

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2016-CP-40-00642

Quality Lawn Care and Landscaping, Inc.,)
d/b/a Design South Landscape Co.,)

Plaintiff,)

vs.)

Coogler Construction Company, Inc.,)

Defendant.)

RECEIVED
JUN 20 2018
SC Court of Appeals

ORDER OF JUDGMENT

This matter was tried before me on October 30, 2017, October 31, 2017, and November 1, 2017. T. Jeff Goodwyn Jr., Esquire represented the plaintiff and Brian P. Robinson, Esquire, represented the defendant.

This controversy is over a retaining wall that Quality Lawn Care and Landscaping, Inc., d/b/a Design South Landscape Co. ("Quality") constructed as a subcontractor to Coogler Construction Company, Inc. ("Coogler") on the Killian Lakes apartment project located in Richland County, South Carolina. Coogler in turn was a subcontractor to Edward Rose Development Company, L.L.C. ("Rose"). Rose was also the owner of the apartment complex.

Quality constructed two retaining walls on the Killian Lakes complex for Coogler. Quality was paid for almost all of the first wall, but was never paid for the second wall. The second wall ("Wall H"), was torn down and rebuilt at Coogler's cost. Quality sued Coogler for the amount it claims it is owed under its subcontract with Coogler for construction of Wall H and the remaining payment on the first wall, as well as what it claims was extra work. Coogler counterclaimed for the amount of money it paid for removing and replacing Wall H over its budgeted amount for Wall H and for some trucking invoices.

This case revolves around the survey for Wall H from which Quality actually constructed the wall and on how far off the design alignment Wall H was when Quality completed the work it did on Wall H. Wall H is not designed as a straight line, but rather it has numerous turns and the top steps up and down as one moves along the wall. Likewise, the foundation also steps up and down to conform with the ground surface. To better facilitate understanding this Order, a discussion of the relevant surveying information is required.

EXPLANATION OF SURVEYING INFORMATION

The following explanation reflects the uncontradicted testimony of several witnesses.

When the surveyor establishes the reference points from which the contractor will measure to actually locate the wall on the ground, the surveyor installs hubs and stakes. Hubs are approximately 1-1/2" by 1-1/2" wooden pegs driven into the ground almost flush with the ground surface. The contractor will measure from the center of the hub to locate his work. Behind the hub, the surveyor will install a stake. The stake is located behind the hub, is approximately 3 feet long, is driven into the ground enough to keep it standing, and is located behind the hub. Written on the stake is the information the contractor will need: the "station number," the "offset" from the face of wall, the difference in elevation between the hub and the bottom of the wall and the difference in elevation between the hub and the top of the wall. Because the wall has thickness, the surveyor must tell the contractor where on the wall the offset references relates to. In this case, both parties agree that the stakes reference the face of the wall at the top of the wall facing the low side of the wall. Defendant's Exhibit 33 shows the face of the wall reference.

A "station" is the nomenclature given to a specific point on the wall alignment. Stations are the distance from a theoretical point of beginning. Stations are measured in increments of

100 feet. If a point on the wall alignment is 100 feet from the point of beginning, it will be Station 1+00.00. If another station is 120.5 feet from the point of beginning, it will be Station 1+20.5. Each point on the alignment of the wall has its own unique station number, corresponding to its distance from the point of beginning, measured along the line of the alignment.

The surveyor uses an AutoCAD file to determine where the hubs should be on the ground. The AutoCAD file is an electronic file that the design engineer made. In this case, the AutoCAD file was made by the civil site design engineer. The AutoCAD file is a master file that includes all of the structures on the apartment complex. It governs the relationship between any structure on the project and any other structure on the project. The AutoCAD file has coordinates from which any point on any structure on the project can be located on the ground. The surveyor downloads the AutoCAD file into his field instrument. The surveyor has a pole with a "black box" on top, which communicates with a hand-held device. When the surveyor sets the pole down at any given place, the readout on the "black box" tells him where to move to a preselected point so that he can locate that point accurately on the ground. The accuracy is about 1/4 inch.

