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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

R. Lawton McIntosh, Judge

Appellate Case No. 2021-000847

Tony T. Good.....Appellant,

v.

Tomekia Means and United States Department of Agriculture.....Respondents.

FINAL BRIEF OF APPELLANT

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April 25, 2022

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STATEMENT OF CASE

Appellant filed his complaint on November 9, 2017, seeking to recover moneys from Respondent Means relating to the construction of improvements to Respondent Means' property at 342 Leaman Avenue, Whitmire, South Carolina (the "subject property") and Respondent USDA's mortgage loan to her in connection therewith. (R., pp. 26-34). The complaint asserted causes of action for specific performance, breach of contract, and unjust enrichment seeking the release to Appellant of $37,200 in loan proceeds then believed to be held by Respondent USDA or, in the alternative, judgment against Respondent Means in such amount. (R., pp. 26-34). Respondent Means filed her answer on December 28, 2017, generally denying Appellant's allegations and asserting affirmative defenses. (R., pp. 36-43). Appellant filed his reply to Respondent Means' affirmative defenses on January 16, 2018. Respondent USDA filed its answer on January 19, 2018. (R., pp. 45-46).

Thereafter, discovery ensued, and Appellant filed a motion to compel certain discovery responses from Respondent Means on July 24, 2018. This motion was resolved prior to a hearing as evidenced by correspondence filed with the Court on September 20, 2018. After having scheduling difficulty due to USDA internal matters, the deposition of Melissa Mays, the USDA loanspecialist assigned to Respondent Means' loan, was taken on February 28, 2019.

A scheduling order was entered by the Honorable Eugene C. Griffith, Jr., on March 25, 2019, wherein the court provided that the parties would file any dispositive motions on or before April 30, 2019. Respondent Means filed her motion for summary judgment on April 30, 2019, seeking to dismiss the complaint based on the operation of S.C. § 40-11-370. Respondent USDA filed its motion for summary judgment on May 2, 2019. After a

hearing, the lower court denied Respondents' motions finding that material questions of fact remained precluding summary judgment. (R., pp. 21-22).

By motion filed on October 31, 2019, Appellant moved to amend the complaint to conform to the evidence revealed in discovery and include causes of action for negligent misrepresentation, constructive fraud, fraud in the inducement and a declaration that Appellant held an equitable lien in the subject property. The lower court granted the motion after a hearing held on November 13, 2019.[1] (R., pp. 18-19).

Appellant filed his amended complaint on December 6, 2019. (R., pp. 26-34). Respondent Means filed her answer to the amended complaint on December 23, 2019. (R., pp. 36-43). Respondent Means answer was substantially similar to her initial answer. Respondent USDA filed its answer to the amended complaint on December 30, 2019, praying that the court protect its security interest in the subject property. Notably, Respondent means never asserted any claims against Appellant for defective or substandard work or otherwise.

The matter was called for trial on April 21, 2021 before the Honorable R. Lawton McIntosh, and, by order dated July 1, 2021, the court denied all relief to Appellant and dismissed the complaint with prejudice. (R., pp. 2-12). Appellant served his notice on August 2, 2021.

STATEMENT OF FACTS

This is an action, which asserts, in part, that Respondent Means, owes Appellant the sum of $37,200 for labor and materials used in the improvement of her real property located at 342 Leaman Avenue, Whitmire, South Carolina. (R., pp. 26-34).

[1] Respondent USDA filed a motion for summary judgment as to Appellant's cause of action for specific performance in response to Appellant's motion to amend that was resolved by way of Appellant's agreement to refrain from asserting such cause of action against Respondent USDA in his amended complaint. (See R., pp. 18-19).

In 2009, Respondent Means contracted with Pennyworth Homes to construct a home on the subject property. (R., p. 124, ln. 10-15). The contract amount with Pennyworth Homes to construct the home was approximately $130,000. (R., p.129, ln. 23-R., p. 130, ln. 9). This contractor would ultimately abandon the project. (R., p. 124, ln. 10-15). Later, in 2010, Respondent Means brought suit against Pennyworth Homes that resulted in the award of an uncollectable money judgment but the absolution of Respondent Means to pay for any of the improvements made to the subject property up to that time. (R., p. 124, ln. 16-23). Respondent Means, therefore, had a home that was "over 50%" complete without having paid a single dollar out of her pocket. (R., p. 131, ln. 14-23).

