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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2012-CP-24-00574

Miller Construction Company, LLC.....Respondent/Appellant

v.

PC Construction of Greenwood, Inc. and Safeco Insurance Company of
America..... Appellants/Respondents

APPELLANTS' INITIAL BRIEF OF APPELLANTS/RESPONDENTS

E. Wade Mullins III
Caitlin Creswick Heyward
Bruner Powell Wall & Mullins, LLC
1735 St. Julian Place (29204)
Post Office Box 61110
Columbia, South Carolina 29260-1110
P: 803-252-7693
F: 803-254-5719
Attorneys for Appellants/Respondents

TABLE OF CONTENTS

Table of Authorities.....ii

Statement of Issues on Appeal..... 1

Statement of the Case 2

Facts..... 4

Standard of Review 12

Arguments

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT PC CONSTRUCTION COULD NOT RECOVER ANY DAMAGES AGAINST MILLER CONSTRUCTION PURSUANT TO THE SUBCONTRACT BECAUSE PC CONSTRUCTION WAS NEVER ASSESSED LIQUIDATED DAMAGES FROM THE OWNER..... 12

2. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT RESPONDENT DID NOT CAUSE ANY DELAYS ON THE PROJECT. 16

3. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT MILLER CONSTRUCTION WAS PROPERLY LICENSED TO PERFORM THE WORK PURSUANT TO THE SUBCONTRACT 21

 A. MILLER’S INSTALLATION OF THE STORM SEWER SYSTEM WAS IN VIOLATION OF THE LICENSING RESTRICTIONS FOR A CONTRACTOR HOLDING A GENERAL CONTRACTOR GRADING SUBCLASSIFICATION LICENSE..... 21

 B. BECAUSE THE WORK PERFORMED BY MILLER EXCEEDED ITS LICENSING RESTRICTIONS, ITS CLAIM FOR BREACH OF CONTRACT IS BARRED BY S.C. Code ANN. § 40-11-370(C) 24

4. THE TRIAL COURT ERRED IN DETERMINING THAT MILLER WAS ENTITLED TO RECOVER ON ITS CLAIM UNDER THE PAYMENT BOND AND IN ORDERING IMMEDIATE PAYMENT FROM THE BOND TO MILLER..... 27

Conclusion 29

TABLE OF AUTHORITIES

CASES

Anderson v. Aetna Casualty & Surety Co., 175 S.C. 254, 178 S.E. 819 (1935)28

Baugh v. Columbia Heart Clinic, P.A., 402 S.C. 738, 738 S.E.2d 480 (Ct. App. 2013) 12

Bob Hammond Constr. Co., Inc. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994)28

C-Sculptures LLC v. Brown, 403 S.C. 53, 742 S.E.2d 359 (S.C. 2013).....24, 25

Duckworth v. Cameron, 270 S.C. 647, 244 S.E.2d 217 (1978).....25

Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 449, 649 S.E.2d 494, 502 (Ct. App. 2007)..... 14

Hiott v. Guar. Nat’l Ins. Co., 329 S.C. 522, 496 S.E.2d 417 (Ct. App. 1997) 12

Kenny v. Graves, 300 S.W.2d 568 (Ky. App. 1957)26, 27

Moore Elec. Supply, Inc. v. Ward, 316 S.C. 367, 369, 450 S.E.2d 96, 97 (Ct. App. 1994)28

Pope v. Gordon, 369 S.C. 469, 633 S.E.2d 148 (2006)..... 12

S.C. Dep’t of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2001) 13

S.C. Dep’t of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008)..... 13

Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 592, 658 S.E.2d 539, 542 (Ct. App. 2008)..... 13

Steeger v. Otto Zollinger, Inc., 287 S.C. 207, 336 S.E.2d 870 (1985) 12

Teseniar v. Professional Plastering & Stucco, 407 S.C. 83, 754 S.E.2d 267 (Ct. App. 2014).....26, 27

Townes Assosc. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) 12

Wagner v. Graham, 296 S.C. 1, 370 S.E.2d 95 (Ct. App. 1988)25

STATUTES

S.C. Code Ann. § 11-35-20(g)26

S.C. Code Ann. § 11-35-303027

S.C. Code Ann. § 11-35-423020

S.C. Code Ann. § 29-5-44027

S.C. Code Ann. § 40-11-27022

S.C. Code Ann. § 40-11-37024, 25, 26, 27

S.C. Code Ann. § 40-11-370(c).....2, 21, 24, 26

S.C. Code Ann. § 40-11-410(2)(d).....4, 22, 24

S.C. Code Ann. § 40-11-410(3)(c).....22, 24

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN FINDING THAT PC CONSTRUCTION COULD NOT RECOVER ANY DAMAGES AGAINST MILLER CONSTRUCTION PURSUANT TO THE SUBCONTRACT BECAUSE PC CONSTRUCTION WAS NEVER ASSESSED LIQUIDATED DAMAGES FROM THE OWNER?
2. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR WHEN IT CONCLUDED THAT MILLER CONSTRUCTION DID NOT CAUSE ANY DELAYS ON THE PROJECT?
3. DID THE TRIAL COURT ERR IN FINDING THAT MILLER CONSTRUCTION WAS PROPERLY LICENSED TO PERFORM THE WORK PURSUANT TO THE SUBCONTRACT; AND THUS PERMITTED TO BRING AN ACTION TO ENFORCE THE SUBCONTRACT PURSUANT TO S.C. CODE ANN. § 40-11-370(C)?
4. DID THE TRIAL COURT ERRED IN DETERMINING THAT MILLER WAS ENTITLED TO RECOVER ON ITS CLAIM UNDER THE PAYMENT BOND AND IN ORDERING IMMEDIATE PAYMENT FROM THE BOND TO MILLER?

STATEMENT OF THE CASE

Respondent-Appellant Miller Construction Company, LLC (“Miller”) commenced this action on May 25, 2012, seeking damages for breach of contract for failure to pay the balance due on its subcontract with Appellant-Respondent PC Construction of Greenwood, Inc. (“PC”) and asserting a cause of action on a payment bond against Safeco Insurance Company of America (“Safeco”). (Compl. pp. 1-4.) On April 23, 2013, PC filed an Amended Answer and Counterclaim, asserting a counterclaim against Miller for breach of contract, seeking damages due to Miller’s delay of the Project. (Am. Ans. and Countercl.) Prior to trial, PC was permitted to further amend its Answer and Counterclaim, asserting as an affirmative defense that Miller was not properly licensed, and therefore, barred from pursuing a claim for breach of contract. (Tr. pp. 63:8–65:5.)

