

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal From Greenwood County
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2014-002749
Trial Court Case No. 2012-CP-24-574

RECEIVED
NOV 06 2015
SC Court of Appeals

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

v.

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

RESPONDENT'S FINAL BRIEF OF RESPONDENT / APPELLANT

David J. Brousseau
McIntosh, Sherard, Sullivan & Brousseau
Post Office Box 197
Anderson, South Carolina 29622-0197
(864) 225-0001 || (864) 225-0004 (Fax)
Attorney for Respondent / Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
STATEMENT OF ISSUES.....	1
STATEMENT OF THE CASE ..	2
SEPARATE STATEMENT OF FACTS	3
ARGUMENT	
(A) STANDARD OF REVIEW.....	5
(B) DISCUSSION	5
I. THE COURT PROPERLY DENIED PC CONSTRUCTION'S COUNTERCLAIM FOR DELAY DAMAGES WHEN A) IT WAS NOT ASSESSED ANY DAMAGES FOR DELAYS BY THE OWNER and B) IT AGREED TO ADDITIONAL COMPENSATION FROM LANDER DUE TO DELAYS NOT CAUSED BY PC OR IT SUBCONTRACTORS.	5
II. THE COURT PROPERLY DENIED PC CONSTRUCTION'S COUNTERCLAIM FOR DELAY DAMAGES WHEN IT WAS UNABLE TO PROVE THAT MILLER CAUSED ANY ALLEGED DELAYS.	9
III. THE COURT PROPERLY FOUND THAT MILLER WAS PROPERLY LICENSED AND PERMITTED TO BRING A LAWSUIT TO ENFORCE THE SUBCONTRACT.	12
IV. THE COURT PROPERLY FOUND THAT MILLER SHOULD BE ENTITLED TO IMMEDIATE PAYMENT FROM THE PAYMENT BOND.	16
CONCLUSION.....	17

TABLE OF AUTHORITIES

Cases

<i>Bostic v. Am. Home Mortg. Servicing, Inc.</i> , 375 S.C. 143, 650 S.E.2d 479 (Ct. App. 2007)	14
<i>Branche Builders, Inc. v. Coggins</i> , 386 S.C. 43, 686 S.E.2d 200 (Ct. App. 2009)	9,10
<i>Drews Co., Inc. v. Ledwith-Wolfe Assocs., Inc.</i> , 296 S.C. 207, 371 S.E.2d 532 (1988).	11,12
<i>Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC</i> , 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007).	5
<i>Grier v. AMISUB of SC</i> , 397 S.C. 532, 725 S.E.2d 693 (2012).	14
<i>Kennoy v. Graves</i> , 300 S.W.2d 568 (Ky. App. 1957).	16
<i>Moore Elec. Supply, Inc. v. Ward</i> , 316 S.C. 367, 450 S.E.2d 96 (Ct. App. 1994).	17
<i>Ross v. Waccamaw Cmty. Hosp.</i> , 404 S.C. 56, 744 S.E.2d 547 (2013).	14,15
<i>S.C. Fed. Savs. Bank v. Thornton-Crosby Dev. Co.</i> , 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990).	9
<i>Teseniar v. Prof'l Plastering & Stucco, Inc.</i> , 407 S.C. 83, 754 S.E.2d 267 (Ct. App. 2014).	16,17
<i>Townes Assocs., Ltd. v. City of Greenville</i> , 266 S.C. 81, 221 S.E.2d 776 (1976)	5,12

Statutes

S.C. Code Ann. § 40-1-10 (2011).	16
S.C. Code Ann. § 40-11-270 (1998).	13,14
S.C. Code Ann. § 40-11-300 (1998).	13,14, 16
S.C. Code Ann. § 40-11-370 (1998).	13
S.C. Code Ann. § 40-11-410 (1998).	13,14

