THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAY 13 2019
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Mikell R. Scarborough, Master in Equity

Appellate Case No. 2018-001971

RS Custom Homes, n/k/a RS General Contracting, LLC,.....Respondent

v.

Matthew David DeNapoli, Lindsay Ann DeNapoli, Branch Banking & Trust, N.A., and Mortgage Electronic Registration Systems, Inc.,

Of whom, Matthew David DeNapoli, Lindsay Ann DeNapoli are ..... Appellants

APPELLANTS' INITIAL BRIEF

THOMAS J. RODE, SC Bar No. 77480
THURMOND KIRCHNER & TIMBES, P.A.
15 Middle Atlantic Wharf
Charleston, SC 29401
Phone: 843-937-8000
Fax: 843-937-4200
thomas@tktlawyers.com

Attorneys for the Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

INTRODUCTION

This matter presents a question of law as to the interpretation of an unambiguous "fixed price" construction contract between the respondent R.S. Custom Homes ("Contractor") and the appellants Matthew and Lindsey DeNapoli ("Owner"). This court should reverse the trial court's interpretation and award of damages as to do otherwise would be to abandon mutual consent as an element of a contract and find, as a matter of law, that where a contractor later finds the terms of his contract unfavorable, he is entitled to recover his costs plus a judicially imposed profit rather that what is provided for by contract.

ISSUES ON APPEAL

I. The trial court committed an error of law by interpreting the contract as a "cost plus" contract which is unsupported by the plain language of the agreement, the testimony of the parties, and the Court's own conclusions that the subject contract was a fixed price contract.

II. The trial court committed an error of law in awarding prejudgment interest on an unliquidated sum.

III. The trial court committed an error of law by finding the subject mechanic's lien was valid and awarding profit and overhead as a lienable amount where the contract did not provide for such profit and overhead above the fixed price contract amount.

STATEMENT OF THE CASE

Contractor substantially completed construction under its $737,544.00 fixed price[1] contract on August 6, 2014. Realizing its actual costs were higher than anticipated and it would not realize its desired profit, Contractor prepared a final invoice—sent to Owner in September 2014—requesting payment on a total contract price of $854,606.00. Because the Contractor had not

[1] Owner uses "$737,544 fixed price contract" to describe the contract generally and acknowledges that some categories of cost were on allowances and depending on the ultimate amount spent by the owner on these items the price of $737,544 might fluctuate up or down. However, as explained in detail herein this amount could not properly fluctuate for increased costs on items that contractor bid as "fixed" price without the owner's prior approval for such a cost increase.

submitted any change orders during the project a dispute arose as to what amount was owed under the fixed price contract. Contractor commenced this action seeking payment in excess of the contract in February 2015.

The trial court found that in a fixed price contract—as this contract was—Contractor was responsible for increased costs unless approved by Owner through a change order, which Contractor failed to do. However, the court found that the contractor's failure to prepare a change order was waived by the Owner who did not stop Contractor from performing the unauthorized work or request Contractor prepare a change order. Incongruously, the court also determined that Owner's issuance of a stop work order when it learned of the budget excess constituted a breach of the contract and concluded that Owner was required to pay the full balance of the Contractor's costs plus 15% for profit and overhead, in the sum of $958,349.00. This despite Contractor's accounting expert testifying that this "cost plus" measure of the contract price was inconsistent with the parties' fixed price contract.

Ultimately the Court's ruling has the effect of judicially rewriting the parties' contract upon terms the parties never agreed—i.e., "cost-plus contracting."

FACTUAL & PROCEDURAL BACKGROUND

a. The Fixed Price Contract

In 2013, Owner purchased a home in Charleston County out of foreclosure in need of extensive remodeling work. For this, on January 21, 2014, the parties' executed a $684,035.35 "fixed price" contract on an amended AIA form which established the **"[a]mount of this contract**

represents the maximum fixed price cost to complete all construction to the property interior, exterior, and landscape." **(Contract p. 1).**[2] (emphasis added)

The contract contained an itemized construction budget labeled "Annex -1," which broke down the $684,035.35 contract price into $332,308.00 of "fixed price" line items and $351,272.00 in "Allowance" line items. **(Contract Annex 1); (Plaintiff's Exhibits 29 & 30); (Trsx. 220).** However, on April 2, 2014, the parties executed an amended version of this budget labeled "Change Order #1" which amended the total contract price to $737,544.00[3] (the "Amended Contract Amount"), allocating $278,440.00 in "Fixed" cost line items, and $459,104.00 in "Allowance" items. **(Change Order 1); *See also* (Stoddard Testimony Trsx. p. 220).** Neither the contract nor Change Order #1 contained a separate provision for any contractor fee, however, Change Order #1 simply contains a note next to the line-item "Combine Grand Total" which reads "includes contractor 15% OH&P." **(Change Order #1).**[4]

As the work progressed, Owner made all requested payments, and the trial court found that the work was substantially completed on or around August 6, 2014. **(Order para 9); (Defs. Exhibit 30).** Although there were discussions about changing some items, Contractor did not indicate there would be any material changes to the contract price or submit any change orders during constructions. The budget problems became apparent when Contractor prepared its final

[2] The contract collectively consists of three documents: (1) the amended AIA form document, (2) an "Addendum" setting forth additional terms; and (3) an itemized construction budget labeled "Annex -1."

[3] The actual amount is $737,543.70 but which is rounded to the nearest Dollar, as are all other figure contained herein.