On October 25, 2013, Miller filed a Motion for Summary Judgment on the ground that PC is not entitled to assess liquidated damages against the Respondent according to the terms of the Subcontract. On November 4, 2013, PC filed a Motion for Summary Judgment on the ground that Miller is not entitled to enforce or recover any damages under the Subcontract because it was not properly licensed to perform its scope of work pursuant to S.C. Code Ann. § 40-11-370(c). (PC’s Mot. For Summ. J., November 4, 2013.) These motions were denied by the trial judge and trial commenced.

A non-jury trial occurred in this matter on November 4, 5, and 6, 2013. At the direction of the trial judge, the parties submitted post-trial briefs to the Court on or about November 20, 2013. (PC’s Post Trial Br.; Miller Post Trial Brief.) On July 8, 2014, the Court issued a Final Order and Judgment on the merits against PC for breach of contract

in the amount of \$51,270.08 and ordered payment to be made immediately by Safeco pursuant to the bond. (Final Order and Judgment, p.7.)

Miller moved the Trial Court to reconsider, alter or amend its order on the grounds that the trial court erred in not granting Miller pre-judgment interest on the breach of contract cause of action. PC also filed a timely Rule 59(e) Motion to Alter or Amend the July 8 Order on the grounds that the Trial Court erred as a matter of law in finding that PC could not recover delay damages from Miller and it failed to consider the overwhelming evidence that Miller in fact caused delays on the Project. (Def.'s Mot. To Alter or Amend, pp. 1-12.) The Trial Court denied both motions. (Order dated November 18, 2014 and filed on November 26, 2014, pp. 1-2.)

PC then served its Notice of Appeal on December 31, 2014, seeking review of the July 8, 2014 and the Order denying PC's Rule 69(e) Motion filed on November 26, 2014. On January 6, 2014, Miller filed a Notice of Cross-Appeal for the same.

STATEMENT OF FACTS

This case arises out of a construction project known as the Lander RWS Complex Initiative Field Construction, State Project No. H21-N0190MJ-A in Greenwood, South Carolina (the "Project"). The Project involved the construction of soccer, baseball, softball and tennis facilities, and associated sitework on the Lander University campus. On December 15, 2009, PC entered into a contract, as general contractor, to perform the work for the Owner, Lander RWS ("Owner") for the sum of \$7,005,310.00. (Def's Exh. 3, Tab 2, pp.1-17.) The Project was publicly solicited and awarded by the Owner pursuant to the South Carolina Consolidated Procurement Code. (Def's Exh. 3, Tab 2, p. 17). PC, in turn, entered into a subcontract with Miller on December 17, 2009, to perform construction services, including but not limited to sitework, grading, paving, and installation of storm sewer for the Project (the "Subcontract"). (Def's Exh. 3, Tab 4, pp. 1-24.) The original amount of the Subcontract was \$492,424.00. (Def's Exh. 3, Tab 4, p. 2.)

Miller possesses a Group 4 General Contractor's License in the Grading subclassification with the Contractor's Licensing Board of the South Carolina Department of Labor, Licensing and Regulation ("LLR"). (Tr. pp. 93:14-94:3.) A contractor's license in the grading subclassification allows a licensee to perform "the **soil preparation and rehabilitation** of streets, roads, highways, railroad beds, building sites, parking lots, and storm sewers." S.C. Code Ann. § 40-11-410(2)(d)(emphasis added). Article 18 of the Subcontract sets forth the scope of work Miller was required to perform on the Project. It specifically requires Miller perform the work set forth in two specification provisions on the Project – (1) Section 31-1000: Site Clearing, Demo and

Erosion Control (the "Site Clearing and Demo Specification) and (2) Section 33-4100: Site Storm Drainage (the "Storm Drain Specification"). (Def's Exh. 3, Tab 4, p. 14.) The Site Clearing and Demo Specification required Miller to demolish and remove the existing storm drain system along with all other below grade site improvements. (Def's Exh. 1; Tr. pp. 98:19-100:13.) The Storm Drain Specification set forth the requirements for Miller's installation of the storm drain pipes and manholes. (Def's. Exh. 2.)

The terms of the Subcontract are clear and unambiguous with respect to Miller's obligations to timely perform its scope of work, and there are repeated references to the fact that TIME IS OF THE ESSENCE in regard to performance and completion of the work. (Def's Exh. 3, Tab 4, pp. 4-5, Tr. pp. 106:13-108:19.) The portions of the Subcontract that are relevant to this action provide as follows:

ARTICLE 4

a. Subcontractor recognizes PC Construction of Greenwood, Inc.'s obligations to the Owner for timely progress upon and completion of the Work and each part thereof and that **TIME IS OF THE ESSENCE** in the performance of the Work under this Subcontract. Subcontractor agrees to perform Subcontractor's Work so that the entire Project and every portion thereof will be completed in accordance with the Contract Documents, including any scheduling requirements contained in this Subcontract. ...

b. **JOB SCHEDULE.** PC Construction of Greenwood, Inc. shall furnish and publish a progress schedule for the Project. This will constitute the basis for starting and finishing of the Subcontractor's Work....PC Construction of Greenwood, Inc. will seek and use information from the Subcontractor regarding durations of tasks, sequences, etc. in formulating the progress schedule. The Subcontractor shall take whatever measures necessary to ensure completion within the framework of the schedule.

.1 The Subcontractor is solely responsible for scheduling his manpower and equipment to meet the needs of the Project and maintain the flow of construction as required by the job schedule. PC Construction of Greenwood, Inc. will not perform required coordination or supervision of the Subcontractor's work force.

ARTICLE 5

d. **COORDINATION OF ITS WORK WITH OTHERS.** Subcontractor agrees as follows:

.4 Subcontractor shall be responsible for taking all field measurements necessary to ensure the proper fitting of Subcontractor's Work with the Work of PC Construction of Greenwood, Inc. and others. Field measurements shall be taken and coordinated in a timely manner to avoid delaying the Job Schedule;

j. **JOB SITE CONDITIONS.** -The Subcontractor shall perform his work in accordance with the following conditions:

.1 ... Should the Subcontractor, in the sole judgment of PC Construction of Greenwood, Inc., delay the progress of the Work, the Subcontractor shall, at his own

expense and cost, work such overtime as may be necessary to finish the Work within the Schedule.