Secondary Sources

<i>Merriam-Webster's Collegiate Dictionary</i> (10 th ed. 1998).	14
---	----

STATEMENT OF ISSUES ON APPEAL

- I. THE COURT PROPERLY DENIED PC CONSTRUCTION'S COUNTERCLAIM FOR DELAY DAMAGES WHEN A) IT WAS NOT ASSESSED ANY DAMAGES FOR DELAYS BY THE OWNER and B) IT AGREED TO ADDITIONAL COMPENSATION FROM LANDER DUE TO DELAYS NOT CAUSED BY PC OR IT SUBCONTRACTORS.
- II. THE COURT PROPERLY DENIED PC CONSTRUCTION'S COUNTERCLAIM FOR DELAY DAMAGES WHEN IT WAS UNABLE TO PROVE THAT MILLER CAUSED ANY ALLEGED DELAYS.
- III. THE COURT PROPERLY FOUND THAT MILLER WAS PROPERLY LICENSED AND PERMITTED TO BRING A LAWSUIT TO ENFORCE THE SUBCONTRACT.
- IV. THE COURT PROPERLY FOUND THAT MILLER SHOULD BE ENTITLED TO IMMEDIATE PAYMENT FROM THE PAYMENT BOND.

STATEMENT OF THE CASE

On November 28, 2011, Respondent-Appellant Miller Construction Company, LLC, [hereinafter “Miller”] filed and served its Statement of Account and Certificate on Payment Bond. (R. pp. 42–52).

On May 25, 2012, Miller filed its Summons and Complaint seeking, *inter alia*, damages for breach of contract and suit on the payment bond. (R. pp. 1-9). Appellant-Respondents PC Construction of Greenwood, Inc., [hereinafter “PC”] and Safeco Insurance Company of America [hereinafter “Safeco”] filed an Answer generally denying the allegations and offering affirmative defenses. (R. pp. 21-33). Subsequently, they were permitted to amend the Answer and Counterclaim alleging, *inter alia*, damages against Miller for breach of contract. (R. pp. 34-41).

Prior to trial, PC was permitted to further amend its Answer and Counterclaim to assert an affirmative defense that Miller was not properly licensed. (R. p. 162, line 8 – p. 164, line 5).

On October 25, 2013, Miller filed a Motion for Summary Judgment. On November 4, 2013, PC filed its Motion for Summary Judgment. Both motions were denied just prior to the start of trial.

A non-jury trial was held before the Honorable Eugene C. Griffith, Jr. on November 4, 5, and 6, 2013. As a result of the trial, a Final Order & Judgment was filed with the Greenwood County Clerk of Court on July 6, 2014. (R. pp. 1-9).

The parties all filed respective motions to reconsider. (R. pp. 83-99). Those motions were denied by way of Order filed on November 26, 2014. (R. pp. 10-13).

PC and Safeco filed their appeal. Miller subsequently filed its cross-appeal.

SEPARATE STATEMENT OF FACTS

PC was the general prime contractor for construction of the Lander University Jeff May Sports Complex [hereinafter referred to as the "Project"]. (R. pp. 1-9). PC hired Miller as a subcontractor on the project to perform, *inter alia*, grading and site prep work. (R. pp. 14-20; p. 179, line 1 - p. 180, line 25). The original subcontract called for Miller to perform these services for a price of \$492,424.00. (R. p. 178, lines 14-25; pp. 450-74).

Early into the project, widespread asbestos laden materials were discovered on site. (R. p. 181, line 1 - p. 184, line 17). This discovery and the removal process of these materials caused significant delays to the project¹. (R. p. 181, line 1 - p. 184, line 17).

Throughout the project, Miller was paid by PC upon making pay applications. (R. p. 363, line 7 - p. 364, line 13; p. 300, line 10 - p. 301, line 7). No complaints were made by PC regarding the timeliness of Miller's work during the progress of the project. (R. p. 188, lines 14-22). Upon receiving Miller's final pay application, PC did not assert that it was withholding payment due to alleged delays. Regardless, PC withheld payment to Miller on the basis that it had not yet been paid by the owner. (R. p. 190, line 5 - p. 191, line 4).

Miller timely filed its Notice of Claim on the Payment Bond held by Safeco. (R. pp. 42-52). Originally, Miller claimed it was owed \$78,363.08. Three (3) months after the filing of the claim on the payment bond, PC paid Miller \$24,688.00². This partial payment reduced Miller's claim to \$53,695.08. (R. p. 185, line 2 - p. 188, line 13).

