

STATE OF SOUTH CAROLINA  
 COUNTY OF CHARLESTON  
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

**RECEIVED**

CASE NO. 2013- CP-10-7413

SEP 14 2015

Affordable Concrete and Masonry,

Roper Hanks, LLC,

SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or
	<input type="checkbox"/> Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

FILED  
 JULIE L. ARMSTRONG  
 CLERK OF COURT  
 2015 MAR -3 PM 2:30

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court: The above matter came before the Court on Defendant's Motion to Dismiss, Transfer Venue, and Compel Arbitration. The Court hereby DENIES Defendant's Motion.

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

*[Signature]*  
 Circuit Court Judge

2151  
 Judge Code

3/2/15  
 Date



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 AFFORDABLE CONCRETE AND )  
 MASONRY D/B/A RSS, LLC, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ROPER HANKS, LLC, )  
 )  
 Defendant. )

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IN THE COURT OF COMMON PLEAS  
 FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-10-7413

FILED  
 2015 MAR -3 AM 9:17  
 JULIE J. ARMSTRONG  
 CLERK OF COURT  
 BY \_\_\_\_\_

THIS MATTER CAME BEFORE THE COURT on December 18, 2014, on a Motion to Dismiss Action, Transfer Venue, and Compel Arbitration filed by the Defendant Roper Hanks, LLC. Based on the memoranda, pleadings, and oral arguments of Counsel presented at the hearing and for the reasons set forth below, the Defendant’s Motion to Dismiss Action, Transfer Venue, and Compel Arbitration is hereby **DENIED**.

**BACKGROUND FACTS**

Defendant Roper Hanks (“Roper”) requested subcontractor bids to remodel Haverty Furniture Companies, Inc. (“Haverty”) in Charleston, South Carolina. Plaintiff Affordable Concrete and Masonry (“Affordable”) submitted a bid to Roper for the contract price of Forty-Two Thousand Forty-Three and 83/100 (\$42,043.83) Dollars to provide labor and materials for the installation of concrete, pavers, and brick work. Roper accepted the bid and selected Affordable as the subcontractor on March 7, 2013.

Affordable is a small company owned by Steve Hughes that conducts most of its business in

Page 1 of 6  
 3/2/15

Horry County, but performs some projects in other parts of South Carolina. Although a small business, its customers include Hobby Lobby, Pet Smart, O'Reilly Auto Parts, Verizon, Starbucks, Horry County, and the City of Conway. Roper Hanks is large corporation located in Georgia and conducts business all throughout the southeast. Roper Hanks supplied the form contract to Affordable. The contract was signed in South Carolina, the materials were purchased in South Carolina, and the entire content and matter of the case relates to South Carolina. The performance of the contract occurred in South Carolina and is related to the development of property in South Carolina.

Affordable began work within ten days and completed Phase I of the project. Affordable submitted its first application for payment on March 28, 2013. At that time Roper presented the Subcontractor Agreement to Affordable for signature. The contract was not signed by either party until April 5, 2013. Affordable signed the Agreement and proceeded to complete Phase II of the project. Affordable was further requested by Roper to perform additional work for Twelve Thousand Five Hundred Thirty and 30/100 (\$12,530.30) Dollars in change orders.

Plaintiff contends it is still owed Twenty Five Thousand Nine Hundred Sixteen and 62/100 (\$25,916.62) Dollars for the work performed. Plaintiff filed suit in December 2013. Defendant filed a Motion to Compel Arbitration in reliance on the Arbitration clause contained in paragraph X of the Subcontract Agreement and Transfer Venue.

#### LAW/ANALYSIS

Under the Federal Arbitration Act (FAA), "arbitration agreements . . . in contracts evidencing transactions involving commerce are valid, irrevocable and enforceable" 9 U.S.C. § 2 (1988). The FAA defines commerce as "commerce among the several states." 9 U.S.C. § 1 (1988).

To determine whether a contract involves interstate commerce, the court must examine the agreement, the complaint, and surrounding facts. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001). "The development of land within South Carolina's border is the quintessential example of a purely intrastate activity."

Affordable was hired to do concrete work at a project in Charleston, South Carolina. Despite Defendant's incorporation in Georgia, the companies contracted to do business in South Carolina and signed the contract in South Carolina. The work was performed in South Carolina. Affordable was responsible under the contract to supply all labor, materials, lifts, and safety equipment. The materials were made or purchased within South Carolina. All of the laborers and potential witnesses are located in South Carolina. Defendant did not supply any evidence, other than the incorporation of Defendant in Georgia, that the specific contract for concrete services involved interstate commerce.

The Court hereby finds that the FAA does not apply to the case at hand and, therefore, South Carolina law is applied to the arbitration agreement. Under the South Carolina Uniform Arbitration Act, "[n]otice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters...on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration". S.C. Code § 15-48-10. The Subcontract Agreement in this case does not contain the requisite notice under South Carolina law and is therefore, unenforceable.