ARTICLE 6

a. **CHANGES.** Without nullifying this Subcontract or any bond given pursuant to this Subcontract, PC Construction of Greenwood, Inc. may, in writing, direct the Subcontractor to make changes to the Subcontractor's Work, which changes are within the scope of this Subcontract. Within ten (10) days of PC Construction of Greenwood, Inc.'s directive or if the Contract Documents require notice to be given by PC Construction of Greenwood, Inc. to the Owner is less than ten days, Subcontractor shall comply with the notice requirements of the Contract Documents by giving notice and a written proposal to PC Construction of Greenwood, Inc. within such time as to enable PC Construction of Greenwood, Inc. to give notice to the Owner or to comply with any other notice requirements of the Contract Documents. **FAILURE OF THE SUBCONTRACTOR TO SUBMIT A WRITTEN PROPOSAL WITHIN THE TIME PROVIDED HEREIN, OR TO PROVIDE A WRITTEN NOTICE WITHIN THE TIME REQUIRED HEREIN, SHALL CONSTITUTE A WAIVER OF THE SUBCONTRACTOR'S RIGHT TO AN ADJUSTMENT OF THE SUBCONTRACT PRICE OR JOB SCHEDULE OR, WHERE A CREDIT IS INVOLVED, SUBCONTRACTOR ACCEPTS THE AMOUNT DETERMINED BY THE OWNER, ARCHITECT AND/OR PC Construction of Greenwood, Inc.** Any adjustments to Subcontract Price or Job Schedule, if any, shall be set forth in a written Subcontract Change Order. ...

... THERE WILL BE NO ADJUSTMENT TO THE SUBCONTRACT PRICE OR JOB SCHEDULE WHICH ARE NOT ORDERED IN WRITING BY PC Construction of Greenwood, Inc. AND SIGNED BY THE PROJECT MANGAER, Gary Piontek...

e. **DELAY.** If the progress of Subcontractor's Work is substantially delayed without the fault or responsibility of Subcontractor, then the Job Schedule shall be adjusted accordingly, but only to the extent an extension of time is obtained by PC Construction of Greenwood, Inc. from Owner under the terms of the Contract Documents; provided that Subcontractor must give written notice of delay to PC Construction of Greenwood, Inc. within such time as to enable PC Construction of Greenwood, Inc. to give Owner any notices required by the Contract Documents, but in any event, no later than five (5) days after the occurrence of the event claimed to be substantial delay, otherwise the right to such an adjustment to the Job Schedule is waived.

... If the Contract Documents provide for liquidated or other damages for delay and such damages are so assessed against PC Construction of Greenwood, Inc., then PC Construction of Greenwood, Inc. may assess same against Subcontractor in proportion to Subcontractor's share of the responsibility for such delay as determined by PC Construction of Greenwood, Inc. **Subcontractor shall also be liable for all additional damages PC Construction of Greenwood, Inc. may incur as a result of Subcontractor's failure to complete the Subcontractor's Work or any portion thereof in accordance with the Job Schedule, including direct costs, liquidated damages and/or PC Construction of Greenwood, Inc. extended overhead.**

(Def's Exh. 3, tab 4, pp. 4-10 (emphasis added).)

Michael Miller testified on behalf of Miller that he understood and agreed to these terms of the Subcontract and that Miller would be bound by the terms of the Subcontract.

(Tr. p. 106:7-25.) Mr. Miller acknowledged that he understood that timely completion of

the Project was important and required under the Subcontract. (Tr. pp. 107:1-108:25.) Mr. Miller further conceded that the Subcontract required Miller to comply with the Schedule and the Schedule durations for Miller's scope of work and that it was required to provide the manpower and equipment to meet the Schedule. (Def's Exh. 3, tab 4, pp. 3-4; Tr. pp. 108:20-111:5.) Mr. Miller's testimony also reflected a clear understanding of the "Changes" provision of the Subcontract. Specifically, he admitted the Subcontract required Miller to submit a request for change order if changed conditions required an increase in price or adjustment to the Schedule for additional days. Moreover, he recognized there was a time limit for submitting a change request and that failure to do so would result in Miller waiving its right to an increase in price or extension to the Schedule because of delays created by any changed conditions.. (Tr. pp.111:7-112:12; Tr. p. 113: 17-21.) Lastly, Mr. Miller testified that by signing the Subcontract he agreed that Miller would be liable to PC for any damages that PC could show was a result of Miller's failure to comply with the Schedule or any portion of the Schedule. (Tr. pp. 113:22-115:4.)

For the duration of the Project, Miller submitted 87 change orders to PC. (Def's Exh. 3, Tab 11.) Of those 87 change orders, only one, Change Order 40, included a request to adjust the Schedule for additional days due to delays caused by the discovery of a large amount of asbestos in early 2010 at the softball field and main parking area. (Def's Exh. 3, Tab 12, pp. 1-3; Tr. pp.111:12-113:21.) PC added additional days to the Schedule to compensate Miller for the asbestos issue pursuant to Change Order 40, and PC does not claim any damages against Miller for that delay. (Def's Exh.3,Tab 15, 16; Tr. pp. 217:6-218:9; Tr. pp. 177:16-182:21.)

After the asbestos issue was resolved, Miller failed to maintain the Schedule. (Tr. p. 182:12-23.) PC encountered consistent and continuous problems with Miller's failure to timely perform its work and complete the scheduled activities in accordance with the Schedule. PC communicated those concerns to Miller through its site personnel and project manager during the Project at weekly meetings and via email. (Def's Exh. 3, Tab 14; Tr. pp. 182:12-193:17.) The problems necessitated PC having to get its President, Randy Piontek, involved in its attempt to have Miller comply with the Schedule. (Tr. pp. 254:10-258:22.) Those efforts to have Miller recover the Schedule proved unsuccessful and PC contends that Miller's noncompliance with the Schedule delayed the project at least 145 days.

PC presented a detailed accounting of the delays caused by Miller and the impact of those delays on PC's ability to complete the Project. In support of those claims, PC introduced its Activity Duration Schedule Analysis reflecting Miller's failure to comply with the Project Schedule as required under the Subcontract. (Def's. Exh. 3, Tabs 15&16; Tr. pp. 193:18-199:8.) The analysis included a comparison of the original activity durations for each task with the actual time it took Miller to complete each task. In an effort to eliminate any questions or confusion raised by the asbestos issues, PC only included delays encountered in activities associated with the site clearing and demolition, the Soccer venue and the Tennis venue. The total delays associated with these activities were claimed to be 145 days. PC multiplied those days by its daily rate of \$945.07 to arrive at a delay damage claim of \$137,035.15 for extended overhead. The \$945.07 daily rate is what it cost PC per day to serve as the general contractor on the site; and, but for the delays attributed to Miller, PC would have completed the work earlier; demobilized

from the site; and would not have incurred those daily costs. (Def's. Exh. 3, Tab 17; Tr. pp. 199:2-200:14.)

