THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE RICHLAND COUNTY
Court Of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

CIVIL ACTION NO.: 2009-CP-40-0179

Boykin Contracting, Inc., ...Respondent.

v.

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

BRIEF OF APPELLANT

E. Wade Mullins, III
Benjamin C. Bruner
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, South Carolina 29260
(P) 803-252-7693
(F) 803-753-0060

Attorneys for the Appellant

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Attorneys for the Appellant

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Statement of the Case

This case arises from the renovation of a former Winn Dixie building located at 2768 Decker Boulevard in Columbia, South Carolina ("the Building"). The purpose of the renovation was to open a bingo business known as Carolina Gold Bingo. Respondent Boykin Contracting, LLC ("Boykin") is an electrical contractor that worked on the Building from April 9, 2008 to May 7, 2008.

On October 27, 2008, Boykin filed a mechanic's lien in the amount of $73,925.40, plus attorneys fees, interest and costs based on its work on the Building. On January 12, 2009, Boykin filed suit alleging a claim to foreclose on its mechanic's lien against LN Dentsville Square, LLC ("LN Dentsville"), which owned the Building, and claims for breach of contract and *quantum meruit* against Appellant K. Wayne Kirby in his individual capacity ("Kirby"). Boykin designated Kirby as "K. Wayne Kirby d/b/a Carolina Gold Bingo" in the caption and alleged Kirby was "an owner, operator, and/or partner in a venture doing business as Carolina Gold Bingo." On March 13, 2009, Boykin amended its complaint to withdraw its claim against LN Dentsville and pursue only its breach of contract and *quantum meruit* claims against Kirby for $73,925.40, plus prejudgment interest, attorney's fees and costs for its work to the Building.

Kirby answered the amended complaint on April 30, 2010.[1] In addition to a general denial, Kirby alleged defenses under Rule 12(b)(6), SCRCP, failure to give proper notice, and setoff.

After a one-day bench trial on November 16, 2011, the trial court issued an order ("Order") on December 19, 2011, filed December 30, 2011, in which the court ruled the

[1] Kirby's Answer was filed May 3, 2010; the time to answer was extended by agreement of counsel. (R. p. 28, lines 12-16.)

parties had no meeting of the minds and, therefore, had no enforceable contract. Nevertheless, the trial court held Boykin was entitled to recover the reasonable value of its labor and materials under its *quantum meruit* claim. The court entered judgment in Boykin's favor in the amount of $59,494.31, plus prejudgment interest at the statutory rate of 8.75% from September 1, 2008, and costs in the amount of $160.00.

After receiving written notice of entry of the Order on January 3, 2012, Kirby filed a Motion to Reconsider, Alter, or Amend Judgment on January 13, 2012. On January 24, 2012, Boykin filed a return to Kirby's motion. By order dated January 31, 2012 and filed February 1, 2012, the trial court denied the Motion to Reconsider, Alter, or Amend Judgment. Kirby received written notice of entry of this order on February 3, 2012, and served its Notice of Appeal on March 1, 2012.

Statement of the Facts

The purpose of the renovation to the Building was to open a bingo business known as Carolina Gold Bingo in two of the three suites in the Building. In 2007, New Covenant Church, Inc. ("Church") entered into negotiations with Kirby Enterprises of SC, Inc. ("Kirby Enterprises") for the operation of a bingo game, and the parties eventually reached an agreement for Kirby Enterprises to serve as promoter for Carolina Gold Bingo. (R. p. 130, line 22—p. 131, line 1.) The South Carolina Bingo Tax Act of 1996, S.C. Code Ann. §§ 12-21-3910 through 4300, ("the Bingo Act") allows a non-profit to conduct a bingo business under certain specific and tightly regulated circumstances. In this case, the Church was the non-profit organization that owned the business, leased the space for the business, obtained insurance coverage, and retained all proceeds from the business. (R. p. 127, line 13—p. 129, line 23; p. 130, line 22—p. 131, line 1; pp. 348-354 (Tr. Ex. 19); pp. 358-359 (Tr. Ex. 26); see also S.C. Code Ann. § 12-21-4080.) As promoter, the role of Kirby Enterprises was to manage, operate and conduct the bingo sessions. (R. pp. 348-354 (Tr. Ex. 19); see also S.C. Code Ann. §12-21-3920(4) (2002) (defining promoter as "an individual, corporation, partnership, or organization licensed as a professional solicitor by the Secretary of State who is hired by a nonprofit organization to manage, operate, or conduct the licensee's bingo game. The person hired under written contract is considered the promoter").) In exchange for its services, Kirby Enterprises was to receive a portion of the admission fee and a percentage of net proceeds. (R. pp. 348-354 (Tr. Ex. 19).)