In addition to finding that the required notice renders the arbitration provision unenforceable, the Court finds that the arbitration provision is unconscionable. A starting point in determining whether a clause is unconscionable is to determine whether the contract was one of adhesion. Although adhesion contracts are not *per se* unconscionable, a finding by the Court that the

agreement constituted an adhesion contract is the beginning point of the analysis. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663, 669 (2007). “[A]n adhesion contract is a standard form contract offered on a ‘take-it-or-leave-it’ basis with terms that are not negotiable.” *Id.* at 26-27. In the instant case, the Subcontract agreement was a form document drafted and provided by Defendant. The document was presented to Plaintiff after it had performed a substantial amount of work on the project. Plaintiff was offered no meaningful opportunity to bargain for the terms; rather, the document was boiler plate terms with attached exhibits. If Plaintiff refused to sign Defendant’s subcontract, Plaintiff risked not getting paid for the work previously done. These circumstances are indicative of an adhesion contract. After finding an adhesion contract, the Court must continue the analysis by examining the elements of unconscionability.

“In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Id.* Factors to be considered when determining whether a party had a meaningful choice include “the relative disparity in the parties’ bargaining power; the parties’ relative sophistication; the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.” *Id.* As established above, the Subcontract Agreement is an adhesion contract and Plaintiff had little to no bargaining power. Defendant is a large corporation that does business throughout the southeast United States, and Plaintiff is a local concrete and masonry company, owned by a single individual. The respective size, scope of business, and business experience demonstrates an imbalance in the parties’ sophistication.

As the Subcontract Agreement was not given to Plaintiff until after it began work on the project further demonstrates a lack of meaningful choice as to the agreement's terms. Plaintiff began work within ten (10) days of being selected as the subcontractor on March 7, 2013. Defendant did not provide the contract to Plaintiff until March 21, 2013. Plaintiff had performed significant work on the project prior to this date. The contract was not signed until April 5, 2013, after Plaintiff had committed a significant amount of time and money on the project.

The agreement, specifically the arbitration clause, did have an element of surprise because of its inconspicuousness and the one-sided terms in the document. Similar to *Simpson*, the arbitration clause was entirely in standard small print and located in Paragraph "X" labeled "Claims and Disputes" in the sixteen (16) page agreement. The Arbitration Clause requires that Affordable agree to an arbitrator selected by Defendant. Further, it mandates that Affordable abide by Defendant's decision or commence arbitration proceedings within thirty (30) days. After thirty days, the Defendant's decision becomes final and binding. The clause also allows Defendant, at its "sole option," to consolidate arbitrations. If the subcontractor fails to abide by the final binding decision of the contractor, the contractor has the right to withhold sums due to the subcontractor. While Paragraph "X" contains many requirements for arbitration for the subcontractor, the contractor is excluded from these obligations as it relates to a dispute between contractor and subcontractor.

Due to Plaintiff's lack of bargaining power, lack of sophistication, the nature of the damages, the inconspicuous placement and form of the arbitration clause, and the timing of the contract, Plaintiff was not afforded a meaningful choice to agree to arbitration. Plaintiff's lack of meaningful choice, in conjunction with the one-sided and oppressive terms of the agreement, makes the arbitration agreement unconscionable, and therefore unenforceable.

Generally, under South Carolina choice of law principles, if the parties to a contract specify

the law under which the contract shall be governed, the court will honor this choice of law. But, if the resulting agreement is invalid as a matter of law or contrary to public policy in South Carolina, our courts will not enforce the agreement. *Id.*; *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 159, 621 S.E.2d 352, 353 (2005). The Court finds that the choice of law provision at issue is one-sided, oppressive, adhesive, and the contract was not provided to Plaintiff until after work had begun. Therefore, Plaintiff did not have a meaningful choice in signing the Venue Clause of the Subcontract Agreement. Further the costs of moving the venue to Georgia coupled with the relative size of the parties makes the clause further imbalanced. Therefore, the clause is unconscionable and invalid.

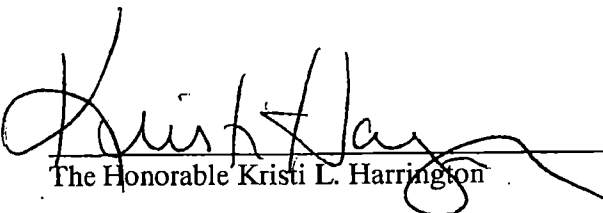
Additionally, South Carolina law applies because the loss occurred in South Carolina, the contract was signed in South Carolina and the entire content and matter of the case relates to South Carolina. Further, as the FAA does not apply, S.C. Code § 15-7-120 provides that even if a contract has a Venue Clause, the cause of action may, alternatively, be brought “in the manner provided in this title and the South Carolina Rules of Civil Procedure.” Here, the South Carolina Rules of Civil Procedure allow this cause of action to be brought in Charleston County, where venue is proper.

**ORDER**

IT IS HEREBY ORDERED that the Motion to Dismiss, Transfer Venue, and Compel Arbitration is hereby **DENIED**.

