THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Circuit Case No. 2018-CP-10-00262

Appellate Case 2020-000921

MARSH WATERPROOFING, INC.

Respondent,

v.

STEEPLE DORCHESTER, LTD. and
HAMILTON MANAGEMENT SERVICES COMPANY, INC.

Appellants.

FINAL BRIEF OF APPELLANTS STEEPLE DORCHESTER, LTD. and HAMILTON MANAGEMENT SERVICES COMPANY, INC.

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I. STATEMENT OF THE CASE

This matter is before the Court on appeal from a bench trial and subsequent Order of the Court of Common Pleas, Charleston County dated March 11, 2020 entered by the Honorable Frank R. Addy, Jr. **(R. pp. 13–26)**. On May 11, 2020, Judge Addy entered an Order denying Appellants Rule 59 Motion to Alter or Amend Judgment of the March 11, 2020 Final Order. **(R. pp. 27-32)**.

A. The Parties

Appellant Steeple Dorchester Ltd. ("Dorchester") was an entity which operated a Church's Chicken franchise located on Dorchester Road in North Charleston, South Carolina. Appellant Hamilton Management Services Company ("Hamilton") provided payroll expertise and other professional services to Dorchester.

Respondent Marsh Waterproofing, Inc. ("Marsh") hails from Vidor, Texas. Marsh was hired to provide structural renovation services at the Church's location situated at 4353 Dorchester Road in North Charleston, South Carolina. ("Project" or "Subject Property").

B. The Underlying Facts

On August 1st, 2016, the hollow, unsupported crawl space at a Church's Chicken in Livingston, Texas collapsed under the weight of heavy kitchen equipment resulting in catastrophic injuries to three Church's employees. (Polk County Today *Floor Collapse at Restaurant, 3 Critically Burned* August 1st, 2016). The Livingston tragedy prompted Church's to commission engineering firm Davis Patrikios Criswell, Inc. ("DPC") to inspect and evaluate the ground floor structural systems at various restaurant locations including the Subject Property.

Following the inspections, DPC recommended 'immediate structural support be provided for all structural members in the crawlspace.' **(R. p. 101, lines 9-11); (R. p. 532, lines 4-6)**. The

engineer recommended that Alchemy Polymers AP Lift 430—a 'high density expanding closed cell structural foam system'—be installed in the crawlspace. **(R. p. 104, lines 15-17); (R. p. 161, lines 15-27)**. AP Lift 430 is a two-component, structural polyurethane foam.[1] **(R. p. 532, lines 8-9)**. Marsh sent a proposal to "Church's Chicken, State Acquisition, LLC, Attn: Alexander Burns" on July 10, 2017. Alexander Burns accepted the proposal on July 21, 2017. (**R. pp. 544-545)**.

The Respondent failed to pull a building permit at the Project. **(R. p. 104, lines 36-38); (R. p. 161 lines 36-38); (R. p. 398, line 25-p. 399, line 2).** Therefore, local building officials have never inspected the renovation work completed by Marsh.

C. The Contractor's Licensing Board Proceeding.

On or about April 5, 2018, Marsh was issued a citation by the South Carolina Contractors' Licensing Board and shortly thereafter a Cease and Desist Order. **(R. p. 100, line 26-p. 101, line 2); (R. p. 157 line 26-p. 158, line 2).** Marsh appealed both citations to the Contractor's Licensing Board. In the Matter of Marsh Waterproofing Inc, Case No. 2017-354 ("Contractors Licensing Board Action"). **Id.** On June 21, 2019, a final order hearing was held before Daniel Lehman, a hearing officer appointed by the South Carolina Contractor's Licensing Board, as a result of the Marsh's Notice of Citation Appeals. The Appellant was not a party to these proceedings. On July 23, 2019, the South Carolina Contractor's Licensing Board provided

[1] The engineering report, dated June 12, 2017, which was prepared by Davis Patrikios Criswell, Inc. (**R. pp. 526-541**), actually further establishes the structural nature of Marsh's work as one of the reasons for insertion of the foam. "The observed structural condition indicates that failure of the floor system is imminent." **(R. p. 531, lines 24-25)**. It goes on to state that "any additional localized failure of the floor system could result in catastrophic collapse of the entire structure." **(R. p. 531, lines 25-26).** Several recommendations are made to achieve "sound structural foam installation results." **(R. p. 532, lines 15-16).**

a written Final Order in the matter ("LLR Order").[2] **(R. pp. 100-106, line 26-p. 101, line 2); (R. pp. 157-162).**