In the Summer of 2007, after the Church and Kirby Enterprises reached their agreement, Kirby Enterprises began plans to renovate a portion of the Building for

Carolina Gold Bingo. At the same time, another business owner, David Whigham, began plans to renovate the remaining suite (Suite 100) in the Building to open a business called The Comedy Club ("Comedy Club"). (R. p. 133, line 25—p.134, line 9; R. p. 154, line 23—p. 205, line 9; see also R. pp. 204—206 (Tr. Exs. 7-9).) Because both renovation projects were taking place at the same time, Hemphill & Associates, Inc. ("Hemphill") was hired as the general contractor for both projects. Hemphill's work, however, was performed under two separate contracts.

Hemphill's contract for the Carolina Gold Bingo space was for a lump sum in the amount of $316,400. (R. p. 127, line 13—p. 128, line 3; R. p. 133, lines 1-21; R. p. 134, line 23—p. 135, line 2; R. p. 356 (Tr. Ex. 21). Of that contract price, Hemphill included a $25,000 line item for the electrical work. (R. p. 134, lines 17-19; R. p. 356 (Tr. Ex. 21).) Hemphill worked on the Building until November of 2007, when funding for the bingo renovation ran dry. (R. p. 134, line 23—p.135, line 23; R. p. 139, lines 1-13.) Meanwhile, Hemphill continued working on the Comedy Club, which passed final inspection in December 2007.[2] (R. p. 205 (Tr. Ex. 8), p. 206 (Tr. Ex. 9), p. 355 (Tr. Ex. 20).) Hemphill never returned to complete the bingo renovation.

The renovation work for Carolina Gold Bingo resumed in the Spring of 2008. (R. p. 139, lines 14-17.) Kirby Enterprises hired Larry Palmer, the electrician who had worked on the project under Hemphill, to complete the electrical work for the balance of the $25,000 allotted in the contract with Hemphill. (R. p. 140, line 14—p. 141, line 11; R. p. 166, lines 6-17; R. pp. 291-314 (Tr. Ex. 13).)

In early April, while Palmer was working on the Building, Tom Brock, a project manager for Boykin, called Kirby to ask about working on the project. (R. p. 34, lines

[2] For reasons unexplained at trial, the County did not issue the certificate of occupancy until months later.

21-19; R. p. 142, lines 1-6.) The two met on site on April 8, 2008 and walked through the Building. The next day, Boykin began work. (R. p. 32, line 20—p. 35, line 22.) Since Palmer had the contract to complete the electrical work, Kirby told Brock to talk to Palmer about subcontracting with him for a portion of the remaining electrical work. (R. p. 142, line 1—p. 143, line 22; R. p. 166, lines 1-17.) When Brock's crew began work, Kirby presumed they had reached an agreement with Palmer because Kirby had not entered into contract with Brock or Boykin. Id.

From April 9, 2008 to May 7, 2008, Boykin repaired the wiring in the main panel room located in the rear of the Building, installed lighting in back areas not associated with the main bingo floor, connected 20 rooftop HVAC units, repaired exterior lights on the Building and in the parking lot, and repaired some lighting in the Comedy Club. (R. p. 7; R. p. 41, line 25—p.42, line 8; R. p. 96, line 1—p. 101, line 1; R. p. 102, line 3—p. 104, line 13.) Boykin used plans that had been prepared for "Carolina Bingo" and the Comedy Club. (R. p. 50, lines 17-18; R. p. 207 (Tr. Ex. 10).) Most of Boykin's work on the Building was attributable to the rear panel room, which served the entire Building. (R. p. 110, lines 6-25; R. p. 111, lines 15-18.) The County issued a certificate of occupancy for Suite 300 on June 4, 2008. (R. p. 203 (Tr. Ex. 6).) At no point during the job did Boykin provide an estimate, quote, invoice, draw request or other pricing information related to its work. (R. p. 74, line 21—p. 75, line 9.) The first time Boykin stated a price for its work was when it delivered a pay application in early August 2008. Id. The pay application, dated July 31, 2008, listed "Carolina Gold Bingo" as the owner and requested payment from that entity in the amount of $73,925.40. The line items for labor and materials total $55,509.46. (R. pp. 199-200.)

