

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

SC Court of Appeals

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2009-CP-40-0179

Boykin Contracting, Inc., Respondent,

v.

K. Wayne Kirby d/b/a Carolina Gold Bingo, Appellant.

BRIEF OF RESPONDENT

Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, PC
Post Office Box 944
Columbia, South Carolina 29202
(803) 779-8900

Counsel for Respondent

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STATEMENT OF FACTS

This case involves Boykin Contracting's ("Boykin") claim for payment under *quantum meruit* for the reasonable value of the labor and materials it provided for the up-fit of certain space within an old Winn Dixie grocery store in Columbia, South Carolina. The space was to be renovated for use as a bingo parlor. Boykin sought recovery from Wayne Kirby in his individual capacity. Kirby was the tenant for the bingo space, (R. pp. 315-317 [Ex. 14]), and was listed as the owner of the space on the Richland County Building Permit and Certificate of Occupancy. (R. pp. 202-203 [Exs. 5 & 6])

Boykin is a licensed general and mechanical contracting firm located in West Columbia. (R. p. 31, lines 13-25) Tom Brock was Boykin's primary witness at trial. Brock was the vice-president for Boykin in 2008 and also acted as project manager for certain of Boykin's jobs including the work done in this case. Brock has been in the electrical contracting business since 1974. He holds electrical contractor licenses in six states. At the time of trial, he served as the President of the Mechanical Contractors Association of South Carolina and was also a sitting member of the South Carolina Building Codes Council having been appointed to this position by former Governor Mark Sanford. (R. p. 29, line 12-p. 31, line 12; p. 34, lines 4-6)

Tom Brock first met with Wayne Kirby at the premises on or about April 8, 2008. (R. p. 32, line 20-p. 33, line 22) During this initial meeting, the two of them inspected the premises giving particular attention to the electrical room housing the main electrical panels for the bingo space. (R. p. 37, line 5-p. 42, line 8) Brock observed significant issues with the existing electrical system and noted that there was a significant amount of electrical work to be performed to get the bingo space operational. [*Id.*] Brock informed

Kirby of his assessment of the scope and magnitude of the work to be done at their initial meeting. (R. p. 41, lines 13-16) Kirby informed Brock that he was under time constraints and needed to open the space for bingo operations by May 1, 2008, to avoid financial losses. (R. p. 43, line 1-p. 44, line 1) Based on this urgency to complete the work, Boykin began work the next day. [*Id.*]

At their initial meeting, Kirby did ask that Boykin work under Kirby's other electrical contractor, Larry Palmer. (R. p. 44, lines 2-7) However, Brock testified that "I emphatically told [Kirby] I would not do anything with his electrical guy. I would not— from the looks of what I saw, I knew that whoever was doing the work was not exactly the most professional person I'd ever met." (R. p. 44, lines 7-12) Brock further testified that the agreement he had with Kirby was for Boykin to do the necessary electrical work to get the building open and send the bill to Kirby. [*Id.*] Brock reiterated this position later in a meeting with Kirby flatly stating "I'm not working for Larry Palmer." (R. p. 47, line 22-p. 48, line 8) Brock explained that he prepared the Application for Payment and that it listed "Carolina Gold Bingo" as the owner as that was the trade name used by Kirby. (R. p. 50, lines 13-21) The Application for Payment was hand delivered to Wayne Kirby at Kirby's place of business at Carpet One near Riverbanks Zoo. (R. p. 50, line 22-p. 51, line 4)

Brock explained in detail how Boykin accounted for its labor and material costs for this project. (R. p. 53, line 21-p. 60, line 20; R. p. 177 [Ex. 1]; R. p. 184 [Ex. 2]; R. p. 199 [Ex. 3]; R. p. 208 [Ex. 11]) He further explained how those costs were used to generate the Application for Payment submitted to Kirby and stated that the customary period for payment in construction is thirty days from receipt of the payment request. (R.

p. 51, line 13-p. 52, line 11; p. 60, lines 7-14) Brock reviewed the Application for Payment before it was sent to Kirby and found it reasonable and in line with what he expected given the significant amount of work performed by Boykin. (R. p. 61, lines 9-21) Brock called Kirby about one month after sending the Application for Payment to inquire about payment. (R. p. 52, line 13-p. 53, line 20) While Kirby expressed displeasure over the amount of the bill, he did not deny that he was the responsible party for payment. [*Id.*] Rather, Kirby cited financial problems as a reason for not paying Boykin. [*Id.*]