In support of its claim, PC presented testimony from John Bahr, president of Construction Interface Services, a construction consulting firm with significant experience in providing scheduling, construction management and contract administration services. Bahr was qualified as an expert in construction management, contract administration and scheduling. (Def's. Exh. 3, Tab 18; Tr. pp. 222:9-226:17.) Bahr testified that he was intimately familiar with the Project as his company had been retained to assist in establishing the Schedule. (Tr. pp. 226:22-227:4; Tr. pp. 232:21-235:3.) He testified that he believed the Schedule was accurate and that the durations set forth for the Miller activities were reasonable. In Bahr's opinion, Miller failed to comply with its contract obligations to perform and complete its activities in accordance with the Schedule and its durations and that the delay calculation of 145 days was reasonable. (Tr. 235:4-237:11.) Furthermore, Bahr testified that he assisted PC in the calculation of the \$945.07 daily rate and that the methodology used for calculating the rate was one he routinely utilized and reflected a reasonable daily rate. (Tr. pp. 237:12-238:15.) He testified that Miller's lack of timely performance impacted PC's completion of the work which resulted in damages incurred by PC and that the delay damages calculation was a reasonable calculation of the damages incurred.

Bahr also presented an analysis as to unexcused delays by Miller. (Def's. Exh. 3, Tab 19; Tr. pp. 238:16-245:24.) He testified that his analysis was based on a review of the daily reports of Miller and PC. Bahr stated that this analysis was conducted to confirm and support the reasonableness of the delay damages presented and to explain

why Miller missed so many of its scheduled durations. Bahr indicated that the claim presented by PC was reasonable and conservative and provided a realistic approach to quantifying the damages incurred by PC as a result of Miller's delay.

Despite causing delays on the Project, Miller admitted that it failed to notify PC at any time that it was seeking additional time through a request for change order pursuant to the terms of the Subcontract. (Tr. p. 112:13-21.) Miller was fully aware of the process by which to seek adjustments to the Schedule, and no adjustments were made because none were requested. (Tr. pp. 111:7-112:12; Tr. p. 113:12-21; Tr. pp. 167:6-168:10.)

Miller offered no expert testimony to refute that of PC. Moreover, Miller offered no specific objective documentary evidence or testimony to refute that Miller failed to comply with the Project Schedule as required by the Subcontract which was presented by PC. Rather, for the first time at trial, Miller attempted to explain why Miller did not meet a handful of the numerous activity durations PC claimed were missed, presumably implying that these delays on the Project were excusable. (Tr. p. 335:12-340:25.) However, Mr. Miller acknowledged that none of the excuses presented for its failure to meet the durations were ever presented to PC in the form of a change order or request to alter the Schedule as required by the Subcontract. (Tr. pp 341:5-342:22.) Remarkably, Miller testified several times during trial that PC never complained to it about the problems Miller was concerning timely performance. (Tr. p. 89:14-22; Tr. pp. 123:24-124:14; Tr. p. 125:22-126:4.) However, PC presented specific evidence that it did in fact communicate concerns to Miller regarding the Miller's performance. (Def's Exh. 3, Tab 14; Tr. p. 126:13-19; Tr. pp. 189:20-191:15.)

There is no evidence in the Record that PC in any way waived its right to assess delay damages against Miller under the Subcontract. Miller submitted its final pay application to PC on or around November of 2011. However, PC did not remit payment to Miller for the final balance of the Subcontract because the delay damages caused by Miller exceeded the contract balance. The balance of the Subcontract amount was \$51,270.08; however, when calculating the delay damages and other backcharges totaling \$140, 956.97, the accounting reflect damages incurred by PC in the amount of \$89,686.89. (Tr. p. 263:8-23; Def's Trial Exhibit 20.)

STANDARD OF REVIEW

In an action at law, on appeal of a case tried without a jury, the trial court's findings are conclusive on appeal when supported by competent evidence. *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 738, 738 S.E.2d 480 (Ct. App. 2013). In a non-jury action at law, the trial judge's findings of fact have the same force and effect as a jury verdict unless he or she committed some error of law leading to an erroneous conclusion or unless the evidence is reasonably susceptible of the opposite conclusion only. *Pope v. Gordon*, 369 S.C. 469, 633 S.E.2d 148 (2006); *See also, Hiott v. Guar. Nat'l. Ins. Co.*, 329 S.C. 522, 496 S.E.2d 417 (Ct. App. 1997); *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976) ("In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings."); *Steger v. Otto Zollinger, Inc.*, 287 S.C. 207, 336 S.E.2d 870 (1985) (overturning findings of fact of trial court where there was no evidence to reasonably support the conclusion that the contract was rescinded).

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT PC CONSTRUCTION COULD NOT RECOVER ANY DAMAGES AGAINST MILLER CONSTRUCTION PURSUANT TO THE SUBCONTRACT BECAUSE PC CONSTRUCTION WAS NEVER ASSESSED LIQUIDATED DAMAGES FROM THE OWNER.

PC is appealing the determination by the Trial Court to grant involuntary nonsuit/directed verdict as to PC's counterclaims for breach of contract. The Trial Court found as follows:

Pursuant to the subcontract, PC cannot recover any type of liquidated damages against Miller as PC was never assessed with liquidated damages or damages for delay from the owner. As such, taking the evidence in a

light most favorable to PC, it is unable to sustain its cause of action for breach of contract against Miller for delay damages. Miller's motion for involuntary non-suit/directed verdict as to this cause of action is hereby granted.

(Final Order and Judgment, p. 6.) PC asserts that the above finding reflects error of law in that it fails to apply the clear and unambiguous terms of the Subcontract and for some inexplicable reason ignores essentially the entirety of PC's case submitted through documentary evidence and testimony that clearly reflects that at no point was PC seeking liquidated damages of any form in this matter.

The Subcontract specifically allows PC to assess delay damages and extended overhead in addition to liquidated damages against Miller. While PC contends the owner did assess liquidated damages against it,¹ PC only sought damages for extended overhead for Miller's delay, which are independent of liquidated damages.

It is well-established in South Carolina that the construction of a contract is a question of law for the court, not an issue for a jury. *S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001); *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 592, 658 S.E.2d 539, 542 (Ct. App. 2008). When a "contract is clear, explicit, unambiguous, and capable of only one reasonable interpretation, the court does not look beyond the four corners to discern the parties intentions." *S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008). The "court's only function is to interpret its lawful meaning and the

¹ Prior to the trial of the present case, there was a dispute as to the amount of final payment owed by Lander to PC, which was ultimately resolved and memorialized in a settlement agreement. PC contends that Lander did in fact assess liquidated damages against it as part of its settlement agreement with Lander. Miller's position is that Lander did not assess liquidated damages against PC and, therefore, PC is not entitled to recover any damages against Miller. Essentially, what Miller argues is that Miller can only be liable to PC for liquidated damages under the terms of the Subcontract if liquidated damages are assessed by the Owner. Whether the Owner assessed liquidated damages has absolutely no relevance to the issues to be decided in this case. PC did not seek liquidated damages from Miller and only sought to enforce Article 6.e related to delays caused by Miller, which is not limited to liquidated damages.

intention of the parties as found within the agreement and give effect to it.” *Id.* The Court is “without authority to alter an unambiguous contract by construction or to make new contracts for the parties.” *Id.*; *Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 449, 649 S.E.2d 494, 502 (Ct. App. 2007) (“[I]f the contract is determined to be unambiguous, the court itself is required to interpret the contract and apply the plain and ordinary meaning of its terms.”).