At all times relevant to this case, LN Dentsville owned the Building. (R. p. 357 (Tr. Ex. 24).) When Hemphill began work in 2007, LN Dentsville was leasing the entire Building to DTW, Sr., Inc. ("DTW"), a corporation owned by David Whigham and unrelated to Kirby and the bingo business. (R. pp. 315-329 (Tr. Ex. 14); R. pp. 330-347 (Tr. Ex. 15); R. p. 76, lines 13-26; R. p. 133, line 25—p. 134, line 2.) LN Dentsville later leased half of the Building space to Kirby under a lease ("2008 Lease") that began July 1, 2008, after Boykin had completed its work. (R. pp. 315-329.) Kirby then sublet the space to the Church for the operation of Carolina Gold Bingo pursuant to the Bingo Contract. (R. pp. 348-354.) Rather than making payments to Kirby, the Church made all lease payments directly to LN Dentsville. Neither Kirby nor Kirby Enterprises received any money from the Church in connection with the 2008 Lease. (R. p. 168, lines 5-16; R. pp. 348-354; R. p. 358.)

On January 12, 2009, having received no payment for its work, Boykin filed this lawsuit.

Argument

"Absent an express contract, recovery under *quantum meruit* is based on quasi-contract." Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010) "[*Q*]*uantum meruit*, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8, 532 S.E.2d 868, 872 (2000); see also Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 466, 684 S.E.2d 756, 764 (2009) (*quantum meruit* as an equitable doctrine allows recovery for unjust enrichment); JASDIP Properties SC, LLC v. Estate of Richardson, 395 S.C. 633, 640, 720 S.E.2d 485, 488 (Ct. App. 2011) (requirements are the same to recover for *quantum meruit*, unjust enrichment, and restitution). "When reviewing an action in equity, an appellate court reviews the evidence to determine facts in accordance with its own view of the preponderance of the evidence." Earthscapes Unlimited, 390 S.C. at 616, 703 S.E.2d at 225.

"The elements of a *quantum meruit* claim are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value." Earthscapes Unlimited, 390 S.C. at 616-17, 703 S.E.2d at 225. The South Carolina Supreme Court has adopted this as the "sole test for a *quantum meruit*/quasi-contract/implied by law claim." Myrtle Beach Hosp., 341 S.C. at 9, 532 S.E.2d at 872.

I. The trial court erred when it held Boykin proved by a preponderance of the evidence that it conferred a benefit upon Wayne Kirby, in his individual capacity, and that Kirby realized value from that benefit.

The first two elements of Boykin's claim required that it prove by a preponderance of the evidence that Boykin conferred a benefit upon Kirby, in his

individual capacity, and that Kirby realized some value from that benefit. Earthscapes Unlimited, 390 S.C. at 616-17, 703 S.E.2d at 225; Myrtle Beach Hosp., 341 S.C. at 8-9, 532 S.E.2d at 872. While Boykin presented evidence that it worked on the Building, the contractor failed to present evidence that Kirby, individually, received or realized any value from Boykin's work.

In Myrtle Beach Hospital, Inc., the South Carolina Supreme Court determined whether a hospital could recover under a theory of *quantum meruit* for medical services it rendered to pretrial detainees, who were in the custody of the City of Myrtle Beach. Myrtle Beach Hosp., 341 S.C. at 4, 532 S.E.2d at 870. The hospital argued it conferred a benefit to the City entitled because it had provided the services, which enabled the City to discharge its Constitutional obligation, at the City's request. Id. The Court disagreed, holding that the hospital's services benefitted the detainees, not the City. 341 S.C. at 9, 532 S.E.2d at 873. In a footnote, the Court conceded that the City received a benefit from the hospital, but the Court labeled that benefit "incidental." 341 S.C. at 9, 532 S.E.2d at 73 n.12.

The Myrtle Beach court's holding underscores the significance that before a plaintiff may recover under a theory of *quantum meruit*, he must prove the defendant received and realized some value from the services the plaintiff performed. As the record illustrates, Boykin failed to carry this burden of proof.

The trial court found that Boykin's work in the project related to the rear area of the Building where the electrical panels were located, other back areas not associated with the main bingo floor, 20 rooftop HVAC units, and exterior lighting. (R. p. 7.) The court concluded that these improvements to the Building clearly benefitted Kirby because

he exercised control over the bingo space, because Boykin's work allowed Kirby to open Carolina Gold Bingo, and because Kirby understood or should have understood he would be individually liable for the work. (R. pp. 8, 11.) However, the record fails to support these findings.