In this case, besides the AutoCAD file, there is a design drawing. The design drawing shows both a "plan view" (which is a "birds-eye view") and an elevation (which is looking at the wall from the side). The design drawing shows the details of the wall, including its height, the foundation, steps in the foundation and in the top of the wall, and the number of blocks in the wall at any given point on the wall. Like the AutoCAD file, the design drawing shows the stations where the wall turns. Unlike the AutoCAD file, the design drawing does not have any

coordinates, and therefore it cannot be used to determine the actual location of the wall on the ground.

There is also an "as-built" drawing. The "as-built" drawing shows where Wall H was actually constructed in relationship to where it should be, as determined by the AutoCAD file. The surveyor used his pole and hand-held box to determine where the wall that Quality built actually was by coordinate, then had the computer determine how far off the alignment set by the AutoCAD file Wall H was. The surveyor then printed an "as-built" drawing, and had the computer mark some of the differences on the drawing. One can determine how far Wall H is from the theoretical alignment (the AutoCAD alignment) by looking at the "as-built" drawing.

DISCUSSION OF A SEGMENTAL RETAINING WALL

To facilitate understanding of this Order, some description of a segmental retaining wall is needed. The following is taken from uncontroverted testimony.

Wall H is a segmental retaining wall. That means that Wall H is made from blocks rather than from cast-in-place concrete. The blocks are supposed to be 8 inches high, 18 inches long, and 12 inches deep. Retaining walls are installed to allow an abrupt change in elevation, with a "high side" and a "low side." The earth behind the wall is on the "high side" and the area in front of the wall (the face) is the "low side." When placing one block on top of another, the face of the top block will be recessed, or setback, 1 inch from the face of the bottom block (likewise the back of the blocks). This makes the wall "lean" away from the side facing the low area, and "lean" toward the side facing the high area. As an example, if the wall is seven blocks high, the face of the top block will be 6 inches further towards the high side than the face of the bottom block, because there are 6 blocks set one inch back from the one below. As detailed on the design drawing, there are layers of geotechnical fabric that are laid on top of a row of blocks and

then backfilled on the high side of the wall. Backfilling is the process of spreading dirt and then compacting the dirt behind the wall. The fabric helps hold the wall from being pushed into the area on the low side of the wall because it cannot easily be pulled through the backfill.

Immediately behind the wall is a two-foot wide section of rock, and then the balance of the area is filled with backfill. The backfill is dirt. Defendants Exhibits 6 and 33 show the general geometry of a segmental retaining wall, although not the specific wall in question here.

When a contractor builds a segmental retaining wall, he first constructs the foundation. He then determines how many blocks high the wall will be at the point where he is working, and determines how many inches the face of the wall will be from the bottom of the wall. He subtracts that number from the offset written on the stake, measures the resulting dimension from the center of the hub, and sets the first block on the foundation at that distance. As an example, if the wall is 7 blocks high and the offset is 5 feet to the face of the wall, the contractor will measure 4 feet 6 inches (5 feet minus 6 inches) from the center of the hub and place his first block at that point.

It should be noted that the survey hubs and stakes must be set before the contractor can begin construction of the wall.

FINDING OF FACTS:

Based upon the testimony and exhibits at trial, I find the following facts:

1. Rose was the general contractor on the Killian Lakes project.
2. Rose was also the owner of the Killian Lakes project.
3. Coogler was a subcontractor to Rose. (Def. Ex. 37)
4. Coogler was require by its subcontract to construct retaining walls, among other things, on the Killian Lakes project.
5. There were five or six retaining walls on the Killian Lakes project.

6. Coogler does not construct retaining wall with its own forces. Instead, Coogler subcontracts the construction of retaining walls to others.
7. Coogler subcontracted the retaining walls to Quality on the Killian Lakes project.
8. Quality was to provide all the labor and equipment to construct the segmental retaining walls, and Coogler was to provide all the permanent material. (Def. Ex. 1)
9. Quality had constructed segmental retaining walls for Coogler on numerous projects for five or six years prior to the Killian Lakes project.
10. On one project at a marina, Quality constructed a segmental retaining wall in the wrong place.
11. That wall varied from where it was supposed to be by anywhere from 6 inches to about 3 feet.
12. Quality had to tear down that entire wall at the marina project and reconstruct it where it belonged.
13. Quality admitted that it had to tear down the marina wall and reconstruct it because Quality had constructed it in the wrong place.
14. Quality was paid only for the marina wall once it was in the correct place.
15. There were only one or two "critical" places on the marina wall, the balance of the area on the high side of the wall was open space.
16. A "critical" place, as used herein, is a place where the top of the wall is adjacent to some other structure.
17. Quality knew, or should have known, at the time it constructed Wall H that a wall that was misplaced by between 6 inches and 3 feet may have to be removed and reconstructed.