A plain reading of the Subcontract allows PC to recover delay damages from Miller *in addition* to any liquidated damages assessed against PC by the Owner. In other words, pursuant to Subcontract Article 6.e, PC’s right to recover liquidated damages is separate and distinct from its right to recover delay damages from Miller:

If the Contract Documents provide for liquidated or other damages for delay and such damages are so assessed against PC Construction of Greenwood, Inc., then PC Construction of Greenwood, Inc. may assess the same against Subcontractor in proportion to Subcontractor’s share of the responsibility for such delay as determined by PC Construction of Greenwood, Inc. **Subcontractor shall also be liable for all additional damages PC Construction of Greenwood, Inc. may incur as a result of Subcontractor’s failure to complete Subcontractor’s Work or any portion thereof in accordance with the Job Schedule, including direct costs, liquidated damages and/or PC Construction of Greenwood, Inc. extended overhead.**

(Def’s Exh. 3, tab 4, p. 9 (emphasis added).)

Here, the Circuit Court made no finding that the terms of the Subcontract are ambiguous, nor did Miller argue the terms of the Subcontract are unclear. In fact, Michael Miller testified on behalf of Miller that he understood the terms of the Subcontract and agreed that the Subcontract provides that Miller would be liable to PC for any additional damages that PC could show was a result of delay. (Tr. pp. 113:22-

115:4.) Therefore, the Court was required to interpret Article 6.e of the Subcontract as allowing PC to recover damages for extended overhead and to enforce the ordinary meaning of its terms.

In reading the Subcontract as a whole, it is clear the Court committed reversible error when it misinterpreted and misapplied the terms of the Subcontract as agreed to by the parties. The only reasonable susceptible conclusion from the evidence in the Record is that PC never attempted to recover liquidated damages from Miller, a fact that PC repeatedly testified to and argued at trial. (Def's Exhibit 3, Tab 16 & 17; Tr. pp. 273:24-274:3.) Instead, PC sought delay damages for extended overhead as a result of Miller's failure to comply with the Project Schedule as specifically contemplated in Article 6.e of the Subcontract. (Def's Exhibit 3, Tab 16 & 17; Tr. pp. 199:2-200:14; Tr. p. 258:20-23.) Whether or not PC assessed any liquidated damages from the Owner is irrelevant to Miller's liability for the delays it caused. Accepting the Trial Court's interpretation of the Subcontract would mean that PC could never recover damages it incurred for direct costs and extended overhead for delay caused by Miller, which extended the Project beyond that contemplated in the Schedule, unless and until the Owner assessed liquidated damages against PC. There is simply no reasonable interpretation of the Subcontract that requires the assessment of liquidated damages by the Owner as a precondition to PC's ability to recover damages against Miller for its breach of its contractual obligations to comply with the Schedule.

It is clear from the Trial Court's findings that the Court misapprehended the plain meaning of Article 6.e of the Subcontract relating to damages. Because the Court failed

to interpret and enforce the terms of the Subcontract as agreed to by the parties, the Court's Order dated July 1, 2014 must be reversed and a judgment entered in favor of PC.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT CONCLUDED THAT MILLER CONSTRUCTION DID NOT CAUSE ANY DELAYS ON THE PROJECT.

The Final Order & Judgment contains a footnote in the section that disposes of PC's counterclaim by grant of motion for involuntary nonsuit/directed verdict. (Final Order and Judgment, fn.3.) Footnote 3 states: "This court would additionally have found that PC did not meet its burden of proof on this issue. The evidence was clear that Miller did not cause any delays on this project." (Final Order, p. 6.) There is no evidence in the record to support the Trial Court's finding that "Miller did not cause any delays on this project" and that "PC did not meet its burden of proof on [the delay] issue." To the contrary, PC presented uncontroverted evidence that Miller caused delays on the Project, and it was Miller who failed to present any evidence to overcome PC's testimony.

The Subcontract is clear and unambiguous as to Miller's obligations to timely perform its scope of work and Article 4 of the Subcontract provided that time is of the essence and that Miller recognizes PC's obligation to the Owner of timely progress upon the completion of the work. (Def's Exh. 3, Tab 4, pp.4-5.) The Subcontract further provided that PC was to furnish a schedule which would be the basis for Miller's deadlines to start and finish the work. *Id.* The Subcontract also required Miller submit a written request for change order seeking an adjustment to the Schedule for any delays incurred on the Project that are beyond its control. (Def's Exh. 3, Tab 4, pp. 8-10.) Paragraph 6.a of the Subcontract provides in bold and capital lettering that Miller waives any right to receive an adjustment of the Schedule if it fails to submit a change order requesting additional days. (Def's Exh. 3, Tab 4, p. 8.) Paragraph 6.e further reflects that

Miller waives its rights to adjustment of the Schedule if it fails to timely submit a written claim. (Def's Exh. 3, Tab 4, pp. 9-10.)

PC presented evidence of the Project Schedule and the durations Miller was expected to perform and complete each activity. (Def's Exh. 3, Tab 5, pp. 1-14; Def's Exh. 3, Tab 10, pp. 1-3.) At trial, Miller acknowledged it was obligated to comply with the Schedule and the Schedule durations for Miller's scope of work and that it was required to provide the manpower and equipment to meet the Schedule. (Def's Exh. 3, Tab 4, pp. 3-4; Tr. pp. 106:7-111:5.) Miller also acknowledged that it was required to submit a change order for any delays on the Project and that it only requested additional days on one change order, change order 40 (Def's Exh. 3, Tab 12, pp. 1-3), relating to the asbestos delay. (Tr. pp.111:12-113:21; Tr. pp. 341:5-342:22.) Miller specifically conceded that the Subcontract provided that if Miller did not complete its work in accordance with the Schedule, or any portion thereof, that Miller would be liable for any damages that PC could show it incurred as a result of the failure to comply with the Schedule. (Tr. pp.113:22-115:4.)