At the time of Miller's final pay application, PC had not yet been paid its final payment from the owner, Lander University (a/k/a The Lander Foundation). A dispute arose

¹ Miller successfully bid on the removal of the asbestos. This was paid through change order.

² This payment was made without prejudice to the rights of the parties.

between Lander and PC regarding how much was owed to PC from Lander. (R. p. 190, line 5 - p. 191, line 4). In the spring of 2013, an agreement was reached between PC and Lander regarding final payment, and PC then received final payment from Lander. No damages for delay were assessed by Lander against PC. (R. p. 366, lines 10-14; p. 403, line 24 - p. 404, line 14). Lander paid PC approximately \$200,000.00 for retainage owed, \$12,000 owed to previous subcontractor and approximately \$120,000.00 as additional compensation to PC for 'extended conditions' due to delays not caused by PC or its subcontractors. (R. p. 403, lines 9-19). However, despite receiving final payment from Lander, PC still withheld final payment to Miller. (R. p. 190, line 5 - p. 191, line 4).

PC claims that it was damaged by delays allegedly caused by Miller. PC also claims that Miller cannot sue PC because it is allegedly not properly licensed. (R. pp. 34-41).

At trial, PC admitted that it owed Miller \$51,270.08 of the \$53,695.08 claimed by Miller as being owed under the subcontract. (R. p. 358, line 21 - p. 362, line 20; p. 629). However, PC claims that it refused payment to Miller because it alleged that Miller owed PC damages for delays that exceeded, by alleged offset, what it owed Miller. (R. p. 366, line 19 - p. 367, line 5).

The Court found that PC owed Miller \$51,270.08. It further denied PC's counter-claim for alleged damages owed for delays in the project. PC appealed the Court's decision. Miller filed a cross-appeal alleging that the Court erred in not granting Miller prejudgment interest on its claim.

ARGUMENT

STANDARD OF REVIEW

“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.” *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). “The judges’s finding are equivalent to a jury’s findings in a law action.” *Id.* This Court may also correct any errors of law. *Id.*

I. THE COURT PROPERLY DENIED PC CONSTRUCTION’S COUNTERCLAIM FOR DELAY DAMAGES WHEN A) IT WAS NOT ASSESSED ANY DAMAGES FOR DELAYS BY THE OWNER and B) IT AGREED TO ADDITIONAL COMPENSATION FROM LANDER DUE TO DELAYS NOT CAUSED BY PC OR IT SUBCONTRACTORS.

“In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties.” *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). “The parties’ intention must be gathered from the contents of the entire agreement and not from any particular clause thereof.” *Id.*, 347 S.C. at 498, 649 S.E.2d at 502. “In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered.” *Id.*

PC claims it is entitled to damages from Miller for delays it says Miller caused on the project. The subcontract, in relevant part, in Article 6, provides as follows:

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

.
.
.
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 Constructions 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 PC Construction of Greenwood, Inc. extended overhead.

(R. pp. 450-74) (emphasis added).

Regarding payment by PC to Miller during the progress of the project, the relevant provisions of the contract are as follows:

ARTICLE 3

.
.
.
e. **CONDITIONS OF PAYMENT**

Within ten (10) days after receipt by PC Construction of Greenwood, Inc. from Owner of monies in payment of Subcontractor's application for payment, receipt of such payment from Owner being an express condition precedent to PC Construction of Greenwood, Inc.'s obligation to pay Subcontractor, PC Construction of Greenwood, Inc. shall pay the same over to Subcontractor, less retainage. Notwithstanding any contrary provision elsewhere in this Subcontract, **PC Construction of Greenwood, Inc. may delay payment of all or any portion of Subcontractor's application for payment in order to reasonably determine that Subcontractor's Work for which payment is requested has been properly performed and is in place, that sufficient funds remain available to complete Subcontractor's Work, that Subcontractor's Work will be completed as required by the Job Schedule, that Subcontractor's application for payment and accompanying affidavits and waivers are true and correct in fact, and that all other requirements of this Subcontract have been satisfied relative to Subcontractor's Work for which payment is sought. When such determinations have been made to PC Construction of Greenwood, Inc.'s satisfaction, PC Construction of Greenwood, Inc. will make payment in accordance with Subcontractor's application as provided for in this Subcontract.** No such determination or payment shall relieve Subcontractor from its obligations

under this Subcontract, nor stop PC Construction of Greenwood, Inc. from subsequently asserting Subcontractor's failure to satisfy said obligations.

