THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Circuit Court Judge

2009-CP-40-00064
Appellate Case No. 2012-210746

F.M. Haynie d/b/a Docwild's General Contractor,.....Appellant,

v.

Paul E. Cash and Carole S. Cash .....Respondents.

RESPONDENTS' INITIAL BRIEF

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I. STATEMENT OF THE CASE

The Contractor, F.M. Haynie, d/b/a Doc Wild ("Contractor"), filed this action on January 6, 2009, alleging breach of contract, foreclosure of a mechanic's lien, breach of contract accompanied by a fraudulent act, and quantum meruit. The action was served on Paul and Carole Cash ("Homeowners") on February 4, 2009. Homeowners answered the complaint, raising as a first defense a general denial; as a second defense that Contractor failed to file notice of the mechanic's lien within ninety days of the time he stopped performing or furnishing materials; as a third defense, the plaintiff failed to file suit foreclosing the mechanic's lien within six months of the time Contractor furnished materials to their property; that the Contractor willfully claimed money that was not due to him pursuant to the mechanic's lien statute; and, that the Contractor was paid in full for all the work done on their property. Homeowners also brought a counterclaim alleging misrepresentation, wrongful filing of the mechanic's lien, violation of the Unfair Trade Practice Act and trespass. Subsequently, on October 22, 2010, Homeowners amended their counterclaim alleging negligence/fraudulent misrepresentation, wrongful filing of a mechanic's lien, violation of the Unfair Trade Practice Act, trespass, breach of implied warranty of workmanship, negligence, breach of contract, and quantum meruit. Contractor replied to the Amended Answer and Counterclaim.

On May 9, 2010, by order of the Honorable James Barber, the case was referred to the Master in Equity, the Honorable Joseph M. Strickland, for final disposition. The case was tried for three days in front of the Honorable Joseph M. Strickland, commencing on September 19, 2011, continuing on September 20, 2011 and September 22, 2011. Judge Strickland issued an order dated March 5, 2012, ruling in favor of Homeowners on the plaintiff's causes of action and granting judgment to the Homeowners on the wrongful filing of a mechanic's lien and the

deficiencies in the Contractor's work. The order was filed on March 6, 2012 and mailed to the parties on March 6, 2012. Contractor and his then attorney, Doug Truslow, Esquire, received the order on March 9, 2012. Beyond the ten days proscribed by the rules, Contractor, pro se, filed a Rule 59(e) Motion for Reconsideration on March 26, 2012. On April 4, 2012, Haynie filed a Notice of Intent to Appeal. On April 17, 2012, Homeowners filed a response to the Motion for Reconsideration, contending that the Contractor's motion was not timely filed and that the trial court did not have jurisdiction to hear the motion. On August 6, 2012, the South Carolina Court of Appeals remanded the case to The Honorable Joseph M. Strickland for the limited purpose of holding a status conference. On August 9, 2012, Judge Strickland held a status conference, but made no additional rulings.

II. STATEMENT OF THE FACTS

This case arises from a dispute between Contractor and Homeowners regarding their agreement to build a shed, their independent oral agreements for additional work, the scope of the work performed by Contractor and whether Homeowners fully paid Contractor pursuant to their agreements.[1] In early 2006, Homeowners sought bids from several of contractors to construct a shed in the Homeowners' backyard located in Forest Acres, South Carolina (Trial Tr., p.351). Homeowners then began discussions with Contractor regarding the scope of the work to build the shed. (Trial Tr., pp.354-357). Although Homeowners knew Contractor from involvement on a tennis team, Contractor represented that he could build the shed for Homeowners due to his experience as a contractor. Contractor graduated from Georgia Tech with a degree in engineering and has been in the construction business for almost forty years. (Trial Tr., p.98, ll.10-25, p.99, ll.1-2). In January of 2006, Contractor presented a drawing to the Homeowners of the proposed shed which was subsequently modified by the parties. (Trial Tr., p.357; Joint Ex. 1). Contractor submitted plans for the shed to the City of Forest Acres. The plans were approved by the Forest Acres building inspector, Tony Rivera, on February 26, 2007. (Defs.' Ex. 2; Joint Ex. 1). Contractor used the drawing approved by Rivera as the basis for his application for the building permit. When Contractor applied for a building permit for the Homeowners' shed, he indicated that the permit was for a storage/shop/dog house with a value of $21,000. (Trial Tr., p.189, ll.18-23; Defs.' Ex. 2). Contractor never amended the amount he claimed to be the value of the construction of the Homeowners' shed with the City of Forest

[1] To the extent Contractor relies on evidence not introduced at trial and a part of the record, including his motion for reconsideration, his attachments to his motion for reconsideration, his affidavit in support of his motion for reconsideration and his brief in support of his motion for reconsideration, this information should not be considered by the court because it is not a part of the record on appeal. Homeowners intend to file a motion to strike these matters from the record.

Acres. The Building Permit Application, filled out by Contractor, included 500 square feet of space. (Trial Tr., pp.188-189; Defs.' Ex 2).

On March 2, 2007, Contractor authored a letter, which references only the construction of an "outbuilding," and presented it in person to Homeowners. (Trial Tr. p.191, ll.2-3; p.365). The letter provides in relevant part as follows:

> Pursuant to our discussions, we will construct the subject addition (outbuilding) to your home at 1501 Greenhill generally according to the sketch we previously drew on a cost plus 25% basis. My direct labor will be billed at $30 per hour and employees at $18 per hour. All material discounts will pass through to your benefit. Heavy equipment (Bobcat or trackhoe) will be billed based on actual use at $30/hr.
>
> We guesstimate the job to take 8 weeks and cost roughly $35,000 greatly contingent upon finish choices as discussed. The actual cost normally is most affected by window, siding, & interior detail selections.
>
> Initially, we require a $6,000 deposit subsequently we will make bimonthly draws, typically in the near $5-10,000 amounts congruent with the construction progress. You are welcome to look at the job book at any time; they are rarely more than a day or two behind the actual cost. Please make checks payable to F.M. Haynie.

(Pl.'s Ex. 5; Trial Tr., p.365; Defs.' Ex. 25).

Contractor contends that the letter is the contract with Homeowner. (Trial Tr., p.136, ll.12-18 - p.298; ll.23-25, p.299, ll.1-3). Homeowners contend that they did not agree with the terms of the letter because the March 2, 2007 letter was ambiguous and inconsistent in that it proposed a cost plus price structure and a price of $35,000. Homeowners orally requested clarification from the Contractor regarding the price to complete the construction. (Trial Tr., p.365, ll.7-25; p.366, ll.1-17). Homeowners testified as follows:

> And I said, I said, Doc, I said that's not what I want. I don't want cost plus 25, mainly for the reason that we're here today, because it leaves too much to interpretation. I said, I need specific details of what you're going to do, materials, hours, and what the total cost is going to be.

(Trial Tr., p.365, ll.13-19).