More than five years later, sometime in 2015, Appellant was approached by Respondent Means regarding construction work that she needed to complete the project on the subject property. (R., p.58, ln 15-23). She went to Appellant 's home to discuss the nature and scope of the work. (R., p.58, ln 15-23). She reported that she got Appellant's name from another of Appellant 's customers, thatshe admired his work, and wanted him to consider taking the job. (R., p.58, ln 15-23). After having been approached by Respondent Means on several occasions, Appellant later visited the property to assess the project. (R., p. 58, ln 25-R., p. 59, ln 16). Respondent Means was present at the time. (R. p.58, ln 25-p. 59, ln 8).

The prior contractor left the home in a state it had been roughed in with electrical and plumbing, the walls framed in, the roof completed and the home wrapped in insulation. (R., pp. 252-257; R., p.61, ln 25-p. 62, ln 18). The home had been unfinished for nearly six years before Appellant was asked to begin any work. (R., p.129, ln 21-p. 130, ln 22). It had, therefore, deteriorated from exposure in the meantime as well as being vandalized. (R., pp. 252-257; R., p.64, ln. 1-23).

At each initial meeting with Respondent Means, Appellant explained the limitations of his contractor's license. (R., p. 59, ln 17-p. 60, ln 9; R., p. 66, ln. 25-p. 67, ln. 5; R., p. 69, ln. 1-9). At the time, he was not licensed to conduct HVAC, electrical or plumbing work. (R., p. 69, ln. 1-6)[2]. Appellant explained that those tradesmen would have to pull their own building permits and that, while Appellant would discuss the project with tradesmen he knew and trusted, their work would not be anything he would be doing. (R., p. 69, ln. 17-p. 70, ln. 6). Despite having been informed of the limitations of Appellant 's license, Respondent Means insisted that he take the job. (R., p. 70, ln. 7-14).

Respondent Means asked that Appellant consult with HVAC, electrical and plumbing contractors and report to her what Appellant believed to be the total cost of the project including both the cost of these tradesmen's work and Appellant's. (R., p. 69, ln. 17-p. 70, ln. 6; R., p. 76, ln. 11-24). Appellant did so and prepared an quote as he would for any other job with Respondent Means' understanding that the work of these tradesmen would not be a part of the work he would perform. (R., pp. 258-270; R., p. 82, ln. 5-11).

Respondent Means was obtaining a loan from Respondent USDA to fund the completion of the home on the property. (R., p. 167, ln. 6-p.168, ln. 1). After having received Appellant's quote, she asked Appellant to meet her at USDA's Newberry Office in late 2015. (R., p. 70, ln. 7-18). There, she and Appellant met with Melissa Mays of the USDA in order to discuss the project and its funding. (R., p. 70, ln. 7-25).

At this meeting, Appellant , again, explained to Respondent Means and Mrs. Mays the limitations of his license. (R., p. 71, ln. 6-p. 72, ln. 7). He provided copies of his license to both Respondent Means and Mrs. Mays which describe what work Appellant is

[2] Appellant's license classification at that time was further limited to a contract sum of $30,000. This amount was increased to $50,000 shortly after December, 2015. (R., p. 119, ln. 23-p. 121, ln. 10).

licensed to do and what work he is not. (R., p. 72, ln. 21-p. 73, ln. 14). Apparently, Mrs. Mays had retrieved all pertinent information concerning Appellant 's license from SCLLR some months prior as the copies of this information attached to the subject contract was time-stamped from April 14, 2015. (R., pp. 258-270; R., p. 75, ln. 25-p. 76, ln. 22). Copies of both Appellant 's license and the information from SCLLR was provided to Respondent Means at that time. (R., p. 183, ln. 12-p. 185, ln. 22). She knew full well what Appellant had a license to do and what he did not and expressed no dissatisfaction or concern. (R., p. 185, ln. 7-p. 31, ln. 17). Nonetheless, Respondent Means asked Mrs. Mays to proceed despite any license issue. (R., p. 185, ln. 23-p. 186, ln. 3).

During the December 2015 meeting, Mrs. Mays indicated that a USDA form contract was required to get the funding of the project started. (R., pp. 258-270; R., p. 78, ln. 10-20). She then prepared the form contract and attached Appellant's quote to it to describe the work. (R., p. 180, ln. 1-p. 27, ln. 4). Apart from the construction draw schedule, neither Appellant nor Respondent Means had any participation or input into the drafting of the terms of the contract presented at the meeting. (R., p. 180, ln. 1-p. 181, ln. 20). While the contract she prepared did not specifically address the matter of the license limitations, Mrs. Mays repeatedly indicated during the meeting that the amounts payable for the HVAC, electrical and plumbing work would be backed out of the contract when that work was completed with those tradesmen securing their own subsequent USDA form contract. (R., p. 71, ln. 19-p. 80, ln. 9).

