

THE STATE OF SOUTH CAROLINA
In The SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

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S.C. SUPREME COURT

Opinion No. 5444 (S.C.Ct.App. filed Sept. 28, 2016)

Rose Electric, Inc., Petitioner,

v.

Cooler Erectors of Atlanta, Inc., Southern Produce, Inc., S2P, LLC, Certified
Development Corporation of South Carolina, Senn Bros., Inc.,
Custom Concrete of Lexington, Inc., and
James Dunlap d/b/a Dunlap Services, ... Defendants,

Of whom

Southern Produce, Inc., and S2P, LLC are Respondents.

APPENDIX – Volume 2

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2011-CP-32-1929

Rose Electric, Inc., Appellant

v.

Cooler Erectors of Atlanta, Inc., Southern Produce, Inc., S2P, LLC, Certified
Development Corporation of South Carolina, Senn Bros., Inc.,
Custom Concrete of Lexington, Inc., and
James Dunlap d/b/a Dunlap Services, ... Defendants

Of whom

Southern Produce, Inc., and S2P, LLC are Respondents

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUES ON APPEAL.....	4
STATEMENT OF THE CASE	6
STATEMENT OF THE FACTS	9
ARGUMENT	11
I. The trial court misapprehended and ignored well settled principles of law dealing with recovery under the theory of <i>quantum meruit</i>	13
II. The total cost of the project was \$224,385.	15
III. There was extra work performed by Rose Electric and the extra work was authorized by Southern Produce.....	16
IV. Rose Electric is entitled to recover the reasonable value of the extra work performed directly for Southern Produce and without a contract.	17
V. The reasonable value of all work and services performed by Rose Electric was \$65,095 and Southern Produce did benefit by the work performed.	19
VI. There was no evidence of an express contract for the work and services furnished by Rose Electric.....	22
VII. The general contractor for the work performed for Southern Produce did not have a license to do such type of work as required by the State of South Carolina.....	23
VIII. While the trial court considered all liens filed, the trial court erred in allowing a proration that was based upon the amount of the claims set forth in the mechanic's lien filings rather than the actual payment or resolution of these liens.	24
IX. Rose Electric is entitled to prejudgment interest.....	25
CONCLUSION.....	27
CERTIFICATE OF COUNSEL	28

TABLE OF AUTHORITIES

Cases

<u>Berkebile v. Outen</u> , 311 S.C. 50, 426 S.E.2d 760 (1993).....	23
<u>Braswell v. Heart of Spartanburg Motel</u> , 251 S.C. 14, 159 S.E.2d 846 (1968)....	13
<u>Coens v. Marousis</u> , 275 Pa. 478, 119 A. 549 (1923)	13
<u>Earthscapes Unlimited, Inc. v. Ulbrich</u> , 390 S.C. 609, 703 S.E.2d 221 (2010)...	11, 12, 14, 20
<u>Edens v. Laurel Hill, Inc.</u> , 271 S.C. 360, 247 S.E.2d 434 (1978)	12
<u>Farr v. Barnes Freight Lines</u> , 97 Ga.App. 36, 101 S.E.2d 906 (Ga.Ct.App. 1958)	13
<u>Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.</u> , 385 S.C. 452, 684 S.E.2d 756 (2009).....	11
<u>Grant v. Butt</u> , 198 S.C. 298, 17 S.E.2d 689 (1941).....	23
<u>Jackson v. Bi-Lo Stores, Inc.</u> , 313 S.C. 272, 437 S.E.2d 168 (1993).....	24
<u>JASDIP Properties, SC, LLC v. Estate of Richardson</u> , 395 S.C. 633, 720 S.E.2d 485 (Ct.App. 2011).....	12
<u>Johnston v. Brown</u> , 290 S.C. 141, 348 S.E.2d 391 (Ct.App. 1986).....	13
<u>Lee v. Travelers' Insurance Co.</u> , 173 S.C. 185, 175 S.E. 429 (1934)	12
<u>Masonic Temple v. Ebert</u> , 199 S.C. 5, 18 S.E.2d 584 (1942)	12
<u>Myrtle Beach Hosp., Inc. v. City of Myrtle Beach</u> , 341 S.C. 1, 532 S.E.2d 868 (2000).....	11, 12
<u>QHG of Lake City, Inc. v. McCutcheon</u> , 360 S.C. 196, 600 S.E.2d 105 (Ct.App. 2004).....	25
<u>Rountree v. Ingle</u> , 94 S.C. 231, 77 S.E. 931 (1913).....	23
<u>Stanley Smith & Sons v. Limestone College</u> , 283 S.C. 430, 322 S.E.2d 474 (Ct.App. 1984).....	22

Statutes

S.C. Code §34-31-2025
S.C. Code §40.11.3024
S.C. Code §40-11-37024
S.C. Code Ann. §15-35-400.....6

Rules

Rule 68, SCRCP.....6

STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court misapprehend and ignore well settled principals of law dealing with recovery under the theory of *quantum meruit*?
- II. Was the total cost of the project \$224,385?
- III. Was there extra work performed by Rose Electric and if so, was the extra work authorized by Southern Produce?
- IV. Is Rose Electric entitled to recover the reasonable value of the extra work performed directly for Southern Produce without a contract?
- V. Should Rose Electric be awarded a judgment for the reasonable value of the worked performed by Rose Electric since Southern Produce never asked for a price and there was no written modification of the contract with Cooler Erectors specifying a price for the extra work, although Southern Produce later agreed to pay a certain price?
- VI. Did Southern Produce benefit from the work performed by Rose Electric and was the reasonable value of all work and services performed \$65,095?
- VII. Was there evidence of an express contract for the work and services furnished by Rose Electric?
- VIII. Was the general contractor for the work performed for Southern Produce licensed to do such type of work as required by the State of South Carolina?

- IX. Did the trial court err in allowing a proration based upon the amount of the claimed set forth in the mechanic's lien filings rather than the actual payment or resolution of these liens?
- X. Is Rose Electric entitled to prejudgment interest?

STATEMENT OF THE CASE

After a one-day bench trial held on February 13, 2013, the trial court issued an Order (R. p. 1) on January 30, 2014, filed on February 3, 2014, in which the court ruled that the Appellant, Rose Electric, Inc. ("Rose Electric"), was not entitled to recovery under the theory of *quantum meruit* because an express contract existed between Rose Electric and Cooler Erectors of Atlanta, Inc. ("Cooler Erectors") for a price of \$54,319.13 for the electrical work performed by Rose Electric at a new refrigerated building, and an express contract existed between Rose Electric and the Respondent, Southern Produce, Inc. ("Southern Produce") for a price of \$10,755.39. (R. p. 1).¹ The trial court also ruled in the Order that Southern Produce was entitled to a judgment for attorney's fees and costs plus an award of interest based on the amount of the award for such fees and costs under Rule 68, SCRCP, and S.C. Code Ann. §15-35-400, and that the Respondent, S2P, LLC ("Property Owner") was entitled to a judgment for attorney's fees and costs. (R. p. 17).

By Order dated June 11, 2014, and filed on June 20, 2014, the trial court modified the Order by (1) deleting the award of interest on the attorney's fees and costs stating that such an award under Rule 68, SCRCP, and S.C. Code Ann. §15-35-400 would not be appropriate, and (2) the court also issued a substituted order in which some typographical errors were corrected by motion of

¹ The Court alternatively found that if no express contracts existed, Rose Electric would not be entitled to recover under the theory of *quantum meruit* because there was no evidence that there would be unjust retention of benefit without payment. (Order dated January 30, 2014, p. 11).

the court (the "Amended Order"). (R. p. 20). The trial court made all modifications on the face of the initial Order by showing all deletions and corrections as being marked up.

This action arises from the construction of a new refrigerated building to be used by Southern Produce for its business operations and located within the new South Carolina Farmers Market. Southern Produce had been ordered to vacate its old location by December 2, 2010. (R. p. 272, lines 9-11). The business of Southern Produce is the processing of fresh vegetables and fruit for sale to wholesale produce distribution companies. The new refrigerated building is located on a portion of property owned by Property Owner, and Southern Produce had a lease for the area of land on which the refrigerated building is located. (R. p. 233, line 20 - p. 234, line 4).

Cooler Erector, a general contractor doing work in South Carolina without being issued a license to do such work, entered into a written contract entitled "Contractor Agreement" dated October 27, 2010, with Southern Produce to act as the general contractor on the building project (the "Contractor Agreement"). (R. p. 402). The Contractor Agreement covered all aspects of the project including site work and a large metal building for a total project cost of \$213,385. For the electrical work specified in the Contractor Agreement, Cooler Erector contacted Rose Electric to perform such work, and Rose Electric performed its work over a thirty-day period of time with the building getting a certificate of occupancy on November 30, 2010, but Southern Produce has not paid for such work. (R. p. 157, line 21 - p. 158, line 5). During that time, Rose Electric did

extra work at the specific request of the general manager of Southern Produce who was at the job site every day during the construction of the building. (R. p. 206, lines 12-14).

On March 4, 2011, Rose Electric filed a notice of Mechanic's Lien with a Statement of Account attached showing the amount owed of \$65,095 including a claim for "Change Orders" in the amount of \$10,755.39. (R. p. 381). Notices of Mechanic's Lien were also filed by Custom Concrete of Lexington, Inc. (\$14,529) and by Dunlap Services (\$10,211), but the claims of those parties had been resolved at the time of trial. (R. p. 422 and 427).

On May 20, 2011, Rose Electric filed an action alleging a claim to foreclose on its mechanic's lien and for claims of breach of contract against Cooler Erectors and claims for unjust enrichment and *quantum meruit* against Southern Produce and Property Owner. (R. p. 52). Southern Produce filed an Answer to the Complaint on July 25, 2011, in which Southern Produce denied owing any amounts to Rose Electric for the work performed for the new refrigerated building. (R. p. 60). Property Owner and Senn Bros., Inc. also filed Answers and filed a cross claim against Southern Produce.² (R. p. 65; R. p. 62).

Cooler Erectors had been served and was given notice of the trial, but did not appear at the trial.³ (R. p. 105, lines 5-19).

² Senn Bros. Inc. was dismissed from the action by agreement at the beginning of trial, but the Order mistakenly includes it as a party.

³ A Notice of Hearing sent to the registered agent was put into evidence.

After receiving written notice of entry of the Order on February 11, 2014, Rose Electric filed a Motion to Alter or Amend the Order. (R. p. 90). Rose Electric received written notice of the entry of the Amended Order on June 25, 2014, and filed its Notice of Appeal on July 24, 2014.

STATEMENT OF THE FACTS

The construction of the refrigerated building for Southern Produce was a rush job due to the notice to vacate that had been issued with the deadline of December 2, 2010. (R. p. 272, lines 3-13). The building permit was issued on November 2, and the Certificate of Occupancy was issued on November 30. (R. p. 379; R. p. 380). Rose Electric was hired to perform the electrical work and was given a set of detailed electrical drawings done by an electrical engineer shortly before beginning the work. (R. p. 292). Due to the urgency of Southern Produce having to vacate, Rose Electric commenced the electrical work without submitting a price or obtaining a written contract with a price signed by either Cooler Erectors or Southern Produce. (R. p. 147, lines 4-10). Although Rose Electric later submitted proposals with a price for the work after the work had been completed, neither Cooler Erectors nor Southern Produce ever signed any of the proposals. (R. p. 151, lines 15-20).

Cooler Erectors did not pay Rose Electric for any of the work performed by it even though Southern Produce paid approximately \$203,277 to Cooler Erectors. (R. p. 408). Cooler Erectors did not file any response and did not appear at the trial so recovery against it was non-existence. Thus, in its Complaint and at the start of the trial, Rose Electric stated that its claim against

Southern Produce would be based upon the theory of *quantum meruit* and not under the theory of an express contract. (R. p. 52; R. pages 57-58; R. p. 102, line 22 – p. 103, line 5).

During the thirty days that Rose Electric was on the job performing electrical work, the general manager of Southern Produce, Daniel Stocker, Jr., was also present each day. (R. p. 206, lines 12-14). On numerous occasions, Stocker directed changes from the original plans and specifications. (R. p. 133, lines 6-11). These changes included the following:

1. Adding disconnects and plugs to allow for proper cleaning;
2. Modifying the material of disconnects to stainless steel to avoid corrosion;
3. Adding a hand-washer heater system;
4. Relocating an onion peeler from inside to outside the building, rewiring, and placing a disconnect for that device;
5. Adding receptacles and the circuits needed to accomplish that addition;
6. Adding dedicated circuits, a time clock, and breakers;
7. Wiring the evaporator coils; and
8. Adding lights in the office.

(R. pages 297-303).

The Contractor Agreement required that charges for extra work be set out and agreed to in writing, but no such written agreements were done for the extra work done by Rose Electric. (R. p. 262, lines 9-19).

The other defendants in this action were also subcontractors for work on the new refrigerated building, but they did not appear and the court was told that their liens had been resolved. (R. p. 110, lines 16-24; p. 266, lines 16-22; p. 267, lines 6-12). Stocker testified that Custom Concrete was not paid anything on its claim and that Dunlap Services was paid \$465 in August of 2011. (R. p. 267, lines 6-9).

The building permit and the certificate of occupancy showed that the general contractor was Mike Hutchins but as far as Southern Produce knew, he only did some grading work but he did not act as the general contractor. (R. p. 379; R. p. 380; R. p. 273, line 13 – p. 274, line 4). A placard with the building permit information including the name of the general contractor is required to be posted at the jobsite so the fact that Cooler Erectors was not the general contractor was clear from this information which was at the site and could have been easily viewed by Southern Produce. (R. p. 166, lines 12-20). The owner of Southern Produce, Nate Crocker, did not appear at the trial.

ARGUMENT

"Absent an express contract, recovery under *quantum meruit* is based on quasi-contract." Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010) "[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8, 532 S.E.2d 868, 872 (2000); see also Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 466, 684 S.E.2d 756, 764 (2009) (*quantum meruit* as an equitable doctrine allows recovery for unjust

enrichment); JASDIP Properties, SC, LLC v. Estate of Richardson, 395 S.C. 633, 640, 720 S.E.2d 485, 488 (Ct.App. 2011) (requirements are the same to recover for *quantum meruit*, unjust enrichment, and restitution).

"When reviewing an action in equity, an appellate court reviews the evidence to determine facts in accordance with its own view of the preponderance of the evidence." Earthscapes Unlimited, 390 S.C. at 616, 703 S.E.2d at 225.

"The elements of a *quantum meruit* claim are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value." Earthscapes Unlimited, 390 S.C. at 616-617, 703 S.E.2d at 225. The South Carolina Supreme Court has adopted this as the "sole test for a *quantum meruit*/quasi-contract/implied by law claim." Myrtle Beach Hosp., 341 S.C. at 9, 532 S.E.2d at 872.