18. The surveyor established the hubs from which Quality would determine where to build the wall.

19. The surveyor was hired by Rose.

20. Coogler did not have any requirement in its subcontract to provide a surveyor or to establish any hubs on the project.

21. Quality used the hubs established by the surveyor when it determined where to construct the wall.

22. It was Quality's responsibility to build the wall in accordance with the hubs and information on the stakes provided by the surveyor.

23. The surveyor wrote the station on every stake. (Def. Ex. 21 A-C)

24. The stations where the wall changes direction on the design drawing are not exactly the same as the stations where the wall changes direction on the AutoCAD file.

25. Because the AutoCAD file was used both to establish where the hubs went and to compare where the wall was actually constructed, the difference between the design drawing stations and the AutoCAD stations is not relevant.

26. At any place where there were two hubs with the same station, Quality assumed those hubs denoted an angle and used them without reference to the design drawing.

27. The surveyor installed two hubs with the same station at every point where there was an angle in the wall.

28. Because Quality used the surveyor's hubs with the same station to determine where the angles in the wall were, and because the surveyor set two hubs with the same station at each angle, it follows that Quality did not use the stations on the design drawing and the

difference between the stations on the design drawing and the stations in the AutoCAD file are irrelevant.

29. The Wall H that Quality built had the correct number of angles, even though some of the angles where Quality built the wall were in the wrong place on the ground.

30. The surveyor wrote "5' O/S FACE WALL" on every stake. (Def. Ex. 21 A-C)

31. Quality, the surveyor, and Coogler all agreed that the writing on the stake means that, measured from the center of the hub, the top outside face of the wall was to be 5 feet from the center of the hub in horizontal measurement.

32. The top outside face of the wall is shown in Defendant's Exhibit 33.

33. Quality was supposed to determine where to start any part of the wall by counting how many blocks high that particular section of the wall was, as shown on the design drawing, and then determining how many inches the wall leaned at that point. Quality was supposed to then subtract that number of inches from 5 feet and set the first block on the foundation.

34. Each block is offset toward the high side by 1 inch from the block below it. (Def. Ex. 3, first page)

35. While there may be some variation in the blocks, Quality was responsible for making the wall conform to the information on the stakes.

36. For any wall higher than one block, any measurement from the hub to the face of the wall at ground level must be less than 5 feet.

37. The lowest point on Wall H was three blocks high. (Def. Ex. 7, Drawing 4)

38. After the wall was found to be in the wrong place, but before any demolition work was done, Coogler and Quality searched for the hubs and found six hubs.

39. It is not unusual for hubs to be displaced or even lost during construction because of equipment or construction operations, which explains why only six of the hubs were found.

40. Quality measured from the center of those hubs to the face of the wall at ground level.

41. Quality took photographs of the six measurements from the face of the wall to the center of the hub at ground level. (Def. Ex. 8 A, C, D, E, G, I)

42. Half of the measurement were 5 feet or greater.

43. One measurement was 5 feet, one was 5 feet and 9 inches, and one was 6 feet and 11 inches. (Def. Ex. 8 A-J)

44. It is impossible for Quality to have set the bottom block in the correct place and have the measurement to the face of the wall at ground level be equal to or greater than 5 feet.