At the meeting, Respondent Means let it be known she went so far as to inquire of the Newberry County Building & Zoning Department the status of the prior building permit. She reported to Appellant that the permit of the prior contractor was still active, and insisted

that this meant that Appellant 's license limitations would not be an issue because he would not have to pull a permit at all[3]. (R., p. 82, ln. 5-21).

It was then explained to Appellant by Mrs. Mays and Respondent Means that an initial USDA form contract for the total costs of the project was necessary in order to close the loan and secure the funding necessary to complete the work. (R., p. 86, ln. 4-19). Respondent Means wanted to get the work started as soon as possible; so, she asked Appellant to sign the contract Mrs. Mays prepared for this purpose. (R., p. 82, ln. 15-p. 83, ln. 7). It also was explained to Appellant by both Mrs. Mays and Respondent Means that this requirement was a mere technicality and that everyone clearly understood what work he was licensed to perform and what work he was not. (R., p. 71, ln. 19-p. 80, ln. 9). Appellant has known Respondent Means since she was a child, her parents having in turn known him since he was a child, and Appellant's relatives are members at the same church as Respondent Means. (R., p. 80, ln. 1-22). So, in that context, at Respondent Means insistence and with Mrs. Mays' assurances, Appellant signed the form contract as requested relying on the agreements reached between the three at the meeting. (R., p. 79, ln. 24-p. 80, ln. 14). In fact, Appellant told both Respondent Means and Mrs. Mays that he was relying on these assurances before signing the USDA contract. (R., p. 105, ln.20-p. 106, ln. 7).

As evidence of the agreement reached at the meeting between Appellant, Respondent Means and Melissa Mays, the amount shown on the USDA form contract representing the costs of the HVAC work on the subject property was, in fact, later taken

[3] Respondent Means was, of course, mistaken in assuming that a further building permit would not be required, but this is an important episode as it shows that she was (1) aware of Appellant's license limitations and (2) knowingly waiving that issue.

out of the contract total and that contractor, with Respondent Means consent, was paid directly by USDA precisely as agreed. (R., p. 364-369; R., p. 85, ln. 8-p. 86, ln. 3)[4].

Respondent Means' loan was approved for a total of $80,000 and closed on January 8, 2016. (Ex. 6 to Deposition of Melissa Mays, R. 301, p. 186, ln. 22-p. 189, ln. 10)[5]. Later that month, without receiving any draw from the loan proceeds, Appellant proceeded to begin the work he agreed to perform. (R., p. 271; R., p. 86, ln. 24-p. 87, ln. 9). Appellant actually made upgrades beyond the specifications for the work at no charge to Respondent Means. Brick porches were added in place of the wooden porches originally installed by the prior defunct contractor and ceramic tile flooring was installed instead of the vinyl called for in the contract. (R., p. 102, ln. 8-p. 103, ln. 19).

USDA periodically inspected the project to determine its percentage completion. The USDA contract provided that Appellant's draws would amount to only 60% of the contract amount based on the percentage completed at inspection with the remaining 40% withheld by USDA until the time of the final draw. (R., pp. 258-270). The contract also stated that Respondent Means was to approve all paymentsfrom the loan proceeds (R., pp. 258-270).

The USDA never noted any issue with the Appellant's work in any inspection it conducted. Plaintiff's Exhibit 5 is a USDA inspection report dated February 10, 2016. This inspection report notes that the project was 50% complete and notes no deficiencies with the work. Mrs. Mays completed the inspection and given there were no issues, she issued Appellant a check for his first draw. (R., p. 196, ln. 6-p.197, ln. 18). The next inspection

[4] However, as set forth below, Appellant ultimately had to pay certain tradesmen directly from his own personal funds because Respondent Means would later go back on her word and refuse to approve any changes to or other disbursements from the construction loan. (R., p. 103, ln. 20-p. 105, ln. 19)

[5] Respondent Means was not required to make any down payment towards the loan and had zero out of pocket expenses. (R., p. 133, ln 5-p. 134, ln. 17).

conducted by Mrs. Mays for USDA was on March 28, 2016. (R., pp. 355-356). This inspection report provides that the project was 75% complete at that time and likewise notes no deficiencies with the work. Appellant received his second draw following this inspection; he would not receive any further draws despite the fact that Appellant continued to incur costs for labor and materials supplied for the ongoing work. (R., p.93, ln.1-11)[6]. It was for this reason that Appellant was forced to pull $20,000 from his personal savings to finance the completion of the home, $20,000 that has never been reimbursed to him. (R., p. 103, ln. 20-p. 105, ln. 19). A portion of these funds were used by Appellant to pay tradesmen because Respondent Means, contrary to the agreements made at the December 2015 meeting, refused any changes to or further disbursements from the loan proceeds. (R., p. 105, ln. 4-15).