[4] Contractor's expert accounting witness Stoddard improperly treated this 15% fee for overhead and profit as if it were as separate line item rather than built into the contract as a whole.

invoice on August 29, 2014[5], which it subsequently provided to Owner in September 2014. **(Defs. Exhibit 4).**

As of August 29, 2014, Owner had made all requested payments on the project, totaling $478,376. **(Defs. Exhibit 4).** However, rather than reflecting the roughly $260,000.00 balance on the contract, the August 29 final invoice demanded $376,228.00, as the balance of an alleged contract price of $854,606.00—more than $117,000.00 overbudget. After receiving this invoice, on September 7, 2014, Owner sent an email to Contractor requesting that Contractor stop all work except wall patching and painting, and the accounting documents in support of its invoice so Owner could evaluate the payment demand "since the amounts you are alleging are more than double or even triple the contracted amount." **(Plaintiff's Exhibit 17, p.4).** Subsequently, Owner made additional payments of roughly $145,000.00 bringing the total amount paid to $623,589.00. *See* **(Complaint & Mech.'s Lien - affidavit of account).**

On February 9, 2015, Contractor recorded a mechanic's lien which alleged the contract price had ballooned from the $854,606 claimed on the final invoice on August 29, 2014, to $944,813.00. **(Id.)** This amount again inflated to $958,349.00 at trial in January of 2018, more than $260,000.00 in excess of the contract amount, without additional work.

b. The Trial

Contractor commenced this action to foreclose on the mechanic's lien on February 17, 2015, asserting additional claims for breach of contract and *quantum meruit*. Owner answered on March 23, 2015 and asserted *inter alia* affirmative defenses of waiver and estoppel and asserting

[5] The trial court's order references this at times as the August 24 invoice. This appears to be a scriveners' error.

counterclaims for breach of contract and negligence, which Contractor denied. *See* **(Pleadings).** The matter was tried before the Charleston County Master-in-Equity in January 2018.

At trial, the Contractor presented the expert testimony of Catherine Stoddard, CPA, who had been retained "to identify areas where and the reasons why the costs exceed the budget and to review the [] documentation supporting those cost overruns." **(Tr. 214, ln 4-9).** Stoddard, who the court found has "considerable experience in the construction industry," testified that the parties' **contract was for a fixed price, and the trial court agreed**. *See* **(Order. p. 9, ¶ 17).** Stoddard additionally explained the distinction that in a fixed price contract, the builder appreciates the benefit of cost savings, but likewise, "the contractor usually takes the responsibility if it goes over cost." **(Tr. P. 218, ln. 24 – p. 219, ln. 2).** At trial the dispute revolved around whether the contract provided for Contractor to recover his cost overruns from Owner.

The contract provides that for any change which will *increase* the contract price, Contractor must first prepare and submit a written change order to Owner:

> **5. In the event of a change requested by Owner which reflects a material difference in price, contractor will submit a written change order request to reflect the actual cost plus 15%, but shall not proceed and perform any change work unless Owner signs and accepts the change order.**

This provision makes clear that intent of the change order provision is to ensure there are no surprises at the end of the work by requiring the change cannot be performed until approved. A change will not automatically be assessed at cost plus 15%. Rather, the parties have set out the means through which to negotiate the proper measure of a price change *if* Contractor provides notice of a potential change and the price cannot be agreed.

> **ARTICLE 10 CHANGES IN THE WORK**
> **§ 10.1 The Owner, without invalidating the Contract, may order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly in writing. If the Owner and Contractor can not agree to a change in the Contract Sum, the Owner shall pay the Contractor its actual cost plus reasonable overhead and profit.**

Conversely, when a change is made which results in the reduction of the contract price the contract does **not** require a written a change order.

3. **The attached Annex-1 represents the Maximum amount to be paid by Owner for said item. In the event of a change which results in a cost reduction to said item, the amount shall be adjusted to reflect the actual cost plus 15%. A refund or credit shall be provided to Owners for said item.**

See **(Contract, ¶¶ 3, 5 and §10.1).**

c. Contractor's Expert Testimony

In a "fixed price" contract—as here—Stoddard explained that the work contemplated by the contract price is set out by line item, each being designated as one of two typical categories: either a "fixed" item, or an "allowance" item. **(Tr. p. 218, ln. 15-25).** Further, she explained a contractor assumes the risk of cost overruns on fixed items but the owner assumes the risk of cost overruns on allowance items because a fixed price item is set by the contractor based on a specific scope of work whereas an allowance item might fluctuate based on selections that still need to be made" by the owner. **(Tr. p. 219).** Unlike fixed costs, which are intended to be static, the contract price will fluctuate—up or down—depending on the owner's allowance selections. **(Id.)** ("[i]f an allowance goes over then that's the owner's responsibility, and if it comes under that savings is also an owner's savings.").

Because Stoddard was asked "to identify areas where and the reasons why the costs exceed the budget and to review the [] documentation supporting those cost overruns" she broke down the contract price into its component parts of "fixed price" line items and "allowance" line items and compared those to the actual costs.

Category	Contract Amount	Actual Cost
Allowance	$459,104	$418,253
Fixed	$278,440	$415,098
TOTAL	**$737,544**	**$833,351**

(Tr. p. 221 & Plaintiff's Exhibit 30 p. 10)[6]

Stoddard opined that ordinarily in a fixed price contract the cost is a factor of two things: the contract price (as it may fluctuate from allowance items) plus all change orders. **(Tr. p. 206)**. Therefore, ordinarily the contract price would first account for $418,253 in allowances (a savings of $40,851) as compared to the contract price, plus $278,440 in fixed items, for a total of $696,693. However, in this case, because Contractor spent more, he asserted he was entitled to recover all its costs plus a fee of 15% without regard for the plain language of the parties fixed price contract.

d. The Trial Court's Ruling.

Initially, the trial court ruled as a matter of law, this was a fixed price contract. *See* **(Order. p. 9, Para. 17)** (emphasis added). The trial court additionally found that the Contractor's failure to comply with the change order provisions of the contract was waived by Owner for failure to prevent Contractor from preforming the extra work. **(Order para. 37)**. Incongruously, the Court found that that by stopping work when it learned of the budget overages (to request documents in accordance with the contract) the Owner breached the contract by preventing Contractor from

[6] Contractor's expert witness Stoddard improperly treated this 15% fee for overhead and profit as if it were as separate line item rather than built into the contract as a whole. This causes confusion. In this way Stoddard calculates all her figures from the perspective of costs to the contractor without consideration for the fee then adds the fee back in. This neglects that the "fee" was part of the total fixed price that owner could expect to pay. For instance, if a fixed price line item has the same amount of "fee" built in regardless of what the actual cost is. By deducting this "fee" from all her cost calculations and then adding it in at the end, Stoddard is not only making her calculations confusing and misleading but, as she concedes, her analysis is inconsistent with the contract. This is further demonstrated when applied to an allowance item. Consider, for example, plumbing fixtures, which the contract provides an allowance of $13,800.00. By Stoddard's testimony, if Owner purchased fixtures for $13,000.00—under the provided allowance—Owner would still be "over budget" because when adding 15% to this amount it totals $14,950. Thus, Stoddard's contention is that despite the contract clearly laying out specific amounts, each line item is actually 15% lower than what's listed, and the Owner was apparently supposed to know his allowance was $11,730 not $13,800 as listed in the contract.

completing work. **(Id.)**. This despite finding Contractor substantially completed the work more than a month before the stop work Order.