The Order concluded that Marsh's scope of work 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) violated S.C. Code Ann. § 40-l l-l l0(A)(5). **(R. p. 104, lines 13-20); (R. p. 161, lines 13-20)**. Furthermore, the Contractor's Licensing Board held that Marsh engaged in contracting work in South Carolina when not properly licensed.[3] **Id**. The Order determined that Marsh violated S.C. Code Ann. § 40-11-110(A)(5) by performing structural repairs without possessing a license. **(R. p. 104, lines 36-38); (R. p. 161, lines 36-38).**

By Respondent's own admission, it was not licensed in the State of South Carolina to perform any general or mechanical contracting work. **(R. p. 101, lines 2-4); (R. p. 399, lines 3-5).** Although the Contractor's Licensing Board elected not to impose punishment or monetary sanction for Marsh's violations, the hearing officer found that "Marsh violated S.C. Code Ann. §40-11-110(A)(5) in that [Marsh] engaged in contracting work in South Carolina when not properly licensed or supervised by a licensee licensed in the required license group and classification." **(R. p. 104, lines 36-38); (R. p. 161, lines 36-38).**

The Contractor's Licensing Board reasoned that the work performed 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). **(R. p. 104, lines 13-20); (R. p. 161, lines 13-20)**.

[2] The Court of Common Pleas took judicial notice of the LLR Order. **(R. p. 420, lines 15-17)**

[3] The Contractor's Licensing Board also referenced an exception which would allow an unlicensed contractor to perform work when supervised by a party licensed within the scope of work performed. The Order concluded that this exception was valid, but inapplicable as it found that Marsh was not supervised by a licensed contractor at the Project. **(R. p. 104, lines 36-38); (R. p. 161, lines 36-38).**

Although Tim Marsh testified in the proceeding that he believed he had permission from the LLR to perform the work in question due to an email communication to Roger Lowe from Marsh legal counsel Mr. Bill Richey, the Contractor's Licensing Board determined that the information provided to Lowe failed to mention that Marsh's scope of work "was being used to provide immediate structural support to prevent the floor from imminent failure" and had Lowe been made aware of this he "would have advised that a general contractor's license was required." **(R. p. 102, lines 29-34); (R. p. 159, lines 29-34)**. The Findings of Fact also note that Marsh only sought Lowe's advice "after the work was performed…." **Id.**

The LLR Order cites the State's position that the "AP Lift 430 (foam) was being used to provide immediate structural support to prevent the floor system from imminent failure." **(R. p. 159, lines 24-27); (R. p. 102, lines 24-27).**

The LLR Order notes that Marsh's information provided to Mr. Lowe failed to state that the AP Lift was being used to provide immediate structural support to prevent the floor system from immediate failure. **(R. p. 102, lines 29-34); (R. p. 159, lines 29-34)**. Thus, the conclusion was that the project was structural and required a general contractor's license. Id. **(R. p. 104, lines 17-20); (R. p. 161, lines 17-20).**

The LLR Order also states in the Conclusion of Law at page 5 paragraph 3, among other things:

> Based on a review of the evidence presented, the hearing officer determined that the Engineer's report recommended the Alchemy Polymers AP Lift 430 product used by the Respondent (Marsh) provided full continuous support to the structural members in the crawlspace of the project(s). The Engineer described the high density expanding closed cell structural foam system as providing the compressive strength to adequately support the superstructure. 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).

(R. p. 104, lines 13-20); (R. p. 161, lines 13-20).

D. The Action

Plaintiff filed an amended complaint for foreclosure of mechanic's lien on March 12, 2018 against Hamilton and Steeple. **(R. pp. 50-62).** It alleged three causes of action: (1) for breach of contract, (2) mechanic's lien and, (3) for *quantum meruit*. **(R. pp. 50-56).** On February 28, 2019, Defendants filed an answer, affirmative defenses and counterclaim generally denying the allegations of the complaint. **(R. pp. 63-67).** Many of the affirmative defenses are related to the issue of Marsh's failure to be licensed and the lack of ability to bring a lawsuit to seek payment. The counterclaim is for tortious interference with contract as to Steeple.[4] **(R. p. 66).**

A bench trial was held on February 5, 2020. Plaintiff called two witnesses, Tim Marsh, the owner of Marsh Waterproofing and Avant Armentrout, an employee. The Defendants presented no witnesses and moved for a directed verdict after the Plaintiff's case concluded. The trial centered on certain work performed by Marsh and whether Marsh had a contractual arrangement with either of the defendants and whether Marsh was required to have a license in South Carolina to perform the work it did, and, if so, whether the failure to have that license is grounds to find for Defendants or otherwise dismiss Plaintiff's claims.