Nonetheless, by October of 2016, USDA had determined the home was 100% complete. (R., pp. 358-359). Newberry County conducted its final inspection and issued its certificate of occupancy. (R., p. 360; R., 363; R., p. 96, ln. 12-p. 97, ln. 9). Plaintiff's Exhibit 8 is a USDA inspection report dated October 21, 2016 indicating that the home was complete. It contains a notation that "[h]omeowner has multiple concerns which all appear to be cosmetic. The county has issued the certificate of occupancy. We [USDA] consider the home to be 100% complete". (R., pp. 358-359). This final inspection report was also signed by USDA's regional director, Timothy Ellis. (R., p. 199, ln. 10-p. 200, ln. 4). Mrs. Mays clarified that if she or her regional director had determined that any deficiencies existed with Appellant's work at this inspection, those deficiencies would be noted and the project would not have been finalized. (R., p. 200, ln. 18-p. 201, ln. 7).

[6] The lower court erroneously found that Appellant received draws totaling $36,800 where the record clearly shows he received two draws totaling $33,300. (R., p. 221, ln. 6-22).

Instead, Mrs. Mays testified that USDA believed that Appellant was entitled to the final draw. (R., p. 201, ln. 10-p. 202, ln. 15).

It was only at this time, when the project was complete, that Respondent Means began to raise the issue of Appellant's license, and while she had approved all of the prior draws, she refused to sign off on the final draw. (R., p. 202, ln. 16-23; R., p. 219, ln. 15-p. 220, ln. 17). USDA, Mrs. Mays, and the regional director, Timothy Ellis, felt there was no lawful reason for Respondent Means to refuse to accept Appellant's work. (R., p. 202, ln. 24-p. 203, ln. 3).

Respondent Means nevertheless sought to justify her conduct by filing complaints with USDA, SCLLR and Newberry County concerning the quality of the work. Inspectors for USDA and Newberry County never found any problems with the work, and SCLLR found after a thorough investigation that "no violations were observed [at the property] with regards to...substandard work." (R., pp. 361-362).

As noted above, USDA did not put any credibility in her complaints. USDA considered the work complete and that Respondent Means had no reason to refuse Appellant his final draw. (R., p. 202, ln. 16-p. 203, ln. 3). Melissa Mays explained in her deposition that on one occasion she stopped by the home on her way home from work in order that Respondent Means could show her what the problem was. (R., p. 203, ln. 4-p. 204, ln. 21). Mrs. Mays did not see any issues with what Respondent Means was showing her; so, Respondent Means explained that the problem could only be seen at night with a flashlight. (R., p. 204, ln. 24-p. 206, ln.16). Again, USDA considered the project complete.

Most important for the Court's understanding of the question raised in this appeal is that Respondent Means never once mentioned to Appellant nor Mrs. Mays any objection or dissatisfaction concerning the agreement reached concerning the matter of Appellant's

license or the performance of the work until the home was entirely completed in October 2016. (R., p. 202, ln. 16-23; R., p. 219, ln. 15-p. 220, ln. 17). At that time, a USDA appraisal valued the home at $87,000. (R., p. 190, ln. 2-p.191, ln. 20).

Nevertheless, as a result of her obstinance, USDA ultimately applied the undisbursed loan proceeds as a principal reduction to Respondent Means' loan. (R., p. 213, ln. 15-p.215, ln. 10). Therefore, after six years long years following the failure of the prior contractor, with the labor, materials and work of Appellant, Respondent Means now has a finished home valued in 2016 at $87,000 that she is finally able to live in; yet, her mortgage has been slashed to less than half of what she originally intended.

To illustrate the shear inequity of it all, Mrs. Mays testified that in all of her 34 years with the USDA and the 2,000 to 3,000 loans she originated she had never seen something like that happen before. (R., p. 213, 22 thru p. 215, ln.14).

STANDARD OF REVIEW

The complaint pleads alternative causes of action both in law and equity. When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal. Kiriakides v. Atlas Food Systems & Services, Inc., 338 S.C. 572, 527 S.E. 2d 371 (Ct. App. 2000). In an action at equity, the appellate court may find facts in accordance with its view of the preponderance of the evidence. West v. Newberry Electric Co-op, 357 S.C. 537, 593 S.E.2d 500 (Ct. App. 2004). Whereas a trial court's findings of fact in an action at law should not be disturbed on appeal unless they are without evidentiary support; even still, a reviewing court is free to decide questions of law with no particular deference to the trial court. Hunt v. Forestry Com'm, 358 S.C. 564, 595 S.E.2d 846 (Ct. App. 2004). In short, appellate

courts may correct errors of law in both legal and equity actions. S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008).