After Homeowners told Contractor that they did not want a cost plus 25% contract, Homeowners required that Contractor provide a written line by line estimate of the costs and labor associated with the building of the shed to establish a price. (Trial Tr., p.194, ll.8-19; p. 365). Contractor thereafter prepared a line by line estimate of the costs associated with the project, including labor and materials, as well as an amount for overhead and profit. (Trial Tr., pp.365-366, Defs.' Ex. 20). The document was titled Construction Estimate for Cash Man House. (Trial Tr., pp.356-366). Homeowners testified that the estimate with specific line item costs and a total price was prepared after the March 2nd letter. (Defs.' Ex. 20; Pl.'s Ex. 9; Trial Tr., pp.366-369). In the line by line estimate of the scope of the work prepared by Contractor and relied upon by Homeowners, Contractor stated that the project would include 367.7 hours in man hours, $13,210.76 in materials with a charge of 15% overhead and 10% profit. It also provided for a 5% contingency amount. The total of the estimate for the work was $38,264.89. (Defs.' Ex. 20; Trial Tr., pp.366-369). Homeowners understood the line by line estimate represented the scope of work for building of the shed. (Trial Tr., pp.366-369). Contractor agreed that the estimate was prepared because Homeowners wanted to see more details about the scope of the project and the cost of the project. (Trial Tr., p.195, ll.4-11). Homeowners then negotiated the price with Contractor to be $35,000 for most of the work within the estimate. (Trial Tr., p.196, ll.6-25). Contractor contended that he "guessed" the price would be $35,000 and told Homeowners. (Trial Tr., p.195, ll.22-25 - p.196, ll.1-19). Homeowners understood $35,000 to be the cost of the scope of work. (Defs.' Ex. 5). Homeowners also understood that they would be given credits for work which was not done, but which was in the estimate such as the HVAC. (Trial Tr., p.377, ll.2-25; p.378, ll.1-11). At the time the project began, the parties both knew

that the shed would be 550 square feet with a vaulted ceiling. (Trial Tr., pp.104-105). The square footage of the shed was increased when Contractor made a forming error on the foundation. (Trial Tr., pp. 363-364).

Homeowners created a ledger for the payments made on the shed and the progress of construction. (Defs.' Ex. 5; Trial Tr., p.370). The notations of Homeowners were made contemporaneous with the events as they occurred during the project. (Trial Tr., p.370; Defs.' Ex. 5). Homeowners documented on their ledger that the cost of the shed would be $35,000 because Homeowners understood that to be the cost. Although Contractor disputed that the contract amount was $35,000, he agreed that he and Homeowners were "aiming at $35,000" and considered $35,000 a "starting point." (Trial Tr., p.200). Contractor made entries on his ledgers, documenting the project by noting that the contract price was $35,000. (Trial Tr., pp.199-201). The contract price of $35,000 was referenced in Contractor's internal documents from June of 2006. (Defs.' Ex. 8; Trial Tr., pp.199-200). The contract price of $35,000 is also referenced in Contractor's internal documents prepared after August 9, 2008. (Trial Tr., p. 201, ll.14-25; Defs.' Ex. 9). The contract price of $35,000 was included on Contractor's final spreadsheet which calculated the amount he claimed he was owed on a purported cost plus 25% contract. (Pl.'s Ex. 9; Trial Tr., pp.201-202). Contractor consistently added "extra work" and the modifications to the $35,000 cost shown on his internal documents.

Throughout the project, Homeowners made payments to Contractor for the construction of the shed. Homeowners also paid for other work which was contracted to be done separately and independent of the shed. (Trial Tr., pp.367-394). Homeowners made the following payments to Contractor:

03/06/07	6,000.00
04/17/07	5,000.00

05/07/07	5,000.00
05/12/07	3,500.00
05/25/07	5,000.00
06/16/07	4,000.00
07/09/07	3,500.00
07/19/07	2,500.00
09/28/07	2,000.00
11/06/07	1,500.00
11/14/07	2,500.00
12/21/07	2,000.00
04/11/08	5,000.00
08/09/08	3,000.00

(Trial Tr., pp.152-156; pp.370-394). Homeowners paid Contractor a total of $50,500.00 which included payment for the construction of the shed, the extra work done in their yard and on their residence, and the building of a tree house for their son. (Trial Tr., p.309, ll.12-14). Homeowners and Contractor agreed on the final reconciliation for the shed project and all extra work when the final $5,000.00 payment was made to Contractor in April of 2008. (Trial Tr., p.393, ll.7-24). When the shed was completed, no certificate of occupancy was issued or could have been issued for the shed. (Trial Tr., pp.115-116).

During the course of the building of the shed, the parties orally agreed to make changes to the initial scope of work. (Trial Tr., p.428; Defs.' Exhibit 20). When the foundation was poured incorrectly, the square footage of the building was increased and two windows were eliminated. (Trial Tr., pp. 363-364). The parties agreed on a price for the windows and doors which totalled $1,255.23. (Defs.' Ex. 5; Trial Tr., pp.375-376). During the framing of the roof of the shed, Contractor suggested to Homeowners that he change the pitch of the roof of the shed which allowed for more space in the loft area. (Trial Tr., pp.361-364). The changing of the pitch of the roof added square footage to the building which then became accessible by fixed stairs rather than a ladder. (Trial Tr., pp.268-272; pp.359-363). Homeowners testified that Contractor told him that the change to the pitch of the roof would not add any costs to the framing of the

shed. (Trial Tr., pp.373-375). When the pitch of the roof was changed, Homeowners agreed with Contractor that there would be additional costs for the interior finish, including the handrail for the loft, the stairs to the loft and the floor in the loft. (Defs.' Ex. 5; Trial Tr., pp.374-375). Homeowners contended that some of Schmidt's (Contractor's employee or subcontractor) work would be done by Schmidt "in trade" for the use of the shed so he could work on other ongoing projects. (Trial Tr., p.344, ll.3-25 - p.345, ll.1-23). The parties agreed to change the HVAC system from a hotel unit to an HVAC unit with ductwork. (Trial Tr., p.377). The parties agreed that the additional total cost of the change for the HVAC was $2,000. (Trial Tr., p.377; Defs.' Ex. 5). The parties further agreed that a recycled toilet and sink could be used in the bathroom so there was no cost for Contractor for materials for the lavatory although the cost was initially provided in the estimate; thus, this amount would be reduced for the overall initial cost. (Trial Tr., pp.207-209). Although the parties had agreed Contractor would install pegboard, Contractor never did so. (Trial Tr., p.388). The parties, during the construction, also agreed to eliminate the beadboard ceiling on the front porch. (Trial Tr., p.206, ll.15-19). It is undisputed that all of the changes to the building of the shed were made orally.

The shed was essentially completed by August of 2007, when the building was dried in with a roof on the shed, the electrical system was completed, the heating and air system was completed and the plumbing was installed. (Trial Tr., pp.242-249; p.343). Contractor's employees worked on the shed for three days in July of 2007, one day in August of 2007; four days in September of 2007; three days in October of 2007; and one day in November of 2007 as documented by Contractor. (Trial Tr., p.70, ll.23-24 - p.71, ll.1-10). Homeowners' spreadsheet indicates that the project was ninety percent completed in August of 2007. (Defs.' Ex. 5; Trial Tr., p.381).

Although the shed was substantially completed in the Summer and Fall of 2007, Contractor and his subcontractor and/or employee, Bill Schmidt, continued to work in the shed on other projects for other clients through April of 2008. (Trial Tr., pp.343-345). In February of 2008, the shed was almost totally completed with the exception of some trim work which needed to be finished. (Trial Tr., p.390). Contractor's daughter testified that she was not aware of any work that needed to be done that had not been completed by April of 2008 when the final payment was made. (Trial Tr., p.80, ll.21-25).