At trial, PC presented specific and unrefuted evidence of Miller's failure to comply with the Project Schedule and the resulting damages of the delay. Gary Piontek testified on behalf of PC that Miller failed to comply with the schedule and delayed the Project at least 145 days. (Tr. pp. 193:18-199:8.) Mr. Piontek also provided the Court with his analysis of Miller's activity on the Project (Def's Exh. 3, Tab 15) and a summary of Miller's delays (Def's Exh. 3, Tab 16.) In addition, PC Construction presented expert testimony from John Bahr. Bahr opined that the delays caused by Miller were not excusable and that PC was entitled to recover for those delays. (Tr. pp. 235:4-238:15; pp.

240:13-243:12.) Bahr also testified that PC's 145 day calculation for delay was fair and reasonable.² (Tr. pp. 237:7-238:15.) Bahr's conclusions were based on his familiarity with the Project, his experience in the industry in presenting such claims and the additional analysis he performed to support the reasonableness of PC's delay claims. In conducting his analysis, Bahr testified that he reviewed the daily records of both PC and Miller. (Tr. pp. 238:16-245:24.)

Miller offered no expert testimony to refute or counter those conclusions reached by Bahr. Indeed, Miller presented no competent testimony or evidence to rebut PC's delay claim against it. Miller simply testified that PC never complained to it about any problems PC was having with Miller on the Project (Tr. p. 89:14-22), a fact that proved to be untrue as evidenced by a number email communications from PC to Miller regarding specific problems PC was having with Miller's timely performance on the Project. (Def's Exhibit 3, Tab 14.) In any event, whether or not PC complained of delays is irrelevant to the Court's consideration of whether Miller complied with its obligations under the Subcontract. It does not excuse Miller's failure to submit request for change orders seeking an adjustment to the Schedule pursuant to the explicit and clear terms of Article 6 of the Subcontract. Furthermore, Miller never alleged that PC waived its right to notice; and, there is no change order to reflect any additional days were provided to the Schedule other than those agreed upon in Change Order 40.

² PC took a conservative approach in calculating its damages, only including delays encountered in activities associated with site clearing and demolition, the Soccer venue and the Tennis venue. (Tr. pp. 194:1-195:19.) The total delays associated with those activities were 145 days. Because it cost PC \$945.07 per day to serve as the general contractor on the site (Def. Exh. 3, Tab 17), PC multiplied 145 days by \$945.07 for a total delay damage claim of \$137,035.15 in direct costs and extended overhead. (Def. Exh. 3, Tab 16; Tr. pp. 199:2-200:14.)

In a hollow attempt to refute the fact that Miller delayed the project, Miller presented testimony from Lander personnel. It is important to note that Lander and PC were in an adversarial position by virtue of a separate action that had been filed by PC against the University. Indeed, Jeff Beaver, the Director of Engineering for Lander, acknowledged that the decision to negotiate and settle PC's claim was conducted by his superiors; and, he was not happy with the settlement that involved Lander paying a portion of PC's claim. (Tr. pp. 311:11-312:11.) The Lander witnesses generally testified that they did not believe Miller caused delays on the project. However, the Lander witnesses had no basis in fact or otherwise for their opinion testimony that Miller did not delay the project, as acknowledged on cross-examination. None of the Lander witnesses could testify as to what Miller's schedule obligations were to PC, the individual duration requirements for the specific activities, or whether Miller complied with the Schedule. (Tr. pp. 312:12-313:9; Tr. p. 323:6-23; pp. 327:7-328:1.) Therefore, the Lander witness's opinion testimony regarding delay was baseless, unsubstantiated and irrelevant to the issues in this case.

The only evidence in the record that attempts to refute the claim for breach of contract is the testimony offered by Mr. Miller that amounts to nothing more than conclusory, surface level attempts to explain delays for a small percentage of the durations PC claims were missed – statements that are not supported by any documentary evidence. (Tr. p. 353:12-340:25.)³ There is no evidence in the record those issues were ever raised during the project. Nevertheless, even assuming the Mr. Miller's testimony reflected compelling evidence that certain delays were beyond the control of Miller,

³ In fact, Robert Sisk, who was Miller's superintendent on the Project, admitted Miller did not meet all of the durations set forth in the Schedule. (Tr. pp. 289:20-291:17.)

which PC denies, Miller was required to timely request an adjustment to the Schedule through change order pursuant to the Subcontract. Miller failed to present the Court with any contractual basis on which to refute the claims for delay and, more importantly, acknowledged that it failed to notify PC of any changed conditions and request any change orders for delay. Therefore, there is no reliable probative evidence that Miller did not breach the contract by virtue of its delays.

The Trial Court assigns significance to PC's claim against Lander under the Subcontract brought pursuant to the South Carolina Procurement Code as having some relevance to PC's claim against Miller that was not under the jurisdiction of the Procurement Code. (Final Order, p.6.) The Trial Court erroneously concludes that because Miller was not made a part of the claim against Lander that it impacted PC's claims against Miller. PC could not have joined Miller in its claim against Lander because Miller's failure to comply with the Schedule is not compensable by Lander under its Prime Contract as a delay caused by the Owner. (Def's Exhibit 3, Tab 2.) The Office of the State Engineer, where PC's claim against Lander was pending, has no jurisdiction to consider claims for breach of contract between a general contractor and its subcontractor. S.C. Code Ann. §11-35-4230. PC's claim against Lander was based on issues unrelated to the claims presented by PC against Miller for its failure to comply with the Schedule; and as such, its resolution has no relevance whatsoever to Miller's liability for its breach of the Subcontract or the damages incurred by PC. The Trial Court's findings on this issue are in error.

The Trial Court makes no specific findings regarding PC's claims that Miller breached its Subcontract by virtue of its failure to comply with the Project Schedule other

than a statement in Footnote 3 that the evidence was clear that Miller did not cause any delays on this Project. (Final Order, p. 6.) This finding is simply not supported by the competent evidence in the Record. The only reasonably susceptible conclusion based on all of the evidence is that Miller breached the Subcontract by failing to comply with the Schedule and that PC incurred damages by incurring extended general conditions at a daily rate for the 145 days that it was forced to man the job.

III. THE TRIAL COURT ERRED IN DETERMINING THAT MILLER CONSTRUCTION WAS PROPERLY LICENSED TO PERFORM THE WORK PURSUANT TO THE SUBCONTRACT, AND THUS, NOT BARRED FROM BRINGING AN ACTION TO ENFORCE THE SUBCONTRACT PURSUANT TO S.C. CODE ANN. § 40-11-370(C).

PC asserted as an affirmative defense that Miller could not pursue its action for breach of contract as a matter of law because it was not properly licensed to perform the installation of the storm sewer system as contemplated by the Storm Sewer Specification. The Trial Court held that Miller was properly licensed to perform its scope of work on the sewer system, finding that the work involved the rehabilitation of an existing system and the PC must have believed Miller's work was in compliance with its license as it hired Miller with knowledge of its licensing status. (Final Order, p. 205.) The Trial Court determination was an error of law. Furthermore, what PC believed or may have believed has no relevance as to whether Miller is barred from pursuing its breach of contract action pursuant to S.C. Code Ann. § 40-11-370(c).