45. Quality made some mistakes in locating where it built Wall H.

46. Quality's mistakes resulted in Wall H being in the wrong place.

47. The high section of the wall is 23 blocks high. (Def. Ex. 7, Drawing 4)

48. That means the bottom of the wall is 22 inches closer to the hub than the top of the wall.

49. The wall is 23 blocks high between Station 11+40 and Station 12+20. (Def. Ex. 7, Drawing 4)

50. There was a hub at Station 11+74.22, which is in the high section of the wall. (Der. Ex. 21 A)

51. The measurement from the center of the hub at Station 11+74.22 should be 3 feet 2 inches.

52. There is no place on the wall where there are more than 3 blocks below ground level except as set forth below.

53. The measurement from the center of the hub to the face of the wall at ground level in the high section of the wall should not be more than 3 feet 4 inches

54. The measurement from the center of the hub at Station 11+74.22 to the face of the wall at ground level at that area is 4 feet 7 inches, allowing 2 inches for three blocks below ground level. (Def. Ex. 8 E & F)

55. Wall H is located too far from the hubs in at least 4 of the 6 positions that Quality and Coogler measured. It is not possible to determine if Wall H is the correct distance from the other two hubs because the location of those hubs cannot now be determined.

56. The design of the wall is with sharp angles, but Quality made rounded corners.

57. No one objected to the rounded corners.

58. One portion of the wall failed when about 7 courses of block leaned toward the high side. (Def Ex. 30 A & B)

59. Rose demanded that the wall be removed and reinstalled.

60. Quality proposed a fix of removing 7 courses and rebuilding the wall from that point up.

61. Coogler argued with Rose on behalf of Quality.

62. Coogler convinced Rose to let Quality repair the wall.

63. Coogler gave Quality notice on several occasions to begin repair, but Quality did not do so.

64. Finally, when pressed by Rose to do so, Coogler began to remove the 7 courses with its own forces.

65. While the removal of the 7 courses was being done, it was discovered that Wall H was not in the correct place.

66. Rose hired its surveyor to make an "as-built" drawing of Wall H.

67. The surveyor made an "as-built" drawing by first determining where Wall H actually was, and then comparing that to where Wall H should be, both based upon the AutoCAD file.

68. The "as-built" drawing was Defendant's Exhibit 36.

69. The "as-built" drawing shows the wall to be 2.9 feet too close to the parking area at the start of the wall, Station 10+00.00; nearly where it should be, but slightly too close at the first turn; 2.4 feet too close at the second turn; nearly where it is supposed to be at the next turn, but the turn is in the wrong place making the wall too close by 2.1 feet as it makes the turn; 3.8 feet too close at the next turn; nearly where it is supposed to be at the next turn but again the turn is in the wrong place and the wall is 2.5 feet too close just beyond the turn; 2.1 feet too close at the last turn; and 1.3 feet too close at the end of the wall.

70. Rose demanded that Coogler remove and reconstruct Wall H or Rose would do so itself and back charge Coogler.

71. A back charge is a deduction from the amount of money otherwise owed.

72. Coogler knew it would cost more to let Rose remove and replace Wall H than it would cost Coogler to do that work, so Coogler told Rose it would do so.

73. Coogler demanded that Quality remove and replace Wall H, but Quality refused to do so.

74. Left with no choice, Coogler removed the Wall H that Quality built.

75. Quality and its expert testified that there was no reason to remove all of Wall H because, even though it was not in the correct place, part of it was adjacent to "green space."

76. However, neither Quality nor its expert could tell the court what Rose eventually intended to use the "green space" for.

77. Coogler testified that there is a requirement for a certain amount of "green space" on the project, but Coogler did not know what that requirement is.

78. One cannot leave small pieces of a segmental retaining wall in place and remove the rest of the wall because the geogrid ties the wall together from side to side as one moves along the wall.

79. Further, as shown in the case of the marina wall, even when the wall is adjacent to open space, when it is in the wrong place it must be removed and replaced.

80. Coogler removed Wall H with its own forces.

81. Coogler subcontracted the reconstruction of Wall H to Brock Landscaping Company. (Def. Ex. 28)

82. Brock was to provide all the labor, equipment, and permanent material to reconstruct Wall H.

83. Coogler and Rose measured Wall H.

84. Coogler and Rose determined that the total square feet of Wall H was 4,160.95 square feet, including an allowance of 2 blocks below the ground surface.

85. Coogler and Rose agreed upon 2 blocks below the ground surface as an allowance because some portions of the wall have 3 blocks below grade and some portions only 1 block, and the distribution is approximately equal.

