STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT
MARSH WATERPROOFING, INC., Plaintiff, vs. STEEPLE DORCHESTER, LTD. AND HAMILTON MANAGEMENT SERVICES COMPANY, INC. Defendants.	CIVIL ACTION NO. 2018CP1000262 DEFENDANTS' NOTICE OF MOTION AND MOTION TO AMEND JUDGMENT OR FOR A NEW TRIAL IN THE ALTERNATIVE (RULE 59)

PLEASE TAKE NOTICE that Defendants STEEPLE DORCHESTER LTD. AND HAMILTON MANAGEMENT SERVICES COMPANY, INC. ("Defendants"), by and through the undersigned counsel, and pursuant to Rules 59(a) and (e), SCRCP, move this court for an order to alter or amend its judgment of February 12th, 2020 to find for the Defendants. Specifically, the Defendants ask that the Court direct the entry of a new judgment pursuant to SCRCP 59(a)(2). In the alternative, the Defendants would move for a new trial based on the grounds and arguments below.

In addition to requesting that the Court's judgment be amended in favor of the Defendants, the moving Defendants also seek for Steeple Dorchester, Ltd. be deemed the "prevailing party" and awarded reasonable attorney's fees and costs pursuant to the South Carolina mechanic's lien statutes as it is rightly the "prevailing party" pursuant to S.C. Code Ann. § 29-5-20(A).

As a third alternative and pursuant to Rule 52, the Defendants seek further clarification as to the Court's ruling dated February 12th, 2020. This motion is timely, pursuant to Rule 6, SCRCP as the tenth day falls on a Saturday and, therefore, runs until Monday, February 24th, 2020.

PROCEDURAL HISTORY

This lawsuit stems from work performed by the Plaintiff at the Church's Chicken located on Dorchester Road in Charleston County, South Carolina. ("The Project") Plaintiff Marsh Waterproofing, Inc. is a Texas contractor who performed work in South Carolina at several Church's Chicken locations during August 2017.

On January 22nd, 2018, the Plaintiffs initiated this action against ARCAFEUSA, the title owner of the property where Steeple Dorchester operated a Church's Chicken franchise.[1] On March 12th, 2018, the Plaintiff amended its Complaint. In its amended complaint, the Plaintiff removed the record property owner and added Defendant Steeple Dorchester, Ltd. as a Defendant more than six months after the Plaintiff's work was performed. *See Amended Summons and Complaint*

On February 5th, 2020, a bench trial was conducted by the Honorable Frank Addy in Charleston, South Carolina. After the Plaintiff called two witnesses, the Defendants moved for a directed verdict which was denied. At the close of arguments, Judge Addy indicated that he would provide a ruling in a few days. On February 12th, 2020, the Court ruled in favor of the Plaintiff in the amount of $36,800.00 holding specifically, as follows:

> **"The Court finds the mechanics lien dated November 16, 2018 in the amount of $36,800.00 is valid and duly enforceable."**

There was no ruling as to the Plaintiff's causes of action for breach of contract or quantum meruit. Furthermore, the Order does not set forth any findings of fact and instructs the Plaintiffs to submit a more formal Order within 30 days of receipt. The Defendants are not able to determine whether or not a more formal order will be submitted. Nevertheless, the Defendants hereby seek a new trial or, in the alternative, an amendment of the Court's February 12th Order. In addition, the Defendants seek clarification pursuant to Rule 52(a), which provides "on the n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." *See Rule 52(a) SCRCP.*

South Carolina Case Law and Statutory Scheme on Unlicensed Contractors

The Defendants respectfully request that this Court alter and amend its judgment pursuant to SCRCP 59(a) as the trial court failed to consider S.C. Code Ann. 40-11-370, which acts as a door closing statute for unlicensed contractors seeking to enforce contractual obligations in South Carolina courts. The Defendants will focus the majority of their efforts on the controlling statute and case law following the statute. According to S.C. Code Ann. 40-11-370, "an entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract." *S.C. Code 40-11-370(c)* This statute should have barred not only the mechanic's lien claim, but all claims due to its plain meaning.

Pursuant to South Carolina law, contractors must be properly licensed to perform construction work. Specifically, S.C. Code §40-11-30 states:

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[1] ARCAFE was inexplicably dismissed as a party before appearing, despite the fact was, at all times relevant, the record title holder to the property.