A. The preponderance of the evidence established that Kirby neither received nor retained any value from a property interest in the Building.

In Earthscapes Unlimited, the South Carolina Supreme Court held that a contractor was entitled to recover in *quantum meruit* for landscaping improvements it made to a home. As in that case, the benefit Boykin conferred in the immediate case is an improvement to real property. Unlike the contractor in Earthscapes Unlimited, however, Boykin did not attempt to collect from the owner of the property. Instead, Boykin sued only Kirby, who was acting as project manager for the renovation. Neither Kirby nor Kirby Enterprises held an interest in the Building, i.e., the improved property, when the benefit was conferred. To the extent Boykin's work increased the value of the Building, that benefit inured to the only entities who held property interests in the Building: LN Dentsville and DTW. (R. p. 76, lines 20-26; R. p. 357; R. p. 15 ¶ 1; R. pp. 330-347.) Without an interest in the Building, Kirby could not have received or retained any benefit from the Building's increased value from Boykin's work.

Boykin argued at trial that the 2008 Lease, which took effect nearly two months after Boykin left the site, shows Kirby received and retained a benefit in his individual capacity. That argument, however, disregards the Bingo Contract (Ex. 19), the Church's financial statement (R. pp. 358-359.) and testimony (R. p. 127, line 13—p. 131, line 18; R. p. 148, lines 1-5; R. p. 149, line 13—p. 152, line 11) demonstrating that the Church,

not Kirby, made the lease payments for Carolina Gold Bingo directly to LN Dentsville. Neither Kirby nor his corporation received any money from the lease. (R. p. 168, lines 5-16; R. pp. 348-350; R. p. 358-359.)

Accordingly, the trial court erred because the preponderance of the evidence at trial showed Kirby received no benefit nor realized any value from a property interest in the Building.

B. The evidence demonstrated that Kirby did not own Carolina Gold Bingo and that Kirby neither received nor retained any value through Carolina Gold Bingo.

The trial court erred when it held Kirby benefitted because Boykin's work enabled the bingo business to open. (R. p. 11.) Contrary to this holding, the only competent evidence in the record that relates to the structure of Carolina Gold Bingo demonstrates that the Church owned the bingo business and that Kirby Enterprises—not Kirby individually—was the promoter, pursuant to the Bingo Act and the Bingo Contract. (R. pp. 348, 358; R. p. 129, line 1—p. 131, line 18; R. p. 148, lines 20-25; see also S.C. Code Ann. §§ 12-21-3930, 3940.) The trial court noted as much in its Order, finding, "In this case, Kirby Enterprises was acting as the promoter for a bingo operation in connection with New Covenant Church, a South Carolina non-profit organization. The bingo operation was to be conducted from leased space located at 2768 Decker Boulevard in Columbia, South Carolina." (R. p. 6.) Pursuant to the Bingo Contract and the Bingo Act, it was the Church, not Kirby or Kirby Enterprises, who owned Carolina Gold Bingo; it was the Church who retained all proceeds from the bingo business; and it was the Church who paid for insurance and leased the Building space for Carolina Gold Bingo. (R. pp. 349, 358; R. p. 127, line 13—p. 129, line 23; see also S.C. Code Ann.

§ 12-21-4080.)

This evidence notwithstanding, the trial court held that Carolina Gold Bingo was the trade name Kirby used for the bingo operation. (R. p. 9.) This holding is based apparently on building permit records and the certificate of occupancy from Richland County which, according to the trial court, demonstrated Kirby's individual involvement in the bingo business. (R. pp. 8-9.) The court's reliance on those records was unwarranted and misplaced. Boykin's own witnesses testified that they did not know who completed the building permit applications, who wrote Kirby's name on the permit applications, or why his name appeared as the "owner" on the county records. (R. pp. 201-203; R. p. 80, lines 5-20; R. p. 90, line 16—p. 91, line 23.) In fact, Boykin offered nothing beyond mere speculation about why Kirby's name appeared as owner on the county records. Moreover, Boykin failed to explain why similar Richland County records for the Comedy Club also listed Kirby as the owner, when neither Kirby nor Carolina Gold Bingo had any association with that business. (R. p. 204-206; R. p. 133, line 25—p. 134, line 2; R. p. 140, line 19; R. p. 154, line 23—p.155, line 9.) Had Boykin not failed to pull its own permit for the project, it would have completed its own application and, in doing so, discovered that Kirby was neither the tenant nor business owner. (R. p. 65, line 23—p. 69, line 24.) Since Boykin failed to pull a permit, however, the County records in evidence contain what third parties wrote on their applications before Boykin began work. Without testimony from any of those parties, the court's conclusion was necessarily based on speculation about why those documents show Kirby as the owner.