At the trial it was established, without dispute, that Marsh held no licenses in South Carolina. **(R. p. 397, line 24-p. 399, line 8)**. There was also no evidence presented at trial of any contract signed by or on behalf of either defendant for any work performed by Plaintiff, but rather only an agreement entered into between Marsh Waterproofing and State Acquisitions. **(R. pp. 545-546).**

[4] The counterclaim was voluntarily dismissed and, therefore, not part of this appeal.

The Appellants were not able to provide evidence as to the fitness of Marsh's work due to the fact that Marsh failed to pull a permit which resulted in the Subject Property never being inspected. Additionally, the filing of the mechanics lien by Marsh resulted in a termination of the lease on the Subject property. The Appellants have, therefore, never had the ability to inspect the work on their own accord.

On February 12, 2020, a Judgment in a Civil Case was entered by the Court in favor of Plaintiff finding the mechanic's lien in the amount of $36,800.00 valid and directing the parties to try to agree on the amount of attorney's fees to be awarded Plaintiff. **(R. pp. 1-2)**

On March 9, 2020, the Charleston County Court of Common Pleas issued a Final Order for Foreclosure of Mechanic's Lien, Non-Jury Decision. **(R. pp. 3-12).** The Court then amended its March 9th 2020 Order on March 11th 2020. **(R. pp. 13-26).** The Court made Findings of Fact and Conclusions of Law and found, among other things, that correspondence between Hamilton and Marsh indicated that Alexander Burns, who signed an authorization for the work to be performed, was acting for Hamilton and Hamilton authorized the improvements to be made by Marsh and agreed to Plaintiff's proposal forming a valid agreement, **(R. p. 14, lines 16-22)**, that Defendants relied on the lack of licensure of Marsh for their defense **(R. p. 15, lines 10-12)**, that due to the nature of the work, Marsh was not required to be licensed **(R. p. 15, line 1-p. 16, line 15)**, and that Defendants did not rely on Marsh being licensed. **(R. p. 17, line 14-p. 18, line 16**).

On March 23 2020, Defendants moved pursuant to SCRCP 59(a) and (e) for an order to alter or amend its judgment of March 11, 2020 to find for the Defendants, to direct entry of a new judgment pursuant to SCRCP 59(e)(2) and in the alternative to grant a new trial.[5] **(R. pp.**

[5] Defendants had previously moved on February 24, 2020 for similar relief based on the trial court's Order, but that motion was never decided and was in effect superseded by the March 22, 2020 motion which sought to alter and amend the Amended Order.

126-345). The basis of that motion was that there was no contract between the Plaintiff and any defendant, that there was no authority to award attorney's fees against Hamilton, that the Final Order contradicts the testimony of the Defendants' witness, that Marsh was not entitled to bring a lawsuit because it was unlicensed in South Carolina, that the testimony of Tim Marsh was inconsistent, that the order misstates Mr. Burns' testimony, that judgment on the mechanics lien is not a justiciable matter, and that the court was prejudiced by improper presentation of extrinsic information regarding a critical witness for Defendants. **(R. pp. 126-141)**.

On April 28, 2020, oral argument was held on the record regarding Defendants' Rule 59 motion as well as the awarding of attorney's fees and expenses. **(R. pp. 475-519).** On May 11, 2020, the Court entered Supplemental Order to Amend Final Order of Foreclosure of Mechanics Lien, Non-Jury Decision ("Supplemental Order"), Filed March 11, 2020. **(R. pp. 27-32)**. In it the Court "conclude[d] that [its] [ ] rulings at the time of the trial of the case and those necessarily contained in the entry of Judgment were sound and are hereby reaffirmed." **(R. p. 27, lines 10-12)**. In the same order the Court granted attorney's fees and paralegal fees in favor of Plaintiff and against the Defendants in the amount of $28,852.00 and costs of $1,042.00 for a total of $29,894.00. **(R. p. 29, lines 18-20)**.

A Notice of Appeal with exhibits was filed on June 10, 2020, which appeals the Final Order of Honorable Frank R. Addy. Jr. dated March 11, 2020 and Supplemental Order dated May 11, 2020. **(R. p. 344-345)**

II. STANDARD OF REVIEW

"In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." Brown v. Dick Smith Nissan, Inc, 414 S.C. 101, 105, 777 S.E.2d 208 (2015), quoting, Temple v. Tec-Fab, Inc., 381 S.C. 597, 599-600, 675 S.E.2d

414, 415 (2009). "The Court will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings." Id.

III. ARGUMENT

A. THE COURT OF COMMON PLEAS ERRED BY ENTERING A MONEY JUDGMENT IN FAVOR OF AN UNLICENSED CONTRACTOR IN VIOLATION OF S.C. CODE §§40-11-370 AND 40-11-30.