A quasi-contract or contract implied in law is no contract at all, but an obligation created by the law in the absence of any agreement between the parties. Id. For a contract to arise there must be an agreement between two or more parties. There must be an offer, there must be an acceptance, and there must be a meeting of the minds of the parties involved. Masonic Temple v. Ebert, 199 S.C. 5, 18 S.E.2d 584 (1942); Lee v. Travelers' Insurance Co., 173 S.C. 185, 175 S.E. 429 (1934). Mutual assent to all the essential terms of the agreement is necessary to the formation of a contract. Edens v. Laurel Hill, Inc., 271 S.C. 360, 247 S.E.2d 434 (1978). In a contract for services two essential terms are the

scope of the work to be performed and the amount of compensation. Farr v. Barnes Freight Lines, 97 Ga.App. 36, 101 S.E.2d 906 (Ga.Ct.App. 1958).

"However, if a person renders services pursuant to an express agreement and does not receive the agreed exchange, he may also, in some instances, recover the fair value of the services in *quantum meruit*. Coens v. Marousis, 275 Pa. 478, 119 A. 549 (1923). In both cases, restitution is awarded on the theory that the plaintiff conferred a benefit at the request of the defendant in the mutual expectation that it was to be paid for. If the defendant receives the benefit of the services without paying for it, he will be unjustly enriched." Johnston v. Brown, 290 S.C. 141, 348 S.E.2d 391 (Ct.App.. 1986).

I. The trial court misapprehended and ignored well settled principles of law dealing with recovery under the theory of *quantum meruit*.

A. Because there was an absence of an agreed upon price for the scope of work performed based upon the original plans and specifications and for the additional work ordered to be done by Southern Produce.

Ordinarily a plaintiff sues in *quantum meruit* because he had no agreement with the defendant concerning the compensation to be paid for his services. Under an implied contract, the plaintiff, because he had no agreement as to the price for his services, is entitled to recover the fair value of the work and labor he performed for the defendant. Braswell v. Heart of Spartanburg Motel, 251 S.C. 14, 159 S.E.2d 846 (1968).

Instead, the trial court found that a binding contract existed by stating the law applicable to a *quantum meruit* action. The following portion of the trial court's Order clearly shows the misapprehension of the law:

To have a contract for materials, labor or services does not require a predetermined set price. The price is typically implied to be the fair and reasonable price in any number of contractual arrangements. For example, consulting a doctor without a predetermined charge implies a promise to pay the reasonable costs of the doctor's services and constitutes a contract between the parties.

(R. p. 8-9)

The above portion of the Order deals with a contract implied in fact where there is a manifestation of an agreement to pay.

B. Because the trial court ruled that even if recovery under the theory of *quantum meruit* was appropriate, Rose Electric would not be entitled to a judgment.

While this statement is found in the Order, the trial court did not perform any analysis for the theory of *quantum meruit* saying only that Southern Produce paid Cooler Erectors for the benefit obtained except for the retainage. Thus, the trial court should have found that Rose Electric would be entitled to a judgment for the retainage. Moreover, the fact that Southern Produce paid Cooler Erectors does not automatically foreclose an examination of other factors to determine if it would be inequitable for Southern Produce to pay for the work performed by Rose Electric. Earthscapes Unlimited, Inc.

The fact that Southern Produce did not make the payment for the extra work without demanding that Rose Electric release the lien and release Southern Produce from any further liability was unfair to Rose Electric. The fact that Cooler Erectors was paid within a few days after the Certificate of Occupancy was issued by the County was unfair to Rose Electric. The fact that the contract did not account for payments due the subcontractors was unfair to Rose Electric

The fact that the contractor was unlicensed was unfair to Rose Electric. The fact that Southern Produce knew that Rose Electric had not been paid for the extra work since the contract price with Cooler Erectors had not been increased due to the extra work was unfair to Rose Electric. The fact that the final payment to Cooler Erectors was not justified and could have been withheld was unfair to Rose Electric. (R. p. 260, line 23 – p. 261, line 8). The fact that the general manager of Southern Produce was at the site every day and directed work to be done by Rose Electric.

II. The total cost of the project was \$224,385.

There was a dispute as to the total project cost for the new building and how much of the total was paid by Southern Produce. Southern Produce claims that the total project cost is \$213,385. The proof of payments made was done by the testimony of Stocker and the submission of five checks⁴ payable to Cooler Erectors. Check number 291 is dated October 8, 2010, in the amount of \$11,000, and according to Stocker, this check was only for the payment of the cost of the architectural plans⁵. The other checks are dated October 27, October 27, November 16, and December 2. These four checks total \$192,277.

The Contractor Agreement entered into by Cooler Erectors and Southern Produce is divided into eight separately numbered paragraphs and is dated October 27, 2010. The first paragraph contains six subparts describing the different categories of work to be performed; *i.e.* the scope of work. Paragraph 4

⁴R. p. 410.

⁵R. p. 405.

states that the amount to be paid for doing the scope of work as outlined is \$213,385. Paragraph 3 states that the finished architectural plans are attached to and made a part of the Agreement. The obtaining of architectural plans is not listed in the sub-parts of the Agreement detailing the scope of work.

Therefore, this Court should find that the total project cost was \$224,385 because the amount set forth in the Agreement does not include the cost for obtaining the architectural plans. This Court should further find that Southern Produce did not pay Cooler Erectors the sum of \$21,108 of the total project cost.

III. There was extra work performed by Rose Electric and the extra work was authorized by Southern Produce.

There was no dispute that Rose Electric performed extra work. But there was a dispute as to whether Stocker specifically authorized Rose Electric to do the extra work and whether Southern Produce is directly responsible for paying for the extra work. The extra work performed can be divided into two categories based on the descriptions of the work on the Invoices⁶ and the testimony of Rose and Frazee. The first category was work required to modify the specifications⁷ set forth on the electrical plans⁸. The second category of work is additional work not detailed in the electrical plans.

⁶ R. p. 295-303.

⁷ An example of a modification was the use of stainless steel disconnects in the place of hard wiring for the equipment used in the refrigerated area so the equipment could be shut off quickly and could be easily moved for cleaning and maintenance.

⁸ R. p. 292.

Rose and Frazee testified that Stocker was frequently at the job site and that he provided the specifications for all the extra work. Stocker knew that Rose Electric would be performing the extra work, and in some cases, he supervised the completion of extra work. Stocker admitted that no written change orders were done for Cooler Erectors to perform, or subcontract for, the extra work.⁹

At times, Stocker assured Frazee that Rose Electric would be paid by Southern Produce for the extra work.¹⁰

This Court should, therefore, find that Southern Produce specifically authorized the extra work performed by Rose Electric, and that it is responsible for payment directly to Rose Electric and not as part of the Contractor Agreement with Cooler Erectors.

IV. Rose Electric is entitled to recover the reasonable value of the extra work performed directly for Southern Produce and without a contract.

All the elements were proven for Rose Electric to recover the value for the extra work done directly for Southern Produce and without a contract. The value of this work is \$10,755.39. In addition, based on a finding of fact that Southern Produce did not pay Cooler Erectors the sum of \$21,108 of the total project cost, the minimum recovery that Rose Electric is entitled is \$31,863.39.

Southern Produce never asked for a price and there was no written modification of the contract with Cooler Erectors specifying a price for the extra

⁹ Paragraph 5 of the Agreement specifies that any "extra services and work" must be set out and agreed to in writing by both the contractor and owner.

¹⁰ The testimony of Frazee was that Stocker said "it's on him". (R. p. 216, lines 13-17).

work and although Southern Produce later agreed to pay a certain price, does not create an express contract and Rose Electric should have been awarded a judgment for the reasonable value of the work performed by Rose Electric.

Again, the trial court denied recovery under *quantum meruit* for the extra work performed by Rose Electric because Rose Electric had abandoned the contract claims. (R. p. 1).

Southern Produce did not admit that it owed Rose Electric separately for these changes and additions in its Answer even though at trial it finally agreed that the price of \$10,750.39 was acceptable. Although Offers of Judgment were submitted, Southern Produce never tendered or offered to pay this amount without agreeing that such payment would be the final payment due Rose Electric for all the electrical work performed by Rose Electric. (R. p. 71-84). In other words, Southern Produce presented a settlement through the offers of judgment, but Southern Produce should have paid both the costs for the extra work as well as its calculation of the proration retainage without a condition or stipulation that depositing the check would be considered final and not allow Rose Electric to seek further payments from Southern Produce.

So, the trial court justifies this misapprehension of the application of the theory of *quantum meruit* solely on the basis that Southern Produce had offered to pay Rose Electric \$10,755.39 for the change orders after the work had been performed. Clearly, this payment was a settlement payment and cannot be construed as making a contract with Rose Electric. The trial court erred in stating

that the plaintiff has an argument under its motion to reconsider that it now wanted to seek a judgment on a contract claim against Southern Produce.

V. The reasonable value of all work and services performed by Rose Electric was \$65,095 and Southern Produce did benefit by the work performed.

There was no dispute as to the value of the work and services furnished by Rose Electric based on the original plans and for the extra work, and no dispute that Southern Produce benefitted by the work performed by Rose Electric. For the proof of the value, Rose Electric presented a detailed spreadsheet as page one of the exhibit¹¹, and the accompanying support for each of the line items on the spreadsheet. The total sum shown is \$65,094.52. Therefore, this Court should find that the reasonable value of the labor and materials furnished by Rose Electric for this project is \$65,094.52.

This Court should further find that a breakdown of the value of the work attributable to the original plans, and the value of the work attributable to the extra work is as follows:

Item	Value
Original electrical plans	\$54,339.13
Extra work	\$10,755.39

For recovery of the balance of the value of the work done by Rose Electric, this Court will need to apply equitable principles and decide whether or not allowing Southern Produce to retain the benefit of Rose Electric's work

¹¹ R. p. 309.

without paying its value under the circumstances of this case would be unjust. This Court should examine a recent case for assistance in applying equitable principals to determine if there is unjust enrichment.

The subcontractor in Earthscapes Unlimited, Inc., had not been paid for landscaping work at a new house owned by Ulbrich. The contract with the general contractor included a \$30,000 allowance for landscaping and an irrigation system. The general contractor hired the landscaper to perform work at the house, but no written contract existed as to the landscaping work.

During the course of doing the landscaping work, Ulbrich asked Earthscapes Unlimited to provide additional work not included in the original plans. This extra work included the installation of drainage for water runoff, adding additional plant materials, and the installation of a well for yard irrigation. A bill was submitted to Ulbrich and the general contractor in the amount of \$33,555, and Ulbrich paid only for the cost of the extra work. When the general contractor did not pay the balance, Earthscapes Unlimited sought payment from Ulbrich who refused to pay the balance saying he had already paid the general contractor for landscaping and an irrigation system. The Court of Appeals found that:

The benefit conferred by Respondent to Appellants was the work performed by Respondent on Appellants' property. Appellants have realized and enjoyed the benefit of the work performed by Respondent. Finally, allowing Appellants to retain the benefit of Respondent's work without paying its value under the circumstances of this case would be unjust.

Id.

This case is applicable because the owner dealt directly with the subcontractor for extra work, and there was no contract for the landscaping work. The Court affirmed the judgment obtained for the payment of \$30,000 to the landscaper.

Certainly, in this case, Southern Produce should not be able to retain the benefit of the work under the original plans performed by Rose Electric. It has treated Rose Electric unfairly by withholding payment for the extra work. By certified mail dated February 16, 2011¹², Rose Electric demanded payment for the extra work from Southern Produce and informed Southern Produce that Cooler Erectors had not made any payments for the work under the original plans. At that time, Southern Produce knew it had withheld some of the payment due Cooler Erectors that could have been paid to Rose Electric. There was no payment made because Southern Produce wanted Rose Electric to accept the payment for the extra work and retainage in return for a full release of Southern Produce from any further liability for the unpaid portion of the work.

Southern Produce also acted unfairly to Rose Electric by not opting to pay for the extra work at the same time that it made the last payment to Cooler Erectors on December 2, 2010. Southern Produce knew that Rose Electric had done the extra work at its request and knew that there had been no written change orders with Cooler Erectors. When Southern Produce asked Rose Electric to do some

¹² R. p. 304.

work in December, it had the opportunity to obtain from Rose Electric the cost of the extra work, but did not even though it paid for this work.

VI. There was no evidence of an express contract for the work and services furnished by Rose Electric.

Rose Electric presented evidence to show that it never had an express contract for any of the work done on the project.¹³ While Rose Electric submitted a proposal¹⁴ to Cooler Erectors for the cost of the work based on the original plans, this proposal was never signed.¹⁵ At the time of authorizing the extra work, Stocker did not ask for a set price for the work but he knew the work was being done by Rose Electric.

After all the work was completed, Rose Electric did submit several "Service Invoices" setting forth a "description of job" and the "total due". The written Invoices do not refer to a contract and were used by Rose Electric in an attempt to get payment. Moreover, there was no proof that any of these Invoices or the amounts shown due was the result of any agreements made as to the cost for the work. While Invoices were submitted to Cooler Erectors and sometimes included billing for the extra work, there was no proof that an agreement existed as to the cost for the work described.

¹³ The requirements for an express contract are discussed in Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 322 S.E.2d 474 (Ct.App. 1984) ("A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct.")

¹⁴ R. p. 308, R. p. 386.

¹⁵ The proposal dated November 24, 2010, specifically states that it is "not a contract for services".

Therefore, this Court should find that there was no contract, either express or implied, for any of the work done by Rose Electric on this project.

VII. The general contractor for the work performed for Southern Produce did not have a license to do such type of work as required by the State of South Carolina.

There was no dispute that Cooler Erectors performed as a general contractor for this project without a license being issued by the State of South Carolina. The County of Lexington had issued a building permit¹⁶ based upon an application filed by Mike Hutchins, a licensed contractor, but there was no evidence that Hutchins performed any work on the project or received any payments. The Contractor Agreement did not contain a provision that Cooler Erectors represented that it was licensed and there was no requirement that the contractor's license number be furnished to Southern Produce.

The fact that Cooler Erectors was unlicensed prevents Southern Produce from maintaining that it paid Cooler Erectors for the work. A contract with an unlicensed general contractor is void as against public policy as stated below:

In Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993), we recognized the general rule that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the constitution. See also Grant v. Butt, 198 S.C. 298, 17 S.E.2d 689 (1941); Rountree v. Ingle, 94 S.C. 231, 77 S.E. 931 (1913). Similarly, the Court of Appeals recently held:

¹⁶ R. p. 379.

It is a well-founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act. This rule applies at both law and in equity and whether the cause of action is in contract or in tort....

Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 276, 437 S.E.2d 168, 170 (1993).

Moreover, Southern Produce did not pay the general contractor named on the Building Permit and on the Certificate of Occupancy. Section 40-11-30 of the South Carolina Code states:

No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.

Section 40-11-370 states that:

(B) It is unlawful to engage in construction under a name other than the exact name which appears on the license issued pursuant to this chapter. "Engaging in construction" includes marketing, advertising, using site signs, and submitting contracts. This requirement does not include advertising on vehicles, which may use an abbreviated version of the license name so long as the advertising is not misleading.