Contractor contended at trial that he maintained records of the amount spent for material and labor on Homeowners' project to support his position that he had a cost plus contract. However, Contractor did not maintain time cards for his employees. (Trial Tr., p.215, ll.23-25 - p.216, ll.1-2). Contractor never provided evidence of the actual amount he paid his employees. Contractor further admitted that he altered the time records after claiming that he kept them contemporaneously. (Trial Tr., p.179). Contractor changed the number of hours claimed and made them more favorable to his position in calculating the labor costs. (Trial Tr., p.180). From the demand letter Contractor wrote on November 6, 2008 to the Homeowners to the second demand letter on November 12, 2008 to the Homeowners, Contractor increased the number of total labor hours claimed to have been worked by 180 hours from 888 man hours to 1068 man hours. (Trial Tr., pp.182-183). No work was done on the project in those days, but Contractor argued that he had undercharged the hourly rate so he adjusted the hours. In testifying about the different calculations regarding the labor hours, Contractor claimed he was confused and not certain how he arrived at the numbers. (Trial Tr., p.184, ll.13-21). Contractor admitted that he changed the recorded number of hours he claimed both he and his employees spent on Homeowners' job to increase the number of hours and the amount allegedly owed by the

Homeowners. (Trial Tr., p.177). Contractor admitted that he added forty hours to the total of his claimed hours worked after Homeowners disputed that they owed him any money. (Trial Tr., p.178, ll.18-25). Contractor testified that he "guessed" at the number of additional hours owed, stating that he took the 40 hour amount "out of the air." (Trial Tr., p.179, ll.11-19).

Contractor testified that he only had four employees working for him in 2007. (Trial Tr., p.222, ll.11-25). Skye Haynie, Contractor's daughter, and the only employee who testified for Contractor, claimed that she regularly worked on the Homeowners' project. She stated that she testified in her deposition that she earned in the "mid-twenties" working for her father. (Trial Tr., p.43, ll.3-21). Ms. Haynie also testified that she worked on other projects for Contractor in 2007. (Trial Tr., pp.44-45). However, Skye Haynie's W-2 form for her 2007 tax returns reported income from her father's business in the total amount of $882.00 for 2007 which would be approximately forty hours of work for the entire year for all projects. (Defs.' Ex. 26, Trial Tr., pp.216-221). Skye Haynie claimed that she worked on other projects in 2007 for her father's business. (Trial Tr., pp.216-221). Contractor explained the inconsistency by claiming that he paid Skye Haynie more than she reported on her W-2 prepared by Contractor for his business because Ms. Haynie owed him money. (Trial Tr., pp.216-221).

In addition to the discrepancies on the Contractor's records regarding the labor, there were numerous issues with the "no charge" hours supposedly credited to Homeowners and then rescinded by Contractor when Homeowners disputed that any additional amounts were owed. (Trial Tr., pp.224-233). In Contractor's spreadsheets, Contractor reduced the amount of "billed" hours by "no charge" hours. (Pl.'s Ex. 9). Contractor did not expect Homeowners to pay for the no charge hours. (Trial Tr., p.224, ll.2-4). Contractor included hours in the no-charge column which he then refuted and testified should have been charged to homeowner. (Trial Tr., pp.224-

226). Contractor initially "no charged hours" for work performed by Schmidt, but then attempted to charge those hours after the dispute arose. (Defs.' Ex. 10; Trial Tr., p.235).

Contractor also contended at the trial that certain amounts were owed by the Homeowners for work performed by Schmidt, the trim man. Homeowners disputed they owed for services completed by Schmidt. Contractor approached Homeowners in July of 2007 to inquire as to whether he could allow one of his subcontractors/employees, Schmidt, to move his equipment and materials into the shed to do carpentry work for Contractor's other projects because Schmidt did not have a place to work. (Trial Tr., pp.343-345). Schmidt, who had a twenty year relationship with Contactor doing carpentry work, brought his equipment and materials to the Homeowners' shed and worked from the shed until he was asked to leave so Homeowners could use their property in the Spring of 2008. Contractor also moved his equipment and materials into the shed during this time and worked out of the shed. Homeowners agreed to allow Schmidt and Contractor to use the shed because Contractor orally agreed that he would trade out Schmidt's services as they finished the shed. (Trial Tr., pp.344-348; pp.380-381). Contractor acknowledged this agreement by testifying that "he was going to take special care of the Homeowners and not charge them for everything while he used his shed" and that "he took good care of him." (Trial Tr., pp.254-256). Contractor did not have any documentation concerning the number of hours Schmidt worked in the shed. (Trial Tr., p.258, ll.1-16). Although Contractor testified that he charged $30 an hour for Schmidt's work, he then testified that he was a subcontractor and that he was "fiddling around" with the numbers and "guesstimating how the costs are going." (Trial Tr., pp.258-259). Homeowners testified that had he rented the shed to Schmidt that the value of the rental would have been $300 to $325 a month.

(Trial Tr., pp.346-347). For approximately nine months, the value of the rent would have been $2,700 to $2,925.

Contractor failed to produce back up documentation regarding the purchase of the materials. Contractor claimed that he purchased materials at Lowe's, but that the receipts were thrown away. (Trial Tr., p.81, ll.13-17). Contractor's daughter also stated that there was no other documentation which related to the purchasing of materials other than what was on Contractor's Palm Pilot. (Trial Tr., p.18, ll.15-17). Contractor testified that the documents regarding the material costs were accurate, but "not guaranteed accurate, but it probably is." (Trial Tr., p.151, ll.6-10). Contractor's documents contained various costs of materials, claiming in a document prepared after August 28, 2008, that the materials for the project totaled $28,259.00. (Defs.' Ex. 9; Trial Tr., p.151, ll.17-19). Contractor testified that $28,259 was "for this particular moment" accurate. (Trial Tr., p.151, ll.17-19). However, Contractor increased the cost of the materials, without doing any work, between the date his spreadsheet was created and the date of the November 6, 2008 letter, but was doing no work on the shed and presented no invoices of the amounts he allegedly spent for materials on the shed. (Trial Tr., p.307, ll.7-13). By November of 2008, Contractor raised the cost of the materials to $38,418. (Defs.' Ex. 12). Contractor also failed to present backup information for any payments allegedly made to any of the subcontractors for any of the work. (Trial Tr., p.306, ll.22-25; p.307, ll.1-13).

After not raising payment issues for months and Homeowners being completely unaware that Contractor believed he was owed money, Contractor confronted Homeowners at the end of October or the beginning of November of 2008, claiming that he was owed additional payments for his work. (Trial Tr., pp.335-336). Contractor informed Homeowners in a telephone call that Homeowners owed $9,000 for additional costs associated with the project. (Trial Tr., pp.335-

337). Contractor testified that he did not recall the amount he initially demanded from Homeowners at the end of October. (Trial Tr., p.168). Homeowners denied that they owed Contractor any additional payments. (Trial Tr., pp.335-336). Contractor then sent Homeowners a letter dated November 6, 2008, the day after Contractor impermissibly entered the property to put a piece of trim under a window, indicating that Homeowners owed him $18,995 for the project. (Defs.' Ex. 12, Trial Tr., pp.337-338). Homeowners told Contractor again that they did not owe him any additional money. (Trial Tr., p.340). When Contractor recognized that Homeowners had changed the locks on the shed, Contractor entered Homeowners' property without Homeowners' consent and nailed a 1x4 inch piece of trim under a window on or after November 5, 2008. (Trial Tr., pp.160-165; 341). The Homeowners had not requested that Contractor perform any work on the shed in November of 2008. (Trial Tr., pp.165-168). Contractor noted the date he entered the Homeowners' property on the photographs he took on November 5, 2008. (Trial Tr., pp.160-161). Contractor knew that Homeowners were not aware that he was entering their property to replace the board and agreed that he did not request permission to enter the property. (Trial Tr., pp.165-169). Contractor agreed that he entered the property without permission because he knew he was trying to perfect a mechanic's lien on the Homeowners' property and knew that he had to perform work on the property within ninety days of the filing of the mechanic's lien. (Trial Tr., pp.164-168).