86. Quality billed Coogler for 5,610 square feet for Wall H. (Def. Ex. 14)

87. Quality based its square footage on its daily count of blocks installed.

88. Quality did not provide any documents to substantiate its count.

89. Coogler provided documentary evidence of the actual square footage of Wall H in the form of both an invoice and an e-mail (Def. Ex. 25; Def. Ex. 26), as well as testimony from James Huggins who helped measure Wall H with Rose.

90. Huggins testified that he and a Rose representative counted the blocks, added 2 blocks below grade, and calculated the square footage by using 1 square foot per block.

91. Quality and Coogler agree that each block is 1 square foot in area measured on the face of the wall.

92. Coogler also paid Brock Landscaping for the square footage that Huggins and Rose measured.

93. Using 4,160.95 square feet, Coogler calculated that it would have paid Quality \$34,702.32 had Quality constructed Wall H where it was supposed to be. (Def. Ex. 22)

94. Coogler paid Brock Landscaping \$72,816.63 for reconstructing Wall H. (Def. Ex. 22)

95. Coogler spent \$7,841.25 in labor removing Wall H. (Def. Ex. 22; Def. Ex. 27)

96. Coogler spent \$10,741.25 in equipment cost in removing Wall H. (Def. Ex. 22; Def. Ex. 27)

97. The difference between what Coogler should have paid for Wall H and what Coogler actually paid for Wall H is \$56,696.81 (Def. Ex. 22).

98. Coogler provided some trucking for Quality on an unrelated job, amounting to \$5,416.00. (Def. Ex. 22; Def. Ex. 29)

99. Quality agrees that it owes Coogler \$5,416.00 for the trucking work.

100. Coogler sought to show that the amount it paid Brock Landscaping was reasonable.
101. Coogler presented its material costs in Defendants Exhibit 27.
102. According to Coogler, it spent \$35,575 in material cost on Wall H.
103. Quality challenged Coogler's actual expenses for the material to build Wall H by pointing out that some of the material was purchased before the date Quality started work on Wall H. (Def. Ex. 1)
104. Quality started work on Wall H on November 20, 2014 and its last day on the job was December 15, 2014.
105. Three of Coogler's invoices were dated before November 20, 2017. (Def. Ex. 34, last three pages)
106. Those invoices totaled \$1,722.78. (Def. Ex. 34, last three pages)
107. While this stone may have been for Wall H, there is evidence that Quality may have been working on the first wall during that time period.
108. The deduction of those three invoices meant that Coogler spent \$33,852.22 in material on the Wall H that Quality constructed.
109. Coogler would have paid Quality \$34,702.32 for Wall H had Wall H been constructed correctly.
110. Coogler's total cost for Wall H would have been \$68,554.54.
111. The difference between what Coogler paid Brock Landscaping and what it would have incurred had Wall H been constructed correctly is less than 6%.
112. Quality filed a mechanic's lien on the project. (Def. Ex. 23)
113. Coogler was required by its contract with Rose to keep the job free from liens.

114. Coogler bonded off the mechanic's lien. (Def. Ex. 23)

115. Coogler paid \$2,146.00 for the bond it provided to remove the mechanic's lien Quality filed on the project. (Def. Ex. 22)

116. Quality did not sue to foreclose on the mechanic's lien.

117. Had Quality been correct in its demand, and had Quality sued to foreclose its mechanic's lien, it could have recovered its attorney's fees. Had Quality sued to foreclose its mechanic's lien and been wrong, Coogler could have recovered its attorney's fees.

118. December 16, 2014 is the day after Quality completed its work on Wall H.

119. On December 16, 2014, Quality originally billed Coogler for \$47,955.00, the sum of \$46,787.40 and \$1,167.60. (Def. Ex. 14)

120. In the December 16, 2014 invoice, Quality demanded payment for 5,610 square feet, which equals a payment of \$46,787.40. (Def. Ex. 14)

121. Quality also demanded payment for 140 square feet of caps installed on the first wall it constructed, for which there is no dispute. The 140 square feet of caps equals payment of \$1,167.60. (Def. Ex. 14)

122. Coogler overpaid Quality for the square feet of the first wall. (Def. Ex. 22)

123. Coogler overpaid Quality by 451 square feet for the first wall because it relied upon Quality's measurement, but when the wall was actually measured, it was found to be 451 square feet less in area. (Def. Ex. 25)

124. The overpayment of 451 square feet was an overpayment of \$3,761.34

125. Michael Young of Quality sent an e-mail to Joey Coogler and James Huggins, owners of Coogler Construction, Inc., dated February 19, 2015. (Def. Ex. 17)

126. Michael Young was the Quality representative at the trial of the case, was the only manager from Quality who was on the Killian Lakes project, and was the person who managed the job and billing for Quality.