A. Miller's installation of the Storm Sewer System was in violation of the licensing restrictions for a contractor holding a general contractor grading subclassification license.

There is no dispute that Miller holds a Group 4 General Contractor's License *in the Grading subclassification* with the South Carolina Department of Labor, Licensing,

and Regulation (“LLR”). Miller does not hold any other contractor licenses with LLR. S.C. Code Ann. § 40-11-270 provides that a licensee is confined to those limitations set forth in the licensee’s subclassification. A contractor’s license in the grading subclassification allows a licensee to perform “the *soil preparation and rehabilitation* of streets, roads, highways, railroad beds, building sites, parking lots, and storm sewers”. S.C. Code Ann. § 40-11-410(2)(d) (emphasis added). A contractor’s license in the grading subclassification does NOT allow a license to install storm sewer. *See id.* For a contractor to install storm sewer, it must possess a General Contractor’s License *in the Water and Sewer Lines subclassification*. S.C. Code Ann. § 40-11-410(3)(c). A license in the water and sewer lines subclassification allows a licensee to perform “**installation and repair of a project involving manholes, the laying of pipe for storm drains and sewer mains**, all necessary connections, and excavation and backfilling, and concrete work incidental thereto.”

There is no question that this Project involved the installation of manholes and the laying of pipe for storm drains. **Def. Exh. 2.** Miller argues that it was properly licensed to perform this scope of work because it involved the rehabilitation of a storm drain. In support of its argument, Miller testified that the Project had an existing storm drain system and its scope of work involved the rehabilitation of that system. (Tr. p. 92:5-16.) However, Miller acknowledges that its scope of work required the demolition and removal of the existing storm drain system that was used for an old shopping center. (Tr. pp.80:20-81:6.)

PC denies that the scope of work involved storm drain rehabilitation as contemplated in the grading classification. PC argues that a storm drain rehabilitation

involves the “in place” repair or restoration of an existing storm drain system. Indeed, the term “rehabilitation” is defined in Webster’s Dictionary as: “to restore to a former capacity; reinstate or to restore to a former state”. The testimony and evidence reflects that there was a small existing storm sewer system that was to be demolished and removed. The Project included the design and installation of a comprehensive new storm drain system to service the athletic facilities. No part of the new storm drain system was installed in the areas where the demolished system had been removed. (Tr. pp.152:11-153:10.) The Site Clearing and Demo Specification provided for the demolition of the existing system along with all other below grade site improvements. (Def. Exh. 1.) In contrast, the Project had a separate and specific specification that set forth the installation of the storm drain pipes and manholes. (Def. Exh. 2.)

PC’s expert John Bahr, who had decades of experience in construction management and contract administration, is also a licensed professional engineer and has been licensed as a general contractor. Bahr is a member of the Construction Specifications Institute. (Tr. pp. 223:24-225:15.) Bahr testified that Miller’s scope of work did not involve rehabilitation of storm drain as contemplated in the grading classification. (Tr. pp. 227:5-228:24.) Rather, Bahr testified that Miller’s scope of work involved the installation of a project involving manholes and the laying of pipe for storm drains. Bahr testified that the specifications supported this opinion in that the demolition of the existing storm drain was in a separate specification from the installation of the new storm drain. Bahr testified that the Construction Specifications Institute was responsible for establishing standard specifications that were used in the construction industry and that there was a separate standard specification for storm drainage rehabilitation that

would have been included in the scope of work had this been a “rehabilitation” of a storm drain system. Bahr presented an example of a standard storm drain rehabilitation specification that would have been included had this been a rehabilitation project. (Tr. pp. 228:25-232:20; Def. Exh. 3, Tab 21.)

The Trial Court’s finding that Miller was properly licensed presumably is based on its belief that Miller’s scope of work fell within the restrictions for a grading subclassification in that the storm sewer work was rehabilitation work. This finding is erroneous and fails to properly consider the specific language of the specifications, the testimony from the witnesses and the relevant statutes (S.C. Code Ann. §§ 40-11-410(2)(d) and 44-11-410(3)(c)). The overwhelming evidence reflects that Miller does not have a valid license as required by Chapter 11 of Title 40.

B. Because the work performed by Miller exceeded its licensing restrictions, its claim for breach of contract is barred by S.C. Code Ann. § 40-11-370(C).

Pursuant to S.C. Code Ann. § 40-11-370(C), “*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.*” The rules of statutory construction are not needed for this Court to apply this provision as the statute at issue “is plain and unambiguous, and conveys a clear and definite meaning” *C-Sculptures LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 361 (S.C. 2013)

S.C. Code § 40-11-370 is not confusing, cannot be misinterpreted, and is clear on its face. The statute is not ambiguous. Although the result of enforcing this statute may be harsh in some circumstances, there is no need, nor does the Court have any leeway, to resort to considerations of fairness or public policy. South Carolina courts have repeatedly enforced the statutory scheme that prohibits unlicensed contractors or licensed

contractors who do not adhere to the licensing statutes from enforcing contracts. *See, e.g., C-Sculptures*, 403 S.C. 53, 742 S.E.2d 359 (general contractor operating outside of license category cannot enforce contract); *Duckworth v. Cameron*, 270 S.C. 647, 244 S.E.2d 217 (1978) (unlicensed homebuilder prohibited from enforcing contract with owner by statute); *see also Wagner v. Graham*, 296 S.C. 1, 3, 370 S.E.2d 95, 96 (Ct. App. 1988) (“The Court has consistently honored the **statute** even though the **result** in some of the cases appears to be drastic.”) (regarding analogous section dealing with residential homebuilders). The Court must enforce the legislature’s will as expressed in this plainly written statute.

Miller’s argument that because PC knew of Miller’s licensing status and should not be entitled to rely upon S.C. Code Ann. § 40-11-370 is unavailing. First, there is no evidence that PC had specific knowledge at the time it entered into the Subcontract with Miller that Miller was not properly licensed. However, even if that fact were true, it has no impact on the applicability of the statute. This statute is mandatory, and the parties are not allowed to agree to alter its affect or contract around it. Moreover, knowledge by the party to the contract upon which the claim is being asserted is not a defense. *See Wagner v. Graham*, 296 S.C. 1, 370 S.E.2d 95 (Ct. App. 1988) (holding estoppel on the grounds that the homeowner knew the residential builder was unlicensed at the time of contracting is not a defense to a similar statute relating to residential home builders, reasoning that “[i]f one might avoid the impact of the statute by applying the law of estoppel, one could, by a similar reasoning, avoid the act by agreement between the Contractor and Homeowner.”).