Having found Owner's breached the fixed price contract, the trial court determined Owner was responsible to pay Contractor damages not in the amount provided under the contract, but instead for Contractor's full costs plus 15%, which the court likewise determined was properly assessable as a mechanic's lien (although not awarding foreclosure). Further, and despite having awarded damages that were different than those contracted for by the parties the court improperly found this unliquidated amount was subject to prejudgment interest. The trial court did not make any rulings in favor of Contractor on its claim for *quantum meruit*. Instead all claims were based on claimed remedies at law. **(Order pp. 18-22).** After the trial court denied Owners motions pursuant to Rule 59, SCRCP, this appeal followed. *See* **(Owner's Motions to Reconsider, Transcripts, and Orders from Same)**

STANDARD OF REVIEW

An action on a contract as well as on a mechanic's lien are both sound in law. *See Sapp v. Wheeler*, 402 S.C. 502, 507, 741 S.E.2d 565, 568 (Ct. App. 2013) (breach of contract is an action at law); *Glover v. Lewis*, 299 S.C. 44, 382 S.E.2d 242, 243 (Ct. App. 1989) (foreclosure of a mechanic's lien is an action at law). On appeal, the Master's findings on questions of law are decided with no particular deference to the trial court. *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 590, 658 S.E.2d 539, 542 (Ct. App. 2008) (in an action at law, questions of law are decided by the appellate court "with no particular deference to the trial court.") The question of "whether a contract is ambiguous," as well as "the interpretation of an unambiguous contract" are both questions of law to be reviewed by an appellate court *de novo*. *Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 4, 747 S.E.2d. 426, 427 (2013) (citing *South Carolina*

Dept. of Natural Resources v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-303 (2001)).

ARGUMENT

The trial court's finding, as a matter of law, that the parties entered a fixed price contract is irreconcilable with its award of damages in the amount of "costs plus 15%." Likewise, to find that Owner breached the contract by stopping work when he learned of the cost overruns, but simultaneously finding the failure of Owner to stop Contractor from performing "extra" work amounted to a waiver—the court's findings are impossibly inconsistent.

Here the trial court erred by misinterpreting the parties' plain and unambiguous contract. It's conclusions of law are contradicted by its findings of fact, and therefore this Court should reverse not only the award of damages, but also the grant of prejudgment interest and the finding that the amount claimed by the Contractor was assessable as a mechanic's lien.

I. The trial court committed an error of law by interpreting the contract as a "cost plus" contract which is unsupported by the plain language of the agreement, the testimony of the parties, and the Court's own conclusions that the subject contract was a fixed price contract.

The primary concern of the court interpreting a contract is to give effect to the intent of the parties, and "is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it." *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 334, 676 S.E.2d 139, 143-144 (Ct. App. 2009); *Lee v. Univ. of S.C.*, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014). A contract is not ambiguous when its meaning is clear to "a reasonably intelligent person who . . . is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business." *Silver,* 376 S.C. at 592, 658 S.E.2d at 543; *quoting Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). Where the requirements of the

contract are clear when "read as a whole" the effect of the contract is to be decided from the "four corners" of the agreement. *Id.* (*quoting McPherson v. JE Sirrine & Co.*, 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)).

a. The trial court committed an error of law in finding that Owner breached the contract.

Here, the trial court found Owner breached by refusing to pay the Contractor's August 29 invoice when due, failing to pay undisputed sums after receiving the requested project cost documents supporting this invoice, and in restricting Contractor's access to the project after receiving the final August 29 invoice. **(Order p. 17, ¶ 36)** (listing these three instances to constitute the extent of Owner's breach(s)). However, this is at odds with the trial court's findings of fact.

Consider first the trial court's finding that the Owner breached by failing to pay the Contractor's August 29 final invoice when due or pay the undisputed portions thereof.[7] **(Order ¶ 36); (Order ¶ 34).** This is contradictory to the Court's conclusion that Owner has paid $623,589, some $145,000.00 more that what had been paid as of August 29. *See* **(Defendant's Exhibit 4)** (showing payments made as of August 29 totaled $478,376). Second, and even more inexplicably, the court makes specific mention of one payment of $25,000 made after the invoice. *See* **(Order ¶ 34).** Additionally, the implication that this invoice was "due" is not supported by the language of the contract which provides, if requested, Owner is entitled to a report "from contractor's automated billing system" supporting the amount. **(Contract ¶. 4).** Here Owner clearly requested this, but the evidence offered by Contractor at trial shows this "report" continued to be modified

[7] The court does not specifically list this Aug. 29 invoice as the one that was unpaid. However, there are no other invoices in the record and the balance of the Court's order suggests this invoice is the one referenced. (Order para. 34)

as late as October of 2016—well after the present lawsuit was filed. *Compare* **(Plaintiff's Exhibit 17, p.4)** (owner requesting the accounting information *via* email in support of the single line August 29 invoice) *with* **(Plaintiff's Exhibit 18 pp.4 & 6)** (cost accounting report reflecting entries and modifications as late as 10/31/2016). Thus, it could hardly be claimed that payment was due before Contractor completed this report.