"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 ... without a license issued in accordance with this chapter". C-Sculptures, LLC v. Brown, 403 S.C. 53, 57, 742 S.E.2d 359, 361 (2013), citing S.C. Code Ann. § 40-11-30 (Supp.2012). "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." Id., quoting, S.C. Code Ann. § 40-11-370. It is the responsibility of the contractor to determine whether a license was required to perform the work involved. The record is clear and uncontested that when Marsh contracted to do the work it did, it was unlicensed. Timothy Marsh, president of Marsh, testified that he was unlicensed in South Carolina. **(R. p. 398, line 25-p. 399, line 8)**. That on its face should have been the end of the case and grounds to grant a motion for a directed verdict.

1. The Court of Common Pleas Erred by Failing to Consider the Determination of the South Carolina LLR Contractor's Licensing Board Which Found That the Plaintiff Was Acting as an Unlicensed General Contractor in Violation of the Law.

The Contractor's Licensing Board is the established agency charged with the regulation of licensing within the industry. The Court of Common Pleas improperly disregarded the fact that the South Carolina LLR Contractor's Licensing Board was the agency that had the authority

to regulate licensing issues and that it had, prior to the trial, determined that Marsh was required to have a license. Yet, despite that finding, and the overwhelming facts in this case, it stated:

> LLR doesn't have the capacity or jurisdiction to rule in this Court whether failure to have a license bars pursuing a mechanic's lien. They simply don't have that authority to make that kind of decision. That's something only for me. And that's something that we can, of course, argue about.
>
> **(R. p. 422, lines 3-9)**.[6]

The Appellants would certainly concede that the LLR does not have the power to bind the Court of Common Pleas. The Appellants do, however, think that the LLR Order should have been considered by the Court. The Court of Common Pleas erred in dismissing, or failing to consider, the LLR's finding that Marsh was required to be licensed to do the job. "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(1992) ("Where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason."). Thus, the appellants would argue that the trial court failed to provide any consideration of the LLR Order, much less "the most respectful consideration."

Thus, without citing a cogent or compelling reason, the Court of Common Pleas should not have ruled contrary to the LLR as to the issue of licensing. Because the LLR Order made a valid determination about the licensing requirements, the Court was then obligated to either follow that Order or provide a compelling reason for not following the LLR Order.

[6] Even without the holding of the LLR, the only way that the Court could have found Marsh to have a valid mechanic's lien would have been if either (a) Marsh possessed a valid general contactor's license in South Carolina; (b) that a license was not required; or (c) that Marsh was working under the supervision of a licensed contractor. None of those conditions were presented at trial.

As an unlicensed contractor, Marsh had no right to bring an action for payment and the Court of Common Pleas should have dismissed the action. It was, therefore, an error of law to award a money judgment to Marsh.

2. Regardless of the Ruling of the LLR, It Was Error for the Court of Common Pleas to Find that Marsh did not Need to be Licensed for the Contracted Job.

Regardless of the LLR Order, the Court of Common Pleas should have been aware that Marsh was required to be licensed when undertaking work which was structural in nature and initiated pursuant to an internal Church's Chicken public safety initiative.

The LLR Order provided compelling reasons why Marsh was required to be licensed. As set forth above, the LLR Order indicated there was an initial and informal email to Marsh from an LLR employee which opined that a license was not required. **(R. p. 572-573).** This informal opinion was certainly based on the information provided by Marsh and his personal attorney. It appears that the email to Mr. Lowe seeking permission to proceed did not include the Engineer's Report. **Id.** The email was also filled with self-serving statements and material omissions including a suggestion that the work had yet to be performed. **Id.** Mr. Lowe was not made aware that the application of the foam was to "prevent the floor system from imminent failure." **(R. p. 102, lines 29-34); (R. p. 571-572).** The LLR Order also clarified that after the Engineer's Report was made available to the Board that it understood the important structural nature of the foam application. **(R. p. 104, lines 13-20).** Thus, Marsh was not being forthcoming to the Board as it withheld information that would have a determinative impact on the issue of licensing requirements.

A review of Tim Marsh's testimony only supports the Contractor's Licensing Board's findings and conclusions. Tim Marsh implicitly acknowledged that the job was structural when he admitted to being aware of the Livingston, Texas tragedy. **(R. p. 402, line 25-p. 403, line 4)**.

Despite that, Tim Marsh, who clearly had much experience in injecting foam in the basements of Church's Chicken locations and no doubt other businesses, incredibly tried to evade admitting the structural nature of his company's work. Being aware of the LLR order, the engineering report and the tragedy in Texas, he clearly understood that if his work was structural it could very well lead to a determination by the Court that a license was necessary and that his lawsuit would be jeopardized. Yet he persisted in presenting a picture of someone hired to do a job but having no idea why he was doing it.