(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. An entity that enters into a contract to engage in construction in a name other than the name that appears on its license may not bring an action either at law or in equity to enforce the provisions of the contract.

VIII. While the trial court considered all liens filed, the trial court erred in allowing a proration that was based upon the amount of the claims set forth in the mechanic's lien filings rather than the actual payment or resolution of these liens.

The trial court ignored the evidence presented about the payments made for the work performed by Custom Concrete and Dunlap Services. The testimony of Stocker shows that the total amount paid to both of these subcontractors was \$465. His testimony is as follows:

A To my understanding, no, sir, it's not active.

Q And even though they claim they're owed about \$14,529, has Southern Produce paid anything to Custom Concrete?

A Other than legal fees, no, sir.

Q Okay. But nothing to Custom Concrete?

A Correct.

(Transcript, p. 174, lines 16-22).

Q And you said you paid something on that and the amount you paid, I believe, was \$465 back on August 19th, 2011; correct?

A That was a settlement, yes, sir.

Q But, again, do you remember the date of the settlement?

A No, sir. I believe you just said August.

(R. p. 267, lines 6-12).

IX. Rose Electric is entitled to prejudgment interest.

Rose Electric has pled and seeks prejudgment interest on any sums found due it by Southern Produce. It seeks interest at the legal rate of 8.75% under S.C. Code §34-31-20(A). The South Carolina Court of Appeals has found that an award of prejudgment interest is permissible in an action to recover under the theory of *quantum meruit*. QHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 600 S.E.2d 105 (Ct.App. 2004). This Court should find and conclude that Rose

Electric is entitled to prejudgment interest in the event this Court reverses the trial court's decision on the application of *quantum meruit*. This Court should further find that Southern Produce should have made payment to Rose Electric for the reasonable value of its labor and materials no later than 30 days after receipt of the demand by letter dated February 16, 2011. Therefore, interest began to accrue on March 18, 2011.

CONCLUSION

For the reasons discussed above, this Court should reverse the rulings of the trial court and remand with instructions to issue an Order granting the relief sought by Appellant and requested herein.

November 16, 2015

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2011-CP-32-1929

Rose Electric, Inc., Appellant

v.

Cooler Erectors of Atlanta, Inc., Southern Produce, Inc., S2P, LLC, Certified
Development Corporation of South Carolina, Senn Bros., Inc.,
Custom Concrete of Lexington, Inc., and
James Dunlap d/b/a Dunlap Services, Defendants

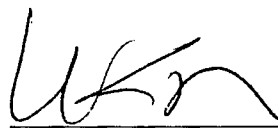
Of whom

Southern Produce, Inc., S2P, LLC, and Senn Bros, Inc., are Respondents

CERTIFICATE OF COUNSEL

The undersigned certifies that the Initial Brief of Appellant complies with Rule
211(b), SCACR.

November 16, 2015



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THE STATE OF SOUTH CAROLINA

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APPEAL FROM LEXINGTON COUNTY

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The Honorable William P. Keesley, Circuit Court Judge

Appellate case No. 2014-001633

Civil Action No. 2011-CP-32-1929

Rose Electric, Inc.,

Appellant

v.

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Development Corporation of South Carolina, Senn Bros., Inc., Custom Concrete of
Lexington, Inc., and James Dunlap d/b/a Dunlap Services, Defendants

Of Whom

Southern Produce, Inc. and S2P, LLC are

Respondents

FINAL BRIEF OF RESPONDENT SOUTHERN PRODUCE, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL1

STATEMENT OF THE CASE2

STATEMENT OF THE FACTS4

ARGUMENT9

 Issue I9

 Issue II14

 Issue III16

CONCLUSION16

TABLE OF AUTHORITIES

CASES

Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 440 S.E.2d 129 (1994).....12, 13

Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 703 S.E.2d 221 (2010).....13

Key Corporation Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007).....11

Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000).....12, 13

Shirley’s Iron Works, Inc. v. City of Union, 387 S.C. 389, 693 S.E.2d 1 (Ct. App. 2002).....13

Swanson v. Stratos, 350 S.C. 116, 564 S.E.2d 117 (Ct. App. 2002).....11, 12

STATUTES

South Carolina Code Ann. § 15-35-400 (2014)3, 7

South Carolina Code Ann. § 29-5-10 (2014)3, 8, 14

South Carolina Code Ann. § 29-5-20 (2014)3, 8, 14, 15

South Carolina Code Ann. § 29-5-40 (2014)15

South Carolina Code Ann. § 29-5-60 (2014)15

SOUTH CAROLINA RULES OF CIVIL PROCEDURE

Rule 68, SCRPC 2, 7

STATEMENT OF ISSUES ON APPEAL

- I. The trial court did not err in denying Appellant Rose relief based on quantum meruit where the court found there was an expressed contract between Appellant and the general contractor and between the Appellant and Respondent Southern Produce for the money sought in this matter.

- II. The trial court did not err in determining the amount to which Appellant Rose would have been entitled from the unpaid contract balance owed to the general contractor based on the proration among other unpaid subcontractors with mechanic's liens.

- III. The trial court did not err in denying an award of prejudgment interest to Appellant Rose where no amount was found owed to Appellant and where Appellant had rejected three Offers of Judgment from Respondent Southern Produce prior to trial.

STATEMENT OF THE CASE

On March 4, 2011, Appellant Rose Electric, Inc. filed a mechanic's lien for \$65,094.52 arising out of electrical work performed in a new fruit and vegetable processing facility located on land owned by Respondent S2P, LLC and leased to Respondent Southern Produce, Inc. at the new S.C. Farmer's Market in Lexington County. (R. pp. 381-385; R. pp. 52-58; R. p. 97, line 13-p. 98, line24; R. p. 106, line 8-p. 107, line107). Southern Produce, Inc. contracted with Defendant Cooler Erectors of Atlanta, Inc. ("Cooler") which served as the general contractor on the construction. (R. pp. 402-407; R. pp. 221, line 11-p.222, line 14). Cooler hired Appellant Rose Electric, Inc. ("Rose") as the electrical subcontractor. (R. pp. 52-58; R. pp. 381-385; R. p. 125, line 19-p. 127, line 22; R. pp. 391-400; R. pp. 1-4). On March 20, 2011, Rose filed an action to foreclose on the mechanic's lien against Defendant Cooler and Respondents Southern Produce, Inc. ("Southern") and S2P, LLC ("S2P") and included cause of action for breach of contract against the general contractor, Cooler, and causes of action of unjust enrichment and quantum meruit against Respondents Southern and S2P. (R. pp. 52-58). Defendant Cooler did not answer, Respondent Southern answered as did Respondent S2P. (R. p. 105, lines 5-20; R. pp. 60-61; R. pp. 65-70). S2P also included a crossclaim against Southern Produce based on contractual indemnity pursuant to the lease between the parties for the cost of defense in the action or, alternatively, equitable indemnity and Southern replied. (R. pp. 65-70).

Thereafter discovery went forward and, prior to trial, Southern made three different Offers of Judgment/Settlement to Appellant Rose Electric pursuant to Rule 68(a) SCRPC,

S.C. Code Ann. § 29-5-10 and § 29-5-20 and S.C. Code Ann. §15-35-400.¹ (R. pp. 79-80; R. pp. 81-84; Supplemental R. pp. 491-493). None of the offers were responded to by Appellant Rose, thus constituting rejection of the same. (R. pp. 6-14; R. p. 51; R. pp. 85-87).

On February 13, 2013, a one day bench trial was held before the Honorable William P. Keesley. Defendant Cooler Erector was given notice of hearing, but did not appear. (R. p. 105, lines 5-20). At the beginning of the case, Appellant Rose announced to the Court that it was abandoning its mechanic's lien foreclosure claim against Respondents Southern and S2P and would proceed solely on the quantum meruit claims. (R. p.102, line 22-p. 104, line 15; R. p. 3; R. pp. 50-51). Appellant also dismissed all claims against Defendant Senn Bros., Inc. at the start of trial. (R. p. 104, line 21-p.105, line 3). Thereafter, Appellant Rose and Respondents Southern and S2P presented their witnesses and documentary evidence. At the close of trial, due to the unusual posture of the case with Appellant Rose abandoning its mechanic's lien/contract claim, Judge Keesley invited post-trial memoranda which were submitted by all parties. (R. p. 289, line 21-p. 290, line 25; R. pp. 85-89).

In late February and early March, 2013, the post-trial memoranda were submitted and the Court considered the case for decision. Again, due to the unusual move of the Appellant in abandoning the contract claim in face of having plead there were contracts and the evidence introduced at trial of a contract between the general contractor, Cooler, and Rose for \$54,339.13 of the \$65,094.52 sought and the evidence of a contract between Rose and Southern Produce for the remaining \$10, 755.39 in extras sought, Judge Keesley held a post-trial hearing to clarify the parties positions on these matters. (R. pp. 485-489; R. pp. 434-484). Specifically, the parties were asked to address the matters set out in the emails sent to

¹ 7/26/2011; 1/23/2012; 7/13/2012 for \$ 18,000.00.

the parties by the Judge. That hearing was held on October 23, 2013. The Judge entered a Form 4 Judgment in the case on October 24, 2013 and issued the formal Order on January 30, 2014 denying Appellant Rose relief and awarding costs and attorney fees to Respondents. (R. pp. 434-484; R. pp. 50-51; R. pp. 1-19).

On February 21, 2014, Appellant Rose filed a Motion for Reconsideration on basically the same grounds as it has now included as issues in this appeal. Judge Keesley issued the order on that motion on June 11, 2014 which was recorded on June 16, 2014. (R. pp. 20-49). In the June Order, the award to Southern Produce and S2P of interest on its attorney fee and cost award was stricken and several typographical errors in the January Order were corrected, but the remaining grounds of Rose's motion were denied. (R. pp. 20-49).

On July 24, 2014, Appellant Rose served its Notice of Appeal from the January, 2014 Order and June, 2014 Order.

STATEMENT OF THE FACTS

This matter arises out of the construction of a produce processing facility at the new S.C. State Farmer's Market in Lexington in late October and November, 2010. The facility itself is essentially two big refrigerated coolers with plumbing and electrical for the processing and packaging of vegetables and fruit sold to wholesalers and retailers. (R. p. 106, lines 8-16). Respondent S2P was the owner of unimproved land which it leased to Respondent Southern. (R. p. 54; R. pp. 60-61; R. pp. 233, line 20-p.234, line 12). Southern then entered into a written contract with Cooler Erectors for construction of the refrigeration building in issue and Cooler engaged Appellant Rose as a subcontractor to provide the electrical scope of work set forth in the plans and specification for the project. (R. pp. 52-56; R. p. 233, lines 4-19; R. p. 221, line 8-p. 222, line 14; R. pp. 402-404; R. pp. 405-407). Cooler also hired other

subcontractors for various parts of the work, including Defendant Custom Concrete of Lexington, Inc. for the concrete and paving work and Defendant James Dunlap for the plumbing work. (R. pp. 422-426; R. pp. 427-431; R. pp. 52-59).

Southern was aware of the general contractor, Cooler Erectors, because it was performing other projects of a similar nature for other businesses at the new Farmer's Market. (R. p. 141, lines 10-19). Southern entered into a written contract for the turnkey construction of its building which included the plans, specifications, labor, and material for a fixed lump sum of \$213,385.00. (R. pp. 402-404; R. pp. 405-407; R. p. 222, line 16-p. 224, line 19). The general contractor, Cooler, then hired all the subcontractors needed for the job, including Appellant Rose. Prior to and simultaneously with the Southern Produce job, Rose had worked as the electrical subcontractor for the Cooler on other projects at the Farmer's Market. (R. p. 127, lines 13-22).

Prior to accepting the work, Homer Rose of Rose Electric was provided a copy of the October 5, 2010 project plans and specifications and then began to perform the required scope of work on the project. (R. p. 129, line 6-p. 130, line 10). During construction, the general manager of Southern, Dan Stocker, requested several upgrades and addition, hereafter "extras", from Rose to the electrical work. (R. p. 238, line 21-p. 240, line 16). Southern agreed to pay for those "extras" and Rose agreed to supply the materials and labor, although no price for the same was set at that time. The building permit was issued by Lexington County on November 2, 2010 and the Certificate of Occupancy was issued on November 30, 2010, although the building was not finished. (R. pp.379-380).

Rose started and completed its scope of work under its agreement with Cooler and the "extras" requested by Southern in late November to early December, 2010. (R. p. 238, line

21-p.241, line 20). In late November and December, 2010, Rose invoiced Cooler Erectors for \$54,339.13 due under its subcontract and \$10,755.39 for the "extras". (R. p. 144, lines 2-25; R. pp. 387-390; R. p. 433). When Appellant Rose did not get paid by Cooler, it then began sending invoices not only for the \$10,755.39 "extras" to Southern for payment, but also for the amount owed to it by the general contractor under the subcontract for \$54,339.13. (R. p. 145, line 6-p. 146, line 16; R. pp. 391-400; R. p. 187, line 20-p. 109, line 15). While Southern acknowledged it owed for the "extras", it advised Rose it was not responsible for the amount owed by Cooler Erectors. (R. p. 157, line 21-p. 158, line 13; R. pp. 71-78). Unfortunately, by the time Appellant advised it had not been paid by Cooler, Southern Produce had paid out to the general contractor all but \$10,108.00 of the \$213,385.00 contact price and Cooler had abandoned the job and left the Farmer's Market. (R. pp. 409-414; R. p. 238, lines 5-20; R. p. 245, line 17-p. 247, line 12). Cooler also left other subcontractors on the Southern Produce project without paying what they were due. (R. pp. 422-431).

Southern explained the situation by letter to Rose and thereafter offered to pay for the extras and Rose's prorate share of the contact funds it was holding as required under the South Carolina mechanic's lien statutes. (R. pp. 71-78). Rose filed its mechanic lien on March 4, 2011 seeking \$54,339.13 under its subcontract with Cooler Erectors and \$10,755.39 for the "extra" under its agreement with Southern for a total lien of \$65,094.52. (R. pp. 381-385; R. p. 175, line 8-p. 182, line 7). The lien was recorded in Lexington County at Lien Book 14754, Page 57. In May, 2011, Appellant filed this action seeking to foreclose on the mechanics lien, breach of contract and unjust enrichment and quantum meruit claims as set out above. (R. pp. 52-58). Prior to trial and during the course of discovery, Southern Produce made three Offers of Settlement/Judgment under the mechanic's lien statutes, Rule

68 of the South Carolina Rules of Civil Procedure, and S.C. Code Ann. §15-35-400. (R. pp. 71-78; R. pp. 79-80; R. pp.81-84; Supplemental R. pp.491-493). The first offer was on July 26, 2011, the second offer was on January 23, 2012 and the third offer was on July 13, 2012 for \$18,000.00. Appellant Rose did not respond to any of the offers and pursuant to South Carolina law made its silence an offer of \$65,095.52 as set forth in the complaint for purposes of the award of cost and attorney fees to the prevailing party after the decision of the trial judge.