Another key witness for Boykin was Chip Barrs. Barrs is an electrical superintendent for Boykin having worked with Boykin for eleven years. (R. p. 93, lines 3-14) Barrs was the lead superintendent for Boykin on this project. [*Id.*] Barrs explained the nature and magnitude of the work done by Boykin, particularly with respect to wiring and energizing the roof-top units that would heat and cool the bingo space. (R. p. 95, line 14-p. 101, line 1; R. p. 207 [Ex. 10]) Barrs relayed that he observed Kirby on the premises very frequently, (R. p. 105, lines 5-8), and that Kirby expressed to him the urgent need to get the business up and running to avoid financial loss. (R. p. 105, line 20-p. 106, line 8)

STANDARD OF REVIEW

“In reviewing a proceeding in equity, this court may find facts based on its own view of the preponderance of the evidence. This broad scope of review does not require this court to ignore the findings below when the circuit court was in a better position to evaluate the credibility of the witnesses. Moreover, the appellant is not relieved of his burden of convincing the appellate court the [circuit court] committed error in its findings.” *N. Am. Rescue Products, Inc. v. Richardson*, 396 S.C. 124, 131, 720 S.E.2d 53, 58 (Ct. App. 2011), reh'g denied (Jan. 27, 2012)(citations omitted).

ARGUMENT

I. The trial court’s findings of fact regarding the individual liability of Wayne Kirby are supported by the evidence presented at trial which was compelling as to the issue of Kirby’s personal benefit from the work performed by Boykin Contracting.

As his primary issue on appeal, Wayne Kirby contends that Boykin “failed to present evidence that Kirby, individually, received or realized any value from Boykin’s work.” [App.’s Initial Brief p. 9] Kirby does not contend that no benefit was conferred by the electrical work performed by Boykin. Instead, Kirby continues to argue that the benefit was conferred on others ranging from: (1) LN Dentsville Square, LLC, the owner of the real property; to (2) Kirby’s company, Kirby Enterprises of SC, Inc.; to (3) New Covenant Church, Inc., the church involved in the bingo enterprise with Kirby. In this appeal, Kirby continues his attempt to shift the responsibility for payment to others despite the obvious conclusion from the facts presented at trial—Kirby controlled the bingo space and he personally benefitted from the work done by Boykin.

A. The Richland County permitting documents establish that Kirby controlled the bingo space and personally benefitted from the work of Boykin Contracting.

The application to Richland County for the building permit to up-fit the bingo space identifies the owner as Wayne Kirby. (R. p. 201 [Ex. 4]) The Richland County Commercial Building Permit issued on June 12, 2007, identifies the owner of the bingo space as Wayne Kirby. (R. p. 202 [Ex. 5]) Lastly, the Richland County Commercial Certificate of Occupancy for the bingo space issued on June 4, 2008, lists Wayne Kirby as the owner of the bingo space. (R. p. 203 [Ex. 6]) Before, during, and after the time that Boykin worked on the bingo space, Kirby was listed as the responsible owner for the work done on the space on all applicable building permits and certificates of occupancy. The building permit was posted at the jobsite for approximately one year (from its issuance in June of 2007 until the certificate of occupancy was issued in June of 2008). (R. pp. 202-203 [Exs. 5-6]) Yet, Kirby never took any steps to change his status as the responsible owner. Nor did he seek to change his status as the responsible owner as listed on the Certificate of Occupancy for the space. Furthermore, Boykin relied on this information to confirm the identity of the party responsible for paying for its services. (R. p. 45, line 1-p. 47, line 11) As for the other parties to which Kirby ascribes possible responsibility for payment to Boykin, the testimony from Boykin established that it dealt solely and exclusively with Wayne Kirby and that Boykin was not aware of these other entities. [*Id.*]

B. The lease entered by Kirby for the bingo space establishes that he controlled this space and personally benefitted from the work of Boykin Contracting.

Perhaps the most compelling evidence of Kirby's individual liability is the lease for the space on which Boykin performed work. While it is undisputed that Kirby

entered into the lease in his individual capacity (R. pp. 315-329 [Ex. 14]; R. p. 161, lines 8-25), Kirby continues to advance excuses as to why this fact is not determinative of his individual liability.