ARGUMENT

The instant appeal presents a fairly straightforward question: does the Appellant have any remedy on any theory under the facts of this case? The plain and simple answer, if justice truly is based on basic concepts of right and wrong, is there just has to be.

The lower court denied all relief under each cause of action based its broad application of S.C. Code § 40-11-370(C). The lower court did not consider all of the evidence. Rather, the lower court's findings of fact ignored the record developed relating to the circumstances and the conduct of the parties attending the formation of the contract and that occurring thereafter and instead limited its findings only to the contents of the USDA contract itself and Appellant's general contractor's license concluding, as a matter of law, that all relief was barred by the statute.

For the reasons stated herein, this was error. The facts peculiar to this case provide a remedy either because Respondent Means waived the defense of S.C. Code § 40-11-370(C), should be estopped from asserting it, or because Appellant's remedy arises not from the contract at all but from her tortious conduct. In sum, South Carolina law does not sanction either Respondent Means' conduct or the inequity of the outcome represented by the lower court's ruling.

I. The Lower Court Erred in Concluding Respondent Means Did not Waive or is Otherwise Estopped from Asserting the Affirmative Defense Based on S.C. Code § 40-11-370.

The lower court correctly found that the defense provided by S.C. Code § 40-11-370(C) is not jurisdictional but is merely an affirmative defense and, as such, may be waived. (R., p. 7). However, the lower court concluded that the only means of waiving

this affirmative defense was to fail to plead it. The lower court further concluded that Respondent Means cannot be estopped from raising the defense irrespective of her knowledge of the limitations of Appellant's license or Appellant's reliance on the agreements and representations made at the initial December 2015 meeting with Mrs. Mays. This is error and the lower court's ruling should be reversed.

A The Lower Court Erred in Relying on Wagner v. Graham to Conclude Respondent Means has not Waived the Facts of This Case.

The record below is clear concerning the circumstances, representations and agreements made by the parties prior to and at the formation of the contract. In fact, the only evidence in the record concerning these matters is Appellant's testimony cited above. Therefore, it is uncontroverted (1) that Appellant had known Respondent Means since she was a child, her family had known him since he was a child, and members of Appellant's family attend church with Respondent Means; (2) that Respondent Means sought Appellant out and that the two of them met on several occasions to discuss the project; (3) that at each meeting with Respondent Means, Appellant he repeatedly discussed with her the limitations of his license[7]; (4) that despite having been informed on multiple occasions by Appellant what work he was and was not licensed to perform, Respondent Means insisted he take the job; (5) that Respondent Means was so insistent that she went to the trouble of checking with the Newberry Zoning Department about the status of the prior building permit reporting that the permit of the prior contractor was still active and maintaining that this meant that Appellant 's license limitations would not be an issue because he would not have to pull a permit at all; (6) that Respondent Means asked that Appellant consult with other tradesmen to compile a quote of the costs of the whole project clearly understanding that

[7] The lower court erroneously found that Respondent Means denied knowledge of Appellant's license limitations. (R., p. 7). However, she was not asked about and did not volunteer any testimony concerning her knowledge at trial on direct or cross examination.

it would include quotes from these other tradesmen because Appellant was not licensed to perform all of the work; (7) that despite knowledge of all of this, she presented Appellant's quote to USDA and insisted Appellant meet with USDA to discuss the project; and, (8) that Appellant only reluctantly did so because of his familiarity with her and her family.

Moreover, the only evidence in the record concerning the circumstances, representations and agreements relating to the December 2015 meeting at the USDA Newberry Office between Appellant, Respondent Means, and Melissa Mays is the testimony of Appellant and Mrs. Mays cited above. Consequently, it is similarly uncontroverted (1) that the issue of the limitations of Appellant's license was prominently discussed at that meeting once again; (2) that Respondent Means was fully aware of those limitations, yet insisted that Appellant be allowed to perform the work; (3) that Appellant did not want to sign the USDA form contract which described the entire project precisely because of his license limitations; and (4) that he only did so relying on Respondent Means and Mrs. Mays' assurances that the USDA contract was just a technicality needed just to process the loan so the work could get started and that everyone understood that the work that Appellant could not do would be performed by other tradesmen and their work would be backed out of the contract later as the work was performed; and (5) that Appellant made clear at this meeting that he was relying on these assurances before signing the contract.