PC is aware that this Court issued an opinion since the subject case was tried and the Final Order issued in which it considered the applicability of Section 40-11-370. *Teseniar v. Professional Plastering & Stucco*, 407 S.C. 83, 754 S.E.2d 267 (Ct. App. 2014). In that case, the Court considered an indemnity claim asserted by one subcontractor against another. The defending subcontractor asserted that the indemnity claim was barred because the subcontractor was unlicensed. Although the Court found that the contractor had not violated the licensing statute, it appeared to note that the Section 40-11-370(c) would not bar claims between contractors because the purpose of protecting the public interest would not exist. *Id.*

There are several reasons why *Teseniar* is inapplicable to this case. First, this Project is in fact a public project. It was awarded under the S.C. Consolidated Procurement Code (the “Code”). Indeed, one of the purposes of the Code is to provide safeguards for the maintenance of a procurement system of quality and integrity on the part of all persons engaged in the public procurement process. S.C. Code Ann. § 11-35-20(g). The Courts have recognized that the purpose of these statutes is for the protection of the public and have strictly enforced the clear and unambiguous provisions of the statute. There is no analysis of the whether one of the parties to the contract are defined as a member of the “public.” Rather the protection of the public is served by the deterrent created by the harsh result of a nonlicensed contractor being prohibited from enforcing its contract.

Furthermore, the Court in *Teseniar* cited a Kentucky case in support of the finding that “the purpose of protecting the public interest by denying enforceability does not exist when dealing with claims between contractors. *Id.*; *Kenny v. Graves*, 300 S.W.2d 568

(Ky. App. 1957). However, the Kentucky Court in *Graves* was applying a general common law rule that a contract entered into by an unlicensed professional is void and unenforceable. In South Carolina, we have a specific statute that is clear and unambiguous that has been strictly applied to prohibit the enforceability of any action at law or in equity if the party is not properly licensed.

Teseniar, to the extent that it reflects a holding from this Court that under certain circumstances S.C. Code Ann. § 40-11-370 does not bar claims between contractors, does not apply to the facts of this case. The Project was a public project awarded pursuant to the Procurement Code and was to be utilized by a public university. There was a very specific public interest to ensure the work was performed by licensed contractors. As Miller cannot enforce its contract with PC either in law or in equity, Miller's claims against PC and Safeco must fail and the Trial Court's refusal to apply this statute should be reversed.

IV. THE TRIAL COURT ERRED IN DETERMINING THAT MILLER WAS ENTITLED TO RECOVER ON ITS CLAIM UNDER THE PAYMENT BOND AND IN ORDERING IMMEDIATE PAYMENT FROM THE BOND TO MILLER.

The Trial Court determined that Miller was entitled to \$51,270 for "suit on the payment bond." (Final Order, p. 7.) Because this Project was awarded pursuant to the Procurement Code, the provisions of S.C. Code Ann. § 11-35-3030 applied, requiring PC to obtain a labor and material payment bond. That bond was issued by Safeco.⁴ However, the payment bond issued pursuant to the South Carolina Consolidated Procurement Code is nothing more than a contract to which Miller may be a third party

⁴ Miller erroneously asserts that its suit on the payment bond is pursuant to S.C. Code Ann. § 29-5-440. (Complaint). Likewise, the Trial Court noted that the matter was brought pursuant to S.C. Code Ann. § 29-5-440. Because this bond was issued pursuant to the SC Procurement Code, the action on the bond could only be brought pursuant to S.C. Code Ann. § 11-35-3030.

beneficiary. See *Bob Hammond Constr. Co., Inc. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). There was no evidence in the Record for the Trial Court to rely on in its finding that Miller was entitled to any recovery on the payment bond. Specifically, there is no evidence as to whether Miller is a proper beneficiary under the bond, whether the claims for recovery are covered under the bond or whether Miller satisfied any conditions under the bond that might exist. Indeed, the bond itself was not introduced as evidence. Therefore, there is not any competent evidence on which the Trial Court could have relied in determining that Miller was entitled to recovery on its “suit on the payment bond” and such finding should be reversed.

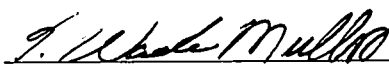
To the extent the Court determines that Safeco is liable to Miller under the payment bond, PC asserts that its Order regarding payment on the bond must be reversed. The Final Order does order judgment entered against PC in favor of Miller in the amount of \$51,270.08. It then goes on to order Safeco “to immediately pay this amount to Miller Construction Company, LLC from the payment bond it holds on behalf of PC Construction of Greenwood...” (Final Order, p. 7.) As stated, the payment bond issued is nothing more than a contract to which Miller may be a third party beneficiary. The bond is not an equity or account from which immediate payment can be ordered. *Anderson v. Aetna Casualty & Surety Co.*, 175 S.C. 254, 178 S.E. 819 (1935) (holding that a bond is nothing more than an agreement or contract under seal to pay money or to do some thing, and an action upon the bond is an action at law.); *Moore Elec. Supply, Inc. v. Ward*, 316 S.C. 367, 369, 450 S.E.2d 96, 97 (Ct. App. 1994). Because the action on the bond is a contract action, the proper remedy is to order judgment against Safeco on

the claim on the bond rather than payment “from the payment bond” as that mischaracterizes the nature of the payment bond and would be inappropriate.

CONCLUSION

For the reasons stated above, this Court should reverse the trial court’s holding that PC cannot recover under their breach of contract cause of action, and reverse the trial court’s holding that Miller did not cause any delay on the Project. Miller presented no probative evidence at trial to refute PC’s overwhelming evidence that Miller caused delay on the Project. PC has a right to enforce Article 6e of the Subcontract, which entitles PC to damages for those delays. Furthermore, the Trial Court erred when it determined that Miller, as an improperly licensed subcontractor, was permitted to pursue its claim for breach of contract. Lastly, the Trial Court’s finding with regards to recovery against Safeco was erroneous and not supported by any competent evidence. This action should be remitted to the Trial Court for a judgment to be entered in favor of PC in the amount of \$ 89,686.89.

Respectfully submitted,



E. Wade Mullins, III
Caitlin Creswick Heyward
BRUNER, POWELL, WALL & MULLINS, LLC
1735 St. Julian Place, Suite 200
P.O. Box 61110
Columbia, South Carolina 29260
(803) 252-7693
Fax: (803) 254-5719
wmullins@brunerpowell.com
cheyward@brunerpowell.com
Attorneys for Appellants-Respondents

August 16, 2015