First, Kirby argues that because Boykin's Application for Payment lists the "Owner" as "Carolina Gold Bingo," (R. pp. 199-200 [Ex. 3]), this demonstrated that Boykin understood payment was to come from Carolina Gold Bingo and not Kirby. [App.'s Initial brief p. 14] However, Boykin explained that it was always looking to Kirby for payment and that Kirby understood this from day one. (R. p. 44, lines 2-22) Indeed, Kirby's own testimony demonstrated surprise only as to the amount of Boykin's Application for Payment, not that Boykin was seeking payment directly from him. (R. p. 166, line 18-p. 167, line 4) Boykin further explained that the Application for Payment's reference to Carolina Gold Bingo as the "Owner" simply referred to the trade name used by Kirby in operating the bingo space. (R. p. 50, lines 13-21) Notably, when contacted by Tom Brock regarding payment on the invoice, Kirby did not refer Tom Brock to any other party for payment nor did Kirby deny he was the responsible party for payment. (R. p. 52, line 13-p. 53, line 20)

Next, Kirby argues that the trial court erred in finding that Carolina Gold Bingo was the trade name Kirby used for the bingo operation. [App.'s Initial Brief pp. 11-12] Kirby further contends that the trial court apparently made this erroneous finding based on records from the Richland County building department. [*Id.*] Incredibly, Kirby makes these claims despite the fact that the lease agreement he entered in his individual capacity clearly states on the cover sheet that the Tenant is "Wayne Kirby d.b.a. Carolina Gold Bingo" and further states on the first page of the lease that "'Tenant's Trade Name' [is]

Carolina Gold Bingo.” (R. pp. 315-316 [Ex. 14]). In light of this compelling evidence that Kirby did business as Carolina Gold Bingo, the trial court correctly found that Kirby and Carolina Gold Bingo were one and the same for purposes of liability for payment to Boykin.

Kirby further argues that because he did not enter into the lease for the bingo space until June 27, 2008, approximately two months after Boykin completed its work, he could not have received any benefit in his individual capacity because Boykin performed its work before his leasehold interest in the property began.¹ This argument is the height of form over substance. To deny that a tenant who entered into a long term lease did not receive any benefit from the work done to the leased space before actually beginning the lease term defies reason. The facts of this case are as follows: (1) Kirby was concerned about losing money due to delays in opening the facility (R. p. 43, line 1-p. 44, line 1; R. p. 105, line 20-p. 106, line 8); (2) Kirby was investing his personal resources to pay for the up-fit work on the leased space (R. p. 164, line 17-p. 165, line 21); and (3) Kirby needed to obtain a certificate of occupancy for the space as soon as possible. (R. p. 43, line 1-p. 44, line 1; R. p. 105, line 20-p. 106, line 8). Under these facts, the trial court correctly found that Kirby, as the individual tenant seeking to operate the bingo facility in the leased space, received a substantial benefit from the work that Boykin performed on the space without regard to whether his leasehold interest had formerly taken effect at the time Boykin completed its work. This is particularly so considering that the work

¹ During the performance of the up-fit work, the entire space of the old Winn Dixie store (comprising what became the Comedy Club space and the Carolina Gold Bingo space) was under lease. (R. pp. 330-347 [Ex. 15]) This lease was co-executed by Wayne Kirby in his individual capacity as the tenant. (R. p. 346 [Ex. 15]) Kirby admitted he signed this lease and had no affiliation with the other listed tenant, DTW, Sr., Inc. (R. p. 160, line 14-p. 161, line 7) Therefore, the evidence further supports that Kirby did, in fact, have a leasehold interest in the space at all times relevant to Boykin’s work.

performed by Boykin was essential to getting a certificate of occupancy for the space leased by Kirby.