These undisputed facts were entirely ignored by the lower court. Relying entirely upon Wagner v. Graham, 296 S.C. 1, 370 S.E.2d 95 (Ct. App. 1988), the lower court concluded that Respondent Means could not waive S.C. 40-11-370 or be estopped from asserting no matter the circumstances. This is incorrect.

Wagner is distinguishable from and, therefore, inapplicable to the facts of this case. First and foremost, the Wagner court did not address the applicability of the doctrine of

waiver to the their concerned statute. It only addressed the contractor's estoppel argument, and in doing so, the court stated explicitly "[t]he law of estoppel is simply inapplicable ***to the facts of this case***." Id. at 96 (emphasis added).

In Wagner, the lone fact asserted by the contractor in that case to support the application of estoppel was that the homeowner knew that the contractor did not have a license. Here, as stated above, it is undisputed that not only did Respondent Means have knowledge of the limitations of the Appellant's license, the fact was repeatedly drilled in to her head, and despite that knowledge, she pleaded with Appellant to sign the USDA contract so that she could close her loan and finish the home after six long years with the explicit understanding and agreement from the outset that the contract- its stated amount and description of the scope of work- was a mere technicality and that significant portions of the work would be performed by other tradesmen whose costs would later be backed out of the contract.

Respondent Means asked Appellant to help her get her home finished and stated that she did not care about the ins and outs of his license. Appellant, relying on those representations, complied with her request allowing her to obtain her loan. She then proceeded to watch as Appellant went about performing his work and waited until the home was complete before raising the matter of the Appellant's license expressly as a means of preventing him from being paid. These facts alone show that Wagner is inapplicable.

What is more, the statutory provision construed by the Wagner court is not the statute at issue here. Granted, both statutory provisions purport to prohibit enforcement of provisions of construction contracts in the absence of a required license and both were enacted for the benefit of the public. However, the Wagner court found it important to its

reasoning that the statute involved in that case made a violation of it a crime. S.C. § 40-11-370 contains no such provision.

The Wagner decision, therefore, has no application to the distinct facts of this case. The lower court erred in its reliance on Wagner and its ruling should be reversed as a result.

B. The Lower Court Erred in Failing to Find That the Facts of This Case Establish that Respondent Means Waived Any Defense Based on S.C. Code § 40-11-370.

The law allows the waiver of all manner of statutory and even constitutional rights; citation to substantiate this point is unnecessary as the concept is ubiquitous in both the civil and criminal courts of this State.

Since the Wagner case was decided in 1988, the legislature passed S.C. § 40-11-370, and while our courts have since held that the statute is meant to protect public interests, courts have also held that these protections may be waived if not plead. See C-Sculptures, LLC v. Brown, 403 S.C.53, 742 S.E.2d 359 (2013); Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 703 S.E.2d 221 (2010); Madren v. Bradford, 378 S.C. 187, 661 S.E.2d (Ct. App. 2008). Surely, if one can waive the benefit of the statute on a mere technicality, it can be waived based on one's affirmative conduct, particularly that of Respondent Means revealed in the record before this Court.

Under South Carolina law, waiver is the voluntary relinquishment of a right with knowledge of all of the facts, and an expression of an intention not to demand a certain thing is sufficient to constitute a waiver. South Carolina Tax Commission v. Metropolitan Life Ins. Co., 266 S.C. 34, 211 S.E.2d 522 (1975). Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended. Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d

384, 387–88 (1992). The doctrine of waiver, however, does not necessarily imply that the party asserting waiver has been misled to his prejudice or into an altered position. Id.

Waiver may be expressed or implied by a party's conduct. Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable. Lyles v. BMI, Inc., 292 S.C. 153, 355 S.E.2d 282 (Ct. App. 1987). Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver. Bonnette v. State, 277 S.C. 17, 282 S.E.2d 597 (1981).

Here, the facts constituting Respondent Means' waiver of the affirmative defense in S.C. § 40-11-370(C) are undisputed. She was repeatedly informed of the limitations of Appellant's license. She certainly knew of the scope of the work required for the project. After all, she presented the quote prepared by Appellant to USDA as the basis for procuring the construction loan. She went so far as to check the status of the building permit from the prior contractor and told Appellant that his license limitations would not be a problem for the project because the prior permit was still active meaning he would not have to obtain one at all. Respondent later asked Appellant to sign the USDA contract so that she could close her loan and finish the home after being told by Appellant that he was relying on the explicit understanding and agreement that the contract was just a technicality and that the matter of his license would therefore not be a problem.