Consider next the trial court's conclusion that the Owner breached the fixed price contract by restricting Contractor's access to job *via* his September 7 stop work order. **(Plaintiff's Exhibit 17, p.4).** Like many of the court's rulings, this is inconsistent with other findings in its order which suggest this stop work directive was rescinded by finding that punch-list work continued into November without any "contention that [Contractor] was on the premises without [Owner's] permission and knowledge." **(Order.¶ 11).** Moreover, its illogical for the trial court to have found the September 7th stop work order prevented the Contractor from completing the job because the Court found Contractor had "substantially completed" its work on August 6—more than a month prior to the stop work order. *Compare* **(Order p. 21 Sec. 3)** (finding Contractor entitled to damages as a result of being "wrongfully prevented from completing the contract") *with* **(Order.¶ 9)** (finding Contractor had substantially completed work on August 6) *and further with* **(Order p. 22 Sec. 4)** (finding that payment was due on August 29—although Owner did not receive the request until September).

These are just a few of the multiple and mutually exclusive findings by the trial court that cannot co-exist. This casts doubt on the entirety of the court's findings and warrants reversal of the trial courts finding of breach, or at the very least remanding the matter for a new trial. *See e.g., Buist v. Buist,* 399 S.C. 110, 124 730 S.E.2d 879, 886 (Ct. App. 2012) (finding, in a matter in which the before this Court on *de novo* review, that where the lower court's factual findings were

inconsistent with its conclusions of law, this Court properly reverses and can make the correct conclusion of law); *see also generally Vinson v. Jackson*, 327 S.C. 290, 293, 491 S.E.2d 249 (1997) (finding that where a verdict is internally inconsistent the matter should be reversed and remanded for a new trial). However, even assuming (for the sake of argument) that Owner breached, the trial court still committed an error of law by concluding the measure of damages to be the Contractor's cost-plus profit.

b. The trial court committed an error of law in finding the measure of damages to be the total of Contractor's total costs plus 15%.

"The measure of damages for breach of contract is the amount necessary to put [the party] in the same position as if the contract had been fulfilled." *King v. Oxford*, 282 S.C. 307, 315-316, 318 S.E.2d 125, 130 (Ct. App. 1984) *citing Jones v. Bates*, 241 S.C. 189, 127 S.E. (2d) 618 (1962). The Court does not award damages to improve a claimant's position but to maintain the status quo. It is "an elementary principle of contract law [that] the purpose of an award of damages for breach is [ ] to put the plaintiff in as good a position as he would have been in had the contract been performed." *Drews Co. v. Ledwith-Wolfe Associates, Inc.*, 296 S.C. 207, 209-210; 371 S.E.2d 532 (1988) *citing* 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, § 1338 (3d ed. 1968). The proper measure of contractual damages "is the loss actually suffered by the contracted as the result of the breach." *South Carolina Finance Corp. v. West Side Finance Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960).

When explaining that damages are to place the non-breaching party in the same "position he would have enjoyed had the contract been performed," courts have sometimes said that "[i]n the normal case, the damage will consist of two [] elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." *South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co., Inc.*,

303 S.C. 74, 77, 399 S.E.2d 8, 10-11 (Ct. App. 1990). However, the trial court has misinterpreted this rule to find that the proper measure of damages in a "fixed price" contract is the Contractor's total costs plus a fee of 15%. This is error.

Relying on *Bensch v. Davidson*, 354 S.C. 173, 177-78, 580 S.E.2d 128, 130 (2003) the trial court found that "a contractor who is [] prevented from completing a contract may recover his actual expenses and damages for lost profits."[8] However, the Court neglects that *Bensch* presents a scenario in which, prior to the breach, there had been *partial performance* on a *cost plus* contract. *Id.* (emphasis added). Importantly, the language the trial court relies on from *Bensch* is a paraphrasing of a jury charge, which was found to be proper only because it was ***not*** a fixed price contract at issue. *Id.* (basing its conclusion on the factual distinction that the contract at issue was unlike the fixed price contract *Warren v. Shealy*, (citation omitted)) (emphasis added). The question in *Bensch* was whether the contractor could recover his profit (i.e., the "plus" portion of its cost plus contract) on "material costs that [were not incurred] as result of performance being prevented." *Id.* The *Bensch* Court made clear they could not. While the *Bensch* Court permitted the recovery of "actual expenditures and [ ] profits" this was because that was "the proper measure of what would have been realized had the contract been performed" in that case. *Id. Bensch* does not provide this is the measure of damages in all cases.

The facts here are opposite of *Bensch*. This was fixed price contract, not a cost plus, and Contractor was not prevented from performing instead, instead the trial court determined work was substantially complete on August 6, well before the alleged breach. However, these factual

[8] The full quotation from *Bensch* gives context: "The trial court charged that *after partially performing a contract*, one who is wrongfully *prevented from completing the contract* may recover actual expenditures and damages for lost profits." (emphasis added). Again, at the very least the italicized portions above are irreconcilable with the Court's own factual conclusions that the Contractor was substantially complete in early August. However, the trial court ignored this.

distinctions notwithstanding *Bensch* does not support the trial court's conclusion that the measure of damages can be different than that which would have been realized under the contract. To award damages inconsistent with the contract was an error of law—even under the reasoning of *Bensch*. *See id.* (stating "the measure of damages for breach of contract is loss actually suffered by contractee as result of loss.")

There can be little doubt that the trial court's interpretation and measure of damages is inconsistent with the terms of the contract. In finding the amount due under the contract was $958,349 the trial court did nothing more than adopt the "total cost" figures testified to by Stoddard, and added a fee of 15%. However, Stoddard admits the "structure" of her analysis is "looking at from the standpoint of the cost incurred by [Contractor]," as if this were a cost plus contract—which she concedes it is not. **(Tr. p. 629-630); (Tr. 257).**

Therefore, even assuming there had been a breach, the proper measure of damages is the amount owed under the fixed price contract of $696,693 less the credits of $644,895 found to be owed to Owner. This court should modify the Court's order or at the very least remand the matter for a new trial with instruction that the proper measure of damages (if any) is that owed under the contract.

c. The trial court committed an error of law to the extent it found that waiver of the change order provision may operate as a modification of the contract to support the award of actual costs plus fee.