127. Michael Young ("Young") is the person with Quality who has authority to speak for Quality.

128. In the e-mail of February 19, 2015, Quality told Coogler that it had performed some work "out of goodwill."

129. Young conceded that he did not intend to get paid for the work he outlined in the February 19, 2015 e-mail at the time the work was done.

130. Young stated that he did not intend for Quality to be paid until after he discovered that Quality would not be paid for the work it did on Wall H.

131. Young prepared Defendant's Exhibit 18, which is undated and based upon Defendant's Exhibit 17 except that now dollar amounts and some further information is included.

132. Young testified that he supplied the dollar amounts after suit was filed; that is, after January 29, 2016.

133. January 29, 2016 is more than a year after the work Quality outlines in Defendant's Exhibit 18.

134. Young testified that he did not produce any records to substantiate the costs he alleges Quality incurred on Defendant's Exhibit 18.

135. In Defendant's Exhibit 18, Quality set forth its hourly cost (including profit) for its crew.

136. In Defendant's Exhibit 18, Quality set forth its hourly cost for equipment.

137. In Defendant's Exhibit 19, Coogler presented an analysis of the number of crew hours that Quality would have had to expend to have justified the extra costs it said it originally provided "out of goodwill."

138. Defendant's Exhibit 19 indicates that Quality would have spent 166.7 crew hours to have performed the extra work at the cost indicated on Defendant's Exhibit 18.

139. Quality agreed that it spent only 16 days on the job.

140. Defendant's Exhibit 19 shows that if Quality worked 10-hour days, it would have worked 16.7 days to have spent 166.7 crew hours.

141. If Quality were awarded the money it claims it is owed for extra work, it would recoup all the money it spent on the entire Wall H work, resulting in no money being allocated to construction of Wall H itself.

142. Defendant's Exhibit 19 deals only with Quality's Wall H alleged extra work, and does not include any of the extra work Quality claims for the first wall.

143. Quality's demand for extra work on Wall H, not backed up with any documents, amounts to payment for more than the total of all Quality crew hours Quality spent on the entire Wall H work.

144. Coogler disputed the extra work Quality claimed it performed on Wall H.

145. Coogler presented a photograph and testimony which tends to show that the backfill Quality claimed as extra work is vastly overstated. (Def. Ex. 24)

146. Coogler also disputed the extra work Quality claimed on the first wall.

147. Coogler conceded that the subgrade may have been too high on the first wall.

148. Coogler disputed that the wall backfill zone on the first wall was not cut back far enough, because Coogler says it cut the slope back to the limits of clearing.

149. The limits of clearing on the first wall are as far as Coogler was allowed under its contract to disturb the natural ground.

150. Uncontradicted testimony was that Quality cut the bank back further for its own reasons, and that it knocked down three or four trees in the process.

151. Quality originally claimed that it was entitled to an additional \$6,000 for putting in 2 feet of stone behind Wall H, but abandoned that claim at trial.

152. Quality claims it should be paid for Wall H because it actually built the wall.

153. Quality claims that Coogler undercut the footing in the first 250 feet of Wall H.

154. Undercut is excavation below the bottom of the footing required by the Owner because the soil in that area was not sufficient to hold up the wall.

155. Quality claims it could not fill the excavation with stone as contemplated, so it used 7 courses of block to build up to the bottom of the wall.

156. Quality admitted that it did not take those 7 courses into account when it built the wall, resulting in Wall H being an additional 6 inches out of alignment in that area.

157. Wall H in the area Quality claims was undercut in the wrong place was out of place by between 1.3 feet and 3.8 feet, depending upon which place one measures. (Def. Ex. 36)

158. There is no evidence that the original undercut was actually in the wrong place, because the wall that Quality built was not in the correct place.

159. Because Quality mis-measured from the hubs when it constructed Wall H, it is inferable that Quality also mis-measured from the hubs when it began to construct the footing for Wall H, which in turn led Quality to believe the excavation was in the wrong place.