(R. pp. 450-74) (emphasis added).

The relevant portions of the contract regarding final payment provides as follows:

iii. **CONDITIONS OF FINAL PAYMENT.** Final Payment of the balance of the Subcontract Price due shall be made to Subcontractor:

1. when appropriate certification and final approval thereof have been received as provided in the Contract Documents; and
2. after receipt by PC Construction of Greenwood, Inc. of final payment from Owner, such receipt being an express condition precedent to PC Construction of Greenwood, Inc.'s obligation to make final payment to the Subcontractor. Subcontractor's acceptance of final payment shall constitute a waiver by Subcontractor of all claims relating to Subcontractor's Work except such claims as have been previously identified and made in writing and fully and properly preserved and pursued pursuant to the terms of this Subcontract.

(R. pp. 450-74).

Lastly, Article 6, Paragraph d of the Subcontract regarding Claims Relating to Owner provides as follows:

... Subcontractor shall only be entitled to an adjustment to the Subcontract Price or Job Schedule, for performing and completing that portion of Subcontractor's Work associated with any claim for which Owner is or may be liable, upon the same terms and conditions as any extension of time or additional compensation is allowable to PC Construction of Greenwood, Inc. under the Contract Documents, and only to the extent actually allowed and paid to PC Construction of Greenwood, Inc. by Owner, receipt of payment from Owner being an express condition precedent to PC Construction of Greenwood, Inc.'s obligation to pay Subcontractor. **Any decision of Owner or Architect with respect to such claims which, under the terms of arbitration or litigation between Owner and PC Construction of Greenwood, Inc. which becomes final and binding on PC Construction of Greenwood, Inc. shall likewise be final and binding on Subcontractor.**

(R. pp. 450-74) (emphasis added).

Throughout the 13 pages of the Subcontract it is clear that the intent of the parties is that if the Owner and PC made a decision regarding the project, or if a dispute arose and through arbitration a decision is made about the dispute, that decision would be binding upon Miller. During testimony, PC agreed that unless Lander assessed damages for delay against PC, PC could not pass those damages on to Miller. (R. p. 366, lines 15-18; pp. 475-78).

At the completion of the project, Lander and PC became involved in a dispute regarding how much PC would receive as final payment. PC was seeking from Lander additional compensation for 'extended overhead' due to delays on the project that were not the fault of PC or its subcontractors. (R. p. 403, lines 9-19).

PC admits that it was not assessed any damages due to delays. (R. p. 366, lines 10-14). Further, as part of its negotiated and agreed upon final payment from Lander it received approximately \$120,000 as additional compensation for 'extended overhead' due to delays on the project not caused by PC or its subcontractors. (R. p. 403, lines 9-19). Coincidentally, this figure is close the same amount PC sought from Miller due to alleged delays.

PC contends that its agreement regarding this amount is irrelevant to the case at hand. However, the Subcontract makes it clear that it is relevant. The contract specifically states that "any decision of Owner or Architect with respect to such claims which, under the terms of arbitration or litigation between Owner and PC Construction of Greenwood, Inc. which becomes final and binding on PC Construction of Greenwood, Inc. shall likewise be final and binding on Subcontractor." (R. pp. 450-74).

PC accepted a final payment from Lander. That final payment did not assess any damages for delay. Further, that payment incorporated a component of additional compensation to PC for 'extended overhead' due to delays not caused by PC or its subcontractors. That decision by PC was final and binding pursuant to the Subcontract

between PC and Miller³. Accordingly, pursuant to the contract, PC can not attempt to assess any type of damages for delay against Miller.