Therefore, not only do the Richland County records fail to establish that Kirby

owned Carolina Gold Bingo, the only competent evidence on this issue shows the Church owned Carolina Gold Bingo and hired Kirby Enterprises to act as promoter. For these reasons, the trial court erred when it held that Kirby received or realized some value from Boykin's work as a result of his individual involvement in the bingo business. Boykin failed to present any evidence that Kirby received any money or realized any other value from the bingo business.

C. The court erred in holding that a benefit received and retained by Kirby Enterprises equated to a benefit received and retained by Kirby individually.

At trial, Kirby argued that any benefit Boykin conferred to Kirby Enterprises did not equate to a benefit received and retained by Kirby in his individual capacity. The trial court disagreed, holding, "Wayne Kirby is the President, control person and sole shareholder of Kirby Enterprises. There can be no doubt that when a corporation like Kirby Enterprises receives a benefit, so does its sole shareholder." (R. p. 12.) Assuming, without conceding, that Boykin proved Kirby Enterprises received a benefit from its work, the court's reasoning is flawed because it ostensibly imposes liability for a corporation's obligation against Kirby individually without requiring Boykin to establish an alter ego theory, claim for piercing the corporate veil, or any other basis to disregard the corporate veil. See S.C. Code Ann. § 33-6-220(b)(shareholder not personally liable for acts or debts of corporation); see also Sturkie v. Sifly, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984). Furthermore, although Boykin's counsel attempted to elicit testimony on cross examination that Kirby received money from the Bingo operation through his corporation, Kirby testified that he never received any money from Kirby Enterprises. (R. p. 153, lines 15-21; R. p. 159, line 25—p. 211, line 7.) Thus, the court erred when it

held a benefit to Kirby Enterprises equated to a benefit received by Kirby individually.

D. The trial court erred when it held Kirby understood or should have understood that Boykin was performing the work with the expectation that payment would be made from him individually.

The trial court held that Kirby either understood or should have understood that Boykin would look to him individually for payment based on the scope of work left to be completed and the short time to complete the renovation. (R. p. 8.) The preponderance of the evidence shows, however, that Boykin knew during the project that it was not working for Kirby individually but instead for "Carolina Gold Bingo."

At trial, Boykin did not dispute that Kirby asked Brock to work under a subcontract with Larry Palmer, the electrician already on site. (R. p. 7.) Instead, Boykin's project manager testified that Kirby never mentioned Kirby Enterprises, that he thought Boykin was working for Kirby individually, and that Kirby had pulled the permit for the renovation work. However, Boykin's own pay application shows Brock knew he was working for Carolina Gold Bingo. (R. pp. 199-200.) The pay application requests payment not from Wayne Kirby individually but from "Carolina Gold Bingo," whom the document lists as the "owner," and addresses its request to the Building address, not to Kirby's residence or business. Id. In fact, Kirby's name appears nowhere on the pay application, on the certified payroll (R. pp. 184-198), or on the job cost analysis (R. p. 177-183) Boykin presented. Additionally, despite obtaining all permitting records for the Building that pertained to the bingo renovation, Boykin failed to produce any document to support Brock's testimony that Kirby pulled the permit for the renovation. (R. p. 64, line 22—p. 67, line 22.) Therefore, despite its employees' testimony, Boykin's documents show it expected payment to come from Carolina Gold Bingo and not from

Wayne Kirby individually.

Even assuming, *arguendo*, that the court did not err in holding Kirby understood or ought to have understood he would be individually liable, Boykin still failed to present evidence that Kirby received any money, advantage, interest, or other value from Boykin's work. Therefore, Boykin failed to prove the second element of its claim: that Kirby realized value from the benefit Boykin conferred. Earthscapes Unlimited, 390 S.C. at 616-17, 703 S.E.2d at 225. Accordingly, Boykin's *quantum meruit* theory must fail.