A bench trial was held on February 13, 2013. At the start of trial, Appellant Rose abandoned its lien claim and proceeded against Respondents Southern and S2P solely on its quantum meruit claims. (R. pp. 485-486; R. p. 3; R. p. 471, line 4-p. 474, line 15). Southern and S2P defended by introducing evidence of the two contract Rose had that encompassed the money it was seeking under its equitable claims, which defeated Rose's ability to recover under unjust enrichment and quantum meruit. Proof of the subcontract that was introduced of the expressed contract between Cooler Erectors and Rose included the plans and specifications, Rose's proposals and invoices, the prior course of conduct between Cooler and Rose and Rose's own Mechanic's Lien and Complaint where it plead it had a contract with Cooler Erectors. (R. p. 147, lines 4-25; R. p. 129, line 6-p. 132, line 23; R. p. 127, lines 13-22). Likewise, the course of conduct between Rose and Southern for the extra work performed and the agreement of the parties was introduced to prove the expressed contract between Southern and Rose for the \$10,755.00 in "extras" sought by Rose as well as the lien and complaint of Rose.(R. pp. 381-385; R. pp. 52-58).

Proof of all mechanics' liens filed on the project was entered and was undisputed. The lien's filed by subcontractors on the project were as follows:

2/08/2011	Custom Concrete	\$14,529.20	18.36%
2/18/2011	Dunlap Services	\$20,210.93	12.90%
3/04/2011	Rose Electric	<u>\$54,339.13</u>	<u>68.74%</u>
Total		\$79,139.26	100%

The amount owed to Rose under the general contractor's subcontract was 68.74% of the \$10,108.00 being held by Southern or \$6,948.24 plus the \$10,755.39 Southern had agreed to pay Rose for the "extras" per their contract. (R. pp. 85-89). This totaled \$17,703.63 under the lien claim that was abandoned by Appellant.

The trial court held that because there were two expressed contracts for the amounts sought, recovery under quantum meruit was not available. (R. pp. 487-489; R. pp. 50-51; R. pp. 8-9; R. pp. 436-443). The court also found that even if there were no expressed contracts that encompassed the money sought by Appellant Rose, the facts in this case did not entitle Rose to recovery. Specifically, the Court found that the element of retention by Southern and S2P of the benefits of work conferred by Rose were not unjust in as much as Southern had paid all but \$10,108.00 of the total contract price of \$213,385 to the general contractor and stood ready and offered to pay Rose its prorated share of the retainage and for the "extras" which Rose has constantly and consistently refused to accept. (R. pp. 9-12).

Last, the court then made its ruling on the award of cost and attorney fees incurred by Respondents Southern and S2P in defending against Appellant Rose's lien and foreclosure action. The lien had been on file since March 4, 2011 and was still pending at the time of the Court's hearing on October 24, 2013. (R. pp. 85-89; R. p. 474, line 16-p. 476, line 25). Pursuant to S.C. Code Ann. §§ 29-5-10 and 29-5-20, Respondent Southern was the

prevailing party because its last offer of \$18,000.00 was closer to the court's award of \$0 to Rose than was Rose's offer of \$65,094.52 as set forth in its pleadings. The court reviewed and considered the Affidavit and Supplemental Affidavit of counsel for Respondent Southern as to the cost and attorney fees that had been incurred in defending against the action. The undisputed Affidavits showed that Southern Produce had incurred from March, 2011 through January 17, 2014 attorney fees of \$24,256.50 and costs of \$156.10 totaling \$24,412.60; and using the analysis required for determining the reasonableness of attorney fees found that an award of \$24,256.50 was reasonable. (R. pp. 12-17). Likewise, the court also found that Respondent S2P had incurred \$11,103.10 in attorney fees and costs in defending against the mechanic's lien action through November 12, 2013 which amount was reasonable. The court awarded judgment of \$11,103.10 against Appellant Rose in favor of Respondent S2P. (R. pp. 14-17). The judgment was entered against Appellant Rose in the amount of \$24,212.60 in favor of Respondent Southern Produce and judgment was entered against Appellant Rose in the amount of \$11,103.10 in favor of Respondent S2P. The court also ordered that the lien of Rose Electric filed in Lexington County at Lien Book 14754 at page 57 be immediately discharged and released. (R. pp. 16-17; R. p. 480, line 9-p. 483, line22).

ARGUMENTS

I. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT ROSE RELIEF BASED ON QUANTUM MERUIT WHERE THE COURT FOUND THERE WAS AN EXPRESSED CONTRACT BETWEEN APPELLANT AND THE GENERAL CONTRACTOR AND THE APPELLANT AND RECONDENT SOUTHERN PRODUCE FOR THE MONEY SOUGHT IN THIS MATTER.

A. Contracts

Appellant Rose filed this action to foreclose on its mechanic's lien which is an action based on contract and other claims against certain of the Defendants. On the morning of trial, Rose chose to abandon its mechanic's lien foreclosure claims against Southern and S2P. Rose took the position for the **first** time at trial on February 13, 2013 that it did not have a contract with Cooler or Southern Produce and sought to recover \$65,094.54 based on the equitable remedy of quantum meruit. Appellant argued that because it did not have a **written** contract with a **set** price for its work there were no agreements and thus only equitable relief was available. Respondents took the position and the undisputed evidence showed that there was an oral agreement between Rose and Cooler coupled with their past conduct on other jobs, their conduct on this project, the October, 2010 plans and specifications, November, 2010 Rose proposal, and Rose invoices which constituted an express contract. A set price is not a requirement for establishment of a contract. Further, the November, 2010 Rose proposal for the Southern produce job was signed by Rose, although not by Cooler and Rose had already started work when it submitted the proposal to the general contractor.

Southern Produce admitted it had an agreement to pay Rose directly for the changes and additions it request on the project. Rose provided the cost for that work in a letter dated 2/16/2011 accompanied by 2/10/2011 Change Orders 2-12 which amounted to \$ 10,755.39. (R. pp. 391-400). This is the same amount sought in the lien and pled by Rose in its Complaint as constituting its contract with Southern Produce.

The March, 2011 mechanic's lien filed by Rose was still on record with the Lexington County Register of Deeds at Mechanic Lien Book 1474 at Page 57 when the trial court issued its order dated January 30, 2014. The lien encumbered not only the leased property where the Southern Produce building was constructed, but also the remaining portion of the 4 acre tract owned by Respondent S2P. The real estate had been encumbered for almost 3 years when the trial court

issued its Order in 2014. Respondents Southern Produce and S2P had to defend against the lien beginning on March 4, 2011 up through and even after trial. Even after Rose's tactical decision to abandon its contract based claims at trial in February, 2013, it did not remove the lien that was still of record encumbering the real estate as late as February, 2014.

First, Appellant Rose is precluded from recovering under the equitable theory of quantum meruit. Actions in quantum meruit are based on the absence of a contract. Quantum meruit and contract claims are mutually exclusive and one cannot recover under the equitable theory when the complaint alleges a contract. Swanson v Stratos, 350 S.C. 116, 564 S.E.2d 117 (Ct. App. 2002). Rose alleged in its subcontractor lien and the Complaint that it had contracts with Cooler and with Southern Produce. A party is bound by the allegations in its pleadings.

Second, a contract can be expressed or implied in fact. If the agreement or intent of the parties is manifested in spoken or written words, the contract is said to be "express". If the mutual undertaking of the parties is inferred from their conduct alone, without oral or written words, then the contract is "implied in fact". It does not matter whether the mutual promises of the parties are expressed in word, written or oral, or are implied from the conduct of the parties. Both are contracts entitling the parties to contractual remedies, but not equitable remedies. Key Corporation Capital, Inc. v County of Beaufort, 373 S.C. 55, 644 S.E.2d 675(2007).

To have a contract for materials, labor, and/or services does not require a set price at the contract's outset. Consulting a doctor or lawyer without a predetermined charge implies a promise to pay for those services and constitutes a contract between the parties. Likewise, the hiring of a contractor to provide materials and labor, even without a predetermined price implies a contract to pay for those materials and services. The evidence clearly shows the existence of contracts between Rose and Cooler for the scope of work under the October, 2010 plans and between Rose and Southern Produce for the requested "extras" on the project. The Rose proposal to perform the work for \$56,488.07, the Rose invoices, and the oral agreement of

Southern Produce to pay for the "extras" clearly evidenced the contracts implied in fact established by the conduct of the parties.

Last, Appellant Rose is bound by its pleadings and the evidence produced at trial, even though it decided to forgo its the contract claims. Rose plead in paragraphs 10,11,12,19, and 20 of the Complaint that it had contracts with Cooler and Southern Produce. In the Notice of Mechanic's Lien and Statement of Account sworn to by Homer Rose, as president of Rose Electric, Inc., he affirmed that Rose had agreements with Cooler Erectors and Respondent Southern and sought the "contract price" of \$65,094.52.

Based on the forgoing, the trial court correctly ruled that there were two expressed contracts in this matter.

B. Quantum Meruit

Quantum meruit, unjust enrichment, and restitution are equivalent terms for equitable remedies for a contract implied by law, as opposed to an expressed contract or contract implied in fact. Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, 341 S.C. 1, at 8, 532 S.E.2d 868, at 872 (2000); Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259,261,440 S.E.2d 129,130 (1994). The equitable remedy of quantum meruit is not available if the services and materials for which the party is seeking to recover are encompassed in an express contract or one implied in fact. Swanson v. Stratos, 350 S.C.116, 122, 564 S.E.2d 117,120 (Ct. App, 2002); Columbia Wholesale Co., 440 S.E.2d at 130-131(1994). Here the evidence clearly showed that Rose had an expressed contract with the general contractor for the scope of work it performed for which it sought recovery of \$54,399.13 and had an expressed contract with Southern Produce for the changes and extras it requested for which Rose sought \$10,755.39 making up the total mechanic's lien of \$65,094.52. This evidence of contract includes the fact that Appellant Rose in Paragraphs 3, 10, 11, and 12 of the complaint plead that it entered into a contract with the general contractor with the

knowledge of Southern Produce to perform work for payment. Respondents Southern Produce and S2P admitted the contract of Rose with Cooler Erectors in their Answers. Appellant is bound by its pleadings. Further, Homer Rose testified that he had done previous jobs as electrical subcontractor for Cooler Erectors at the new Farmer's Market prior to the Southern Produce project based on a handshake and he expected to be paid by Cooler Erectors, just as he had been in the other jobs. The oral agreement was further evidenced by a written proposal and a series of written invoices from Appellant Rose, first to Cooler Erectors and then to Respondent Southern. Rose testified and Dan Stocker of Southern Produce confirmed that Respondent Southern requested the "extras" from Rose and agreed to pay for the same. Because there were contracts under which recovery was available but which Appellant chose to abandon, recovery under quantum meruit was not proper as held by the trial court.

Even if there were no contracts encompassing Appellant's claim for recovery, Rose, under the facts of this case, would still not be entitled to an award under quantum meruit. The elements of quantum meruit are: 1) a benefit conferred on the defendant by the plaintiff; 2) realization of that benefit by the defendant; and 3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value. (Emphasis added). Earthscapes Unlimited, Inc. v Ulbrich, 390 S.C. 609, 703 S.E.2d 221 (2010); Columbia Wholesale, 312 S.C. 259, 440 S.E.2d 129 (1994); Shirley's Iron Works, Inc. v City of Union, 387 S.C. 389, 693 S.E.2d 1 (Ct. App. 2009). The main focus of this inquiry is whether the enrichment to the owner is unjust. In claims of unjust enrichment by subcontractors, the courts typically deny recovery where the owner has paid on its contract with the general contractor. Columbia Wholesale, supra; Shirley's Iron Works, Inc., supra; Myrtle Beach Hospital, Inc., supra. Since Southern Produce had paid all but \$10,108.00 of the \$213,385.00 contract price for the services and materials provided, it was not unjust for it to

retain the benefits as Southern Produce has paid for them. To require Southern Produce to pay twice would have been unjust. Further, Respondent Southern offered to pay Appellant Rose \$10,755.39 for the "extras" per its verbal contract and pursuant to S.C. Code Ann. §29-5-10, but Rose refused the same. Southern Produce offered to pay Rose it's pro rata share of the remaining balance due Cooler Erectors per S.C. Code Ann. §29-5-20 of \$6,953.29, but Rose refused the same. Appellant Rose made the strategic decision to abandon its contract/lien claims against Respondents Southern Produce and S2P and thus must live by that decision which resulted in a verdict for the Respondents.

II. THE TRIAL COURT DID NOT ERR IN DETERMINING THE AMOUNT TO WHICH APPELLANT ROSE WOULD HAVE BEEN ENTITLED FROM THE UNPAID CONTRACT BALANCE OWED TO GENERAL CONTRACTOR BASED ON THE PRORATION AMONG OTHER UNPAID SUBCONTRACTORS WITH MECHANIC'S LIENS.

The undisputed evidence at trial and as found by the trial court was that there was a turnkey written contract between Respondent Southern and Cooler Erectors for \$213,385.00 which included Cooler providing the plans and specifications for the job and all labor and materials for the produce processing facility to be completed by November 30, 2011. It was also admitted that Southern had no previous association with the general contractor; whereas Appellant Rose had done multiple jobs as an electrical subcontractor for Cooler Erectors prior to the Southern Produce job and did several jobs contemporaneously with this project. Rose admitted it had never had a written contract with Cooler and handled this job the same as it had handled all others with Cooler.

It was not until Cooler failed to pay Rose and several other subcontractors on this project, abandoned the job before it was completed, and left the Farmer's Market that Rose and Southern Produce learn Cooler Erectors was not a licensed contractor. However, while S.C. law prevented Cooler Erectors from suing to collect its remaining contract balance of \$10,108.00 that was held by Southern, it did not prevent the subcontractors, who themselves had contracted with and worked for an unlicensed general contractor, from filing mechanics lien's to seek payment from Respondent Southern from the funds not disbursed under the contract to Cooler. Pursuant to S.C. Code Ann. § 29-5-20, § 29-5-40, and § 29-5-60, Respondent Southern was liable only for the prorate share of the retainage to each of the three subcontractors which filed mechanic liens totaling \$79,139.26 as set out above. Rose Electric's lien was for \$54,339.13 owed under its agreement with the general contractor, which was 68.74% of the total lien amount. Pursuant to S.C. subcontractor lien statutes, Appellant Rose was entitled to 68.74% of the \$10,108.00 held by Southern or \$6,948.24 which was offered by Southern Produce to Rose before it filed its lien, before it filed the lien foreclosure action, during the discovery period, and prior to trial. Appellant Rose flatly refused each offer of payment. Rose never challenged the calculations under the statute for proration nor did Rose ever avail itself of the opportunity to have the court consider the proration computation per S.C. statutory authority. At trial, Appellant Rose abandoned its lien claim and as a result of its strategic decision to pursue only the quantum meruit claim. The proration calculation became irrelevant as it related to any recovery by Rose at trial. The proration calculation was relevant at trial only as it applied to the court's evaluation of Southern Produces Offers of Judgment and its entitlement to attorney fees and cost for defending this action.