Waiver implies an intention to give up a known right and rests generally in express or implied agreement, but arises also by estoppel, in which case a person's conduct inconsistent with known fact and inducing belief that such fact will not be asserted

precludes him from asserting that he did not intentionally relinquish right founded on such fact. Johnson v. Life & Casualty Ins. Co. of Tennessee, 191 S.C. 96, 3 S.E.2d 805 (1939).

She could have insisted upon a properly licensed contractor to carry out the work, but instead she repeatedly insisted that Appellant help her and that USDA accept Appellant as the contractor for the project and then did not voice any objection while USDA closed the loan and Appellant began and completed the work on that basis. As a result, she knew of her rights, or at a minimum, knew of all of the material facts upon which those rights depend and knowingly relinquished them. Respondent Means, therefore, waived any defense based on the limitations of Appellant's license.

The lower court erred in failing to conclude that Respondent Means waived the affirmative defense provided by S.C. Code § 40-11-370(C), and its ruling should be reversed accordingly.

C. The Lower Court Erred in Failing to Find That the Facts of This Case Establish that Respondent Means is Estopped From Asserting Any Defense Based on S.C. Code § 40-11-370.

The principles of estoppel stand upon the very foundations of right and fair dealing. Gen. Motors Acceptance Corp. v. Herlong, 248 S.C. 55, 63, 149 S.E.2d 51, 54 (1966). It considers and weighs the conduct of the parties in their dealings with each other, and gives such effect and meaning to their actions which common sense and justice dictate. Id. Essentially, equitable estoppel precludes a party from asserting rights she would otherwise have when her own conduct causes the assertion of those rights contrary to equity. Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012). Unlike waiver, however, the estopped party need not even intend to relinquish or change any existing right for estoppel to arise. Provident Life & Acc. Ins. Co. v. Driver, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (Ct. App. 1994).

The elements of equitable estoppel as to the party to be estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. *e.g.*, Rodarte v. Univ. of S.C., 419 S.C. 592, 799 S.E.2d 912 (2017). The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped. *Id.*

That the facts of this case amount to textbook estoppel cannot be reasonably denied. Respondent Means was repeatedly availed of all of the information related to what Appellant's license allowed and did not allow. Armed with that information she did not cut off her entreaties to Appellant, but redoubled them asking him to discuss the project with the other tradesmen that could perform the work he could not and gather from them an estimated cost of that work. She told Appellant that the license issue was not a problem for her and took the quote he provided to USDA in order to process her loan and finish her home that had sat wasting for the better part of six years. When Appellant was reluctant to sign the USDA form contract precisely because of the limitations of his license, Respondent Means (and Mrs. Mays) told Appellant in order to induce him to sign it that the contract was just a technicality necessary to process her loan and that those limitations would dealt with later.

Appellant then, expressly relying on those representations, signed the contract, began the work, and ultimately sank $20,000 of his personal funds into Respondent Means' home. Clearly, he could not have known that Respondent Means was setting a trap, but

that is what she did. After procuring Appellant's signature on the contract, accepting the benefit of the resulting loan, and allowing Appellant to complete the project, only then does she wield the licensing statute as a means of avoiding liability under the contract.

A party may not accept the benefits of a contract when it works to her advantage, and then repudiate it when it works to her disadvantage. Pearson, *supra*. Accordingly, Respondent Means should be estopped to assert the defense of the licensing statute.

The propriety of the application of estoppel to this case is illustrated by comparing its application to another statute prohibiting the enforcement of certain contracts enacted for the protection of public interest: the statute of frauds, S.C. Code § 32-3-10, et seq. See Suber v. Parr Shoals Power Co., 113 S.C. 317, 102 S.E. 335 (1920) (noting that the public policy of the statute of frauds is to avoid unnecessary litigation); see also 73 Am. Jur. 2d, *Statute of Frauds* § 403 (providing that the public policy underlying the statute of frauds is to prevent frauds and perjuries). It is has long been the jurisprudence of this State that equity will not allow the statute of frauds to itself be used as an instrument of fraud. Florence Printing Co. v. Parnell, 178 S.C. 119, 182 S.E. 313, 316 (1935). Instead, where a party to a contract induces the other to rely on a parol agreement to his detriment such that he is placed in a situation which amounts to a fraud upon him unless the parol agreement is enforced, the party inducing such reliance will be estopped from asserting the statute of frauds as a means of avoiding performance under the parol agreement. Id.

The very same reasoning should apply in this case. Respondent Means should not be allowed to induce Appellant to sign the USDA contract by promising that she will not use his license limitations as a means of avoiding the very same contract and then remain silent as he completes the work only to then do the exact opposite and raise the licensing

statute to escape responsibility under the agreement. The doctrine of estoppel exists to prevent this type of behavior.