For these reasons, the trial court erred when it held that Boykin proved by a preponderance of the evidence that Boykin conferred a benefit to Kirby, in his individual capacity, and that Kirby realized some value from that benefit.

II. The trial court erred when it held Boykin was entitled to judgment in the amount of $59,494.91 for its labor and material costs, plus pre-judgment interest.

The trial court awarded Boykin $59,494.91 for the reasonable value of its labor and materials, plus prejudgment interest and costs. Assuming, *arguendo*, that Boykin satisfied the elements of *quantum meruit*, the court erred by entering judgment in this amount because (i) the court applied an improper measure of damages, (ii) Boykin's labor and material costs were only $52,749.17, and (iii) prejudgment interest was improper because Boykin's claim was not for a liquidated amount.

A. The trial court erred by measuring damages based on Boykin's costs rather than on the value of the benefit Kirby realized from Boykin's work.

"In a law action, the measure of damages is determined by the parties' agreement, while in equity, 'the measure of the recovery is the extent of the duty or obligation imposed by law, and is expressed by *the amount which the court considers the defendant*

has been unjustly enriched at the expense of the plaintiff.'" Myrtle Beach Hosp., 341 S.C. at 8, 532 S.E.2d at 872 (quoting U.S. Rubber Prods., Inc. v. Town of Batesburg, 183 S.C. 49, 55, 190 S.E. 120, 126 (1937)) (emphasis added). In Stringer Oil Co. v. Bobo, 320 S.C. 369, 465 S.E.2d 366 (Ct. App. 1995), Judge Hearn clarified the proper measure of damages in *quantum meruit* cases:

> The appropriate standard for calculating *quantum meruit* recovery is stated in 66 Am.Jur.2d, Restitution and Implied Contracts, § 166, p. 1096, n. 85:
>
> > If the value of what was received and what was lost were always equal, there would be no substantial problem as to the amount of recovery, since actions of restitution are not punitive. In fact, however, *the plaintiff frequently has lost more than the defendant has gained,* and sometimes the defendant has gained more than the plaintiff has lost. In such cases the measure of restitution is determined with reference to the tortiousness of the defendant's conduct or the negligence or other fault of one or both of the parties in creating the situation giving rise to the right to restitution. If the defendant was tortious in his acquisition of the benefit he is required to pay for what the other has lost although that is more than the recipient benefited. If he was consciously tortious in acquiring the benefit he is also deprived of any profit derived from his subsequent dealing with it. *If he was no more at fault than the claimant, he is not required to pay for the losses in excess of benefit received by him* and he is permitted to retain gains which result from his dealing with the property.

320 S.C. at 373-74, 465 S.E.2d at 369 (emphasis in original). The Stringer Oil court further noted,

> Moreover, [Bobo's] testimony as to valuation and unjust enrichment to him was not contradicted by Stringer. Instead, Stringer continued to maintain its erroneous position that Stringer was entitled to recover from Bobo based upon the cost of Stringer's investment. It is basic hornbook law that although the plaintiff's costs of performance might represent some evidence of value, they do not represent a recoverable item of restitution themselves.

320 S.C. 374, 465 S.E.2d at 369 (internal citation omitted).

Recently, the South Carolina Supreme Court reaffirmed this measure of damages in Atl. Coast Builders & Contractors, LLC v. Lewis, Op. No. 27044, 2012 WL 1700145 (S.C. Sup. Ct. filed May 16, 2012) (addressing restitution under an unjust enrichment claim).[3] In that case, although the majority ultimately held the issue had not been preserved for review, it noted that a plaintiff's costs are not a proper measure of damages for unjust enrichment. 2012 WL 1700145 at *2. In a separate concurring opinion, the Chief Justice recognized, "The proper measure of damages for an unjust enrichment claim is the amount of increase in the fair market value of the subject property due to the improvements made by the plaintiff." 2012 WL 1700145 at *6 (Toal, concurring) (citing Stringer Oil Co., Inc., 320 S.C. at 372–73, 465 S.E.2d at 368–69); see also JASDIP Properties, 395 S.C. at 640, 720 S.E.2d at 488-89 (noting the requirements are the same to recover for *quantum meruit* and for restitution); and Gignilliat, 385 S.C. at 466, 684 S.E.2d at 764 (*quantum meruit* as an equitable doctrine allows recovery for unjust enrichment).