One week after the initial letter requesting $18,995, and two weeks after initially requesting $9,000, Contractor sent another bill to Homeowners claiming that the homeowners owed $26,146 for the balance due on the project. (Trial Tr., p.340; Defs.' Ex. 13). It is this amount Contractor made the basis of this lawsuit. Homeowners denied that they owed any additional amount, claiming that they paid Contractor in full for his work. On November 18,

2008, Contractor filed a mechanic's lien in the amount of $26,146. (Defs.' Ex. 31; Trial Tr., p.341). Contractor delivered a copy of the mechanic's lien to Homeowners on November 18, 2008. (Trial Tr., p.341).

Homeowners' spreadsheet reflects other work which was performed by Contractor which was not part of the original scope of work to build the shed. (Defs.' Ex. 5). During the course of Contractor's work on the shed, Homeowners requested that Contractor perform several other items, unrelated to the shed and/or the initial agreement. The extra work performed by Contractor was outside the scope of the building of the shed. (Trial Tr., pp.370-394). Additional work consisted of the removal of pine trees, the removal of a hackberry tree, changing the electrical service to the Homeowners' main house, building a tree house for the Homeowners' son, painting the interior of the shed, and completing some repairs on the siding of the Homeowners' house. (Trial Tr., pp.370-394). The additional work was separately negotiated and orally agreed to by the parties. Contractor admitted that Homeowners would ask for a price for some work, such as taking down a tree, and he would provide them with a price, but claimed it was approximate. (Trial Tr., p.212, ll.9-25; p.213, ll.1-17). Homeowners understood that the price was the cost of completing each independent job. Contractor testified that Homeowners requested that a particular tree be removed which he could not do himself. Contractor then called "the Forest Acres tree guy" who gave a price to Contractor. (Trial Tr., p.286, ll.8-20). Homeowners agreed to pay the quoted price for the work. Likewise, Contractor "took a shot" at the price on removing a hackberry tree by giving a price to Homeowners. (Trial Tr., p.287, ll.7-25). In the summer of 2008, Contractor approached Homeowners and offered to have his painters paint the interior of the building because Homeowners had not had an opportunity to do so. (Trial Tr., p.338) Contractor had been entering the shed to show it to his potential clients. (Trial

Tr., pp.338-339). Homeowners entered into a separate agreement with Contractor to have the interior painted and a tree (the hackberry) removed. Homeowners paid Contractor in full for that completed work on August 9, 2008. (Trial Tr., pp.239-240; pp.338-340). In summary, the additional work totaled $500 for the clubhouse, $1,400 for the cutting and removal of the hackberry tree, including a dumpster (Trial Tr., pp.383-384), $2,000 for the electrical service to the Homeowners' residence, $180 for the siding on the Homeowners' residence (Trial Tr., p.372), $400 for the cutting down of the dead pine trees (Trial Tr., p.302; Defs.' Ex. 5; Trial Tr., p.372), $1,200 for the Homeowners' son's tree house (Trial Tr., p.385), and $2,500 for the removal of a second set of pine trees in April of 2008. (Trial Tr., p.392).

Contractor admitted that he installed a septic tank in violation of the DHEC regulations, the residential building codes and zoning and that he had a duty to follow the building codes. (Trial Tr., p.272). Homeowner did not know that the septic tank was installed against the building code and local ordinances. (Trial Tr., p.395). After discovering that the septic tank was installed in violation of DHEC regulations, Homeowners replaced the septic tank with a line connecting to the public sewage system. The cost to repair Contractor's work was $1,995 which was paid by homeowners to Capital City Plumbing. (Trial Tr., p.396; Defs.' Ex. 16 & 17). Homeowners further spent $1,590 to repair their irrigation system as a result of laying the sewer line. (Trial Tr., pp.396-397, Defs.' Ex. 14). Furthermore, the Homeowners paid $585 to correct deficiencies in the construction of the shed by Contractor. (Trial Tr., pp.398-399; Defs.' Ex. 15).

ARGUMENT

I. THE TRIAL COURT PROPERLY CONCLUDED THAT A CONTRACT EXISTED BETWEEN HOMEOWNERS AND CONTRACTOR AND THAT ALL AMOUNTS OWED HAVE BEEN PAID TO CONTRACTOR.

The standard of review for breach of contract is the standard for an action at law. An action to construe a contract is an action at law reviewable under an "any evidence" standard. *Sherlock Homes Pub., Inc. v. City of Columbia*, 389 S.C. 77, 697 S.E.2d 619, 621 (Ct. App. 2010). *Hamrick v. Cooper River Lumber Co.*, 223 S.C. 119, 126, 74 S.E.2d 575, 578 (1953). This expression of the standard of appellate review arises out of *Townes Associates, Ltd. v City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976), wherein the South Carolina Supreme Court stated:

> In an action at law, an appeal of a case tried without a jury, the findings of facts of the judge will not be disturbed on appeal unless found to be without evidence which reasonably supports the judge's findings. The rule is the same whether the findings are made with or without, a reference. The judge's findings are equivalent to a jury's findings in a law action.

Id. at 86, 221 S.E.2d at 775. See also, *United Farm Agency v. Malanuk*, 284 S.C. 382, 383, 325 S.E.2d 544, 545 (1985).

Where there is conflicting evidence in a law case, the appellate court, has no power to weigh conflicting evidence. *Hiberian Society v. Thomas*, 282 S.C. 465, 319 S.E.2d 339 (Ct. App. 1984). In an action at law, tried without a jury, the appellate court's standard of review extends only to the corrections of errors of law. *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006). Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved. *S.C. Dept. of Social Services v. Forrester*, 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct.

App. 1984). The trial court's findings of fact must be affirmed unless his findings are not reasonably supported by the evidence in the record.

The trial court, after hearing the testimony of the witnesses, and judging the credibility of the parties, properly concluded that a contract existed between the parties and that there was no breach of the contract by Homeowners, and that Contractor was fully compensated for the work he performed. Ample evidence supports the trial court's ruling that a contract existed and there was no breach of the contract by Homeowners; thus, this court should affirm the findings of the trial court.

A contract is an obligation which arises from an actual agreement of the parties, manifested by words, oral or written or by conduct. *Roberts v. Gaskins,* 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). Mutual assent, or a meeting of the minds between the parties as to all essential terms of an agreement, is necessary to the formation of the contract. *Player v. Chandler,* 299 S.C. 101, 382 S.E.2d 891 (1989). In order for a contract to be binding, certain terms, such as price, time and place, are considered indispensable and must be set out with reasonable certainty. *McPeters v. Yeargin Construction Co., Inc.,* 290 S.C. 327, 350 S.E.2d 208 (Ct. App. 1986).

In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. The parties' intention, in the first instance, must be derived from the language of the contract. If the language of a contract is perfectly plain and capable of legal construction, it alone determines the document's force and effect. *Ecclesiastes Prod. Ministries v. OutParcels Associates, LLC,* 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007). If a contract's language is plain, unambiguous and capable of only one reasonable interpretation, no construction is required and this language determines the instrument's force and effect.