Therefore, Respondent Means is estopped from asserting the affirmative defense of S.C. Code § 40-11-379(C). The lower court was in error to conclude otherwise and should be reversed.

II. The Lower Court Erred in Failing to Find That the Conduct of Respondent Means Constituted a Tort for Which a Recovery May be Had by Appellant.

As noted by the lower court's order, Appellant plead alternative causes of action for negligent misrepresentation, constructive fraud, and fraud in the inducement. At a minimum, as a matter of statutory construction, it is clear S.C. Code § 40-11-379(C) does not prohibit Appellant's recovery for Respondent Means tortious conduct. The lower court's conclusion to the contrary was in error and should be reversed.

To the extent Respondent Means has not waived the defense or is not estopped to raise it, S.C. Code § 40-11-379(C) prohibits actions "to enforce the provisions of a contract." Contract law seeks to protect the expectancy interests of the parties. Sapp v. Ford Motor Co., 386 S.C. 143, 687 S.E.2d 47 (2009). Tort law, on the other hand, seeks to redress harm arising from a breach of a duty arising between the parties. Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (1995). It is axiomatic that one owes a duty to refrain misrepresentation and fraud. See 48 Am. Jur. Proof Facts 3d 329 (the duty to refrain from using fraud or misrepresentation to obtain a contract is separate and distinct any duty to perform any contract entered); see also, 37 Am. Jur. *Fraud and Deceit* § 270 (claims of fraud in the inducement logically preexist any contract allegedly induced).

A party asserting a claim for fraud in the inducement to enter into a contract must establish "(1) a representation, (2) its falsity, (3) its materiality, (4) knowledge of its falsity or reckless disregard of its truth or falsity, (5) intent that the representation be acted upon, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on its truth, (8) the hearer's right to rely thereon, and (9) the hearer's consequent and proximate injury. Brown v. Stewart, 348 S.C. 33, 41, 557 S.E.2d 676, 680 (Ct. App. 2001). Constructive fraud is distinguishable only in that constructive fraud does not require the element of intent to deceive. Maybank v. BB&T Corporation, 416 S.C. 541, 787 S.E.2d 498 (2016).

The elements of negligent misrepresentation are: (1) the defendant made a false representation to plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that truthful information was communicated to plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on that representation; and, (6) plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation. *e.g.*, AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992).

The uncontroverted evidence in this record establishes that Respondent Means made repeated representations concerning her intent with regard to limitations of Appellant's license and her willingness to allow later changes to the USDA contract to back the costs of other tradesmen out of the contract amount, representations only she could have known were false. She made those representations to Appellant for the purpose of inducing Appellant to sign the USDA contract and allow for her loan to be processed and her home finished. Appellant had a right to rely on her stated intentions with respect to his license and the contract and, given the relationship, had no reason to suspect that she would lie to him. In fact, Respondent Means knew Appellant was relying on her assurances

because he explicitly told her so at the December 2015 meeting at the USDA office. Based on these representations and assurances, Appellant signed the contract, put $20,000 of his own personal funds towards labor and materials installed in Respondent Means' home, and completed the project without being paid.

These facts support each of the torts Appellant plead. The lower court's denial of damages on any of them was error and should be reversed.

CONCLUSION

This Court should not sanction Respondent Means' conduct in this matter, the evidence of which is uncontroverted in the record, nor should the Court allow the inequity represented by the lower court's ruling to stand.

The lower court erroneously concluded that Respondent Means could not waive or be otherwise estopped from asserting the affirmative defense based on S.C. Code § 40-11-370. It did so by relying on Wagner v. Graham, *supra*. Wagner is distinguishable from and inapplicable to the unique facts of this case. The record on appeal clearly establishes that Respondent Means waived the licensing statute defense and should be estopped from raising it in any case.

Alternatively, even if the lower court was correct with regard to S.C. Code § 40-11-370, the lower court erred by denying Appellant relief as to his alternative causes of action as statute does not prohibit Appellant's recover his damages resulting from Respondent Means' tortious conduct.

For the reasons set forth above, the lower court's ruling should be reversed.

(Signature of Counsel Appears on the Following Page)

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

R. Lawton McIntosh, Judge

Appellate Case No. 2021-000847

Tony T. Good.....Appellant,

v.

Tomekia Means and United States Department of Agriculture.....Respondents.

CERTIFICATE OF COUNSEL

I certify, pursuant to Rule 211(a), SCACR, that the Respondent's final brief complies with the requirements of Rule 211(b), SCACR.

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