Q. No. What I'm getting at is, the work you performed was structural in nature?

A. We filled the void with foam. It was in the report.

(R. p. 407, lines 11-14).

Q. What is the purpose of -- I guess what I'm getting at is this, if it's not aesthetic, what is the purpose if it's not structural?

A. Because the engineer gave a report. The owner, that's what they wanted.

Q. In the report it states it's a life-safety issue and that's why they specified the foam to be installed by you?

A. It didn't have to be by me. It could have been by anyone.

Q. Well, but it was installed. But what you're saying is that you had nothing to do with the structural integrity of the building?

A. I sprayed foam under the building, what we were hired to do. I had no structural opinion, no nothing.

Q. Let me make this a little bit easier. What benefit does the foam provide. Is it -- are people stuffing gifts with it?

A. Somewhere the engineer had to come up with what it was going to provide. I mean, that's all I know.

Q. And so you didn't even talk to the engineer about why you were doing what you were doing?

A. He just gave a report to the owners and the owners gave it to me with prices.

(R. p. 408, lines 3-25-p. 409, lines 1-5).

It is beyond credibility for Tim Marsh, who testified to having much experience injecting foam, and being aware of the tragedy in Texas, not to understand that the purpose of the job was structural and for the Court of Common Pleas not to have understood that the purpose of the job was structural. That was the precise reason the LLR Order ruled that a license was necessary. Tim Marsh testified that he understood that he would be addressing a "life-safety" issue. **(R. p. 375, lines 17-21); (R. p. 389, lines 14-21).** Tim Marsh's statements that he was just asked to insert foam and had no idea why fail to pass even the least stringent tests for credibility. He understood that if the record did not support the fact that his work was structural in nature that he could be excused from being licensed. The DPC Report clearly stated the structural purpose of the foam installation and Marsh acknowledged the contents of the report. Moreover, he had received a copy of the engineer's report that explained the structural significance. **(R. p. 367, lines 8-11); (R. p. 367, lines 16-24); (R. p. 371, lines 20-24).**

Yet, despite his experience, and despite getting the Engineering Report not only for the location at issue, but for other nearly identical restaurants, he is unable to acknowledge that the work he performed was to provide a structural benefit. When asked whether the purpose of the foam is structural integrity, he answers, "And it could be. But I'm not the engineer that designed it. And I put the foam, what they said to install." **(R. p. 410, lines 17-23).**

The Board was able to determine from reviewing the DPC report that the work performed by Marsh fit the definition of "general construction." **(R. p. 104, lines 17-20); (R. p. 161, lines 17-20).** The Court of Common Pleas depended on two general points to conclude that a license was not required. First, it found that Marsh was not the general contractor because it did not perform all the work on the project and that the various trades involved were being performed by

others. **(R. p. 6-7)**. The Court then reasoned that, if Marsh was not a general contractor, it must have been a subcontractor and, thus, exempt from licensing requirements. **(R. p. 6, line 16-p. 7, line 13)**. But there was no evidence at trial adduced that Marsh was working subordinate to a general contractor or took orders from any other contractor. In fact, Marsh testified that he was unable to name the identity of a general contractor at the job, and the mythical general contractor was never seen (by him or his workers) on the job. **(R. p. 411, line 12-p. 412, line 2)**.

Tim Marsh also conceded that his company was not scheduled by a general contractor, contracted by a general contractor, and did not seek payment from a general contractor. **(R. 383, line 14-21).** Marsh was not working under the supervision of a properly licensed general contractor. **(R. p. 411, line 12-p. 412, line 2)**.

In the definition section S.C. Code Ann. § 40-11-10 et seq., it provides that "'Contractor' means a general . . . contractor regulated under this chapter." S.C. Code Ann. § 40-11-20(4). "General contractor," in turn, "means an entity which performs or supervises or offers to perform or supervise general construction." Id. § 40-11-20(9). "'General construction' means the installation, replacement, or repair of a building [or] structure, … or improvement of any kind to real property." Id. § 40-11-20(8).

Common Pleas relied in great part on Teseniar v. Prof'l Plastering & Stucco, Inc. 407 S.C. 83, 754 S.E. 2d 267 (Ct. App. 2014), for limiting the application of the bar to a lawsuit if the contractor is not licensed. A close look at Teseniar shows that an unlicensed contractor was working as a subcontractor under the supervision of a general contractor who was licensed and who had full responsibility. The subcontractor was able to work under the general contractor's license.

As the Court of Appeals stated, "Professional claims it did not need a license pursuant to section 40-11-270(C), which states:

> Licensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee's license group and license classification or subclassification; provided, the licensee provides supervision. The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee.