Ecclesiastes Prod. Ministries v. OutParcels Associates, LLC, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007). The Contractor argues that his March 2, 2007 letter formed the contract between the parties that the shed would be constructed for "cost plus 25%" and the "other work" would be done for "cost plus 25%." Homeowners disputed that the March 2, 2007 letter, not signed by both parties, defined the terms and conditions of the contract. Rather, Homeowners contended that the contract was formed after the letter after Homeowners sought clarification and agreement from Contractor as to the scope of work and price. Furthermore, the trial court properly rejected Contractor's argument that the letter formed a contract because the ambiguous language of the letter was not clear and expressed an indefinite price which was challenged by Homeowners as not acceptable. The trial court concluded that the language of the letter alone was not sufficiently definite to construe without considering parol evidence to determine the true intent of the parties.

A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear. *Ellie, Inc. v. Miccichi,* 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004). An ambiguous contract is one which can be understood in more ways than just one or is unclear because it expresses its purpose in an indefinite manner. *Koontz v. Thomas*, 333 S.C. 702, 708, 511 S.E.2d 407, 411 (1999). A contract is ambiguous when the terms of the contract are inconsistent on their face, or reasonably susceptible of more than one interpretation. *Hawkins v. Greenwood Development Corporation,* 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997). Since the purported contract was ambiguous, the trial court considered other evidence to reveal the intent of the parties as to their agreement. Parol evidence is admissible to ascertain the true meaning and intent of the parties. *Koontz v. Thomas,* 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999). Furthermore, ambiguous language in the contract should be construed most strongly in favor of

the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in the contract, doubt or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage. *Myrtle Beach Lumber Co., Inc. v. Willoughby,* 276 S.C. 3, 274 S.E.2d 423 (1981).

Based on the line by line estimate which detailed the scope of the project, the internal documents of Contractor which referenced a contract price of $35,000, the ledger of Homeowners which referenced a price of $35,000, the court correctly concluded that the parties intended that the building of the shed would be completed for a price of $35,000 which was subject to oral modification for changes to the building. The court, in determining the price of the contract to build the shed, heard the testimony from all the witnesses and assessed their credibility. Consistent with Homeowners' spreadsheet that the cost of the project was $35,000, Contractor repeatedly referenced the contract price as $35,000 in his internal documents. The price of $35,000 was referenced in June of 2006. (Defs.' Ex. 8; Trial Tr., pp.199-200). The contract price was also referenced in Contractor's internal document prepared after August 9, 2008. (Trial Tr., p.201, ll.14-25; Defs.' Ex. 9). Contractor conceded that the last document he prepared showed the same contract price of $35,000. (Pl.'s Ex. 9; bate stamp #15). Although the labor hours and material costs on the Contractor's documents change, the contract price always remained the same which supported the judge's finding that the price was set at $35,000. Moreover, Homeowners testified that he rejected the proposal in the March 2, 2007 letter and renegotiated the scope of the contract as well as the price after reviewing the line by line estimate prepared by Contractor. Furthermore, Contractor recognized that the Homeowners were "aiming at $35,000" and was a "starting point" which is an implicit admission that he knew the contract price was $35,000. (Trial Tr., p.200, ll.4-25).

The trial court reconciled the ambiguity in the contract and the conflicting testimony of the parties by determining that the parties intended the price of the building of the shed to be $35,000 with subsequent modifications. The trial court weighed the credibility of the witnesses and determined the Homeowners to be more credible than Contractor. The trial court considered the inconsistent testimony of the Contract in finding the Homeowners were more credible. For instance, Contractor, after contending that his records were accurate and contemporaneously created, admitted that he altered the records to support his claim after Homeowners disputed that they owed him any money. There was evidence that the material amounts were changed and the labor hours were altered. Within a span of three weeks, long after the work had been completed and final payment made, Contractor demanded $9,000 for full payment on the account, $18,995 for full payment as of November 6, 2008 and then increased the amount allegedly owed six days later to what was set forth in the mechanic's lien of $26,146. (Trial Tr., p.179, ll.1-19). Contractor's alleged amount due from the Homeowners tripled in three weeks with the work having been substantially completed over a year earlier. Moreover, there were numerous issues with Contractor's calculations as he testified that he "pulled them out of the air." (Trial Tr., p.179, ll.1-19). Contractor had no records of payments to his laborers. The only records he presented were from his daughter, April Skye Haynie, who failed to accurately report the income she was paid by Contractor. (Trial Tr., pp.216-221). Incredibly, Contractor himself prepared his daughter's tax returns and W-2 forms which did not report the income. There were also numerous issues regarding the manipulation of "no charge" hours where Contractor first claimed that he was not charging work which had been incorrectly done or completed by Schmidt, but later added hours back in to inflate the amounts requested by Homeowners to support the basis of this lawsuit. Contractor's credibility was at issue in this case. The trial court found the

testimony of the Homeowners concerning the terms of the contract between the parties to be more credible. There was evidence for the trial court to conclude that there was an agreement between the parties with a price of $35,000 and that subsequent oral contracts were separately entered into to establish the terms of the changes and the costs for the changes. The trial court correctly concluded that Homeowners did not breach the contract and all amounts had been paid to Contractor by Homeowners.

The trial court properly concluded that Homeowners and Contractor agreed orally to amend the original scope of work and the original price of $35,000 for the building of the shed by allowing changes to the scope of work by accepting new work and deleting other work. Throughout the project, amounts were both added and subtracted from the contract price. To amend the agreement between the parties, Contractor would propose a price to be paid for the changes to the project and Homeowners would agree to the price to pay for the change or delete work from the scope of work for the change. Homeowners testified that almost all the changes suggested by Contractor were proposed to him over the phone to which Homeowners would agree or not. (Trial Tr., p.419, ll.6-18). The trial court found that the parties had entered into the oral contracts for the changes as none of the changes were made in writing. Assuming the letter is the contract, a written contract may be modified by oral agreement. *Evatt v. Campbell*, 234 S.C. 1, 106 S.E.2d 447 (1950). Oral contracts are enforceable according to their terms. The existence of terms of an oral contract must be proved by evidence which is "clear, specific, definite and convincing in nature." *Parr v. Parr,* 268 S.C. 58, 65, 231 S.E.2d 695, 698 (1977). The changes to the scope of work for the shed were made pursuant to oral agreements between the parties with the price agreed to by the parties and fully paid for by Homeowners.

Even if the contract were not ambiguous and could be construed and enforced as a cost plus 25% contract, Contractor failed to prove that he was owed any additional sums for his work because of his lack of records of hours worked by his employees, his lack of invoices of materials purchased, his manipulated labor hours, his inconsistent costs of materials, his lack of support for payments to contractors, and his general shoddy and inaccurate bookkeeping on the project. Rule 220 (c), SCACR, allows the court to affirm the trial court for any ground appearing in the Record on Appeal. In this case, Contractor failed to meet his burden of proof in establishing Homeowners owed any additional sums under a cost plus 25% agreement because he failed to prove each and every cost and its reasonableness in light of the Homeowners' challenge to the propriety of the alleged costs. The trial court correctly found that the Contractor's claim for amounts due under a cost plus contract failed because he did not meet his burden of proof. Although South Carolina courts have not yet spoken directly on the issue of a cost plus 25% contract, the trial court correctly relied on significant nationwide legal authority as persuasive that the builder must prove the costs he incurred in a cost plus contract in order to be able to recover. A Louisiana court described a contractor's burden of proof for a cost plus contract as follows:

> In any cost-plus contract there is an implicit understanding between the parties that the cost must be reasonable and proper. The contractor is under a duty of itemizing each and every expenditure made by him on the job and where the owner denies being indebted to the contractor the latter has the burden of proving each and every item expense in connection with the job. . . . .
>
> . . . Obviously, to meet this test a cost-plus contractor must show that his work was performed efficiently and without the necessity of recurring remedial work suggestive of poor workmanship, so that the owner is not faced with excessive labor cost.