As with any fixed cost contract, the final price is ordinarily the sum of the contract price plus the approved change orders. *See Stoddard Testimony* **(Tr. 206)** (agreeing the contract sum and change orders make up the "two parts of the job costs that have to be added together"). Paramount to a fixed price contract is the ability of the parties to differentiate between a cost overrun and a "change." *See Stoddard Testimony* **(Tr. P. 218, ln. 24 – p. 219, ln. 2)** ("the contractor

usually takes the responsibility if it goes over cost."). Simply because there is a price fluctuation does not mean there has been a "change" under the contract. *See Stoddard Testimony* **(Tr. 219)** (contractor is entitled to cost saving on fixed price items); *see also* **(Contract §10.2)** (describing "changes in the Work not involving changes in the Contract Sum").

Here the contract specifically provides that when a change is made that:

> "reflects a material difference in price, **contractor will submit a written change order** request to reflect the actual cost plus 15%, **but shall not proceed** and perform any change work unless Owner signs and accepts the change order."

(Contract p. 1) (emphasis added).

However, Section 10.1 of the contract commands that if, after Contractor submits a change order, the parties cannot agree on the price, then the contractor is to be paid "actual cost plus a reasonable overhead and profit." **(Contract § 10.1)**. When read as whole it cannot be said that the parties agreed that the absence of a change order meant payment was due for the "cost plus 15%" for the entire project. In fact, the opposite is true. What is plain is the parties' intent to address these issues *before* the work was done. In this way the parties have agreed to a means by which to differentiate between a cost overrun and a "change."

Ignoring this plain intent to agree on price *before* the work, the trial court held; the work was, "for the most part [] either directed by the owner or [] accepted by the owner," and because "strict adherence to the change provisions in the agreement was not enforced [by Owner]" it had waived the right to rely on the pricing provisions of the fixed price contract and claim it was not a cost plus contract. **(Order p. 19)**. Thus, at least according to the trial court, it was incumbent on Owner not to accept the "extra" work in order to avoid waiver.

First, this finding is illogical when considering that the court found that this very same conduct—i.e., the stop work order on September 7—amounted to a breach. This is paradoxical.

It cannot be that the failure to breach a contract is likewise a waiver of one's rights under the same contract—or *visa-versa*. The trial court would have it that Owner can either avoid waiver by rejecting the work and as a result breach the contract, or alternatively, Owner can avoid breach by accepting the work and as a result suffer the consequences of waiver. This proverbial "lose-lose," leaves Owner utterly stripped of all its contracted-for benefits.

This paradox notwithstanding, the trial court nonetheless erred in finding waiver. There is no evidence to suggest that Owner knew a change order was necessary, thus how could he know to request one even if this was his duty? Instead, Contractor's commencement of work without the change orders is nothing short of affirmation that no change order is needed. This is confirmed by the contract language. Owner was left with no reason to suspect a change order was needed and no reason to suspect that he needed to stop the work in order to avoid waiver.

It is settled that waiver is intentional forfeiture of a right and cannot be found on mistake. *See Edwards v. Rouse,* 290 S.C. 449, 451, 351 S.E.2d 174, 176 (Ct. App. 1986) ("waiver is the intentional relinquishment of a **known** right") (*citing Ellis v. Metropolitan Casualty Insurance Co.*, 187 S.C. 162, 197 S.E. 510 (1938) (emphasis added). While this state has "always recognized a party's right to waive strict compliance with a condition precedent," waiver may occur only after the party who is alleged to have waived a right knows that such right has arisen. *Id.* (waiver may be found upon an "expression of intention not to demand a certain thing" provided the right to demand that certain thing is "known" to the party against whom waiver is to be charged)*; accord Whaley v. Guardian Fire Ins. Co.*, 124 S.C. 173, 178, 117 S.E.2d 209, 210 (1923) (an insurer may be charged with waiver when the act constituting waiver it undertaken "after knowledge" of the right to dispute validity of the contract). Thus, the Owner's act of not demanding a change order

from Contractor can only amount to a waiver if he knew a change order was required as to each line item and/or cost overrun on which Contractor claims he's entitled to payment.

The contract's plain language requires Contractor to identify when a change order is needed and to generate the change order. *See* **(Contract ¶. 1)** (stating that when a change will result in price increase, "contractor will submit a written change order"). Moreover Contractor's "Work" is defined by the contract to include all "labor, materials, equipment and services . . . to fulfill the Contractor's obligations." **(Contract § 6.2)**. It is intended that the contract "is to include all items necessary for the proper execution and completion of the work." **(Contract § 6.3)**. Also, the "Contract Sum shall include all items and service necessary for the proper execution and completion of the Work." **(Contract § 3.6).**

An Owner may rely on the fixed prices provided by the Contractor encompassing the full scope of the project because the "**[e]xecution of the Contract by the Contractor is a representation that the Contractor has visited the site, become familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.**" **(Contract § 8.1.1)** (emphasis added). Accordingly, it stands that Owner may presume that if work is commenced without the contractor submitting a change order, the work is within the scope contemplated by the contract price. *See* **(Contract p. 1 ¶ 5)** (stating Contractor "shall not proceed and perform any change work unless Owner signs and accepts the change order."). If Contractor incurs a cost overrun by virtue of a mistake in evaluating the extent of work necessary for a given line item, this is a risk he assumes and not a cost than can be passed off as a change after the fact.

One such example here is the trim-work. Contractor's exhibits confirm this was bid as a fixed price line item in the amount of $27,500.00, to include "all labor and materials." **(Plaintiff's**

Exhibit 26). However, Contractor claims its total costs for this line item exceeded $38,200.00.[9] Stoddard explained this cost overrun resulted from the Contractor failing to scrutinize a bid it received from a sub-contractor and by claiming, for example, that extra work and trim were needed "because of the type of concrete walls [Owner] had" in his home. **(Tr. p. 222).** This is a quintessential example of a cost overrun of which the Contractor assumes the risk in a fixed price contract. In the face of Contractor's contractual representations, Owner cannot be responsible for the Contractor's failure to examine the property—for instance the type of concrete walls—before executing the contract. *See* **(Contract § 8.1.1)** (warranting contractor has examined the property before making its offer) and **(Contract §6.2, §6.3, and §3.6)** (warranting that work will encompass all things necessary to complete the job).