160. 7 courses of block over 250 feet of wall is 1,750 square feet, because each block is one square foot.

161. This explains almost all of the discrepancy between the quantify Quality billed for (5,960 square feet) and the quantity Coogler and Rose measured (4,160.95 square feet)

162. The seven courses of block Quality installed in the wrong place had to be removed by Block Landscaping, the contractor who constructed Wall H the second time, because Quality admitted they were in the wrong place.

CONCLUSIONS OF LAW:

1. Coogler and Quality entered into a subcontract agreement with terms set forth in Defendant's Exhibit 1
2. There is no provision in the subcontract between Coogler and Quality regarding extra work or regarding the tolerances to which Wall H should be constructed by Quality.
3. General breach of contract law governs this dispute because the complaint and the counterclaims are for breach of contract only.
4. Quality held itself out as specially qualified to construct segmental retaining walls.
5. Quality had a contractual duty to construct Wall H in a workmanlike manner. (Hill v. Polar Pantries, 219 SC 263, 64 SE 2d 885 (1951); Carolina Winds Owners' Ass'n v. Joe Harden Builder, Inc., 297 S.C. 74 374 S.E.2d 897 (1988)).
6. The evidence regarding the marina wall establishes that a segmental retaining wall that is between 6 inches and 3 feet out of place is not constructed in a workmanlike manner.
7. Quality did not construct Wall H in a workmanlike manner.

8. For Quality to recover from Coogler on its breach of contract claim, it must show a contract, a breach of that contract, and damages. (Allegro, Inc. v. Scully, 418 S.C. 24, 791 S.E.2d 140 (2016)).

9. For a contractor to claim a breach of contract because it was not paid, it must show that its work was performed in accordance with the contract or that it was acceptable to the other party if it was not in accordance with the contract, i.e., that it did not breach its contract.

10. Quality cannot show that its work on Wall H was in accordance with the contract.

11. Quality cannot show that its work on Wall H was acceptable to Coogler.

12. Had Quality sued to foreclose its mechanic's lien, and had Quality prevailed to the extent required by the Mechanic's Lien Statute, Quality could have recovered its attorney's fees.

13. Because Quality did not sue to foreclose its mechanic's lien, it is inferable that Quality had serious doubts about the amount, if any, that it was owed.

14. Quality can show that its work on the cap of the first wall was in accordance with the contract.

15. Quality claims extra work over and above the requirements of the contract.

16. There is no change order incorporating that extra work into the contract.

17. However, Coogler acknowledged that it agreed that Quality could use Coogler's equipment and perform the excavation of the soil that was too high on the first wall.

18. Written contracts can be modified by oral agreements. ESA Servs., LLC v. S.C. Dep't of Revenue, 392 S.C. 11, 707 S.E.2d 431 (Ct.App. 2011)

19. It is inferable that Coogler and Quality intended that Quality would be paid a reasonable sum for extra work Coogler approved.

20. Because the total of extra work Quality claims to have performed is equal to more than the acknowledged total time Quality was working on Wall H, either its hourly costs or the actual time spent are highly suspect.

21. However, because Quality presented some evidence of its costs, Quality is entitled to recover \$1,400.00 for the excavation of the too-high subgrade.

22. Coogler also acknowledged that it approved Quality excavating old brick, pipe and debris on Wall H.

23. Because the Wall H footing had to be in place for both the Quality Wall H and the replacement Wall H, there was benefit to Coogler for this excavation.

24. Because Quality presented some evidence of the cost of the work of excavation of brick, pipe and debris, it is entitled to recover \$700.00.

25. However, Coogler did not acknowledge that it agreed with Quality for any of the other extra work Quality claims it performed.

26. An oral change to a contract requires a meeting of the minds. ESA Servs., LLC v. S.C. Dep't of Revenue, 392 S.C. 11, 707 S.E.2d 431 (Ct.App. 2011)

27. There was no meeting of the minds regarding the balance of the extra work claimed by Quality.

28. Quality must therefore ground its claims on a quantum meruit claim.

29. Quality did not sue in quantum meruit.

30. Quality waived any claim under quantum meruit when it did not include a claim for quantum meruit in its complaint. Phillips Refrigeration Co. v. Commercial Credit Co., 256 S.C. 500, 183 S.E.2d 330 (1971).