III. THE TRIAL COURT DID NOT ERR IN DENYING AN AWARD OF PREJUDGEMENT INTEREST TO APPELLANT ROSE WHERE NO AMOUNT WAS FOUND TO BE OWED TO APPELLANT AND WHERE APPELLANT HAD REJECTED THREE OFFERS OF JUDGEMENT FROM RESPONDENT SOUTHERN PRODUCE PRIOR TO TRIAL.

Prejudgment interest is due on the liquidated amount owed to a claimant. In as much as the court found that there were contracts between Rose and the general contractor and Rose and Southern Produce and it abandoned those claims at the start of trial, no prejudgment interest was due or recoverable on the award of \$0 to Rose since the contracts barred any recovery to it based on the quantum meruit claims.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the trial court and remand this case to Judge Keesley for supplementing the award of attorney fees and costs incurred by Respondent Southern Produce, Inc. and Respondent S2P, LLC as a result of this appeal.

Respectfully submitted.



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November 15, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
The Honorable William P. Keesley, Circuit Court Judge

Appellate case No. 2014-001633

Civil Action No. 2011-CP-32-1929

Rose Electric, Inc.,

Appellant

v.

Cooler Erectors of Atlanta, Inc., Southern Produce, Inc., S2P, LLC, Certified
Development Corporation of South Carolina, Senn Bros., Inc., Custom Concrete of
Lexington, Inc., and James Dunlap d/b/a Dunlap Services, Defendants

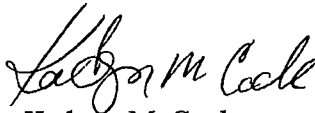
Of Whom

Southern Produce, Inc. and S2P, LLC are

Respondents

CERTIFICATE OF COMPLIANCE

I hereby certify that the FINAL BRIEF OF RESPONDENT SOUTHERN
PRODUCE, INC. complies with Rule 211(b) of the South Carolina Rules of Appellate
Practice.



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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

The Honorable William P. Keesley, Circuit Court Judge

Trial Court Case No. 2011-CP-32-01929

Appellate Case No. 2014-001633

Rose Electric, Inc.,

Appellant

v.

Cooler Erectors of South Carolina, Inc., Southern Produce, Inc., S2P, LLC,
Certified Development Corporation of South Carolina, Senn Bros., Inc.,
Custom Concrete of Lexington, Inc. and James Dunlap, d/b/a Dunlap
Services, Defendants,

Of whom

Southern Produce, Inc., and S2P, LLC are the Respondents

FINAL BRIEF OF RESPONDENT S2P, LLC

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TABLE OF CONTENTS

Table of authorities	2
Statement of issues on appeal	3
Statement of the case	4
Argument	
Issue I and issue II	8
Issue III	15
Issue IV	16
Issue V	17

TABLE OF AUTHORITIES

Cited	Page
S.C. Code Ann. 29-5-40 (2014)	6
S.C. Code Ann. 29-5-10 (2014)	8
S.C. Code Ann. 29-5-60 [2014]	8
S.C. Code Ann. 29-5-10 and -20 (2014)	8
S.C. Code Ann. 29-5-20(C) (2014)	8
S.C. Code Ann. 29-5-40 (2014)	9
<u>Stanley Smith & Sons</u> , 283 S.C. 430, 322 S.E.2d 474 (Ct.App.1984)	11
<u>Devereaux v. Taft</u> , 20 S.C. 555 (1884)	11
<u>Edens v. Laurel Hill, Inc.</u> , 271 S.C. 360, 247 S.E.2d 434, at 436 (1978)	11
<u>Swanson v. Stratos</u> , 350 S.C. at 122, 564 S.E.2d at 120 (Ct.App 2002),	16
6 Am Jur 2 nd <i>Restitution and Implied Contracts</i> §81 (2001)	16
<u>Williams Carpet Contractors, Inc. v. Skelly</u> , 400 S.C. at 327, 734 S.E.2 nd at 181 (S.C.App.2012)	16
<u>Earthscapes Unlimited, Inc. V. Ulbrich</u> , 390 S.C 609, 703 SE2d 221[2010];	18
<u>Columbia Wholesale Co. V. Scudder May, N.V.</u> , 312 S.C. 259, 440 S.E.2d 129 [1994]	18
S.C.Code Ann 29-5-40 (2014)	20
<u>Columbia Wholesale Co. V. Scudder May, N.V.</u> , 312 S.C. 259, 440 S.E.2d 129 [1994]	21
S.C. Code Ann 29-5-60 (2014)	22

STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court err in determining that a contract existed between the Appellant and Cooler Erectors, Inc. encompassing the electrical work performed by Appellant pursuant to the building plans and specifications?

- II. Did the Trial Court err in determining that a contract existed between the Appellant and Southern Produce, Inc. encompassing the electrical work performed by Appellant for changes and add-ons “outside” the building plans and specifications?

- III. If contracts indeed existed as described in issues (I) and (II), did the Court err in determining that the Appellant was barred or prevented from recovering the reasonable value of Appellant’s labor and materials expended in these activities under Appellant’s claims of *quantum meruit*, in each instance?

- IV. If the Appellant should not have been barred or prevented from asserting one or more claims in *quantum meruit* as a result of the Court of Appeals’ determination of issue (III), then, did the Trial Court err in his finding that there were no facts or circumstances rendering the retaining of benefits of by Southern Produce, Inc. unjust, preventing recovery by the Appellant under *quantum meruit*?

- V. Was the Trial Court’s determination that Respondent Southern Produce, Inc. properly apportioned its retainage among unpaid subcontractors controlled by an error of law?

STATEMENT OF THE CASE

The nature of the action below was a controversy arising over payment on a commercial construction project. An action was commenced by Appellant, an unpaid electrical subcontractor, against several parties for a monetary judgment and for foreclosure of a mechanics lien, and this is an appeal of a final order in that matter.

The project was for the construction of a refrigerated produce processing building at the new South Carolina State Farmers Market. Despite having been paid approximately 95% of the building's contract price (R., p. 226, ln.13 - R., p. 235 L4). The general contractor, Cooler Erectors, Inc., a Georgia corporation ("Cooler Erectors"), left the job unfinished and failed to pay at least three (3) subcontractors (including the Appellant and two others) (R., p. 236, ln.1 - R., p. 238, L20). On March 4, 2012, Appellant filed and served a mechanics lien against the real property (R. pp.381-385).

Appellant filed suit on May 20, 2011, perfecting the mechanics lien and seeking payment from Cooler Erectors (general contractor), Southern Produce, Inc. (owner of the new building, referred to herein as "Southern Produce") and S2P, LLC (or "S2P," the owner of a tract of land, a portion of which was leased to Southern Produce) (R., pp., 56-58).

Certified Development Corporation of South Carolina was named as a party by virtue of its pre-existing mortgage on the liened real estate, but made no appearance. The remaining two unpaid subcontractor-lienors, James Dunlap d/b/a Dunlap Services and Custom Concrete of Lexington, Inc., had both been dismissed as parties prior to the

trial of the case, having resolved their liens by agreement. Another commercial tenant (other than Respondent Southern Produce) on S2P's 4-acre tract of real estate (Senn Brothers, Inc.) was named as a Defendant but was dismissed as a party by the Appellant without objection on the date of the trial (R., p. 104, ln. 21 - R., p. 105, ln.4).

Respondent Southern Produce, Inc. generally denied the allegations of the Complaint by Answer, denying knowledge of the actions of the general contractor with respect to Appellant, as did Respondent S2P, LLC, which also asserted defense under S.C. Code Ann. 29-5-40 (2014), centered upon S2P's belief that the owner of the project had paid the GC at the time of the notice of the lien, and was protected against the subcontractor except as to amounts still due and payable between Southern Produce and Cooler Erectors. S2P additionally raised other defenses of statutory construction based upon the definition of "owner" within the statutory scheme. Additionally, S2P cross-claimed against Southern Produce for indemnification for the costs of its defense against the project's mechanics liens pursuant to the language of the lease between them or, in the alternative, for equitable indemnification from Southern Produce (R., pp. 65-70). The cross-claims were denied by Southern Produce's reply, but S2P and Southern Produce later stipulated at trial to allow the Court to order indemnification under the lease.

The general contractor on the project, Cooler Erectors, did not answer the complaint or otherwise appear during the case (R., p. 105, ln.5-9) and was found in default by the Court, though judgment against Cooler Erectors, Inc. was not pursued by the Appellant at trial.

Formal pretrial offers of settlement were found by the Court to have been properly made to the Appellant by Respondent by Appellant Southern Produce, Inc., the last in the

amount of \$18,000, but were all refused (R., pp. 42-44).

Trial was held on February 13, 2013, and testimony completed that same afternoon.

In its opening statement, Appellant's counsel announced to the Court that Appellant was proceeding only on its *quantum meruit* claim and was not going to pursue its claims based on contract as a previously pled, thereafter seeking judgment solely based on *quantum meruit*, both as to the work performed under the original building specifications (priced at \$54,319.13) and as compensation for the extras, changes or additions to the original construction job (priced at \$10,755.39) (R., p.102 ln.22 - R., p. 104, ln. 15; R., p.3; R., pp. 50-51).

Testimony of four (4) witnesses was taken, and numerous exhibits introduced into evidence. At the conclusion of the evidence, the Court and the parties agreed that the parties could submit any further argument by memorandum to be considered prior to final decision (R., p.289 ln.21 - R., p. 290 ln.10). Rose Electric, Southern Produce and S2P did submit memoranda.

In addition to entertaining memoranda, the Court invited Counsel to appear before it on October 23, 2013 for further argument (R., pp. 32-33; R., pp. 434-484).

A decision on the merits was issued in the case by January 30, 2014 Order (R., pp. 1-17). A Motion for Reconsideration was timely made by the Appellant resulting in the "Order on Reconsideration," modifying, but not changing the basic holdings of the January 30 Order (R., pp. 20-47). The latter Order was issued by Judge William R. Keesley dated June 11, 2014 and filed June 20, 2014. This appeal followed.

In the order appealed from, the Trial Court ruled that there was an express

contract between Appellant Rose Electric and General Contractor Cooler Erectors to supply the electrical subcontracting pursuant to plans and specifications shared between them, and that there was a second express contract between Appellant Rose Electric and Southern Produce for change orders or add-ons separate from the contract between Appellant and Cooler Erectors (R., pp. 36-38). He further held that where there is an express contract encompassing the same work for which the Plaintiff seeks quantum meruit, then, an action in quantum meruit cannot lie. He denied relief in *quantum meruit* to the Appellant for that reason (R., pp. 39-41), but also ruled as an additional ground for denial that, even if Appellant were allowed to seek quantum meruit based upon the facts of this case, the Court would have denied such an award, finding that, because Respondent Southern Produce stood ready to pay the Appellant, there was no evidence of a “...retention by the Defendant of the benefit under conditions that make it unjust for him to retain it without paying its value.” (R., p. 40).

Based upon the outcome of the case in favor of the Respondents, and also because of the prior offers of judgment made to Appellant under S.C. Code Ann. 29-5-10 (2014), were refused by the Appellant (offers of payment were partially prorated under S.C. Code Ann. 29-5-60 [2014]), the Court found that the Respondents were prevailing parties. The Court went on to award attorneys fees and costs to each of the Respondents as against the Appellant. The Court based its award of fees to S2P based upon the expense of defending against the Appellant’s mechanics lien under S.C. Code Ann. 29-5-10 and -20 (2014), and based its award of fees by Appellant to Southern Produce upon a finding that Southern Produce’s prior \$18,000 offer of settlement was more than sufficient to establish its entitlement to fees under S.C. Code Ann. 29-5-20(C) (2014). (R., pp. 41-44).

The Court took note that there had already been partial reimbursement by Southern Produce of S2P's attorneys fees and costs of litigation, quantified those, ordered that Southern Produce, Inc. be required to reimburse the remainder of those fees to S2P under the indemnification terms of the land lease between them, and awarded Southern Produce an offset, credit or reimbursement from S2P of any amounts S2P may collect from Appellant, to avoid a double recovery by S2P (R., pp. 45-47).

ARGUMENT

Argument as to Issues I and II

I. DID THE TRIAL COURT ERR IN DETERMINING THAT A CONTRACT EXISTED BETWEEN THE APPELLANT AND COOLER ERECTORS, INCORPORATED ENCOMPASSING THE ELECTRICAL WORK PERFORMED BY APPELLANT PURSUANT TO THE BUILDING PLANS AND SPECIFICATIONS?

And

II DID THE TRIAL COURT ERR IN DETERMINING THAT A CONTRACT EXISTED BETWEEN THE APPELLANT AND SOUTHERN PRODUCE, INCORPORATED ENCOMPASSING THE ELECTRICAL WORK PERFORMED BY APPELLANT FOR CHANGES AND ADD-ONS "OUTSIDE" THE BUILDING PLANS AND SPECIFICATIONS?

Appellant attempts to avoid the defense raised by the Respondents (that nearly the entire price of the building had already been made to the general contractor before notice

of the subcontractor's claim was received, so that the Appellant was therefore relegated to a prorated share of the retainage under S.C. Code Ann. 29-5-40 [2014]), by way of announcing, *on the day of trial*, that it would not pursue further its breach of contract claim and began claiming there *was no* contract, after approximately 2 years of asserting that there was a contract applicable to each instance of its work on the project. Even without affording the Respondents the opportunity to conduct pretrial discovery to disprove the underpinnings of that 11th hour assertion, it is apparent, readily, that such a convenient repudiation of contract could only be sustained by an inaccurate and unreasonable view of the facts. Respondent S2P, LLC asserts that this maneuver cannot fairly be allowed to frustrate the provisions of the mechanics lien statutes under which the action was brought, and upon which defense S2P rightly depended.

The Court's finding that contracts for electrical work with the Appellant existed in both instances giving rise to the suit (the larger contract between Appellant and the contractor, and the smaller, later contract between Appellant and the owner) are well supported by the testimony of Mr. Rose and the testimony of Mr. Stocker. And the Court's contract finding, carefully made by the learned trial judge after much research, briefing and oral argument, becomes important and a central issue of the Appellant's argument, which seems to be: if there was no contract, then Appellant should not only not be relegated to the mechanics lien remedies or subject to the mechanics lien defenses, but, instead, should be entitled to relief in *quantum meruit*, since there was no contract.

Firstly, it cannot be claimed that contracts do not exist without a signed writing encompassing all material terms of the agreement, and this is especially true with respect to subcontract work on a building site; in fact, it is common knowledge that artisans,

materialmen and laborers often provide goods and services without benefit of a signed contract. And while this sometimes leads to disagreements as to what the parties intended, and while, in a perfect world, there would be no understandings with or without written contracts, the fact remains that the courts, especially in mechanics lien litigation, recognize that contracts may exist by virtue of verbal agreements, course of dealing, and actual performance, or a combination of these. And in a case such as this, where there was a previous course of dealing between the parties establishing the method of invoicing and payment, where the work was fully performed, where the existence of a contract was pled by the Plaintiff and where such contracts admitted by the Defendants, to claim there never was a contract seems ingenuous.