Moreover, even if there were a waiver, the trial court erred by finding that waiver resulted in a modification of the fixed price contract to a cost plus contract.

Contrary to the master's ruling here, "while waiver may operate to preclude the repudiation of a contract, **it cannot create a contract.**" *Carolina Amusement Co. v. Conn. Nat'l Life Ins.* Co., 313 S.C. 215, 222, 437 S.E.2d 122, 127 (Ct App. 1993) (emphasis added) (*citing Johnson v. Wabash Life Ins. Co.*, 244 S.C. 95, 100, 135 S.E.2d 620, 623 (1964). Waiver cannot be invoked to bind a party to a claimed modification. *See Sterling Dev. Co. v. Collins*, 309 S.C. 237, 241, 421 S.E.2d 402, 404 (1992) (rejecting the argument that a party "acquiesced [to] additional term[s which] became binding under a theory of waiver" as "inconsistent with waiver principles."); *See also Johnson*, 244 S.C. at 101, 135 S.E.2d at 623 ("We have held that the doctrine of waiver cannot

[9] This total cost was actually closer to $40,000, but Contractor notes $1,775 of this cost overrun was reapplied to the line item entitled "Juliet Porches"—conveniently, an "allowance" item. *See* (Plaintiff's Exhibit 26 p. 1). Which underscores another fundamental problem where, if the Contractor is free to re-allocate fixed cost overruns to allowance items it undermines the clear intent of the parties to operate under a fixed price contract.

be successfully invoked to create a primary liability, or a liability for a benefit not contracted for") (quoting *Moore v. Palmetto State Life Ins. Co.*, 222 S.C. 492, 73 S.E.2d 688 (1952) (internal quotations and citations omitted).

Unlike waiver which is a unilateral action, modification requires mutuality and assent. "Mutual consent is as much a requisite in effecting a contractual modification as it is in the initial creation of a contract." *First Fed. Sav. & Loan Ass'n v. Dangerfield*, 307 S.C. 260, 266, 414 S.E.2d 590, 594 (Ct. App. 1992) (*citing Yamaha International Corporation v. Parks*, 72 N.C. App. 625, 325 S.E.2d 55 (1985)); *accord Gold Kist, Inc. v. Citizens & Southern Nat'l Bank*, 286 S.C. 272, 277-278, 333 S.E.2d 67, 71 (Ct. App. 1985) ("An agreement to modify [a contract for the sale of goods] can only be found [] if the evidence reveals that the buyer acquired knowledge of the offered modification and had an opportunity to object to it.").

The trial court's finding of waiver is incongruous with its award of damages because waiver and breach are not the same and cannot logically be deemed synonymous. Finding that Owner waived a right does not mean that Contractor is entitled to damages. The trial court has conflated these concepts with an alleged "modification" to improperly imply mutual consent to a cost plus contract where none exists. *Contra Carolina Amusement Co.*, 313 S.C. at 222, 437 S.E.2d at 127 ("while waiver may operate to preclude the repudiation of a contract, **it cannot create a contract**") (emphasis added). The trial court's conclusion is based on the faulty assumption that consenting to some increase is consenting to all increases. While the parties might have foregone the formalities of the change order provisions (i.e., formal written and signed documents), they did

not depart from the general intent of the provision which was designed to address potential increases *before* they occurred.[10]

The trial court found that as a result of Owner's alleged waiver, he was responsible for all contractor's costs plus a fee of 15%. In support of this the trial court cites to three cases: *T.W. Morton Builders v. Von Buedingen*, 316 S.C. 388, 450 S.E.2d 87 (Ct. App. 1994), *Smith-Hunter Construction Co. v. Hopson*, 365 S.C. 125, 616 S.E. 419 (2005), and *Lazer Construciton Co. v. Long*, 296 S.C. 127 370 S.E.2d 900 (Ct. App. 1988). However, the court's reliance on these rulings is misplaced because each of these cases addressed the issue in the context of a cost plus agreement rather than a fixed price. *See supra.* Such a scenario is fundamentally different than a fixed price contract because in a cost plus the parties have agreed to a means of measuring the price understanding that it will fluctuate rather than on a specific price.

The Court's reliance on these opinions undermines its conclusion by confirming the contract must control the measure of damages. For instance, in *Lazer*, this Court affirmed the finding that in a cost-plus arrangement the failure to properly execute change orders did not prevent the contractor from recovering his actual costs, but did prohibit the collection of the contractor's fee, because this is what the language of the contract contemplated. *Lazer*, 296 S.C. at 130, 370 S.E.2d at 902. Telling, the *Lazer* Court recognized the significant distinction between a cost plus and fixed price contract by emphasizing that in a cost-plus-contracting the measure of damages

[10] Consider for example the line item for doors. Although no formal change order was prepared there were emails through which the Owner acknowledged that an increase costs was likely with relation to this line item. However, by agreeing to pay an increase cost for doors it cannot be said Owner agreed to a whole-sale conversion of its fixed price contract to a cost-plus for the entire project. This underscores the impropriety of the trial court's faulty assumption that consenting to some increase is consenting to all increases. While the parties might have foregone the formalities of the change order provisions (i.e., formal written and signed documents) they did not depart from the general intent of the contract to address potential increases *before* they occurred.

does not need to differentiate cost over-runs from changes because the owner bears the risk of both. *See id.* (finding the need to identify cost over-runs was irrelevant for approved work in a cost-plus contract). This is a significant distinction to the fixed price contract, like we have here, in which it is imperative to differentiate between a "change" and a cost-overrun. *Contra* (Stoddard testifying that contract assumes risk of cost over-runs as opposed to changes).

In sum, the trial court erred in finding Owner waived its rights under the contract. However, even if there were a waiver the trial court committed an error of law in finding this waiver supported the imposition of damages on a cost-plus basis rather than on the terms of the plain and unambiguous fixed price contract.

II. The trial court committed an error of law in awarding prejudgment interest on an unliquidated sum.

After finding that Owner was required to pay Contractor its full costs plus 15%, the trial court improperly assessed prejudgment interest on this sum from the date of August 29, 2014. This was an error of law.