Accordingly, the Court did not err in its decision to grant Miller's motion for an involuntary non-suit as to PC's counterclaim for alleged delay damages. Viewing the evidence and any inferences therefrom in a light most favorable to PC, it could not sustain the cause of action because a) it was not assessed damages by the owner for delay and b) once it accepted the decision in its dispute with Lander regarding additional compensation for delays not caused by PC or its subcontractors, it was bound by that decision pursuant to its subcontract with Miller.

II. THE COURT PROPERLY DENIED PC CONSTRUCTION'S COUNTERCLAIM FOR DELAY DAMAGES WHEN IT WAS UNABLE TO PROVE THAT MILLER CAUSED ANY ALLEGED DELAYS.

Miller contends that the Court did not err in granting its motion for involuntary non-suit as to PC's counterclaim. However, even if the Court did err in that regard, the evidence was overwhelming that PC was not entitled to damages for alleged delays.

"The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Id.* "In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed." *Id.* citing *S.C. Fed. Savs. Bank v. Thornton-Crosby Dev. Co.*, 303 S.C. 74, 71, 399 S.E.2d 8, 10 (Ct. App. 1990).

³ It should be noted that the Subcontract does not allow Miller to make a claim against PC for damages due to delay on the part PC. (R. pp. 450-74).

In this case, PC claims that a) Miller caused delays on the project in breach of the Subcontract and that b) PC was damaged as a result of those delays. (R. pp. 34-41). The Court granted Miller's motion for involuntary non-suit on PC's counterclaim. (R. pp. 1-9). However, in a footnote, the Court further stated, "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." (R. pp. 1-9).

Throughout the project, Miller was paid by PC upon making pay applications. (R. p. 363, line 7 - p. 364, line 13; p. 300, line 10 - p. 301, line 7). No complaints were made by PC regarding the timeliness of Miller's work or the quality of Miller's work during the progress of the project. (R. p. 188, lines 14-22).

In January of 2011, PC emailed Miller acknowledging Miller was on-site when allegedly no other subcontractors were. Further, PC stated that Miller was a great sub of which PC would gladly recommend. (R. p. 312, line 10 - p. 314, line 5; pp. 481-84).

In April of 2011, PC again sent emails to Miller claiming that PC wants to make sure that Miller is doing what is necessary to keep the project on track. (R. p. 314, lines 6-15). Additionally, later that same month, PC confirmed to Miller that the owner had not charged for liquidated damages due to alleged delays. (R. p. 314, lines 16-25; pp. 485-86).

At the completion of the project in November of 2011, PC admitted that it owed Miller approximately \$15,000 as well as its retainage of approximately \$51,000. (R. p. 315, lines 4-16; p. 479). No mention was made by PC of any alleged delays or damages due to delays of Miller at the time of Miller's final pay application. (R. p. 315, lines 13-16).

In fact, at no stage during the project, or even shortly after completion of the project, did PC ever give notice to Miller that it was invoking any type of damages against Miller for any type of delays.

Numerous witnesses testified that Miller did not cause any delays on the project. Some of these same witnesses testified that, if anything, Miller kept the project running, as best it could, in accordance with the job schedule. (R. p. 396, line 6 - p. 400, line 1; p. 417, line 18 - p. 421, line 9; p. 424, line 2 - p. 426, line 2).

All parties involved in this action agree that significant delays occurred on this project. Most notably the discovery of asbestos laden materials found under the ground on site caused the most significant delays. No party anticipated such a discovery or delay.

PC further admits that it was not assessed liquidated damages for delay from Lander. (R. p. 366, lines 10-14). Additionally, PC accepted additional compensation from Lander for “extended general conditions” due to delays not caused by PC or its subcontractors. (R. p. 403, lines 9-19).

Lastly, the damages PC states arose due to alleged delays are speculative and duplicative. They were approximately two (2) times the amount of what the liquidated damages would be on a daily basis. (R. p. 350, lines 5-8). PC’s expert testified that the daily rate of \$945.07 for alleged delays was “[t]hat daily rate represents **generally** on an average basis what it costs for PC to be on the project daily.” (R. p. 336, line 12 - p. 337, line 15). Gary Piontek of PC testified that the daily rate was a break down of PC’s expenditures, including supervision and profit. (R. p. 298, lines 2-24; p. 623).