Kerner v. Geagan Lumber Co., Inc., 296 So.2d 428, 431-32 (La App. 4th Cir. 1974). Also, a builder must show the costs he expended and the necessity of each in the following manner:

> The rules of law controlling 'cost plus' contracts are well established. Upon reason and authority, where a person agrees to do work for another upon a cost plus basis, it is his duty to keep accurate and correct accounts of all material used and labor performed, with the names of the material men and laborers, so that the owner may check up the same. He must use the same skill and ability as is used in contract work for a gross sum. If the aggregate cost upon the face of the account is as excessive and unreasonable as to suggest gross negligence or fraud, the law would impose upon the contractor the duty of establishing the bona fides of his performance of the work. The contractor does not have the right to expend any amount of money he may see fit upon the work, regardless of the propriety, necessity, or honesty of the expenditure, and then compel repayment by the other party, who has confided in his integrity, ability and industry.

Shaw v. Bula Cannon Shops, 205 Miss. 458, 470-71, 38 So. 2d 916, 918 (1949) (internal citations omitted); *see also Freeman & Co. v. Bolt*, 132 Idaho 152, 968 P.2d 247 (Idaho Ct. App. 1998); *Wendel v. Maybury*, 75 So. 2d 379 (La. Ct. App. 1954).

Contractor claimed that the summary on his Palm Pilot justified the amounts owed. However, Contractor was unable to testify as to how he completed his own calculations, having admitted to numerous changes, miscalculations, and additions after the dispute arose. Contractor admitted to adding back "No Charge" costs, was unable to explain the methodology of his calculations, added material costs when minimal work was being done after the shed was completed, and also added labor hours for himself which were "pulled out of the air because he failed to keep records." Contractor also increased the number of labor hours claimed by 180 hours after Homeowners disputed that they owed any additional amounts, claiming that he rescinded "the discount." Contractor failed to support his claimed amounts owed with any documentation of invoices, amounts paid to contractors and amounts paid to laborers. The summaries of amounts allegedly owed by Homeowners were unsupported and incalculable even for the Contractor who allegedly was keeping the records. Assuming that the court finds that there was no ambiguity and the contract was for cost plus 25%, the trial court correctly

concluded that Contractor failed to meet his burden of proof to establish that any additional amounts were owed by Homeowners and the trial court's findings should be upheld.

II. THE TRIAL COURT PROPERLY CONCLUDED THAT THE EXTRA WORK PERFORMED BY CONTRACTOR WAS NOT AS A PART OF THE BUILDING OF THE HOMEOWNERS' SHED, BUT WAS CONTROLLED BY ORAL AGREEMENTS BETWEEN HOMEOWNERS AND CONTRACTOR

The trial court found that the "extra work" performed by Contractor was not subject to the contract to build the shed, but was work which was separately and independently negotiated. Homeowners and Contractor agreed that extra work was performed while the shed was under construction, including the removal of trees, siding repairs on the main house, the building of a tree house, the addition of electrical service to the main house, and the painting of the interior of the shed. All of this work arose outside of and entirely independent of the contract because it was not required to complete performance of the building of the shed. *Carolina Mechanical Contractors, Inc., v Yeargin Constr. Co., Inc.*, 261 S.C.1, 198 S.E.2d 224 (1973). As such, this work should be considered separately from the contract to build the shed for $35,000. Here, the trial court properly found that the Homeowners would ask for a price for the work; Contractor would give a price to which Homeowners would agree. There was never any agreement that the "extra work" would be under the sum certain contract or a cost plus contract. Contractor does not dispute that he did extra work for Homeowners, but he claims that the extra work would be subject to the March 2, 2007 letter by expanding the language in the letter to encompass all work done by Contractor for Homeowners. This was not the agreement between the parties and was rejected by the trial court.

A contract need not be in writing to be enforceable. *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005). Oral contracts are enforceable by the courts according to their terms. *Wright v. Trask*, 329 S.C. 170, 495 S.E.2d 222 (Ct. App. 1997). The existence and terms

of an oral contract must be proved by evidence which is clear, specific, definite and convincing in nature. *Parr v. Parr*, 268 S.C. 58, 231 S.E.2d 695 (1977). In this action at law, this court must affirm the trial court's finding if there is any evidence to support the finding of oral contacts for the extra work. The trial court, faced with two versions of what happened, believed the Homeowners over Contractor on the issues of the "extra work." Evidence reasonably supports the trial court's findings on this issue, and this court should affirm the trial court.

III. ALTERNATIVELY, IF THE TRIAL COURT ERRED IN FINDING A CONTRACT AND THERE WAS NO CONTRACT BETWEEN THE PARTIES BECAUSE THERE WAS NO MEETING OF THE MINDS AS TO PRICE, CONTRACTOR HAS FAILED TO MEET HIS BURDEN OF PROOF TO RECOVER UNDER QUANTUM MERUIT

Upon reviewing the findings of the trial court in an equitable matter, the appellate court "reviews the evidence to determine facts in accordance with [its] own view of the preponderance of the evidence." *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 703 S.E.2d 221 (2010); *LandBank Fund VII, LLC v. Dickerson*, 369 S.C. 621, 630, 632 S.E.2d 882, 887-88 (Ct. App. 2006) (*citing Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989)). "The appellate court is impotent to determine questions of credibility and must defer to the good judgment of the trial court who heard and observed the witnesses." *Costa and Sons Const. Co., Inc. v. Long*, 306 S.C. 465, 468, 412 S.E.2d 450, 452 (Ct. App. 1991).

Contractor contends that he is entitled to relief under the equitable doctrine of quantum meruit if the trial court did not properly conclude that a contract existed between the parties. Appellant cannot recover under the theory of quantum meruit if the Court determines a contract exists and that contract has not been abandoned or rescinded. *See Swanson v. Stratos*, 350 S.C. 116, 122, 564 S.E.2d 117, 120 (Ct. App. 2002). In the present case, the trial court determined that sufficient evidence had been presented at trial to establish a binding contractual agreement between the parties, and that no further amount was owed to the Contractor.

Assuming the trial court erred in concluding that there was a contract between the parties which was not breached, then this court must review the evidence to determine if Contractor can recover any additional payments, other than the $50,500 already paid. The general rule is that in the absence of an express contract, plaintiff has the right to pursue the quasi-contractual equitable remedy of quantum meruit to recover the value of labor and material furnished. *See Earthscapes Unlimited, Inc. v. Ulbrich,* 390 S.C. 609, 616, 703 S.E.2d 221, 225 (2010); *see also Costa and Sons Const. Co.*, 306 S.C. 465, 467, 412 S.E.2d 450, 451 (1991). In an equitable action, Contractor could pursue equitable damages "in the amount which the court considers the defendant has been unjustly enriched at the expense of the plaintiff." *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8, 532 S.E.2d 868, 872 (2000). However, Contractor should not be entitled to such an equitable remedy as Contractor did not, and, cannot establish, beyond a preponderance of the evidence, that he received compensation less than the fair market value for his services.