This Court has explained that prejudgment interest is permitted only "if the sum is certain or capable of being reduced to certainty based upon a mathematical calculation previously agreed to by the parties." *Vaughn Dev., Inc. v. Westvaco Dev. Corp.*, 372 S.C. 576, 579, 642 S.E.2d 757, 759 (Ct. App. 2007) (*quoting Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 631 S.E.2d 252 (2006)); *Smith-Hunter*, 365 S.C. at 128, 616 S.E.2d at 421.

The trial court's reliance on *Smith-Hunter*, is misguided because this undisputedly involved a "cost plus" price calculation. *Smith-Hunter*, 365 S.C. 125, 616 S.E. 419. Naturally, a "cost plus" contract provides for a mathematical formula of calculating the amount due on a contract. In such a scenario, the measure of recovery is fixed by the contract at the time the claim arose and is "capable of being reduced to a certainty based upon [the] mathematical calculation previously

agreed to by the parties." *Vaughn Dev.*, 372 S.C. at 579, 642 S.E.2d at 759; *see also Smith-Hunter*, 365 S.C. 125, 616 S.E. 419 (finding prejudgment interest proper where the parties agreed to payment based on cost plus a fee). In the absence of an agreement, at the time the claim arose, through which the parties agreed to the means of calculating the amount due, interest is not permitted. *See Southern Welding Works Inc. v. K&S Construction Co.*, 286 S.C. 158, 332 S.E.2d 102 (Ct. App. 1985) (affirming the denial of prejudgment interest in the absence of a stated account or means of calculating a liquidated sum).

Where there is "an intermediate question that had to be decided before the measure of damages could be ascertained" prejudgment interest is not property recoverable. *Vaughn Dev.*, 372 S.C. at 580, 642 S.E.2 at 759. In a fixed price contract, unless the amount claimed is based on the fixed contract amount or through agreed upon change orders, the amount is not subject to pre-judgment interest. *See Butler*, 369 S.C. at 134, 631 S.E.2d at 259 (finding that where the amount claimed was based on the original contract price plus approved change orders the setting for an agreed upon amount, prejudgment interest was permitted). In the absence of an approved change order interest is not permitted because there is no agreed mathematical formula for calculating the amount owed and the court is required to answer an intermediate question of how much, if any, is owed for contract overages. *Accord Vaughn Dev.*, , 372 S.C. 576, 642 S.E.2 757 and *Butler*, 369 S.C. 121, 631 S.E.2d 252.

This is the case here. With no change orders there is a dispute over what costs, if any, were approved changes and what costs, if any, were beyond the scope of the fixed price contract—i.e., cost overruns. Moreover, to the extent that any item was deemed a change there exists yet another intermediate question of how much is owed for such changes. Specifically, the contract provides that in the absence of an agreement on the price of a change the contractor would be entitled to his

cost plus "reasonable" overhead and profit. **(Contract §10.1)**. A "reasonable" amount does not establish a mathematical means of reducing the amount owed to a certainty. Thus, even in the light most favorable to Contractor, prejudgment interest is not permitted. *See Vaughn Dev.*, , 372 S.C. at 580, 642 S.E.2 at 759 (unliquidated amounts or amounts not capable of certainty without resolution of intermediate questions are not properly assessed prejudgment interest).

Further, it is significant that the award of interest must invariably require the amount be capable of certainty *at the time* the dispute arose, and interest is only assessable from the time the amount was properly due. *See id.* (the agreed upon means of measure recovery must be fixed at the time the claim for payment is made) (emphasis added).

Here, the trial court assessed interest from August 29, 2014, the date on which Contractor submitted its "final invoice" for $376,228.00 **(Defs. Exhibit 4)**. This is problematic for a variety of reasons. First, the trial court held the project was substantially complete nearly a month prior to the invoice which reflects a total contract price of $854,606.00—more than $100,00.00 less than the trial court's finding. **(Order p. 21 Sec. 3)**. Thus, it cannot be said that $958,349.00 was due on August 29, 2014, when this amount was not claimed until many years later at trial. The simple fact that the amounts Contractor claimed continued to change over time, after the work was completed, shows the amount cannot a "liquidated sum" capable of certainty based on an agreement existing at the time the demand was made.

Therefore, because the parties did not agree on a means of calculating an amount owed, or how much overhead and profit would be payable in the absence of an approved change order, the grant of prejudgment interest was error and should be reversed.

III. The trial court committed an error of law by finding the subject mechanic's lien was valid and awarding profit and overhead as a lienable amount where the contract did not provide for such profit and overhead above the fixed price contract amount.

Here the trial court found that the damages alleged to be owed by Owner in the amount of costs plus 15% were assessable as part of the mechanic's lien. However, the trial court's finding of a valid mechanic's lien is unsupported by evidence that it was timely perfected, and further, the trial court erred in assessing 15% profit and overhead as part of the mechanic's lien because this amount was not provided for by contract.

a. There is no evidence supporting the trial court's finding that the mechanic's lien was timely.

To be valid, a mechanic's lien must be recorded with the register of deeds and served within ninety days of when the contractor "ceases to labor on or furnish labor or material for such building." S.C. Code §29-5-90. A trial court properly enters directed verdict on a mechanic's lien claims where there the claimant did not perfect or serve the property owner with notice of the lien within the statutory period. *Utilities Constr. Co. v. Wilson*, 321 S.C. 244, 247-48, 468 S.E.2d 1, 2-3 (Ct. App. 1996).

"[Courts] must give the words found in the statute their plain and ordinary meaning without resort to subtle or force construction... and [] must apply their literal meaning." *CFRE, LLC v. Greenville County Assessor* 395 S.C. 67, 74 716 S.E.2d 877, 880 (2011). The plain meaning of "furnish labor and materials" as used in the statute is plain, requiring some measure of physical work, improvement made or actual material supplied. *See* S.C. Code Ann. § 29-5-90 and S.C. Code Ann. § 29-5-120; *see also* S.C. Code Ann. §29-5-10(a) (setting out that "[a]s used in this section labor performed or furnished in the erection alteration or repair of any building or

structure" and then listing a variety of activities all of which required in application of physical labor to manipulate or alter the property from its current state).