There is obviously no requirement of a written contract for legal recognition as a contract of and subsequent enforceability of verbal construction agreements generally (Stanley Smith & Sons, 283 S.C. 430, 322 S.E.2d 474 [Ct.App.1984]), nor in the mechanics lien context (Devereaux v. Taft, 20 S.C. 555 [1884]). In the instant case, uncontradicted testimony shows that the place, time and description of the work were clearly and definitely agreed in each instance, and the only term which was not determined in advance was the exact cost, however, this is where the course of dealing and the "time and materials" billings between the Appellant and the GC and between the Appellant and Southern Produce become dispositive as to the issue of pricing in this contract. But that doesn't have to be a fixed price: "Where a contract does not fix a price, there must be a definite method for ascertaining it." 17 C.J.S. contracts§36(2)(c), cited with approval in Edens v. Laurel Hill, Inc., 271 S.C. 360, 247 S.E.2d 434, at 436 (1978). Respondent submits that there was such a method, the "T and M" method described by

Appellant's Homer Rose to the Court (R., p. 147, ln. 4 - 148, ln. 13), in which the subcontractor submitted one or more invoices based upon the amount of work and materials required for the job, generally after the work and materials were expended. Without doubt, the Trial Court was correct in not allowing the absence of an exact dollar-price control its determination that a contract existed in each instance.

At the risk of belaboring the issue, the representations of the parties throughout the litigation, including sworn testimony, the applicable law all and common sense establish that a contract existed not only for the electrical work performed for the general contractor, but also for the add-ons and extra work provided for Southern Produce. For other specific instances in the record supporting the Court's finding of the existence of a contract or agreement for the electrical work, we would respectfully point out the following:

a. Mr. Homer Rose, Appellant's owner, along with his legal counsel, filed a sworn verification of account (Exhibit "B" Statement of Account) appended to a NOTICE OF MECHANICS LIEN dated March 3, 2011 and filed March 4, 2011 in Mechanics Lien Book 14754 at Page 57 in the Lexington County Register of Deeds (R., p. 54, paragraph 12; R., pp. 38- 384). An examination of the body of this central filing by the Appellant reveals the following statement, "Services and materials were furnished by the Plaintiff by virtue of an agreement with the above-named Defendant, Cooler Erectors of Atlanta, Inc." (Emphasis added).

b. Months after the filing of the mechanics lien mentioned above, Appellant filed its complaint in the action, alleging, "... *The Plaintiff did*

subcontract... with Defendant Cooler [Erectors, Inc.] to furnish all labor, materials, equipment, subcontract work, and services required to provide electrical service for the construction of a refrigerated building... (emphasis added). (R., p. 54, paragraph 10)

c. Appellant again referred to the arrangement between itself And Cooler Erectors as a “*subcontract*” (R., p. 54, paragraph 11), and stated that the amount due “*under the said contract is \$65,094.52,*” (R., p. 54, paragraph 12) (emphasis added).

d. Appellant’s second cause of action in its complaint repeatedly refers to the “contract” between itself and the Defendants as a *fait accompli*, a binding agreement completely executed except for the payment, not requesting the Court to add any missing terms, but representing the arrangement as a binding and fully performed construction subcontract.(R., pp. 52-59).

e. At trial, while Mr. Homer Rose, the owner and prime functionary of the Appellant, was careful to testify under his counsel’s questioning that there was never any *written* contract between Rose Electric and Cooler Erectors on this job, his testimony clearly shows that there was an agreement between his company and the general contractor, that he would provide the labor and materials necessary to complete the work with he was presented in the plans and specs from the general contractor, with an understanding that the general contractor would pay him on his standard invoices for the work. On each job he did for this GC, Mr. Rose surely had a clear expectation of payment based upon his invoices or “takeoffs” that he would prepare from time to time and submit to

Cooler Electric in order to be paid immediately and "...paid well," (R., p. 47). Late in the project, Appellant submitted invoices for \$10,755.39 to Southern Produce for change orders (R., pp. 295-303), which were likewise calculated on a time and materials basis (R., p.148 ln. 1-14), and \$56,488.07 for the main construction contract with Cooler Erectors (R., p. 177 ln. 24 - 178 ln.3; R., p. 308), and later, perhaps in anticipation of litigation, Appellant submitted a combined invoice with time and materials records for the 2 contracts (general contractor and owner build together), for \$65,094.52 based on a time and materials calculation by Appellant (R. p. 309). Mr. Rose understandably expected to be paid his invoices based upon time and materials, into which his profit was ostensibly built, apparently coming up with a more rigorous summary after the original "takeoffs" done during the project for \$56,488.07. (R., p.308). Other billings in varying amounts were also submitted after that point by Appellant, at the request of the general contractor, according to Mr. Rose, but the important thing to recognize is that, while there might have been some difference of opinion as far as the exact amount of money to which the Appellant was entitled, that bit of uncertainty was accepted by the parties to the contract and that reasonable standard of pricing was part of the contract.

f. Mr. Homer Rose's trial testimony admitted that he had done several jobs for the same general contractor at the market on the other wholesalers' buildings (R. p.126, ln. 6 - p. 127 ln. 22), and he was unable to distinguish in any meaningful way between his prior payment process with this general contractor and his relationship with the contractor on this occasion, except, perhaps, in that

that he apparently had **more** written terms (plans and specifications [Plaintiff's Exhibit #1]) on the Southern Produce job (R.p.129, ln.6-17; R..p.131, ln.15 - p.131, ln.23; R., p. 151, ln. 10 - ln. 25) than he may have started with on the Hook building or the Rabon building or the Senn building, and while he didn't know why they weren't signed, viewed in the context of his testimony, it didn't matter whether the plans and specifications were signed or not, he agreed to perform them and his Company did so. And pricing was based, to some extent, upon his standard charges for labor and materials, submitted at the end or near the end of his performance.

In conclusion of the argument as to ISSUE I, the parties to the litigation either alleged are admitted the existence of the contract. Aside from that, The scope of the work was clearly understood, being laid out in the plans and specifications exchanged between the contractor and the subcontractor, and received in evidence. The location and the persons charged with performance were never an issue. The timing was well understood and agreed (to begin immediately, and if possible to be completed within 30 days), and the work was to be billed by the subcontractor generally on his calculations based upon Appellant's expenditure of time and materials. Which occurred. The amount charged is not contested by any party to the litigation. The evidence taken as a whole clearly establishes that this was a construction subcontract between Cooler Erectors Inc. and Appellant.

In conclusion to argument on ISSUE II, the parties to the litigation alleged or admitted the existence of a contract. The scope of the work was also clearly understood,

being laid out in discussions in which representatives of the owner, the contractor and the subcontractor agreed to the changes, and for which the owner was responsible. The location and the persons charged with performance were never an issue. The timing was well understood and agreed (to begin immediately and finish as soon as possible, on an urgent basis), and the work was to be invoiced to the owner on a time and materials basis. Which occurred. Weather was some disagreement as to the reasonableness of the charges for the change orders, the full amount sought by the Appellant was eventually offered by the Respondent Southern Produce. This evidence, taken as a whole, clearly establishes the existence of an agreement or contract between Southern Produce, Inc. and Appellant.

Argument as to issue III

III. IF CONTRACTS INDEED EXISTED AS DESCRIBED IN ISSUES (I) AND (II), DID THE COURT ERR IN DETERMINING THAT THE APPELLANT WAS BARRED OR PREVENTED FROM RECOVERING THE REASONABLE VALUE OF APPELLANT'S LABOR AND MATERIALS EXPENDED IN THESE ACTIVITIES UNDER APPELLANT'S CLAIMS OF *QUANTUM MERUIT*, IN EACH INSTANCE?

No, no error. The law is quite clear, and the Trial Court committed no error in dismissing the quantum meruit claims based upon this issue. Once it established that contracts had been formed by Appellant for the electrical work involved in the main construction project and in the change orders, and that those contracts encompassed all of the work done by the Appellant, the Appellant is precluded from seeking compensation for that work by *quantum meruit* as a matter of law. (*"If the tasks the Plaintiff is seeking*

compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not been abandoned or rescinded, the Plaintiff may not recover under quantum meruit.” So wrote our S.C. Court of Appeals in Swanson v. Stratos, 350 S.C. at 122, 564 S.E.2d at 120 (Ct.App 2002), citing with approval 6 Am Jur 2nd *Restitution and Implied Contracts* §81 (2001), and quoted with approval in Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. at 327, 734 S.E.2nd at 181 (S.C.App.2012). In this case, the Respondents have not abandoned the contract, have never denied the existence of contract, have not waived or abandoned their statutory defenses based upon the existence of contract under the mechanics lien statutes, and still crave the protection of the Court. It is only the Appellant who decided not to pursue his contract claim on the day of trial in what amounts to a misguided attempt to avoid this principle of law. That does not eliminate the existence of the contract. In the instant case, neither contract was rescinded nor abandoned by the Respondents, but were fully performed by Appellant’s according to all accounts, and offer of full performance made by Respondent Southern Produce, Inc. Under the policy and the language of this line of cases, it is not proper to consider an award for *quantum meruit* for the work done on these contracts.

Argument As to Issue IV

IV. IF THE APPELLANT SHOULD NOT HAVE BEEN BARRED OR PREVENTED FROM ASSERTING ONE OR MORE CLAIMS IN *QUANTUM MERUIT* AS A RESULT OF THE COURT OF APPEALS’ DETERMINATION OF ISSUE (III), THEN, DID THE TRIAL COURT ERR IN HIS FINDING THAT THERE WERE NO FACTS OR CIRCUMSTANCES RENDERING THE RETAINING OF BENEFITS OF BY

SOUTHERN PRODUCE, INC. UNJUST, PREVENTING RECOVERY BY THE
APPELLANT UNDER *QUANTUM MERUIT*?

Assuming, arguendo, that Respondent S2P has misapprehended the controlling common law (as a bar to the Appellant from recovering in quantum meruit where the Appellant's performance is encompassed by a viable contract), then, the issue still remains as to whether the Appellant could otherwise meet the burden of recovery in the facts of this case, under a theory of *quantum meruit*. Appellant rightly asserts in its initial brief that there are three elements required for a claim of quantum meruit, and that the Supreme Court of the State of South Carolina has adopted one dispositive test "for a quantum meruit/quasi-contract/implied by law claim,": stating the three (3) required elements as, "(1) a benefit conferred upon the Defendant by the Plaintiff; (2) realization of that benefit by the Defendant; and (3) retention by the Defendant of the benefit under conditions that make it unjust for him to retain it without paying its value." (Appellant's initial brief, page 13, *mirroring the order appealed from, citing with approval Earthscapes Unlimited, Inc. V. Ulbrich*, 390 S.C 609, 703 SE2d 221[2010]; *Columbia Wholesale Co. V. Scudder May, N.V.*, 312 S.C. 259, 440 S.E.2d 129 [1994]). In the instant case, this "strict" test has simply not been met, as it the Appellant has not shown that any circumstances or conditions exist which would make it unjust for any Respondent to retain the benefits of Appellant's labors: on the contrary, Southern Produce paid for the electrical work to be done in connection with the contract, by paying the price of the building to the general contractor, which price was supposed to contain supposed to have been paid over by the general contractor to the Appellant. That it was not paid

over to the Appellant does not render that Respondent's position or retention of benefits unjust. There was no evidence that Southern Produce or S2P engaged in any conduct that would render the retention of the electrical work by Southern Produce unjust. On the contrary, the clear weight of the evidence, and the express finding below, was that after Southern Produce paid to its contractor (Cooler Erectors, Inc.) the lion's share of the agreed contract price for the building (including Rose's work performed for the contractor), it offered a sum of money from the \$10,108 retainage to Appellant properly prorated among lienors (\$6,953.29 to Rose), and, additionally, formally tendered to Appellant the payment demanded (\$10,755.39) for extra work performed by Appellant for Southern Produce, but Appellant has refused to accept this payment R., p.40).

Considerable effort was expended by Appellant in trying to prove and arguing that the person applying for the initial construction permit for the project, a licensed contractor who did the site preparation on the project, made application or "pulled the building permit" as an apparent accommodation for the unlicensed general contractor Cooler Erectors, Inc., or as a subterfuge to mislead the County planning officials, a person who had no active role in Cooler Erectors and only worked on the site briefly. And it became generally understood that Cooler Erectors was an unlicensed contractor, according to the testimony. Assuming, *arguendo*, this to be the case, any violation in the permitting process or application for building permit does not affect the rights and remedies between the owner and any subcontractors on the project. It may well affect the potential right of Cooler Erectors to enforce its contract against Southern Produce, but that is not the issue in the case. Even if the lack of a GC license for cooler erectors is somehow relevant to the harm suffered by the various parties to this case, and that was

not shown to the trial judge, still, there was no evidence whatsoever that anyone other than the GC was at fault for anyone's damages, and, just as importantly, there was absolutely no evidence that the GC and the owner conspired in any way to harm the subcontractor-appellant, nor was any legal duty shown to exist on the part of the owner to investigate the contractor for the good of the subcontractor. Rather, the *subcontractor* had dealt with the contractor on numerous occasions, and, as between the parties to this case, if anyone were in a position to detect any irregularity in the GC's permit, as between the parties still in the case, it would be the Appellant, who would have more knowledge of the general contractor's licensure, mettle and fidelity. The permitting information was posted on the site (testimony of Michael Moore, R., p. 165 ln. 22 - p. 166 ln. 20). There was no evidence that the owner had any knowledge that the contractor was unlicensed, or that it improperly used another licensed contractor to obtain the building permit. Appellant is a professional in this field, and Southern Produce is not, being in the business of vegetables, contrary to the situation with the appellant, the respondent Southern Produce had never worked with the general contractor prior to this project nor was there any evidence that any respondent conspired in any way with the general contractor to hoodwink or defraud appellant. Nevertheless, this apparent permitting violation was urged by Appellant as an additional basis for arguing that this meant an air of injustice to the retention of the electrical work by Southern Produce or that that the making of full payment to Cooler Erectors by the owner could not protect the owner from an unpaid subcontractor under S.C. Code Ann 29-5-40 (2014) – essentially arguing that, since the counterfeit GC would not have been allowed to use South Carolina Courts or the mechanics lien statutes to enforce his contract, likewise, Southern Produce's

payments to such an unlicensed GC do not deserve full credit as against the unpaid subcontractor under the mechanics lien statutes. The argument is specious. It has neither equitable nor legal merit.