**IT IS SO ORDERED!**

Dated: March 2, 2015  
Charles, South Carolina

  
The Honorable Kristi L. Harrington

LAW OFFICES

# CARLOCK COPELAND & STAIR, LLP

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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REPLY TO CHARLESTON OFFICE

SEP 14 2015

SC Court of Appeals

September 9, 2015

Susan Mia Perron  
P.O. Box 31865  
Charleston, SC 29417-1865

Re: Affordable Concrete and Masonry d/b/a RSS, LLC, Respondent v. Roper Hanks,  
LLC, Appellant  
Appellate Case No. 2015-001788

Dear Ms. Perron:

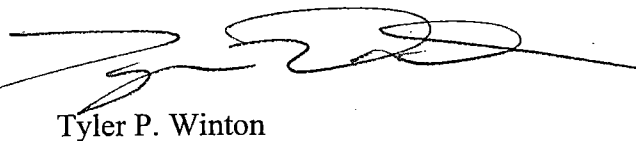
I have received and thank you for your letter of August 30, 2015 (copy enclosed) regarding the cost for the transcript relating to the above appeal. Enclosed is our firm's check in the amount of \$42.25. Please provide me with a copy of the transcript from the hearing on Roper Hanks, LLC's Motion to Dismiss, Transfer Venue, and Compel, which was heard by the Honorable Kristi Lea Harrington on December 18, 2014. The case caption is enclosed, per your request.

Pursuant to the Rule 207 of the South Carolina Appellate Court Rules, you should deliver the transcript to me within 60 days, or, notify me that you have requested an extension.

By copy of this letter, with enclosures, to all counsel of record, the Clerk of Court for the South Carolina Court of Appeals, and the Office of Court Administration, I am providing them with copies of our correspondence regarding the transcript.

Thank you for your assistance. I look forward to hearing from you soon.

Sincerely,



Tyler P. Winton

TPW/tal

Enclosures

Cc (w/enc.): Natasha Hanna, Esq.

Clerk of Court, South Carolina Court of Appeals  
Office of Court Administration

SUSAN "MIA" PERRON  
CIRCUIT COURT REPORTER  
POST OFFICE BOX 31865  
CHARLESTON, SOUTH CAROLINA 29417-1865  
1-706-231-6028 [office]

August 30, 2015

Tyler P. Winton, Esquire  
Carlock Copeland & Stair  
40 Calhoun Street, Suite 400  
Charleston, South Carolina 29401

In Re: Affordable Concrete and Masonry d/b/a RSS LLC.v. Haverty Furniture  
2013-CP-10-07413

Dear Mr. Winton:

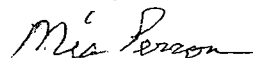
Per your request for the above-captioned transcript, I have reviewed my records and estimate that the transcript will be approximately 15 pages. Based on the current rate of \$3.25 per page, the estimated cost of the transcript will be \$42.25.

Under our rules, I have 60 days to complete the transcript. Upon receipt of your check in the amount of \$42.25, the 60 days begin. If I have underestimated the number of pages, you will be notified of the balance due prior to delivery of the transcript. If I have overestimated the number of pages, you will be refunded the overpayment.

Please enclose a case caption so that all parties can be adequately reflected.

In the event I need an extension of time to complete the transcript, I will request an extension from Court Administration. You will be notified if the extension is granted.

Sincerely,



Mia Perron, CVR-CM-M



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**The South Carolina Court of Appeals**

SEP 14 2015

**SC Court of Appeals**

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29211  
1220 SENATE STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
[www.sccourts.org](http://www.sccourts.org)

September 04, 2015

Mr. Paul Eliot Sperry, Esquire  
Carlock Copeland & Stair  
40 Calhoun Street, Suite 400  
Charleston SC 29401

Re: Affordable Concrete v. Roper Hanks, LLC  
Appellate Case No. 2015-001788

Dear Counsel:

You must file a copy of the order dated March 3, 2015 in order for it to be reviewed by this Court.

Very truly yours,

*V. Claire Allen, Deputy*

CLERK

cc: Tyler Paul Winton, Esquire  
Natasha M. Hanna, Esquire

LAW OFFICES

# CARLOCK COPELAND & STAIR, LLP

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SEP 14 2015

SC Court of Appeals

September 9, 2015

Jenny Abbott Kitchings, Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

Re: Affordable Concrete and Masonry d/b/a RSS, LLC, Respondent v. Roper Hanks,  
LLC, Appellant  
Appellate Case No. 2015-001788

Dear Ms. Kitching:

Per your letter of September 4, 2015 (copy attached), enclosed is a copy of the Order denying Appellant's Motion to Dismiss, Transfer Venue, and Compel Arbitration dated March 3, 2015.

By copy of this letter, I am providing counsel for the Respondent, Natasha M. Hanna, Esquire, with this correspondence and Order.

Thank you for your assistance. If you have any questions, please do not hesitate to contact me.

Sincerely,



Tyler P. Winton

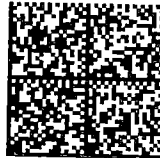
TPW:tal

Enclosures

cc (w/enc.): Natasha Hanna, Esq.

**CARLOCK**  
**COPELAND**  
CIVIL LITIGATION

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40 Calhoun Street, Suite 400  
Charleston, SC 29401



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South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

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SEP 14 2015

SC Court of Appeals

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