Contractor bears the burden of proof in an action for quantum meruit. *Pittman v. Le Master*, 128 S.C. 98, 121 S.E. 677, 678 (1924) (stating plaintiff must prove the services were rendered and the value of those services rendered); *See also*, 66 Am. Jur. 2d *Restitution and Implied Contracts* § 87 (Nov. 2012). Contractor, pursuant to this burden, must establish "facts and circumstances sufficient to justify the inference of an implied promise to pay for the service and of proving the amount and value thereof." 66 Am.Jur.2d, *Restitution and Implied Contracts* §87 (Nov. 2012) (citing *Anderson v. Zweigbaum*, 150 Conn. 478, 191 A.2d 133, 5 A.L.R.3d 941 (1963); *Nagele v. Miller*, 73 Idaho 441, 253 P.2d 233 (1953)). Contractor's burden is also set forth in South Carolina's three part quantum merit test. Under this test, Contractor must establish the following elements in order to prevail on an action for quantum merit:

(1) benefit conferred by plaintiff upon defendant;
(2) realization of that benefit by defendant; and
(3) retention of benefit by defendant under circumstances that make it inequitable for him to retain it without paying its value.

Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 616–17, 703 S.E.2d 221, 225 (2010). The measure of recovery for quantum meruit is the reasonable value of the performance. *United States v. Algernon Blair*, 479 F.2d 638 (4th Cir. 1973). The standard for measuring the reasonable value of the services rendered is the amount for which such services could have been purchased from one in the plaintiff's position at the time and place the services were rendered. *Id.* Additionally, Contractor must also establish Homeowners were unjustly enriched as a prerequisite to a quantum meruit cause of action. *Columbia Wholesale Co., Inc. v. Scudder May N.V.*, 312 S.C. 259, 263, 440 S.E.2d 129, 131 (1994); *See also Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 467, 684 S.E.2d 756, 764 (2009) ("It is axiomatic that a claim for quantum meruit will not lie absent evidence of unjust enrichment."). This court should reject Contractor's claim for quantum meruit.

First, Contractor failed to present credible evidence of the reasonable value of his services by proving the amount Homeowners would have spent to purchase the services from a contractor at the time and place Contractor provided the services. There was no credible testimony of the value of the labor and or materials used by Contractor because his books were in disarray. Contractor failed to bring in a fellow contractor to testify as to the amount which needed to be spent to purchase the same services. Rather, Contractor alone attempted to present evidence of the reasonable value of his services by testifying as to the price per square foot using the National Building Code and Cost Manual which was not relevant to the construction of a non-residential building as in this case, making the testimony as its outset, fatally flawed. Contractor testified that such standard applied to "a Jim Walter home" built in a "craftsman-like"

manner. (Trial Tr., p.446, ll.17-25). Contractor admitted that a person would not be allowed to move into the shed as a residence. (Trial Tr., p.454, ll.3-7). Contractor admitted that the ordinances in Forest Acres do not allow buildings that are not attached to homes to be occupied. (Trial Tr., p.461). Contractor relied on the prices quoted for building a recreational dwelling which was defined as a "beach house or a ski house," not a shed in a person's backyard. (Trial Tr., pp.454-454). Contractor also failed to deduct the "location modification" using his calculation methodology. (Trial Tr., pp.456-457). The trial court rejected Contractor's testimony because the shed could not be occupied as a residence, did not have a kitchen, did not have a completed bathroom, had a "dog pen" septic system, had no access for ingress and egress, and generally was not built to the standards of a "minimum" residential building. The trial court also rejected the basis of the Contractor's quantum meruit argument because Contractor testified incorrectly as to the square footage of the building. (Trial Tr., pp.450-452).

Because Contractor failed to establish at trial that respondent had been unjustly enriched or that respondent did not properly compensate appellant for services provided, this court should reject the Contractor's claim. In rejecting a quantum meruit action, the trial court held "the plaintiff has failed to prove by a preponderance of the evidence that he is entitled to relief under a theory of quantum meruit because he based his opinion as to the value of the building on the erroneous premise that the building was a residential, conventional, recreational dwelling, which this courts finds it was not." "Quantum meruit recovery is an equitable remedy relied upon by the courts to correct the situation in which a defendant to an action has retained a benefit conferred by a plaintiff without paying to the plaintiff the fair value." *Register v. Cameron & Barkley Co.*, 467 F. Supp. 2d 519, 531 (D.S.C. 2006) (*citing Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868, 872 (2000)). Contractor failed to demonstrate that the

fair market value of services provided exceeded the compensation received, and, hence, Contractor has not established an entitlement to additional compensation because he has been justly compensated.

The amount of compensation received by appellant is not in dispute. Contractor received $50,500.00 as compensation for all of his work. Between June 2007 and April 2008, respondent also provided Contractor's subcontractor and Contractor with the benefit of rent free use of the shed to complete their work on numerous other projects. It is undisputed that this use directly benefitted plaintiff. The trial court questioned the accuracy of the Contractor's records, the amount owed on the project, and the value of the completed shed. Although there is a broader scope of review under a claim for equitable relief, this broader scope of review does not require that the court disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility. *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). The trial court had to make a determination as to credibility of the witnesses, and correctly decided that Contractor failed to meet his burden of proof.

Contractor cites *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 703 S.E.2d 221 (2010) to support his contention that he is entitled to additional compensation under a quasi-contract theory. In that case, the sub-contractor claimed that he was only paid a small fraction ($3,270) of the $33,555 he was owed. Homeowners contended that the amount owed under the contract was paid to the general contractor and the sub-contractor should seek payment from the general contractor. Without deciding whether a contract existed, the court ruled that the sub-contractor had proved the reasonable value of his services, the amount of the landscaping allowance under the contract, and awarded judgment in favor of subcontractor. *Earthscapes* is

distinguishable from the case at hand because Contractor failed to prove that he was entitled to any other compensation and the reasonableness of the value of his claimed services.

Contractor also seeks an award of attorney's fees under his quantum meruit theory. Attorneys' fees are not recoverable unless authorized by contract or statute. *Blumberg v. Neal Co., Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993). South Carolina Courts interpret statutes that grant the power to award attorney's fees narrowly because these laws were enacted in derogation of the common law. *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 177, 557 S.E.2d 708, 711 (Ct. App. 2001) (holding trial court, in a settlement agreement suit, cannot force party to pay opposing counsel's attorneys' fees).

Attorney's fees are not recoverable under the theory of quantum meruit. *See Duke Power Co. v. South Carolina Public Service Com'n*, 284 S.C. 81, 326 S.E.2d 395 (1985) (holding one cannot recover attorney fees in a promissory estoppel cause of action); *See also QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 201, 600 S.E.2d 105, 107 (Ct. App. 2004) (fn. 4) (noting special referee's holding that there is not a contractual basis, under a quantum meruit cause of action, for an award of attorney fees); *See also Simonetti v. Lovermi*, 15 Conn. App. 722, 546 A.2d 331 (Conn. App. Ct. 1988) (declaring "Because ... the right of the [contractor] to recover for the work performed was based on equity and not the original contract, the plaintiff could not recover attorneys fees under a provision of that contract."). Without authorization in either contract or statute, an attorney "must look to his or her client for compensation for services performed rather than to an award of fees." *Duke Power Co. v. South Carolina Public Service Com'n*, 284 S.C. 81, 100, 326 S.E.2d 395, 406 (1985).

Attorney fees cannot be authorized under a contract since a contract does not exist in order to establish recover under a quantum meruit action. *See Stanley Smith & Sons v. Limestone*

College, 283 S.C. 430, 322 S.E.2d 474 (Ct. App. 1984). Likewise, there is not a South Carolina statute that allows attorney fees in an action for quantum meruit. Therefore, Contractor cannot recover attorney fees under the theory of quantum meruit

Moreover, Contractor did not prevail on his claim to foreclose his mechanic's lien and thus cannot recover under S.C. Code Ann. §29-5-20(A) (2007). Conversely, Homeowners have a final judgment against Contractor for their attorneys' fees for the wrongful filing by Contractor of the mechanic's lien against their property.