And, should other equitable considerations enter into the analysis? Probably not, but if the court were inclined in its wisdom to allow this sort of case to represent an exception to the rule, the result would be manifestly unfair to the litigants and counsel in this case: the parties' respective rights and responsibilities in this matter should be determined by reference to the mechanics liens statutes, especially since this route was chosen by the appellant and that is the way the case was conducted up until the trial. While the Appellant certainly had the option of pleading both contract causes of action and quantum meruit or unjust enrichment, as alternative causes of action, and did so (which was presumed to have been done in an abundance of caution -- in the event the lien was somehow disallowed), Appellant should not have been allowed to enjoy the luxury of proceeding to the date of trial, then, denying the existence of a contract unilaterally, then simply to totally shift the trial of the case to an equitable process that was precluded up to that minute, thereby defeating statutory defenses and solid legal presumptions relied upon. Adding to the unfairness of allowing this shift in tactics to succeed, such would have changed the discovery process considerably: individual building materials and labor processes would have to have been studied in minute detail, priced out, other experts retained, etc., raising the cost of litigation still further, to be ready to give persuasive expert testimony as to the relative value of the work performed and materials installed. The Respondents did, and should have, had the ability to rely upon existing case law indicating that, where the work is fully encompassed in a

contractual relationship, and there is no misdeed on the part of the property owner, quantum meruit should not lie.

No circumstances rendering it unjust that Southern Produce keep its electric work being shown to the court, and no reason to force the owner to pay twice for it, there was no unjust enrichment, and, based upon the above analysis, there was no error, nor basis for quantum meruit. Columbia wholesale, supra.

Argument, issue V

V. WAS THE TRIAL COURT'S DETERMINATION THAT Respondent Southern Produce, INC. PROPERLY APPORTIONED ITS RETAINAGE AMONG UNPAID SUBCONTRACTORS CONTROLLED BY AN ERROR OF LAW?

The Trial Court found that the contract price between Respondent Southern Produce, Inc. and the general contractor, Cooler Erectors, Inc. was \$213,385.00, of which \$203,277.00 was paid, leaving a \$10,108 retainage (Tr., pp 35-36). There were 3 subcontractors who filed liens on the project, the Appellant (\$65,094.52 total lien, of which \$54,339.12 was attributable to the Cooler Erectors contract [and retainage]) and two of the original Defendants, James Dunlap DBA Dunlap services (\$10,210.93) and custom concrete of Lexington, Inc. (\$14,529.20). Based upon these figures, the total mechanics liens attributable to the contract with Cooler Erectors equaled \$79,079.26. The Appellant's lien attributable to the contract with Cooler Erectors, \$54,339.12, would indicate that "Appellant's percentage" would equal 68.71% of the retainage, or \$6,945.21

Respondent Southern Produce offered Appellant \$6,953.29 out of the retainage pursuant to S.C. Code Ann. 29-5-60 (2014), which was ruled as sufficient by the Trial Court for purposes of applying the apportionment statute. The Trial Court also ruled that Plaintiff, when it decided not to seek judgment based on contract, also waived its right to proceed under the mechanics lien and, under the procedural posture of the case, the Court was unable to award any of the retainage under the statute, making the issue of the amount of the retainage and the calculations moot, especially in so far as the Trial Court found that offers of judgment were made and refused; however, Appellant's initial brief does not contain sufficient information from which this claim of improper proration can be evaluated, nor does the record. There was some testimony elicited from witness Dan Stocker on the subject of the other liens, but insufficient testimony was taken from that witness from which any alternative calculations could have been made, if appropriate. The Trial Court did not commit an error using the amounts listed in the liens as the most reliable evidence of the competing claims for the retainage, especially in the absence of further evidence at trial. No error was committed and even if it were error, the calculation itself is, as posited above, moot under these particular circumstances.

CONCLUSION

Examination of the Transcript and the Orders of the learned Trial Judge's will show that there was no error controlling his decisionmaking, that the Court entertained every argument and gave every opportunity for the Appellant to develop and argue its case, but that there was no way for a Court of Law to award relief to Appellant in this particular posture in which it found, or placed, itself. Its remedy lies against its Contractor, Cooler

Erectors, Inc., or its principals. The appeal is without substantial merit. The decision below should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Robin Turner', written over a horizontal line.

J. Robin Turner #5657

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Attorney for Respondent S2P, LLC

November 16, 2015

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2011-CP-32-1929

Rose Electric, Inc., Appellant

v.

Cooler Erectors of Atlanta, Inc., Southern Produce, Inc., S2P, LLC, Certified
Development Corporation of South Carolina, Senn Bros., Inc.,
Custom Concrete of Lexington, Inc., and
James Dunlap d/b/a Dunlap Services, ... Defendants

Of whom

Southern Produce, Inc., and S2P, LLC are Respondents

REPLY BRIEF

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SC Bar No. 771

Attorney for Appellant

CONTENTS

ARGUMENT2
CONCLUSION.....3
CERTIFICATE OF COUNSEL.....4

Pursuant to the provisions of Rule 208(a) (3), SCACR, the Appellant herein submits this Brief in Reply.

ARGUMENT

In the Statement of Facts in the brief of Respondent Southern Produce, Inc., the statement is made that the mechanics' liens for Custom Concrete of Lexington, Inc., and James Dunlap d/b/a Dunlap Services were undisputed. (Respondent Southern Produce's Brief, p. 7). This statement of fact is contrary to the testimony of the general manager and only witness presented by Southern Produce, Inc. The relevant testimony of Mr. Stocker is presented on page 26 of Appellant's brief and this testimony clearly shows that these claims were settled prior to the trial. (Appellant's Brief, p. 26).

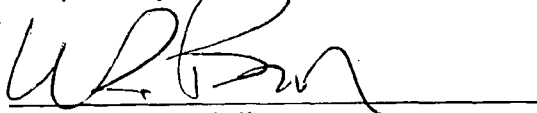
In the Statement of the Case in the brief of Respondent S2P, LLC, S2P, LLC correctly states that Custom Concrete of Lexington, Inc., and James Dunlap d/b/a Dunlap Services "had been both dismissed as parties prior to the trial of the case, having resolved their liens by agreement." (Respondent S2P's Brief, p. 4). So, the evidence that mechanics' liens had been filed and the amount of the filings are irrelevant to the apportionment of any retainage. At most, Mr. Stocker testified that the total amount paid to both claimants was \$465.

In both Respondent Briefs, the parties argue that the pursuit of only the quantum meruit claim and not pursuit of a contract claim was not proper or should be used against Appellant in deciding the issues in this case. An examination of the Complaint shows that the claim of quantum meruit had been a claim involved in this action since the beginning, and there was no objection by either party at the trial for the abandonment of all claims except a claim for quantum meruit.

CONCLUSION

This Court should reverse the rulings of the trial court and remand with instructions to issue an Order granting the relief sought by Appellant in its Brief.

Respectfully submitted,



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November 16, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2011-CP-32-1929

RECEIVED

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SC Court of Appeals

Rose Electric, Inc., Appellant

v.

Cooler Erectors of Atlanta, Inc., Southern Produce, Inc., S2P, LLC, Certified
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Custom Concrete of Lexington, Inc., and
James Dunlap d/b/a Dunlap Services, Defendants

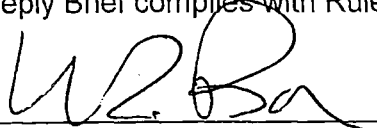
Of whom

Southern Produce, Inc., S2P, LLC, and Senn Bros, Inc., are Respondents

CERTIFICATE OF COUNSEL

The undersigned certifies that the Initial Reply Brief complies with Rule 211(b), SCACR.

November 16, 2015



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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Rose Electric, Inc., Appellant,

v.

Cooler Erectors of Atlanta, Inc., Southern Produce, Inc.,
S2P, LLC, Certified Development Corporation of South
Carolina, Senn Bros., Inc., Custom Concrete of
Lexington, Inc., and James Dunlap d/b/a Dunlap
Services, Defendants,

Of whom Southern Produce, Inc., and S2P, LLC, are the
Respondents.

Appellate Case No. 2014-001633

Appeal From Lexington County
William P. Keesley, Circuit Court Judge

Opinion No. 5444
Heard June 16, 2016 – Filed September 28, 2016

REVERSED AND REMANDED

William E. Booth, III, of Booth Law Firm, LLC, of West
Columbia, for Appellant.

Jon Robin Turner, of J. Robin Turner, P.A., of Columbia,
for Respondent S2P, LLC and Kathryn M. Cook, of
Myrtle Beach for Respondent Southern Produce, Inc.

LOCKEMY, C.J.: In this dispute arising out of a construction project, Rose Electric, Inc. (Rose Electric) appeals the trial court's order finding for Southern Produce, Inc. (Southern) and S2P, LLC, (S2P) (collectively Respondents) arguing the trial court erred in (1) finding an expressed contract barred its recovery under the theory of quantum meruit; (2) finding Rose Electric did not establish the elements of its quantum meruit claim; (3) and failing to award Rose Electric damages.

FACTS

Southern is in the business of processing produce for sale. In the fall of 2010, Southern leased a parcel of land from S2P in the new South Carolina Farmers Market in Lexington County. On October 27, 2010, Southern entered into a "flat fee, turnkey contract" with Cooler Erectors of Atlanta (Cooler Erectors) to construct a refrigerated processing center on the property.

During the first week of November 2010, Morris Teasley, the president of Cooler Erectors, contacted Homer Rose, the owner of Rose Electric, about subcontracting the electrical work on the Southern project. Cooler Erectors and Rose Electric worked on three other projects at the new Farmers Market prior to working on the Southern project. Rose Electric agreed to complete the work; however, Rose Electric and Cooler Erectors did not discuss a price for the Southern project.

During the project Southern asked Rose Electric to modify the plans and materials Rose Electric received from Cooler Erectors. Rose Electric agreed to make those changes.

Throughout the construction process, Southern paid Cooler Erectors \$203,277.00 of the project's \$213,385.00 contract price. However, Cooler Erectors did not pay Rose Electric. Eventually, Rose Electric filed a mechanics' lien on Southern's property. The statement of account attached to the mechanics lien claimed Rose Electric was owed \$54,339.13 for the "Total Contract Price" and \$10,755.39 for "Change Orders."

On May 20, 2011, Rose Electric filed its complaint alleging causes of action for foreclosure of its mechanics' lien, breach of contract, unjust enrichment, and quantum meruit. During opening statements, Rose Electric notified the trial court it would only be pursuing its equitable cause of action for quantum meruit.

The trial court issued its order finding for Respondents on January 30, 2014. The trial court found an expressed contract existed between Rose Electric and Southern for the change orders and between Rose Electric and Cooler Erectors for the

original scope of work. The trial court recognized Rose Electric elected not to proceed on its contract claims; therefore, the trial court found for Respondents. The trial court found the existence of an expressed contract precluded Rose Electric from recovery under quantum meruit. In the alternative, the trial court found Rose Electric failed to establish the elements of quantum meruit because Southern paid all but \$10,108.00 of the contract price to Cooler Erectors and offered to pay Rose Electric for the change orders and a prorated share of the retainage.

STANDARD OF REVIEW

Quantum meruit is an equitable doctrine to allow recovery for unjust enrichment. *Columbia Wholesale Co., Inc. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). "When reviewing an action in equity, an appellate court reviews the evidence to determine facts in accordance with its own view of the preponderance of the evidence." *Boykin Contracting, Inc. v. Kirby*, 405 S.C. 631, 637, 748 S.E.2d 795, 798 (Ct. App. 2013).

LAW/ANALYSIS

a) Existence of a Contract

Rose Electric argues the trial court erred in finding an express contract between Rose Electric and Cooler Erectors for the scope of work under the original plans and between Rose Electric and Southern for the change orders because there was no assent to the price term of either agreement. We agree.

"A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." *Stanley Smith & Sons v. Limestone College*, 283 S.C. 430, 433, 322 S.E.2d 474, 477 (Ct. App. 1984). "If agreement is manifested by words, the contract is said to be express." *Id.*; see also 13 Am. Jur. 2d *Building & Constr. Contracts* § 5 (2009) ("Where the parties to a building contract have orally agreed to the terms of performance *and the price*, there is an express contract." (emphasis added)). "If [the contract] is manifested by conduct, it is said to be implied." *Stanley Smith & Sons*, 283 S.C. at 434, 322 S.E.2d at 477.

"Certain terms, such as price, time and place, are considered indispensable and must be set out with reasonable certainty." *McPeters v. Yeargin Const. Co., Inc.*, 290 S.C. 327, 331, 350 S.E.2d 208, 211 (Ct. App. 1986); see also *Stanley Smith & Sons*, 283 S.C. at 434, 322 S.E.2d at 477 (noting price is an essential term in a construction contract). Even if the parties intend to be bound by an agreement, the

absence of material terms renders the agreement unenforceable. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 579, 762 S.E.2d 696, 701 (2014).

We find the trial court erred in finding an express contract between Rose Electric and Cooler Erectors and Rose Electric and Southern. The evidence presented showed each of the three parties intended to be bound to their agreements. Rose Electric began working prior to signing an agreement and Homer Rose testified, "We had previously done work for Cooler Erectors of Atlanta. We had completed three jobs, all of which we had been paid well. We had been paid on demand." However, Rose acknowledged Rose Electric did not have a written contract with Cooler Erectors, nor had the two parties agreed to a contract price. Rather, Rose Electric sent Cooler Erectors invoices based on the time and cost of materials used. No evidence was presented to support the trial court's finding that Rose Electric and Cooler Erectors manifested an agreement on the price of the electrical work required on the Southern project, which our courts require as an essential term in construction contracts. *See Stanley Smith & Sons*, 283 S.C. at 434, 322 S.E.2d at 477 (noting price is an essential term in a construction contract); *McPeters*, 290 S.C. at 331, 350 S.E.2d at 211 ("Certain terms, such as price, time and place, are considered indispensable and must be set out with reasonable certainty."). Therefore, the trial court erred in finding an express contract between Cooler Erectors and Rose Electric.

We also find the trial court erred in finding an express contract between Rose Electric and Southern. At several points during the construction, Dan Stocker, the general manager of Southern, requested Rose Electric modify the electrical plans to better accommodate Southern's anticipated uses. Specifically Southern requested Rose Electric include stainless steel disconnects rather than hard wiring in certain equipment, add a hand washer and water heater circuit, relocate an onion peeler station outside the building, install additional receptacles, and add additional lighting. According to Rose, Southern took responsibility for paying for these changes. However, the parties did not agree on the cost of those changes or the method by which those charges would be determined. In this case, the lack of a price term is fatal to the existence of an express contract and the trial court erred in finding an express contract existed.

