCabe, Jr., Esquire
Brian C. Gambrell, Esquire
ROGERS, TOWNSEND & THOMAS, PC
Post Office Box 100200
Columbia, South Carolina 29202

July 20, 2012
Columbia, South Carolina

Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC

BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

Margaret Miles Bluestein
John Shannon Nichols
Stacy Elizabeth Thompson
John Dennis Delgado
Allison Paige Sullivan
Ashley Trout Thompson
Blake Alexander Hewitt

OF COUNSEL
O. Eugene Powell, Jr.

July 20, 2012

RECEIVED
JUL 20 2012
S.C. Supreme Court

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: C-Sculptures, LLC v. Gregory A. Brown and Kerry W. Brown
Case Tracking No.: 2011-195907

Dear Mr. Shearouse:

Please find enclosed for filing the original and fourteen (14) copies of the Brief of Petitioner and thirteen (13) copies of the Appendix in regards to this case. I have also enclosed a Proof of Service of these documents on counsel of record.

Thank you in advance for your attention to this matter. If you need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON &
DELGADO, LLC

/emb
Enclosures
cc: Donald Ryan McCabe, Jr., Esquire
Brian C. Gambrell, Esquire
Gregory and Kerry Brown

COLUMBIA 1614 Taylor Street
PO Box 7965 | Columbia, SC 29202
P·803 779.7599 F·803 779.8995

FLORENCE 248 South Irby Street
Florence, SC 29501
P·843 665.9779

TOLL FREE 877 524.4675

BNTDLAW.COM