Furthermore, the Record reflects that the reasonable value of the services rendered by Contractor have already been paid by Homeowners to Contractor. Homeowners carefully documented the amounts the Contractor claimed were owed during the project, and paid the amounts owed. The appellate court may affirm the trial court for any ground appearing in the Record on Appeal as provided by Rule 220(c), SCACR and thus can affirm the finding because there is sufficient evidence of the reasonable value of the Contractor's services in the record and that amount has been paid by the Homeowners.

Contractor raises the issue of equitable estoppel in his brief. Contractor did not raise the issue of equitable estoppel before the trial court and the trial court did not rule upon the issue. A ruling by the trial court is vital in an equitable estoppel claim as some of the elements of equitable estoppel are questions of fact and are not an issue for appeal. *See* 7 S.C. Jur. Estoppel and Waiver § 12 (Dec. 2012). Since Contractor did not present the issue of equitable estoppel at trial, this Court should not rule upon the issue as it has not been preserved for appeal. *See Herron v. Century BMW*, 719 S.E.2d 640 (S.C. 2011).

Assuming the court considers Contractor's argument, it is without merit. One claiming equitable estoppel must establish that the party to be estopped "(1) acted in a way amounting to a

false representation or concealment of material facts; (2) intended such conduct to be acted upon by the other party; and (3) possessed knowledge, either actual or constructive, of the true facts." *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 682 S.E.2d 1 (Ct. App. 2009). The burden of establishing all elements is on the party asserting equitable estoppel. *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1, 7 (Ct. App. 2009) (*citing Estes v. Roper Temp. Servs. Inc.,* 304 S.C. 120, 122, 403 S.E.2d 157, 158 (Ct. App.1991). Estoppel cannot exist where the knowledge of both parties is equal and nothing is done by the one to mislead the other. *Helsel v. North Myrtle Beach*, 307 S.C. 24, 413 S.E.2d 821 (1992); *Johns v. Johns*, 309 S.C. 199, 420 S.E.2d 856 (Ct. App. 1992). Contractor has not met his burden in establishing a claim for equitable estoppel. Contractor has not provided any evidence that Homeowners intended to mislead Contractor. Further, there is no evidence that Contractor relied upon any such representations. Thus, Contractor cannot prove the elements of equitable estoppel.

IV. THE TRIAL COURT PROPERLY ASKED FOR PROPOSED ORDERS FROM THE ATTORNEYS FOR HOMEOWNERS AND CONTRACTOR AND PROPERLY ISSUED ITS ORDER

Contractor argues that it was improper for the court to adopt the proposed order of Homeowners because "the court prepares the findings of fact and conclusions of law." The Contractor then cites seminar materials for newly appointed federal district court judges from 1963 that discourage the practice of signing proposed orders for fear that the orders will overstate facts in favor of the party who drafted the order. The seminar materials cited by the Contractor do not control this issue in South Carolina as they have no precedential value. Rather, the South Carolina Court of Appeals has ruled on this issue, "While the Supreme Court and this court has said that it is reversible error for a judge to sign an order contrary to a ruling announced and not in open court, where, as here, the trial judge requests proposed orders, he is

free to accept or reject all or any portion of such orders." *Josey v. Josey*, 291 S.C. 26, 35, 351 S.E.2d 891, 897 (Ct. App. 1986). *Josey* involved an appeal from a divorce proceeding in which the trial judge gave instructions to each party to propose an order within certain parameters. Id. at 34, 351 S.E.2d at 896. The wife's attorney claimed that the trial judge gave him permission to go outside the instructions in certain provisions of the order if he could justify it. Id. at 35, 351 S.E.2d at 897. The judge adopted the wife's attorney's proposed order as a final order. Id. The husband claimed the final order did not reflect the decision of the trial judge because the wife's attorney's proposed order varied in several respects from the judge's instructions and cited case law to justify the deviations from the instructions. Id. In *Josey*, the appellate court found no error in the practice of requesting attorneys to draft proposed orders.

In this case, the court asked for proposed orders by both parties. Doug Truslow, Esquire, on behalf of Contractor, submitted a proposed order with findings of facts and conclusions of law. Likewise, the attorney for the Homeowners submitted a proposed order with findings of facts and conclusions of law. It is within the judge's discretion to ask for proposed orders, review the orders, and modify them to comport with his findings of facts and conclusions of law. Similarly, should the trial judge decide not to modify a proposed order, that decision does not invalidate the order.

Contractor also argues that in its order, the trial court improperly considered evidence presented by the Homeowners. Contractor contends that Homeowners' journal (Defs.' Ex. 5), and Contractor's spreadsheets, Defendant's Exhibits nine (9) and ten (10), should not have been relied on by the court in its order for various reasons. At the time of trial, Defendants' Exhibits number five (5), nine (9) and ten (10) were admitted into evidence without objection. Failure to object to evidence at the time it is offered at trial constitutes a waiver of the right to have the

issue heard on appeal. *Parr v. Gaines*, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992). Therefore, the Contractor has waived any complaint he has with respect to the admission of this document.

Because this court recognizes the workload of the trial bench and has approved of the practice of requesting proposed orders from the parties, this court should reject Contractor's argument that the trial court should not have accepted proposed orders from the parties, and affirm the trial court.

V. THE TRIAL COURT PROPERLY FOUND THAT CONTRACTOR BREACHED HIS IMPLIED WARRANTY OF WORKMANSHIP AND PROPERLY AWARDED DAMAGES

This court should uphold the trial court's ruling that Homeowners were damaged by the Contractor's poor workmanship because there is evidence to support the ruling of the trial court. Contractor argues that the judge's award of $4,135.00 to Homeowners in actual damages for defective work was erroneous because the claims were not part of the contract between the parties. However, Homeowners counterclaimed for breach of an implied warranty of workmanship and negligence for the poor workmanship performed by Contractor. A contractor who constructs a dwelling impliedly warrants that the work will be performed in a careful, diligent, workmanlike manner. *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157 (4th Cir. 2004). Homeowners presented evidence that they were required to hire other contractors to fix the poor workmanship of Contractor. (Trial Tr., pp.395-399). Homeowners also testified that Contractor installed an illegal septic tank. Contractor admitted that he improperly installed the septic tank, but claimed that it was a temporary fix. After hearing the evidence and judging the credibility of the witnesses on these issues, the trial court correctly concluded that Contractor breached the warranty of workmanship and was responsible for

payment for the deficiencies as associated with the building of the shed. The court correctly concluded that Contractor breached his duty to Homeowners by improperly installing a septic tank against DHEC regulations and improperly installing shingles and fascia board on the shed. As a proximate result of Contractor's poor workmanship, the trial court properly found that the Homeowners incurred costs to repair the damage. The court should affirm the Master's ruling because there is evidence which reasonably supports his findings.

CONCLUSION

For the reasons stated above, this court should affirm the trial court's findings that a contract existed between the parties and all amounts have been paid by the Homeowners under the contract, that the parties had an oral agreement regarding the "extra work" and all amounts were paid to Contractor for the extra work. Alternatively, if there is found to be no contract, then the court should affirm the trial court that Contractor is not entitled to an award for quantum meruit.

Respectfully submitted.

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