“The crucial requirement in lost profits determinations is that they be ‘established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative.’ *Drews Co., Inc. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 213, 371 S.E.2d 532, 535-36 (1988). “The proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally

drawn.” *Id.* Like the owner-respondent in *Drews Co.*, PC simply provided a sheet of figures that were not supplemented with corresponding bills, statements or testimony. Additionally, much the exhibit has payment for supervisors, who would not be on this particular project if the project was delayed and no work was being performed. Lastly, PC received compensation from Lander for ‘extended general conditions.’ It now seeks additional compensation from Miller for the identical issue.

In a breach of contract action, “[t]he 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.” *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). “The judges’s finding are equivalent to a jury’s findings in a law action.” There is overwhelming evidence in the record to support the trial court’s finding that PC did not meet its burden of proof that Miller breached the Subcontract, and its finding that “Miller did not cause any delays on this project.” As such, the trial court’s decision regarding this issue should be affirmed.

III. THE COURT PROPERLY FOUND THAT MILLER WAS PROPERLY LICENSED AND PERMITTED TO BRING A LAWSUIT TO ENFORCE THE SUBCONTRACT.

Miller holds a license with the classification of “grading.” PC holds a license of “general contractors - highway.” PC’s license classification is unlimited in the amount. PC contends that Miller is barred from bringing this lawsuit because it is not properly licensed. PC further contends that Miller should have held a license in “water and sewer.”

S.C. Code Ann. § 40-11-370(C) states, “[a]n entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract.”

S.C. Code Ann. § 40-11-300 (1998) provides, “It is unlawful for an owner, a construction manager, **a prime contractor**, or another entity with contracting or hiring authority on a construction project to divide work into portions so as to avoid the financial or other requirements of this chapter as it relates to license classifications or subclassifications or license groups, or both.” (Emphasis added). Further, S.C. Code Ann. § 40-11-270 (1998) states, “[l]icensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee’s license group and license classification or subclassification; provided, the licensee provides supervision. **The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee.**” (Emphasis added).

S.C. Code Ann. § 40-11-410(2)(d) provides that the license classification of “General Contractors-Highway” *includes* work under these subclassifications:

- (d) Grading- which includes the soil preparation and rehabilitation of streets, roads, highways, railroad beds, building sites, parking lots, **and storm sewers**. This subclassification also includes work under the subclassification of Highway Incidental.
- (e) Highway Incidental- which includes highway work for grooving, milling, rehabilitating, and installing guardrails, gutters, highway signs, pavement mark and painting.

S.C. Code Ann. § 40-11-410(2)(d)(1998) (emphasis added).

There is no question in this case that PC, as prime contractor, supervised all construction on this project on a daily basis.

Pursuant to S.C. Code Ann. §§ 40-11-300 and 40-11-270, as the prime contractor, PC was responsible to ensure that it, or its subcontractors, were properly licensed and if not properly licensed it was responsible for all actions of those working under its license.

PC contends that because Miller performed work in fixing the old sewer system and putting it into a working sewer system that Miller was not properly licensed. It contends that Miller should have held a license in “water and sewer” in order to perform such work.

“Statutes in derogation of the common law are to be strictly construed. Under this rule, a statute restricting the common law will not be extended beyond the clear intent of the legislature. Statutes subject to this rule include those which limit a claimant’s right to bring suit.” *Grier v. AMISUB of SC*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.” *Id.*

“If a statute’s language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and the court had no right to impose another meaning.” *Bostic v. Am. Home Mortg. Servicing, Inc.*, 375 S.C. 143, 149, 650 S.E.2d 479, 482 (Ct. App. 2007). “The tenor of modern law is to avoid dismissal of cases on technical grounds and to allow adjudication on the merits.” *Ross v. Waccamaw Cmty. Hosp.*, 404 S.C. 56, 65, 744 S.E.2d 547, 551 (2013).