Id. 407 S.C. at 97, 754 S.E. 2d at 274.

It makes sense that the rule did not require a license in Teseniar, because there was the general contractor to supervise and under whose licensed the subcontractor plaintiff worked. In contrast, here there is no evidence that Marsh was a subcontractor working under any general contractor who would have responsibility for its work and under whose license it was operating. It was neither working under its own license nor that of a general contractor.

Pursuant to South Carolina statute, Marsh is a "general contractor" falling within the restrictions of 40-11-30 which maintain that such an entity cannot perform work in excess of $5,000.00 without holding a license.

> 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. 40-11-30 ***(Emphasis added)***

Marsh was "an entity which performs or supervises or offers to perform or supervise general construction." Id. § 40-11-20(9). "'General construction' means the installation, replacement, or repair of a building [or] structure, … or improvement of any kind to real property." Id. § 40-11-20(8). Therefore, Marsh participated in "general contracting" under the terms of this state's laws regulating the contracting industry.

The Court erred in rejecting the holding of C-Sculptures, LLC v. Brown, 403 S.C. 53, 742 S.E.2d 359 (2013), which had been cited by Defendants for the proposition that a court may not entertain an action in law or equity for a contractor to recover, with few exceptions, if the contractor does not hold a valid license in South Carolina. The Court found C-Sculptures to be distinguishable to the facts in the instant case because it "arises from a construction contract by which 'a general contractor agreed to build a home …'", quoting C-Sculptures, 403 SC at 65, 742 SE2d at 360. **(R. p. 111, lines 3-8)**. Common Pleas noted the cases cited by Defendants "uniformly involve contractors who were either admittedly general contractors, or were adjudged to be general contractors based upon either the nature of the work." **(R. p. 111, lines 8-11)**. But Common Pleas did not explain why Marsh, who admittedly did not report to, was not supervised by, was not paid by a general contractor, and indeed could not even identify a general contractor on the sight, did not qualify as a general contractor under South Carolina law. Common Pleas did not even consider the definition of a general contractor in South Carolina. But SC Code § 40-11-20(9) defines general contractor as "an entity which performs or supervises or offers to perform or supervise general construction." Thus, Marsh was a general contractor by virtue of it performing the work, notwithstanding the fact that it had no role in supervising other contractors. The Code finds no distinction or requirement that a contractor must have supervisory responsibilities to fall within the licensing requirement. As a result, it was error for Common Pleas to hold that Marsh did not need to be licensed and that it could sue to recover its fees.

B. THE COURT OF COMMON PLEAS ERRED IN ISSUING A MONEY JUDGMENT AGAINST DEFENDANTS WHERE NO PROOF WAS PRESENTED THAT EITHER DEFENDANT HAD ENTERED INTO A CONTRACT WITH PLAINTIFF.

Although the Court of Common Pleas entered judgment against defendants based on a contract between Hamilton and Marsh, in fact, there is no document substantiating such agreement and the only contractual document was signed by a person acting on behalf of another entity.

The record is clear that there was no contract between Hamilton or Steeple and Marsh. The documentation only supports that there was an agreement for the work to be performed between Marsh and State Acquisitions, LLC ("State") with Alex Burns acting on behalf of State. **(R. p. 543)**. That is a document dated July 7, 2017, indicating, as acknowledged by Tim Marsh in his testimony that the email of that date that Burns was employed by State. **(R. 376, line 14-p. 377, line 4)**. Tim Marsh explained at trial that Burns was asking him to send him a proposal and send a quote to install foam in the restaurant. **(R. p. 377, line 3-8)**.

Tim Marsh prepared a proposal on July 10, 2017 and addressed it to Alex Burns at State. **(R. pp. 545-546)**; see also **(R. p. 377, line 13-p. 378, line 4)**. Burns signed the proposal that was sent to his attention at State. **(R. pp. 545-546)**. Thus, there was no evidence showing that either defendant entered into an agreement with Marsh to do any work and thus they had no contractual relationship and could not be held financially responsible for the work done. Yet, Common Pleas in its Conclusions of Law stated that, "I conclude that Hamilton Management Services Company, Inc. entered into an agreement for the work, and Plaintiff shall have judgment against it on the contract claim." **(R. p. 10, lines 13-16)**. Although the Court of Common Pleas in its Finding of Fact states that,

> "I find that all of the correspondence between the Defendant, Hamilton Management Services Company, Inc. and Marsh Waterproofing, Inc. indicated Alexander Burns was acting for Hamilton Management Services Company, Inc. I find that Hamilton Management Services Company, Inc. authorized the improvements to the property to be made by Marsh Waterproofing, Inc. and signed the acceptance proposal (Exhibit 6), thereby forming a valid and binding agreement supported by valid consideration."