In this case, the trial court held that although the parties had no meeting of the minds to support a contract, Boykin was entitled to recover the reasonable value of its labor and materials under its *quantum meruit* theory. (R. pp. 10, 12.) This measure of damages is acceptable when the benefit to the defendant and the cost to the plaintiff are equal. In the immediate case, however, Boykin's work benefitted other areas of the Building through no fault of Kirby's. The record is saturated with evidence that Boykin's work improved areas of the Building that had no connection with Carolina Gold Bingo. Boykin's employees testified that nearly all of their work was related to the electrical

[3] "The terms 'restitution' and 'unjust enrichment' are modern designations for the older doctrine of quasi-contracts." JASDIP Properties SC, LLC, 395 S.C. at 640, 720 S.E.2d at 488.

panel room and benefitted the entire Building. (R. p. 40, lines 3-5; R. p. 83, lines 7-18; R. p. 84, line 10—p. 85, line 6; R. p. 100, line 12—p. 101, line 1; R. p. 109, line 13—p. 111, line 18.) According to Boykin's superintendant on the job, "everything" Boykin did was attributable to the rear panel room. (R. p. 111, lines 15-18.) Boykin's employees also testified about work they performed that benefitted parts of the Building with no connection with Carolina Gold Bingo. (R. p. 102, line 22—p. 104, line 13; R. p. 115, line 18—p. 116, line 1; R. p. 117, line 13—p. 118, line 13.) In its Order, the trial court even recognized that Boykin "did lighting work to back areas *not associated with the main bingo floor*[.]" (R. p. 7.) (emphasis added). Based on this evidence, the court should have measured damages by determining, from Kirby's perspective, the value he received from Boykin's work. See Stringer Oil, supra. Instead, the trial court failed to consider that portions of Boykin's benefitted areas of the Building not associated with Carolina Gold Bingo.

The court also failed to consider the benefit others realized from Boykin's work to the bingo space. There can be little doubt that the Church benefitted from Boykin's work because it owned the bingo business. Additionally, the court failed to consider the value LN Dentsville and the Comedy Club received from Boykin's improvements to the Building. As a result, rather than Boykin receiving an award in the amount Kirby was unjustly enriched, the court held Kirby, individually and alone, liable for the benefits everyone realized from Boykin's work. Surely, equity would not require that Kirby pay for benefits realized by the Church and LN Dentsville.

For these reasons, the trial court failed to apply the proper measure of damages and, as a result, erred when it measured damages based upon Boykin's costs for

performing the work. Had the court properly measured damages based upon evidence of the value Kirby received—not the Boykin's cost for the work—the only competent evidence in the record on that issue was Kirby's testimony that he never received any personal benefit from the project. (R. p. 153, lines 15-21.) See also Stringer Oil, 320 S.C. at 374, 465 S.E.2nd at 369 (because plaintiff's evidence related only to its costs of the improvements, the only competent evidence as to the amount in which the defendant was unjustly enriched was the defendant's own testimony). Assuming, without conceding, Boykin is entitled to recover the value of its work that benefitted the bingo space, Boykin's award should still be reduced by the value of its work that benefit areas of the Building not connected to Carolina Gold Bingo.

B. The trial court erred in awarding Boykin $59,494.91 for its labor and material costs because the labor and material costs were only $52,749.17

Even if the trial court did not err in measuring damages based upon Boykin's costs to perform its work, the evidence in the record does not support the court's finding that Boykin's labor and material costs for the job were $59,494.31. (R. pp. 9-10, 12.) In its damages calculation, the trial court held, "The amount sought by Boykin in the application for payment was $73,925.40. This amount is based upon the labor and material costs incurred by Boykin as well as a mark-up of 15% for overhead and profit. The job cost total incurred by Boykin was $62,254.60." (R. p. 9.) While it is unclear how the court reached that sum, the court reached $59,494.31 by reducing that amount for $2,760.29 worth of costs for credit card charge for fuel Boykin purchased prior to Brock's first call to Kirby about the project.

Boykin's pay application (R. pp. 199-200), however, clearly shows that its

material costs were $33,575.72 and its labor totaled $21,933.74, for a sum of only $55,509.46. (See also R. p. 49, line 23—p. 50, line 12; R. p. 51, line 5—p. 52, line 11.) If that sum is reduced by $2,760.29 for the unrelated fuel costs, Boykin's true labor and material costs were only $52,749.17. Therefore, to the extent this Court determines the trial court applied the proper measure of damages, Boykin's award for its labor and material costs should be reduced by to $52,749.17.