Initially, there is no evidence that the mechanic's lien was served within the statutory period. Further, the trial court's finding regarding the last day of work is based on an email dated November 20, 2014, which references a meeting between Owner and Contractor the previous day to review instances of work that needed correction. **(Plaintiff's Exhibit 17, p. 13).** However, there is no evidence of any work performed on this date, nor does Contractor claim any work was performed on this date. With the alleged mechanic's lien being recorded on February 9, 2014, there must be proof of work with ninety days preceding (i.e., on or after November 11, 2014). No such proof exists. South Carolina courts have never held that a simple meeting is sufficient to reset the mechanic's lien time-lines. Rather, the courts have consistently held that some degree of physical labor or actual material be provided to the property. *See Butler,* 369 S.C. at 133, 631 S.E.2d at 258 (in the absence of work being performed, requiring at minimum delivery of goods requested or needed). Therefore, this Court should reverse the trial court's finding that the mechanic's lien was time—and the associated award of attorney fees.

b. The trial court erred in finding that 15% profit and overhead was assessible as a mechanic's lien because it was not provided for by contract.

Even if the mechanic's lien was timely, as set forth more fully above the parties' contract did not provide for the application of 15% profit and overhead on unapproved changes. Therefore, assessment of the same through a mechanic's lien was error.

Profit and overhead "standing by themselves, are non-lienable, but they become lienable when they are **included in a contract price** or are reflected in the reasonable value of labor or materials furnished.'" *Zepsa Constr., Inc. v. Randazzo,* 357 S.C. 32, 37, 591 S.E.2d 29, 31 (Ct. App. 2003) *citing Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.,* 287 S.C. 346, 352,

338 S.E.2d 631, 634 (1985) (emphasis added). "Generally, overhead costs and lost profits are not within the purview of a mechanics' lien statute; but, where overhead costs and profits are provided for in the contract, they become subject to collection on a mechanic's lien." *Id. citing* 56 C.J.S. *Mechanics' Liens* § 196 (2000).

Here, to the extent that overhead and profit were included in the contract price, such amounts were contained only within the fixed price as agreed to by the parties of $747,544. However, the trial court awarded overheard and profits in amounts exceeding the contract price and based on extra-contractual considerations. With no explicit agreement between the parties governing the overhead and profit in the absence of a change order, (*see supra*) the trial court erred in including profit and overhead as lienable amounts. Therefore, this court should reverse the same.

CONCLUSION

For the reasons stated above this Court should reverse the trial court's finding of breach, its award of damages, its award of prejudgment interest, and its finding as to the validity of the validity of the mechanic's lien, or alternatively reverse and remand the matter for a new trial.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

THOMAS J. RODE, SC Bar No. 77480
15 Middle Atlantic Wharf
Charleston, SC 29401
Phone: 843-937-8000
thomas@tktlawyers.com
Attorneys for the Appellants

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Mikell R. Scarborough, Master in Equity

Appellate Case No. 2018-001971

RS Custom Homes, n/k/a RS General Contracting, LLC,.....Respondent

v.

Matthew David DeNapoli, Lindsay Ann DeNapoli, Branch Banking & Trust, N.A., and Mortgage Electronic Registration Systems, Inc.,

Of whom, Matthew David DeNapoli, Lindsay Ann DeNapoli are ..... Appellants

---

PROOF OF SERVICE

I certify that I served the below listed parties by United States Mail, postage paid, and *via* email, a true and correct copy of Appellant's Initial Brief and Designation of Mattter on this date:

Frank M. Cisa, Esq.
Cisa & Dodds, LLP
858 Lowcountry Blvd.
Mt. Pleasant, SC 29464
843-881-6530
frank@cisadodds.com

Ronald G. Tate
Gallivan White and Boyd, PA
PO Box 10589
Greenville, SC 29603
864-271-9580
rtate@gwblawfirm.com

Jeffery A. Ross
Jeff Ross Law, LLC
1100 Queensborough Blvd
Ste. 200
Mt. Pleasant, SC 29464
843-329-4040
jross@jeffrosslaw.com

[signature to follow]

I so certify, this 13th day of May, 2019.

THOMAS J. RODE, SC Bar No. 77480
THURMOND KIRCHNER & TIMBES, P.A.
15 Middle Atlantic Wharf
Charleston, SC 29401
Phone: 843-937-8000
Fax: 843-937-4200
thomas@tktlawyers.com

Attorneys for the Appellants

THURMOND KIRCHNER & TIMBES, P.A.
ATTORNEYS AT LAW

15 Middle Atlantic Wharf
Charleston, SC 29401
o: 843.937.8000
f: 843.937.4200
www.TKTLawyers.com

May 13, 2019

VIA US MAIL & FAX
The Hon. Jenny A. Kitchings
S.C. Court of Appeals
PO Box 11629
Columbia, SC 29211
803-734-1839

Re: RS Custom Homes v. DeNapoli et. al.
Appellate Case No. 2018-001971

Dear Mrs. Kitchings,

Pursuant to Rules 208 and 209, SCACR, please find enclosed for filing a copy of the following:

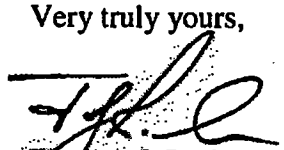
1. Appellants' Initial Brief
2. Appellants' Designation of Matter

By copy of this letter I am serving all counsel record with the same.

Should you have any questions or concerns, please do not hesitate to contact me.

With best regards, I remain

Very truly yours,



Thomas J. Rode
thomas@tktlawyers.com

TJR/ceb

Cc: All counsel of record

Fax

Date: 5/13/2019

To: 8037341839
From: +18439374200

Subject: Attn Jenny Kitchings

Caroline Boyce
Paralegal
Thurmond Kirchner & Timbes, P.A.
?
P: (843) 937-8000 | F: (843) 937-4200
E: carolineb@tktlawyers.com | W: www.TKTLawyers.com
A: 15 Middle Atlantic Wharf, Charleston, SC
29401