(R. p. 4, lines 16-22).

Yet, the very same exhibit that the Court of Common Pleas cited as supporting a finding of an agreement with Hamilton, does not support such an agreement and in fact supports a finding that any agreement was with State. Indeed, it was Tim Marsh, of Marsh that addressed the proposal to Alex Burns at State, not Hamilton.

C. COMMON PLEAS ERRED IN GRANTING A JUDGMENT ON THE MECHANIC'S LIEN AS IT WAS NOT A JUDICIABLE MATTER.

Testimony from Alex Burns was presented to Common Pleas as follows: "Following Marsh's filing of the mechanic's liens, on or about December 18, 2017, the landlord terminated all of the leases to the Steeple entities pursuant to a breach of the forbearance agreement, which specially prohibited the filing of any Mechanic's Lien on the properties." **(R. p. 152, lines 18-26)**.

Plaintiff had dismissed the landlord from the action in 2017 when it filed an amended complaint that did not name the landlord. There is no indemnification of any consideration received which would serve to otherwise offset Plaintiff's claim. Yet, Common Pleas ordered foreclosure to be permitted. Permitting foreclosure on the real estate and Steeple's leasehold interest, which has not existed since 2017, was error.

While the Court instructed that "the case be referred to the Master in Equity so that he may conduct the sale" **(R. p. 11, lines 19-21)**, such instruction was in error because there was

nothing to be sold. If there is no leasehold interest by virtue of the termination of the lease, then there is nothing upon which Marsh may foreclose the Mechanic's Lien upon. If there is no possibility of recovery under the foreclosure, then it would not have served justice for Common Pleas to have considered the merits of the Mechanic's Lien as a distraction cause of action from breach of contract and the *quantum meruit* claims. The Plaintiff had been made aware of the termination of the leases since the inception of the lawsuit. The counterclaim was raised specifically upon the grounds that the harm caused by the Plaintiff was a result of the termination of the leases.

While the focus of the trial was upon the determination whether the Plaintiff was acting as an unlicensed contractor and thus not able to bring a lawsuit for any amounts Plaintiff claimed were owed and that would resolve the causes of action of the Plaintiff together, it remained the burden of Plaintiff to ensure that the cause of action it sought to maintain represented a justiciable controversy for which relief can be granted and which were not brought for any improper purposes. such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation, as required by SCRCP Rule 11(b)(1).

The termination of the leases has appeared in the record and had been well known to the Plaintiff for over two years and yet it still maintained this cause of action, which should not have been permitted to advance its interest financially or otherwise, to the detriment of the Defendants. The clear motivation for the Plaintiff to maintain the illusory cause of action related to the foreclosure of the Mechanic's Lien is the imposition of their attorney's fees and costs, which would not otherwise be available to it. It cannot be an appropriate remedy to foreclose a lien which does not secure anything solely to recover attorney's fees and expenses that cannot otherwise be recovered. Such point was clearly made in Defendants' Rule 59 motion, filed on

March 22, 2020 and for which the Common Pleas did not address in its decision on the motion but which was decided without any analysis whatsoever when it merely stated, "I find and conclude that my rulings at the time of the trial of the case and those necessarily contained in the entry of Judgment were sound and are hereby reaffirmed. **(R. p. 27, lines 10-13)**.

The Defendants respectfully request that this Court reverse the judgment of Common Pleas in that regard and render judgment in favor of the Defendants on the foreclosure of the mechanic's lien, deem them to be the prevailing party, or in the alternative impose sanctions in favor of the Defendants in the amount of their attorney's fees and costs associated with defending the action for foreclosure of the Mechanic's Lien, pursuant to the Court's inherent authority under Rule 11(b)(3).

Additionally, Defendants respectfully request that this Court remand the action to Common Pleas pursuant to SCRCP Rule 52(a) for a determination by that Court as to whether there is even currently a lien on the property, its leasehold interest, and clarification as to what exactly is to be sold by the Master in Equity.

D. THE COURT OF COMMON PLEAS ERRED IN AWARDING ATTORNEY'S FEES AND COSTS TO PLAINTIFF AGAINST HAMILTON.

In South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract. There is no common law right to recover attorney's fees. Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171 176, 557 S.E.2d 708, 710 (Ct. App. 2001); Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997); American Fed.Bank, FSB v. Number One Main Joint Venture, 321 S.C. 169, 467 S.E.2d 439 (1996); Dowaliby v. Chambless, 344 S.C. 558, 544 S.E.2d 646 (Ct. App. 2001). Hamilton asserts that Common Pleas erred in awarding attorney's fees and costs in favor of Marsh and against it and that it did not reconsider

the award in Defendants motion to amend the judgment pursuant to SCRCP 59(a). Even if there had been some ground for Common Pleas to otherwise rule in favor of Marsh and against Defendants on the underlying claims, Common Pleas failed to consider whether there was any statutory or contractual authority by which it could award the attorney's fees and costs against Hamilton.