Moreover, Kirby's argument ignores the fact that before he executed the lease for the bingo space, Kirby exercised complete control of the bingo space. In fact, Kirby admitted that Hemphill & Associates was hired to perform all of the up-fit work on the bingo space well over a year before he entered the lease for the bingo space. (R. p. 154, line 23-p. 157, line 12) In addition, before he executed the lease agreement, Kirby even had the keys to the leased space which he gave to Boykin so that it could have access to perform its work. (R. p. 38, lines 2-12; R. p. 47, lines 17-21) Kirby also gave Boykin the electrical plans relating to the installation of lighting and power for the bingo space (R. p. 47, lines 12-21; R. p. 207 [Ex. 10]) So regardless of when Kirby's lease for the bingo space went into effect, the facts show that Kirby had full control and unfettered access to this space during the time Boykin performed its work. Therefore, certainly as to Boykin, Kirby was acting as the tenant without regard as to when the lease went into effect.

C. The trial court's finding of liability as to Wayne Kirby was not predicated on piercing the corporate veil of Kirby Enterprises.

Kirby argues that the trial court erred in finding that a benefit conferred on Kirby Enterprises equates to a benefit received and retained by Wayne Kirby in his individual capacity. [App.'s Initial Brief p. 13] As a threshold matter, Boykin never claimed or agreed that a benefit was conferred on Kirby Enterprises. As the trial court noted, it was Kirby who raised this as a defense to his individual liability. (R. pp. 5-14 [Order of Judgment, December 30, 2011, p. 8]) Moreover, nothing in the trial court's findings of fact or conclusions of law relied upon or referenced any theory of piercing the corporate veil in finding individual liability on the part of Kirby. Boykin neither pled nor sought

recovery under a theory of piercing the corporate veil because it was not necessary when the evidence established that the relationship giving rise to liability under *quantum meruit* was between Boykin and Wayne Kirby. The portion of the trial court's order to which Kirby assigns error, when read in context, clearly shows that the trial court rejected Kirby's argument that a benefit was conferred to Kirby Enterprises rather than Wayne Kirby. (R. pp. 5-14 [Order of Judgment, December 30, 2011, p. 8])

II. The trial court properly found that the measure of Boykin Contracting's recovery under *quantum meruit* was the reasonable value of the labor and materials furnished by Boykin.

In determining how to measure Boykin's recovery on its claim for quantum meruit, the trial court properly found that the measure of recovery was the reasonable value of the labor and materials furnished by Boykin. (R. pp. 5-14 [Order of Judgment, December 30, 2011, p. 6 and p. 8]) This has long been the measure of recovery used in such cases by South Carolina courts. *See e.g. Braswell v. Heart of Spartanburg Motel*, 251 S.C. 14, 159 S.E.2d 848 (1968).

When faced with facts very similar to those of this case, the South Carolina Supreme Court held in *Braswell v. Heart of Spartanburg Motel*, that the party that rendered services at the request of the project owner was "entitled to recover . . . the reasonable value of the services rendered by him." *Id.* at 18-19, 159 S.E.2d at 850. In *Braswell*, a termite exterminator claimed that the owner of the motel project engaged his services directly for termite treatment. The owner denied engaging the services of the termite exterminator claiming instead that he merely introduced him to the prime contractor on the project with whom the exterminator made an agreement to provide services. The exterminator adamantly denied making an agreement with the contractor

and insisted his agreement was directly with the owner. The court held that a question of fact was presented as to whether the exterminator was entitled to recover against the property owner in quasi-contract and further held that the reasonable value of services rendered by the exterminator would be the appropriate measure of recovery. *See Braswell, supra.*

Later, in the case of *Costa & Sons Const. Co., Inc. v. Long*, 306 S.C. 465, 412 S.E.2d 450 (Ct. App. 1991), this Court relied on *Braswell* in finding that the measure of recovery for a contractor under a quasi-contract theory was the reasonable value of labor and materials furnished by the contractor. In *Costa & Sons*, this Court noted that “the value of the labor and materials furnished by Costa involves a question of credibility of the witnesses and the weighing of other evidence.” *Costa & Sons*, 306 S.C. at 468, 412 S.E.2d at 452. This Court concluded that “[w]e recognize that in an equity case we may make our own findings of fact based on the preponderance of the evidence. . . [a]s a practical matter, however, we are impotent to determine questions of credibility and must defer to the good judgment of the trial court who heard and observed the witnesses.” *Id.* So it should be in this case. The trial court’s determination of the reasonable value of the labor and materials provided by Boykin is sound and there is no basis for it to be disturbed on appeal.