We acknowledge Rose Electric worked with Cooler Erectors on other projects at the new farmers market, and had been paid without signing a contract. Rose Electric also provided Cooler Erectors with a "proposal" after construction was complete detailing the amount of work Rose Electric completed. We also acknowledge Southern requested Rose Electric make certain changes to the

electrical plans and accepted responsibility for any additional charges. This evidence supports the inference that Rose Electric, Southern, and Cooler Erectors intended to be bound by their agreements; however, the missing price term is fatal to finding an express contract where, as here, the parties are contemplating a construction project. *See Stevens & Wilkinson of S.C., Inc.*, 409 S.C. at 579, 762 S.E.2d at 701 (2014) (finding no contract existed though the parties intended to be bound by an agreement because the absence of material terms rendered the agreement unenforceable); *McPeters*, 290 S.C. at 331, 350 S.E.2d at 211 ("Certain terms, such as price, time and place, are considered indispensable and must be set out with reasonable certainty."); *Stanley Smith & Sons*, 283 S.C. at 434, 322 S.E.2d at 477 (noting price is an essential term in a construction contract).

b) Quantum Meruit

Rose Electric also argues the trial court erred in finding it could not recover under quantum meruit because it did not prove Southern unjustly retained a benefit without paying for its value. We agree.

"[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8, 532 S.E.2d 868, 872 (2000). In order to recover under the theory of quantum meruit, a plaintiff must prove: "1) a benefit conferred by the plaintiff upon the defendant; 2) realization of that benefit by the defendant; and 3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value." *Swanson v. Stratos*, 350 S.C. 116, 121, 564 S.E.2d 117, 119 (Ct. App. 2002).

"Courts addressing a claim of unjust enrichment by a subcontractor against a property owner have typically denied recovery when the owner in fact paid on its contract with the general contractor." *Williams Carpet Contractors*, 400 S.C. at 326, 734 S.E.2d at 180 (quoting *Columbia Wholesale Co.*, 312 S.C. at 262-63, 440 S.E.2d at 131)).

Southern paid \$203,277.00 to Cooler Erectors pursuant to its October 22, 2010 contract. The total contract price for the building was \$213,385.00.¹ Southern

¹ Rose Electric challenges the trial court's finding that the total cost of the project was \$213,385.00, and that the architectural plans were included in the total project price. We recognize in an action in equity, this court may find the facts based on our own view of the preponderance of the evidence. *First Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 567, 511 S.E.2d 372, 379 (Ct. App. 1998). "However, we are

retained \$10,103 from the contract price because "the work contained within the scope of the contract had not been completed." On December 2 the walls were not painted, the doors were not painted, automatic door closers were not installed, and there were draining issues. However, Rose Electric's work had been completed.

The trial court found Southern paid over 95% of the contract price to Cooler Erectors and "ha[d] consistently stood ready to pay the prorated shares of the retainage." We agree with the trial court that it would be unjust to require Southern pay the entire \$54,339.13 owed to Rose Electric by Cooler Erectors. Southern did withhold \$10,103 from the purchase price. This was a benefit that Southern retained from the work performed by Rose Electric Southern did not pay for.

We find Southern's offer to pay Rose Electric a prorated share of the retainage creates a sufficient equitable remedy. A subcontractor that is owed a debt for labor or materials furnished and used in the erection of a building has a lien upon the building and the land to secure the payment due. S.C. Code Ann. § 29-5-10 (2007). "However, in no event shall the aggregate amount of any liens on the improvement exceed the amount due by the owner." S.C. Code Ann. § 29-5-20 (2007). "In the event the amount due the contractor by the owner is insufficient to pay all the lienors acquiring liens as herein provided it is the duty of the owner to prorate among all just claims the amount due the contractor." S.C. Code Ann. §29-5-60(A) (2007).

Of the \$213,385.00 total price of the project, Southern paid Cooler Erectors \$203,277.00. Southern retained \$10,103 because "the work contained within the scope of the contract had not been completed." When Cooler Erectors abandoned the job site, two other sub-contractors filed mechanic's liens on the property to secure payment. Rose Electric's lien claimed it was owed \$54,339.13 on the construction agreement, a concrete supplier claimed a lien of \$14,528.20, and a plumber claimed a lien of \$10,210.93. The three subcontractors' claims totaled \$79,139.26.

not required to disregard the findings of the trial [court] who saw and heard the witnesses and was in a better position to judge their credibility." *Id.* Evidence supported both Rose Electric and Southern's respective position. We find the issue of whether the architectural plans were intended to be part of the contract price was an issue of credibility. Accordingly, we adopt the trial court's finding that the total contract price of the project included the architectural plans.

Had Rose Electric proceeded with its mechanics' lien foreclosure action, its recovery would have been limited to 68.74% of the retainage, totaling \$6,948.24. However, Rose Electric abandoned its mechanics' lien cause of action prior to trial and proceeded only on its quantum meruit cause of action. While Rose Electric did not invoke the mechanics' lien statute as a theory for recovery, we find the statute provides a framework for determining what recovery is proper in quantum meruit cases involving construction contracts. Where, as here, a building owner has paid a general contractor a substantial amount of the contract price, we find the mechanics lien statutes, and their limitations, are a proper measure of the subcontractor's damages against the property owner in a quantum meruit action.

Furthermore, the mechanics' lien statutes do not distinguish between liens that settle prior to trial and those that continue to trial. Rather, "it is the duty of the owner to prorate among all just claims the amount due the contractor." § 29-5-60(A). Southern did that in this case. We find the trial court properly included all liens filed against Southern when considering the amount of the retainage to which Rose Electric was entitled.²

A defendant is not relieved of its responsibility to pay for a benefit because the defendant offered to pay prior to trial. Here, Southern has retained \$10,103 of the contract price, but has recognized the full benefit of Rose Electric's services. The trial court erred in finding Rose Electric could not prove Southern retained a benefit without paying for it to the extent of the retainage. Accordingly we reverse and direct the trial court to enter judgment for Rose Electric for \$6,948.24—the amount of its prorated share of the retainage.

We also reverse the trial court's order denying Rose Electric recovery for the change orders. As previously noted, no express contract between Rose Electric

² Rose Electric argues Southern should not be able to use their payments to Cooler Erectors as a defense to Rose Electric's quantum meruit claim because Cooler Erectors was not a licensed general contractor in South Carolina. We disagree that Cooler Erector's status as an unlicensed general contractor prohibits Southern from relying on its payments to Cooler Erectors as a defense in this case. Section 40-11-370 of the South Carolina Code (2011) prohibits unlicensed contractors, like Cooler Erectors, from attempting to enforce a contract they entered into. That statute does not prohibit individuals who contract with unlicensed general contractors from alleging payment to those contractors as a defense to claims by subcontractors. We affirm the trial court's determination that Cooler Erector's status as an unlicensed general contractor is irrelevant to this case.

and Southern existed in this case. The court's only discussion of the quantum meruit action based on the change orders was "Southern Produce has offered to pay Rose [Electric] \$10,755.39 for the change orders per its verbal contract." Based on Southern's offer to pay for the change orders, the trial court found Rose Electric failed to prove Southern retained a benefit under conditions that make it unjust for it to retain the benefit without paying its value. As discussed previously, there is no authority to support the assertion that a defendant is relieved of its responsibility to pay for a benefit because the defendant offered to pay prior to trial. Rose Electric modified the electrical plans to better suit Southern's work process; Southern has realized the benefit of Rose Electric's services; and Southern has not paid for those services. *See Swanson*, 350 S.C. at 121, 564 S.E.2d at 119 (noting the elements of quantum meruit are: "1) a benefit conferred by the plaintiff upon the defendant; 2) realization of that benefit by the defendant; and 3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value"). We find Rose Electric is entitled to be paid the stipulated price for its work and remand to the trial court to enter judgment in the amount of \$10,755.39 for those services.

We reverse and remand to the trial court to modify its judgment to include an award of damages to Rose Electric in the amount of \$17,703.63 and to address Rose Electric's claim for prejudgment interest.

CONCLUSION

For the foregoing reasons, the decision of the trial court is

REVERSED AND REMANDED.

WILLIAMS and MCDONALD, JJ., concur.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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OCT 13 2016

SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2011-CP-32-1929

Rose Electric, Inc., Appellant

v.

Cooler Erectors of Atlanta, Inc., Southern Produce, Inc., S2P, LLC, Certified
Development Corporation of South Carolina, Senn Bros., Inc.,
Custom Concrete of Lexington, Inc., and
James Dunlap d/b/a Dunlap Services, ... Defendants

Of whom

Southern Produce, Inc., and S2P, LLC are Respondents

PETITION FOR REHEARING EN BANC

Opinion No. 5444

Heard June 16, 2016 – Filed September 28, 2016

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SC Bar No. 771

Attorney for Appellant

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Under Rule 221(a), SCACR, Appellant, Rose Electric, Inc. ("Rose"), submits this Petition for Rehearing *en banc* on the points overlooked or misapprehended by this Court in its Opinion No. 5444 filed on September 28, 2016, :

POINT 1: The Record contradicts the statements in the Opinion that there was evidence to support the position of Respondent Southern Produce, Inc. ("Southern Produce") that the architectural plans were included in the contract price as well as the position of Rose that the cost of the plans were not included in the total contract price.

There was no evidence in the Record that the architectural plans were included in the total contract price. The evidence of the contract price was based upon a written contract which clearly in the scope had no suggestion that the architectural plans were included. The Contractor Agreement entered by Cooler Erectors and Southern Produce is divided into eight separately numbered paragraphs and is dated October 27, 2010. The first paragraph contains six subparts describing the different categories of work to be performed; *i.e.* the scope of work. Paragraph 4 states that the amount to be paid for doing the scope of work as outlined is \$213,385. Paragraph 3 states that the finished architectural plans are attached to and made a part of the Agreement so no need for the finished plans to be done under the Agreement. Obtaining architectural plans is not listed in the sub-parts of the Agreement detailing the scope of work.

Therefore, this Court should find that the total project cost was \$224,385 because the amount in the Agreement does not include the cost for obtaining the

architectural plans. This Court should further find that Southern Produce did not pay Cooler Erectors \$21,108 of the total project cost.

Contract	Oct. 22, 2010 - Date Signed	\$213,385.00	
Plans	Oct. 8, 2010 - Payment for Plans	\$11,000.00	
	Total Project Cost	\$224,385.00	
Other Payments			
10/27/2010	Southern Produce, Inc.	Cooler Erectors of Atlanta	\$49,600.00
10/27/2010	Southern Produce, Inc.	Cooler Erectors of Atlanta	\$42,677.00
11/16/2010	Southern Produce, Inc.	Cooler Erectors of Atlanta	\$70,000.00
12/2/2010	Southern Produce, Inc.	Cooler Erectors of Atlanta	\$30,000.00
		Total Other Payments:	\$192,277.00
		Payment for Plans	\$11,000.00
		Total All Payments	\$203,277.00
		Total Project Cost	\$224,385.00
		Total All Payments	\$203,277.00
		Total Retainage	\$21,108.00

POINT 2: The Court failed to recognize that although two other subcontractors had filed liens, those liens were no longer active or owed by Southern Produce due to settlement or payment prior to trial. The testimony of Stocker, the only witness presented by Southern Produce, shows that the total amount paid to both was \$465. He testified :

A To my understanding, no, sir, it's not active.

Q And even though they claim they're owed about \$14,529, has Southern Produce paid anything to Custom Concrete?

A Other than legal fees, no, sir.

Q Okay. But nothing to Custom Concrete?

A Correct.

(Transcript, p. 174, lines 16-22).

Q And you said you paid something on that and the amount you paid, I believe, was \$465 back on August 19th, 2011; correct?

A That was a settlement, yes, sir.

Q But, again, do you remember the date of the settlement?

A No, sir. I believe you just said August.

(R. p. 267, lines 6-12).

The Court misapprehends the mechanic's lien statute for allowing an owner to allocate the subcontractors' unpaid amounts to compute how much each subcontractor would be paid from the retainage. But, the statement in the Court's decision that the mechanic's lien statute does not distinguish between liens that settle prior to trial and those that continue to trial is not logical or fair to the subcontractor that pursues the payment from the owner.

In fact, S.C. Code §29-5-220 contemplates this scenario. §29-5-220 states:

At the time assigned for the hearing, or within such further time as the court allows for that purpose, every creditor having a lien of the kind before mentioned upon the same property may appear and prove his claim and the owner and each of the creditors may contest the several claims of every other creditor and the court shall hear and determine them in a summary manner, either with or without a jury, as the case may require.

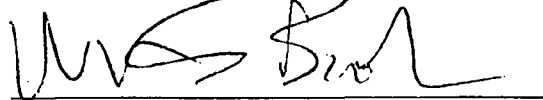
At the time of the hearing of this action, there were no other creditors having liens of any kind and so the only lien to be considered for any determination was that of Rose. Because the other subcontractors had settled any claims, they no longer had any lien and were paid under the contract. Therefore, at the time of

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the hearing, the only subcontractor not paid was Rose and there were no other creditors with which to prorate any retainage.

For these reasons, Respondent asks the Court to rehear the case *en banc*.

Respectfully submitted,



October 13, 2016

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Attorney for Appellant

The South Carolina Court of Appeals

Rose Electric, Inc., Appellant,

v.

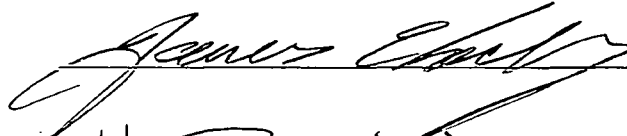
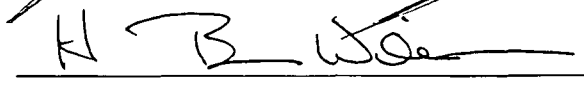
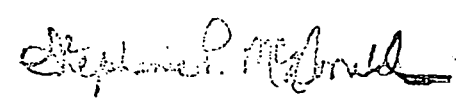
Cooler Erectors of Atlanta, Inc., Southern Produce, Inc.,
S2P, LLC, Certified Development Corporation of South
Carolina, Senn Bros., Inc., Custom Concrete of
Lexington, Inc., and James Dunlap d/b/a Dunlap
Services, Defendants,

Of whom Southern Produce, Inc., and S2P, LLC, are the
Respondents.


Appellate Case No. 2014-001633

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, both Appellant's and Respondents' petitions for rehearing are denied.

 C.J.
 J.
 J.

Columbia, South Carolina

FILED
12/29/16 

cc:

William E. Booth, III, Esquire

Jon Robin Turner, Esquire

Kathryn M. Cook, Esquire

THE STATE OF SOUTH CAROLINA
In The SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Opinion No. 5444 (S.C.Ct.App. filed Sept. 28, 2016)

Rose Electric, Inc., Petitioner,

v.

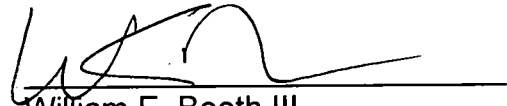
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Custom Concrete of Lexington, Inc., and
James Dunlap d/b/a Dunlap Services, ... Defendants,

Of whom

Southern Produce, Inc., and S2P, LLC are Respondents.

CERTIFICATE OF COUNSEL

The undersigned, as counsel for Petitioner, hereby certifies that this
Appendix contains all of the documents required by Rule 242(e), SCACR.



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