Indeed there is no statute or provision of contract by which Hamilton could have been subject to an award of attorney's fees and costs insofar as it has at no time held any interest in the subject property, whether as an owner or tenant. As such, Defendant Hamilton respectfully requests that this Court reverse the judgment of Common Pleas to relieve Hamilton from the Plaintiff's attorney's fees and costs. In the alternative, if this Court otherwise sustains the judgment on the underlying causes of action, Hamilton respectfully requests pursuant to SCRCP Rule 52(a) a remand to Common Pleas for determination of whether there are any contractual or statutory grounds under which can award the Plaintiff's attorney's fees and costs as judgment against Hamilton with instruction that it may not make such an award without making an express finding of such statutory or contractual grounds.

E. THE COURT OF COMMON PLEAS ERRED IN NOT GRANTING A NEW TRIAL PURSUANT TO SOUTH CAROLINA RULE OF CIVIL PROCEDURE 59(a).

"A [circuit court]'s order granting or denying a new trial upon the facts will not be disturbed unless [its] decision is wholly unsupported by the evidence [] or the conclusion was controlled by an error of law." Ralph v. McLaughlin, 428 S.C. 320, 339, 834 S.E.2d 213, 223-24 (Ct. App. 2019), quoting, Curtis v. Blake, 392 S.C. 494, 500, 709 S.E.2d 79, 82 (Ct. App. 2011) (quoting Folkens v. Hunt, 300 S.C. 251, 254-55, 387 S.E.2d 265, 267 (1990)). "Review by an appellate court of the grant or denial of a new trial is 'limited to consideration of whether

evidence exists to support the [circuit] court's order.'" Id. at 505-06, 709 S.E.2d at 85 (quoting Lane v. Gilbert Constr. Co., Ltd., 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009)). "In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996); Umhoefer v. Bollinger, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989).

Here, Defendants previously sought a new trial on various grounds including, among other things, the prohibition of contractor's recovering for work performed when they are not licensed in South Carolina for that work, that the LLR had already ruled that Marsh was required to be licensed for the work that it did, that defendants had not contracted with Plaintiff for any of the work performed, that foreclosure should not have been granted because the defendants did not hold an interest in the property which Common Pleas ordered be sold and that Common Pleas had no authority to grant attorney's fees and costs again Hamilton in favor of Marsh. Moreover, as previously demonstrated, there is no evidence of a contact between Marsh and Defendants. The only evidence is that Marsh lacked a license in South Carolina and there is nothing to support Marsh's assertion that a license was not required. Although Defendants seek reversal of the judgment in total, if the Court is not inclined to grant full reversal, it respectfully requests that it order that the underlying Rule 59(a) Motion be granted, and a new trial ordered.

F. THE COURT OF COMMON PLEAS ERRED IN NOT GRANTING RECONSIDERATION PURSUANT TO SCRCP 59(e).

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (quoting Budinich v. Becton Dickinson and

Co., 486 U.S. 196, 200, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988)). In their Rule 59(e) motion, Defendants requested that Common Pleas reconsider a wide variety of issues that were encompassed in Common Pleas' decision on the trial in granting an award of attorney's fees and costs against Hamilton and in favor of Plaintiff. These issues are the same ones further discussed with respect to the Rule 59(a) motion and throughout this appellate brief as their were numerous facts and issues overlooked by Common Pleas in particular regarding the requirement for Marsh to be licensed, whether Marsh could pursue this lawsuit even if it was required to be licensed and whether either of the defendants entered into any kind of contractual relationship with Marsh such that they should be responsible for paying the costs of the foam installation at the Church's Chicken restaurant.

It is respectfully suggested that Common Pleas had erred in its original determinations, among other things, that Marsh was not required to be licensed, that there was a contractual relationship between defendants and Marsh and that there was a basis to award attorney's fees and costs against Defendants. Further, it was additional error for the Common Pleas not to amend or alter the judgment against Defendants based on the arguments defendants made that support reconsideration.

CONCLUSION

For the reasons stated above, the judgment of the Court of Common Pleas should be reversed, and if not, in the alternative the case should be remanded to the Court of Common Pleas in a manner consistent with this memorandum.

[Signature on Following Page]

Respectfully submitted,

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