> *No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total costs of construction is greater than $5,000 for general contracting or greater than $5,000 for mechanical contracting without a license issued in accordance with this chapter.*

S.C. Code Ann. §40-11-370(c) and S.C. Code Ann. §40-11-30 operate in tandem to bar lawsuits by unlicensed contractors in South Carolina. The statutes are all well-settled and, when raised as an affirmative defense, our courts have consistently barred unlicensed contractors from prevailing in lawsuits.

In a 2013 decision by the South Carolina Supreme Court, S.C. Code Ann. §40-11-370(c) was found to be "clear, defined, explicit, and unquestionably applicable" to bar the claims of an improperly licensed contractor who prevailed in an arbitration proceeding prior to having that decision overturned. *C-Sculptures, LLC v. Brown, 403 S.C. 53, 56-57, 742 S.E.2d 359, 361 (2013)*

The court in *C-Sculptures* provides a thorough analysis of S.C. Code Ann. §40-11-30 and S.C. Code Ann. §40-11-370(c) and, in doing so, deemed the latter to be subject to strict construction and outside the discretion of an arbitrator. The court held, "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning." *C-Sculptures, LLC v. Brown, 403 S.C. 53, 56-57, 742 S.E.2d 359, 361 (2013)* The C-Sculptures opinion is the key to Defendants' Rule 59 arguments because there is no way it can be reconciled with the Court's findings in this case.

C-Sculptures was cited on directed verdict. If anything, the facts in the case at bar are even less hazy than the issues presented by C-Sculptures, which held that an arbitrator's decision to deny a property owner's motion to dismiss claims brought by an *improperly* licensed contractor, pursuant to 40-11-370, constituted "manifest disregard" of a "well-defined, explicit, and clearly applicable" legal maxim. The Defendants would respectfully ask that the Court reconsider and amend its previous Order in favor of the Plaintiff and find for the Defendants based on the record and arguments.

The Defendants are of the opinion that the Court placed far too much weight on statements and arguments made in the record by counsel for the Plaintiff regarding the nature and scope of work performed by the Plaintiff. In closing arguments, Defendants sought to confuse the Court with an alternate interpretation of the phrase "general contracting" as it is used in S.C. Code Ann. §40-11-30. The statute holds as follows:

> "No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for ***general contracting*** or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter." S.C. Code Ann. § 40-11-30 (Emphasis Added)

The Plaintiff's argument(s) were well articulated, albeit wrong. The Defendants are of the belief that Plaintiff's improper and unfounded arguments only served to confuse the Court and "muddy the waters." Specifically, the Plaintiff argued that it was not subject to the door closing effect of S.C. Code Ann. § 40-11-370(c) because it was not the *general contractor* on the job. As Defendants argued in rebuttal, the phrase *"general contracting"* must be read in context of the Chapter regulating contractors in the South Carolina Code. Specifically, the Code defines "General contractor" as "an entity which performs or supervises or offers to perform or supervise general construction." *S.C. Code Ann. § 40-11-20(8)* The key language in the provision is "performs or supervises" which clearly and unequivocally provides that a contractor need not be a supervising prime, or general contractor to be included in the definition of "general contractor" pursuant to the prevailing Code provisions. In addition, "General construction" means the installation, replacement, or repair of a building, structure, highway, sewer, grading, asphalt or concrete paving, or improvement of any kind to real property. *S.C. Code Ann. § 40-11-20(9)* Therefore, an entity is required to be licensed so long as it is performing general construction at a cost of more than $5,000.00 to be subject to the licensing requirement.

The Defendants understand that is quite easy to get lost in the minutia of S.C. 40-11-10 et seq. The Contractors Licensing Board clearly understood the requirements of its own commission, however, when it found that Marsh was in violation:

> **As such, the hearing officer determined that the scope of work for the use of this foam underneath the crawlspace of the project(s) was structural in nature and required a general contractor's license pursuant to S.C. Code Ann §§ 40-11-20(8) and 40-11-410(1) (1976, as amended) See the third conclusion of law in the Order issued by the Contractor's Licensing Board.**

Finally, the Contractors Licensing Board could not have concluded its opinion any clearer than in its final paragraph where its ruling should be all that is required to bar Marsh's claims in this matter:

> **"The Respondent is cautioned that the scope of the work on the project(s) does require a general contracting license in South Carolina if the Respondent is not supervised by a licensee in the required license group and classification."**

The Order has served to clarify and contradict every one of the Plaintiff's arguments and, despite the muddy water, this Court should have applied the law as it is written, not as interpreted by the Plaintiff. For these reasons, the Defendants would respectfully request that judgment be amended in its favor. Alternatively, the Defendants would ask for a new trial.