C. Boykin was not entitled to receive prejudgment interest because its claim is not for a liquidated amount.

S.C. Code Ann. § 34-31-20 allows a party to recover prejudgment interest "[i]n all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained. . . ." The South Carolina Supreme Court has interpreted this statute to allow prejudgment interest "on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties. Prejudgment interest is not allowed on an unliquidated claim in the absence of an agreement or statute." Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006). The Butler court further explained, "The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." 369 S.C. at 133, 631 S.E.2d at 259.

The South Carolina Court of Appeals examined the distinctions between liquidated and unliquidated damages in Dixie Bell, Inc. v. Redd, 376 S.C. 361, 656 S.E.2d 765 (Ct. App. 2007), *rehearing denied* February 14, 2008, *cert. denied* June 10, 2009. After surveying prior South Carolina cases on the issue, the Court held,

Dixie Belle's damages, however, were unliquidated, not entitling Dixie

> Belle to pre-judgment interest. The claim was unliquidated because: (1) there was no agreement between the parties as to a sum certain, (2) it could not be reduced to a sum certain by computation or formula, (3) the purchase price was not contractually stipulated, (4) it is not reduced to a sum certain by operation of law or a controlling statute, and (5) it could only be reduced to certainty by a jury determination. Furthermore, the conditions existing at the time the claim arose did not fix the measure of recovery.

376 S.C. at 374, 656 S.E.2d at 771-72.

In the immediate case, the record does not support an award of prejudgment interest because Boykin's claim was for an unliquidated amount. As in Dixie Bell, the parties in this case had no contract. Indeed, the trial court held there was no meeting of the minds. (R. p. 10.) Thus, the price for Boykin's work was not contractually stipulated. Also similar to Dixie Bell, Boykin's claim in this case could not be reduced to a sum certain by computation or formula because Boykin's work benefitted areas of the Building with no connection to Carolina Gold Bingo and benefitted other parties, as well. See Section II.A., supra. The parties had no predetermined formula to determine how much of the work was attributable to other parts of the Building or how much benefitted LN Dentsville, DTW, the Church and the Comedy Club. Therefore, an award on Boykin's *quantum meruit* claim necessarily required that a fact-finder determine how much of Boykin's work benefitted Kirby and how much benefitted others. Therefore, Boykin's claim was not for a liquidated sum, and the prejudgment interest award was improper.

Conclusion

Although Boykin proved that it worked on the Building, it failed to establish that Kirby received a benefit or realized some value in his individual capacity from that work. Even assuming, without conceding, Kirby received a benefit, the trial court erred when it

entered judgment based upon Boykin's costs for the work. Instead, the proper measure of damages required that the court determine the value Kirby received. The only competent evidence on this issue is Kirby's testimony that he received no value from Boykin's work. To the extent this Court holds Kirby nevertheless is obligated to pay Boykin for its work to the bingo space, the trial court's award should be significantly reduced to reflect the amount of Boykin's work that benefitted areas of the Building not related to Carolina Gold Bingo. The parties had no predetermined formula or method to calculate how much of Boykin's work benefitted other entities and areas unrelated to Carolina Gold Bingo. Therefore, the parties must rely on a fact-finder to determine the benefit Kirby received, and Boykin's claim was not for a liquidated sum. For these reasons, the trial court erred by entering judgment against Kirby, individually, for the reasonable value of Boykin's labor and material costs, plus prejudgment interest. Accordingly, the trial court's Order of Judgment should be reversed, and this case should be remanded for judgment to be entered in Kirby's favor.

E. Wade Mullins, III
Benjamin C. Bruner
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, South Carolina 29260
(P) 803-252-7693
(F) 803-753-0060

Attorneys for the Appellant

October 29, 2012

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE RICHLAND COUNTY
Court Of Common Pleas

RECEIVED
NOV 0 3 2012
SC Court of Appeals

G. Thomas Cooper, Jr., Circuit Court Judge

CIVIL ACTION NO.: 2009-CP-40-0179

Boykin Contracting, Inc., ...Respondent.

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Briefs filed on behalf of the Appellant on October 30, 2012 in this matter comply with Rule 211(b), SCACR.

November 7, 2012

E. Wade Mullins, III
Benjamin C. Bruner
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, South Carolina 29260
(P) 803-252-7693
(F) 803-753-0060
Attorneys for the Appellant