While both *Braswell* and *Costa & Sons* used the terms quasi-contract or implied by law contract, characterizing Boykin’s claim as one in *quantum meruit* does not change the measure of recovery. As the South Carolina Supreme Court held in *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8-10, 532 S.E.2d 868, 872-73 (2000), “*quantum meruit*, quasi-contract, and implied by law contract are equivalent terms for an

equitable remedy.” Thus, the trial court correctly found that the measure of recovery for Boykin was the reasonable value of its labor and materials.

Kirby argues that because Boykin performed work in the electrical panel room and other parts of the building not directly associated with the bingo space, such work did not benefit Kirby. [App.’s Initial Brief pp. 17-18] The testimony established that Boykin did extensive work in the electrical panel room to provide power to the bingo space for lighting and to energize the roof-top units that would heat and cool the bingo space. (R. p. 95, line 14-p. 101, line 1; R. p. 207 [Ex. 10]) Additionally, at Kirby’s request, Boykin repaired the existing exterior lighting for the premises to provide for the safety and convenience of patrons of the bingo space. (R. p. 112, line 14-p. 116, line 9; R. pp. 283-291 [Exs. 12a-12h]) Under these facts, it is absurd for Kirby, as the tenant of the bingo space, to claim that he received no benefit from this work. Kirby further argues that even if the trial court properly concluded he received a benefit in his individual capacity from Boykin’s work, the trial court should have measured damages by determining the value of such services from Kirby’s perspective. [App.’s Initial Brief pp. 18-19] However, Kirby’s only testimony on this issue was that Boykin was performing its work under an agreement with Kirby’s other electrical contractor, Larry Palmer, for an amount less than \$5,000.00. (R. p. 166, lines 18-24) The trial court correctly found this testimony lacked credibility and rejected it. (R. pp. 5-14 [Order of Judgment, December 30, 2011, pp. 3-4])

III. The trial court's findings with respect to the value of the benefit conferred to Wayne Kirby by Boykin Contracting are fully supported by the evidence presented at trial.

The trial court found that the reasonable value of the labor and materials provided by Boykin was \$59,494.31. (R. pp. 5-14 [Order of Judgment, December 30, 2011, pp. 5-6]) This calculation came straight from Boykin's job cost records. (R. pp. 177-183 [Ex. 1]) After considering the evidence, the trial court concluded that Boykin's labor and material costs were reasonable and should be used as the measure of recovery for Boykin. (R. pp. 5-14 [Order of Judgment, December 30, 2011, pp. 5-6]) The trial court simply disallowed certain credit card charges shown on Boykin's job cost records. [*Id.*] The trial court then deducted the credit card charges from the total job costs to arrive at its finding that Boykin was entitled to recover \$59,494.31 on its *quantum meruit* claim. [*Id.* at p. 5-6, p. 8.] Kirby's argument is premised on the mistaken belief that the trial court used Boykin's Application for Payment (R. pp. 199-200 [Ex. 3]) in determining the reasonable value of labor and materials. [App.'s Initial Brief pp. 19-20] While the Application for Payment was relevant as to the issue of from whom and when payment was expected, in determining the reasonable value of the labor and materials provided by Boykin, the trial court relied on the actual job cost records which set forth the labor and material costs in detail. (R. pp. 5-14 [Order of Judgment, December 30, 2011, pp. 5-6]) Therefore, the trial court's finding with respect to the reasonable value of the labor and materials provided by Boykin is fully supported by the detailed job cost records presented by Boykin as well as Boykin's testimony on the nature and extent of the work it performed. (R. p. 53, line 21-p. 60, line 20; R. pp. 177-183 [Ex. 1]; R. pp. 184-198 [Ex. 2]; R. pp. 208-255 [Ex. 11])

IV. The trial court properly exercised its discretionary right to award Boykin Contracting interest on its *quantum meruit* claim under the long recognized right of courts sitting in equity to award interest on equitable claims.