Should the court fail to find that the Defendants are entitled to an amendment of its original judgment and, further, hold that the Defendants are not entitled to a new trial, the Defendants seek clarification as to the Court's holding that the mechanics lien was "valid and enforceable." The Defendants note that Rule 52(a) is applicable to non-jury matters and instructs the trial court to find the

facts specially and state separately its conclusions of law thereon in support of a judgment. Rule 52(b) allows a court to also amend its findings or make additional findings and may amend the judgment accordingly.

The Judgment's Validation of the Mechanic's Lien was Improper

The Court's judgment in this case declares that the Plaintiff's mechanics lien was "valid and enforceable." *See Order.* This holding goes against the weight of established and well-developed South Carolina statutory and case law as has been discussed throughout this memorandum.

In order for the Court to find that the mechanics lien was valid and enforceable, the Court would have to find that either: (a) Marsh Waterproofing possessed a valid general contractor's license in the State of South Carolina; (b) a license was not required; or (c) that Marsh Waterproofing was working under the supervision of a licensed contractor. Both (a) and (c) are immediately ruled out via Tim Marsh's trial testimony. Thus, the holding can only be based on the Court's implied holding that a license was not required.

The Court Failed to Consider Evidence in the Contractor's Licensing Board Order

It is clear that the Court did not place any weight on the South Carolina LLR Contractor's Licensing Board Opinion[2] which held, in pertinent part, as follows:

> a. "The hearing officer determined that the scope of work for the use of this foam underneath the crawlspace of the project(s) was structural in nature and required a general contractor's license pursuant to S.C. Code Ann §§ 40-11-20(8) and 40-11-410(1) (1976, as amended)." See LLR Order, Page 5.
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> b. "The hearing officer finds that Respondent violated S.C. Code Ann.§ 40-11-110(A)(5) in that Respondent engaged in contracting work in South Carolina when not properly licensed or supervised by a licensee licensed in the required license group and classification." See LLR Order, Page 5.

The LLR's Contractor's Licensing Board is the established agency charged with the regulation of licensing within the industry. As the Order found that the scope of work fell within that which a license was required and further found that the Plaintiff violated South Carolina law by engaging in contracting work in South Carolina while not being properly licensed, a new trial or amendment of the Order is paramount to the furtherance of justice.

In considering the LLR Order, the court should have considered the great weight previous courts have afforded agency administrative orders. "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Dunton v. S.C. Bd. of Exam'rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987); see also Nucor Steel v. Pub. Serv. Comm'n of S.C., 310 S.C. 539, 543, 426 S.E.2d 319, 321

[2] The Order is attached as Exhibit B.

(1992) ("Where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason."). There is no cogent reason to ignore or overrule a decision made by the Contractors Licensing Board in this case. The Board Order represents legal and factual findings in an ex parte regulatory proceeding in which the Defendants were not able to testify or present evidence.

The Court was Prejudiced by Plaintiff's Presentation of SEC Materials

The Defendants have included a final exhibit, which is an affidavit prepared by Alexander C. Burns, principal of Hamilton Management. The full weight of Burns' testimony should be considered in light of the court's consideration of irrelevant, yet untrue assertions made by the Plaintiff. Specifically, the Plaintiff repeatedly contended that Burns and the Defendants were aware of Marsh's status as an unlicensed contractor. S.C. Code Ann. 40-11-370 does not allow for exceptions, whether they be invented or actual, and the presentation of Burns testimony should not be necessary in light of the Plaintiff's status as an unlicensed contractor. Regardless, Burns' testimony should be considered by the Court to the extent the Court's judgment of the Defendants was hampered by Plaintiff's shameless presentation of the inflammatory materials.

WHEREFORE, the Defendants seek consideration of this memorandum and exhibits and amend its judgment accordingly to find in favor of the Defendants. Alternatively, this Court should grant a new trial absolute to the Plaintiffs.

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