31. Quality did not pursue quantum meruit at trial; that claim was not tried by agreement.

32. Even if Quality had included a quantum meruit claim, it could not prevail on the balance of what it claims is extra work.

33. Quality must show that its extra work had a benefit for Coogler.

34. If Quality can show that its extra work had a benefit for Coogler, it must show what the reasonable value of its work was to Coogler.

35. Quality has not shown what that benefit was to Coogler. Instead, Quality has presented some evidence of what its own lost time may have been worth.

36. Quality also stated that what it now claims as extra work was done "out of goodwill" and that it did not intend to be paid for that work at the time it performed the work.

37. Because the evidence is that Coogler did not request the "extra work" and Quality did not expect payment for the "extra work," it would be unequitable to now require Coogler to pay Quality for that "extra work."

38. Coogler provided documentary evidence and testimony that the total square footage of Wall H was 4,160.95 square feet.

39. Because Quality evidently measured the first wall incorrectly, and because Quality did not provide any documentary evidence of its measurement of Wall H, even though it claimed to have such evidence, it is more probable than not that the Coogler quantity is the correct quantity.

40. Quality did not construct Wall H in the correct place.

41. Wall H was more than 6 inches out of place, and in some places was more than 3 feet out of place.

42. Wall H had to be removed and replaced because it was constructed more than 6 inches out of place, as evidenced by the marina wall removal and replacement.

43. In a construction dispute, the non-breaching party is entitled to recover the cost of correction. (Kincaid v. Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct.App. 1986).

44. Coogler is entitled to recover its cost of correction.

45. The amount Coogler paid to Brock Landscaping was reasonable, based upon the cost Coogler would have paid when Quality built Wall H.

46. The amount Coogler paid to dismantle the Wall H that Quality built was not disputed.

47. The amount Coogler paid to bond off the mechanic's lien that Quality filed is not disputed.

48. The requirement that Coogler bond off the mechanic's lien is not disputed.

49. The overpayment by Coogler on the first wall is not disputed.

50. The amount of the trucking work Coogler provided to Quality is not disputed.

51. Coogler is entitled to recover:

- a. \$7,841.25 for labor used to remove Wall H;
- b. \$10,741.25 for equipment used to remove Wall H;
- c. \$72,816.63 for reconstruction of Wall H by Brock Landscaping
- d. \$2,146.00 for the cost of bonds to bond off Quality's mechanic's lien
- e. \$3,761.34 for the overpayment on the first wall; and
- f. \$5,416.00 for the trucking work Coogler provided on another Quality job.

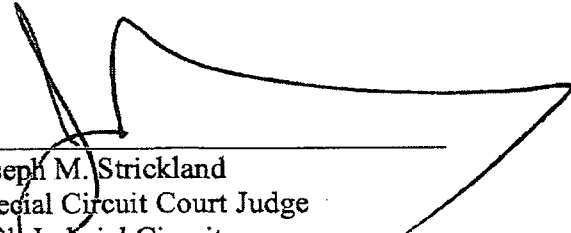
52. Coogler is entitled to reimbursement of \$102,722.47.

53. Coogler would have paid Quality \$34,702.32 for constructing Wall H.

- 54. Coogler's cost of correction is \$68,020.15.
- 55. Quality is entitled to recover:
 - a. \$1,167.60 for installation of the caps on the first wall;
 - b. \$1,400.00 for excavation on the first wall; and
 - c. \$700.00 for excavation of brick, pipe and debris on Wall H.
- 56. Quality is entitled to recover a total of \$3,267.60.
- 57. Coogler is entitled to Judgment Against Quality in the Amount of \$64,752.55.

IT IS THEREFORE ORDERED that Coogler Construction, Inc. have, and it hereby has, judgment against Quality Lawn Care and Landscaping, Inc., d/b/a Design South Landscape Co., in the amount of \$64,752.55.

AND IT IS SO ORDERED.



Joseph M. Strickland
Special Circuit Court Judge
Fifth Judicial Circuit

Columbia, South Carolina
April 25, 2018
2017.