In *QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 204-05, 600 S.E.2d 105, 109 (Ct. App. 2004), this Court held that an award of prejudgment interest is permissible in an action to recover under the theory of *quantum meruit*. In so finding, this Court relied upon the case of *Anderson v. Purvis*, 220 S.C. 259, 67 S.E.2d 80 (1951), which held that a trial court sitting in equity has discretion to award pre-judgment interest without regard to whether the claim was for a liquidated amount. One of the issues in *Anderson* was whether a physician was entitled to interest on his unliquidated claim for professional services which was asserted as an off-set against a debt owed by the physician. *Id.* The South Carolina Supreme Court stated that “[t]he rule in equity with respect to the allowance of interest is clearly set forth [as follows] . . . ‘[u]pon demands bearing interest at law, the Court of Equity is, it seems, bound to allow interest; but where the demand does not bear interest at law, interest will or will not be allowed according to the equity of the case’ and ‘[u]pon demands not bearing interest at law, equity usually allows interest, but may in its discretion withhold it.’” *Id.* at 262, 67 S.E.2d at 81.

In this instance, the trial court was sitting in equity as to Boykin’s claim for relief under *quantum meruit*. See *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8, 532 S.E.2d 868, 872 (2000) (“*quantum meruit*, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy”). Therefore, the trial court had the discretion to award interest as a matter of equity without regard to whether the claim was liquidated.² See *Anderson supra*. Thus, the issue presented to this Court is whether the

² This Court is bound by the decisions of the South Carolina Supreme Court, see e.g. *Freeman v. Freeman*, 323 S.C. 95, 105, 473 S.E.2d 467, 473 (Ct. App. 1996). Therefore, to the extent that *QHG of*

award of interest to Boykin was an abuse of the discretion afforded the trial judge sitting in equity.³

In ruling on Boykin's claim for interest, the trial court found that Boykin was entitled to pre-judgment interest on its *quantum meruit* claim "[u]nder the circumstances of this case." (R. pp. 5-14 [Order of Judgment, December 30, 2011, p. 9]) It is instructive to examine some of the circumstances supporting such a finding:

(1) From April 8, 2008, until May 7, 2008, with the full knowledge and consent of Kirby, Boykin provided substantial labor and materials necessary to getting the space for the bingo facility ready for occupancy and put to its intended use by Kirby (R. p. 53, line 21-p. 60, line 20; R. pp. 177-183 [Ex. 1]; R. pp. 184-198 [Ex. 2]; R. pp. 208-255 [Ex. 11]);

(2) On June 4, 2008, a certificate of occupancy was issued to Kirby permitting the bingo space to be occupied and used for bingo operations (R. p. 203 [Ex. 6]);

(3) On or about July 31, 2008, Kirby received an Application and Certification for Payment from Boykin requesting payment in the amount of \$73,925.40 for its services (R. pp. 199-200 [Ex. 3]);

(4) When contacted by Boykin about payment, Kirby did not deny he was the responsible party nor did he refer Boykin to any other party for payment (R. p. 52, line 13-p. 53, line 20);

Lake City is in conflict with the long established rule of interest in equity cases as set forth in *Anderson v. Purvis* and earlier cases, the holding in *Anderson v. Purvis* applies.

³ To the extent the Order of the trial court is unclear on the issue of Boykin's right to interest as part of the equitable relief to which it found Boykin was entitled, this Court should affirm this decision pursuant to Rule 208(b)(2) and Rule 220(c), SCACR.

(5) Kirby has never made any attempt to pay Boykin for its work despite the substantial nature of such work and the importance it played in getting a certificate of occupancy;

(6) In April 2010, approximately two years after receiving Boykin's Application for Payment, Kirby filed his first and only responsive pleading in which he admitted that Boykin performed work for him at his request, yet Kirby attempted to convince the Court otherwise at trial despite compelling evidence to the contrary (R. pp. 19-21, [Amended Compl. ¶¶ 2 and 7; and, Answer ¶¶ 2 and 6]); and

(7) Kirby's testimony on key issues, such as who was responsible for payment to Boykin, was simply not credible (R. pp. 5-14 [Order of Judgment, December 30, 2011, p. 4 and p. 8]).

Thus, the equities of this case clearly support the trial court's finding that Boykin was entitled to recover interest on its *quantum meruit* claim. The trial court further found that an appropriate means of calculating interest was to use the stated rate of 8.75% set forth in S.C. Code Ann. § 34-31-20(A) as requested by Boykin. Kirby does not assign error with the rate of interest, only the entitlement of Boykin to interest. Regardless, there is no basis to find that the trial court's use of the legal rate of interest was in error or inappropriate as a matter of equity. *See Anderson v. Purvis, supra* (trial court used legal rate of interest for measure of interest on equitable award).