Webster’s Dictionary defines the word “rehabilitat[ion]” as follows: “to restore or bring to a condition of health or useful and constructive activity.” *Merriam-Webster’s Collegiate Dictionary* 985-86 (10th ed. 1998).

In this case, there was an old sewer system already in place on the property where this project was located. (R. p. 179, line 17 - p. 180, line 19). Old lines were torn out, some old lines stayed, and new lines tied into old existing catch basins. (R. p. 179, line 17 - p. 180, line 19; p. 200, line 23 - p. 201, line 9). The evidence was clear that Miller did not install a new sewer system. Rather, it rehabilitated what was once an old unworkable system into a

functioning system. Had the legislature intended to exclude installation and demolition of an existing sewer system from the 'grading' licensing definition it would have specifically excluded it. However the legislature included the very broad term of 'rehabilitation' without any exclusionary language. Because the statute inhibits one's common law right to bring a lawsuit, one must assume that the legislature intended to keep such a broad term like 'rehabilitation' within the context of the statute.

PC agreed with the above analysis at the outset of executing the Subcontract with Miller. Otherwise, PC would be in violation of S.C. Code Ann. §§ 40-11-300 and 40-11-270 by knowingly hiring Miller to perform work on the storm sewer system. PC was aware of Miller's licensing status at the outset of the project as well as the scope of work Miller would be performing under the Subcontract.

PC contends that this Court's recent opinion in *Tesenier v. Professional Plastering & Stucco, Inc.*, 407 S.C. 83, 754 S.E.2d 267 (Ct. App. 2014), is inapplicable to this case. PC's contention is misplaced.

As relevant to this case, in *Tesenier* this Court reversed the grant of summary judgment against a subcontractor versus a prime contractor on ground that the subcontractor was not properly licensed. *Tesenier v. Prof'l Plastering & Stucco, Inc.*, 407 S.C. 83, 96, 754 S.E.2d 267, 273-74 (Ct. App. 2014). In *Tesenier*, a subcontractor, Professional, had brought an indemnity cross-claim against another subcontractor APS. *Id.* The trial court granted APS's motion for summary judgment on the grounds that Professional was unlicensed. *Id.* This Court noted that both Professional and APS were permitted to work as unlicensed contractors under the prime contractor's license pursuant to S.C. Code Ann. § 40-11-270 (1998). More importantly, this Court stated that the licensing statutes are intended to protect

the public interest (see S.C. Code Ann. § 40-1-10(A)-(B) (2011)). *Id.* Further, “[t]he purpose of protecting the public interest by denying enforceability does not exist when dealing with claims between contractors.” *Id.* citing *Kennoy v. Graves*, 300 S.W.2d 568 (Ky. App. 1957) (emphasis added).

The reasoning behind this decision makes sense in relation to the statutory scheme. First, the statutes place the responsibility to ensure proper licensing squarely upon the prime contractor. Secondly, the availability to check on one’s licensing status pursuant to the LLR website is readily available and known to a prime contractor. Conversely, an individual who contracts with a contractor may not know how to check the licensing status of a contractor. Additionally, claims between contractors typically, like this case, involve payment pursuant to contract for work performed. As such, *Teseniar* is directly on point with the issue raised by PC in this case.

Accordingly, Miller was properly licensed or acting within the scope of PC’s license in performing construction services on this project. Even if it was not properly licensed, the same being denied, pursuant to *Teseniar* it is still permitted to bring this claim against PC as it is a contractor versus contractor claim.

IV. THE COURT PROPERLY FOUND THAT MILLER SHOULD BE ENTITLED TO IMMEDIATE PAYMENT FROM THE PAYMENT BOND.

Safeco holds a payment bond for PC. The purpose of the payment bond is to ensure payment to subcontractors who may be denied payment by PC. Because this was a State funded job, Miller could not file a mechanic’s lien claim against the owner, but was rather limited to filing a claim against the payment bond. Miller did so. (R. pp. 42-52; pp. 14-20). Miller was successful on the underlying action for enforcement of the Subcontract and payment for amounts due. (R. pp. 1-9). As a result, it is entitled to payment under the

payment bond held by Safeco. The Respondents seem to agree as in their brief they contend that instead of ordering judgment against Safeco, the Court should order payment from the 'payment bond.' *Moore Elec. Supply, Inc. v. Ward*, 316 S.C. 367, 450 S.E.2d 96 (Ct. App. 1994).