Moreover, in examining the cases from other jurisdictions cited by this Court in *QHG of Lake City, Inc. v. McCutcheon* which address the issue of prejudgment interest on *quantum meruit* claims, it is clear that other jurisdictions recognize the unique nature of the claim and that it is not always capable of being neatly classified as liquidated or

unliquidated. See e.g. *Lucent Technologies, Inc. v. Mid-West Elecs., Inc.*, 49 S.W.3d 236, 247 (Mo.Ct.App.2001) (“On principle there is no reason for denying interest when the action is in quantum meruit and the claim is unliquidated in the sense that the amount due is to be measured and determined by the standard of reasonable value of the services.” (quoting *Mid-West Eng'g Constr. Co. v. Campagna*, 421 S.W.2d 229, 234 (Mo.1967))); *Ogletree, Deakins, Nash, Smoak & Stewart, P.C. v. Albany Steel, Inc.*, 243 A.D.2d 877, 663 N.Y.S.2d 313, 315 (1997) (holding trial court correctly awarded prejudgment interest on a quantum meruit claim to recover attorney fees given a “quantum meruit action is essentially an action at law, inasmuch as it seeks money damages in the nature of a breach of contract, ‘notwithstanding that the rationale underlying such causes of action is fairness and equitable principles in a general rather than a legal sense.’ ” (quoting *Hudson View II Assocs. v. Gooden*, 222 A.D.2d 163, 644 N.Y.S.2d 512, 516 (1996))); *Compton v. Hastings*, 87 Or.App. 388, 742 P.2d 75, 75-76 (1987) (“ ‘Prejudgment interest is proper in *quantum meruit* cases if the exact amount owing is ascertained or ascertainable by simple computation or by reference to generally recognized standards and where the time from which interest must run can be ascertained.’ ” (quoting *Hazelwood Water Dist. v. First Union Management*, 78 Or.App. 226, 715 P.2d 498, 501 (1986))).

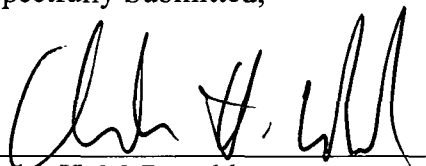
For instance, in this case, the claim can be characterized as unliquidated only in the sense that the amount due is measured by the reasonable value of Boykin’s services as determined by the finder of fact. But the value of such services were readily ascertainable from examining the job cost records of Boykin, which would certainly be a generally recognized source from which to ascertain the reasonable value of the labor and materials furnished by Boykin. Moreover, there was a demand for payment of a

liquidated sum by Boykin which clearly gave Kirby notice of when payment was expected and in what amount. (R. pp. 199-200 [Ex. 3]) Therefore, to deny interest to Boykin in this case would not only be contrary to the equities of the matter, it would also be in conflict with one of the primary reasons for prejudgment interest—to compensate the judgment creditor for the wrongful withholding of payment. *See Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 631 S.E.2d 252 (2006).

CONCLUSION

For the reasons set forth above, the ruling of the trial court should be affirmed. The trial court's findings of fact are fully supported by the evidence presented at trial and the trial court did not err in awarding Boykin damages based on the reasonable value of its labor and materials. Lastly, the award of interest to Boykin was a proper exercise of the trial court's equitable powers and should not be disturbed on appeal.

Respectfully Submitted,



Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

Counsel for Respondent Boykin
Contracting, Inc.

October 24, 2012

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

H. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2009-CP-40-0179

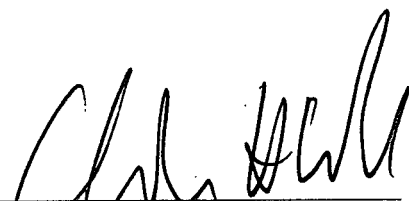
Boykin Contracting, Inc.,Respondent,

v.

K. Wayne Kirby d/b/a Carolina Gold Bingo, Appellant.

Respondent's Certification of Compliance with Rule 211(b)

I certify that Respondent's Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.



Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, PC
Post Office Box 944
Columbia, South Carolina 29202
(803) 779-8900

Counsel for Respondent

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