To rule otherwise, would negate the whole purpose of procuring a payment bond rather than the subcontractor filing a mechanic's lien on the State funded project.

CONCLUSION

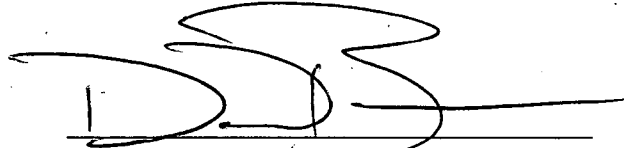
The trial court properly granted Miller's motion for involuntary non-suit as to PC's counterclaim for delay damages when the Subcontract clearly provides that PC is only entitled to delay damages if so assessed by the owner. Lander did not assess damages for delay against PC. Further, once PC agreed with Lander to the amount of final payment that included additional compensation to PC for "extended general conditions" due to delays not caused by PC or its subcontractors, PC was bound by that decision pursuant to the Subcontract. Accordingly, taking the evidence and any inferences therefrom in a light most favorable to PC, the Court properly granted Miller's motion for involuntary non-suit.

Additionally, there exists significant evidence in the record to support the Court's alternative finding that PC did not meet its burden of proof on its counterclaim and its finding that Miller did not cause the delays on the project.

Miller was properly licensed, and upon final payment by Lander to PC should have received final payment by PC. PC's refusal to pay what it admits is owed was in breach of its Subcontract with Miller. The payment bond protects Miller and ensures that Miller is to be paid from the same.

For all the foregoing reasons as well as any other reasons as this Court deems appropriate pursuant to Rule 220(c) of the SCACR, Miller requests that the decision of the Circuit Court be affirmed⁴.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'DJB', written over a horizontal line.

David J. Brousseau, SC Bar No 71150
McIntosh, Sherard, Sullivan & Brousseau
Post Office Box 197
Anderson, South Carolina 29622-0197
(864) 225-0001 || (864) 225-0004 [fax]
Attorney for Respondent / Appellant

October 28, 2015.

⁴ Miller does ask this Court to reverse the trial court's decision to deny prejudgment interest as argued in Appellant's Final Brief of Respondent / Appellant.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal From Greenwood County
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2014-002749
Trial Court Case No. 2012-CP-24-574

RECEIVED

NOV 06 2015

SC Court of Appeals

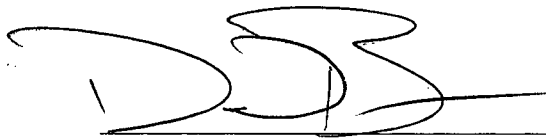
Miller Construction Company, LLC, ... Respondent / Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondent's Final Brief of Respondent/Appellant complies with Rule 211(b) of the *South Carolina Appellate Court Rules*.



David J. Brousseau
McIntosh, Sherard, Sullivan & Brousseau
Post Office Box 197
Anderson, South Carolina 29622
(864) 225-0001
Attorney for Respondent

November 5, 2015.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

NOV 06 2015

SC Court of Appeals

Appeal From Greenwood County
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2014-002749
Trial Court Case No. 2012-CP-24-574

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

v.

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

PROOF OF SERVICE

I certify that I have served the Respondent's Final Brief of Respondent/Appellant and Appellant's Final Brief of Respondent/Appellant by mailing a copy of the same to its attorney of record, Edward Wade Mullins, III of Bruner, Powell, Robbins, Wall & Mullins, LLC, Post Office Box 61110, Columbia, South Carolina 29260 via United States mail, postage prepaid this 5th day of November, 2015.

November 5, 2015.



David J. Brousseau
McIntosh, Sherard, Sullivan & Brousseau
Post Office Box 197
Anderson, South Carolina 29622
(864) 225-0001 | 225-0004 (fax)
Attorney for Respondent