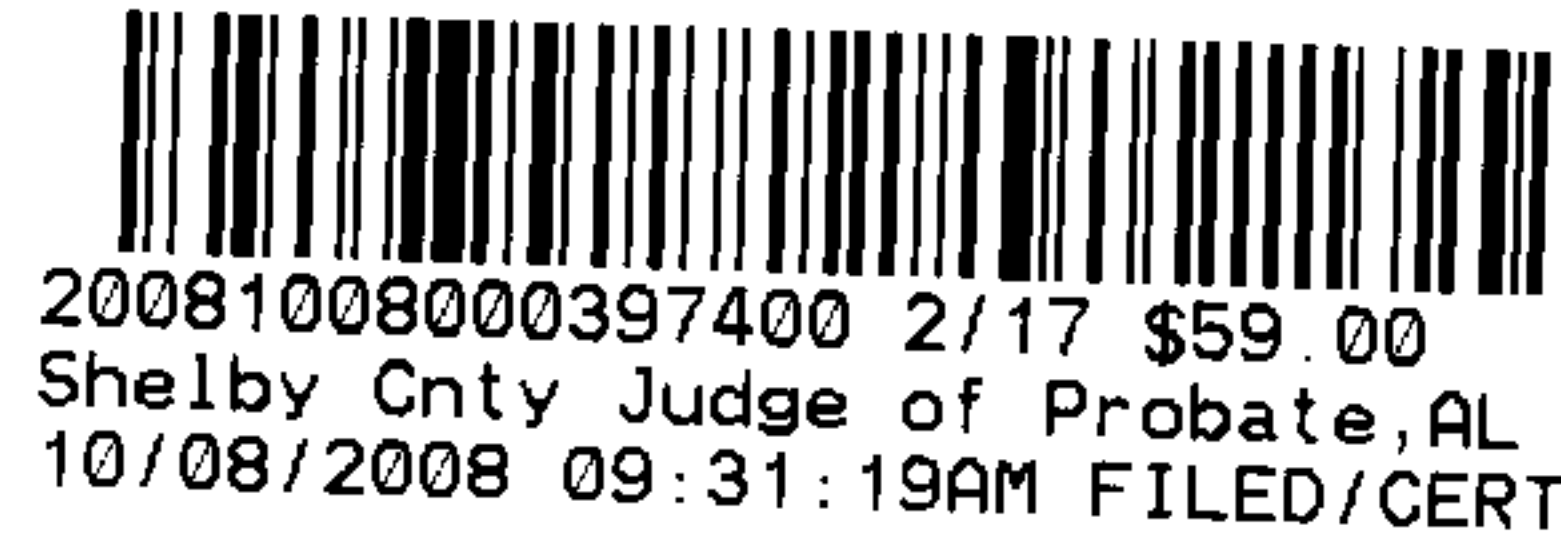


RECEIVED AND FILED
MARY H. HARRIS
FEB 22 2008
CIRCUIT & DISTRICT
COURT CLERK
SHELBY CO.

DEFENDANT,

CV 2006-199

Page 7 of Plaintiff's Exhibit 1.



estimated quantities, Byrd extended the estimated cost for each item of work. Where estimated quantities were not provided by Long Branch, no such extension was possible. Under the terms of the proposal, Byrd agreed to start the Project on or before May 16, 2005, contingent upon approval by the City of Calera.

On April 27, 2005, Long Branch and Byrd entered into a subcontract ("**Contract**") based upon the work proposal submitted by Byrd⁴. In the Contract, Byrd agreed to perform the work described in Byrd's proposal at the prices contained in the proposal. Byrd was not engaged to provide environmental, geo-technical, compaction or testing services.

In the Contract, Byrd and Long Branch agreed:

- A. While the total contact amount would be based upon the engineer's final quantities and the unit price on the attached bid proposal⁵, Byrd was entitled to make progress payment requests during the pendency of the work and Long Branch agreed to pay Byrd each invoice amount, less 10% retainage⁶;
- B. Subject inexcusable delays, Byrd would complete the work within 90 days or Byrd would pay, as liquidated damages, \$500 for each calendar day of inexcusable delay until the work was substantially completed⁷;

⁴ Plaintiff's Exhibit 1.

⁵ Paragraph 2.4 of Plaintiff's Exhibit 1.

⁶ Paragraphs 2.1 and 2.2 of Plaintiff's Exhibit 1.

⁷ Paragraphs 1.1, 3.1 and 4.1 of Plaintiff's Exhibit 1.

C. In the event of any arbitration or litigation to the project performance or the contract, the prevailing party was entitled to reasonable attorney fees, cost and expense⁸.

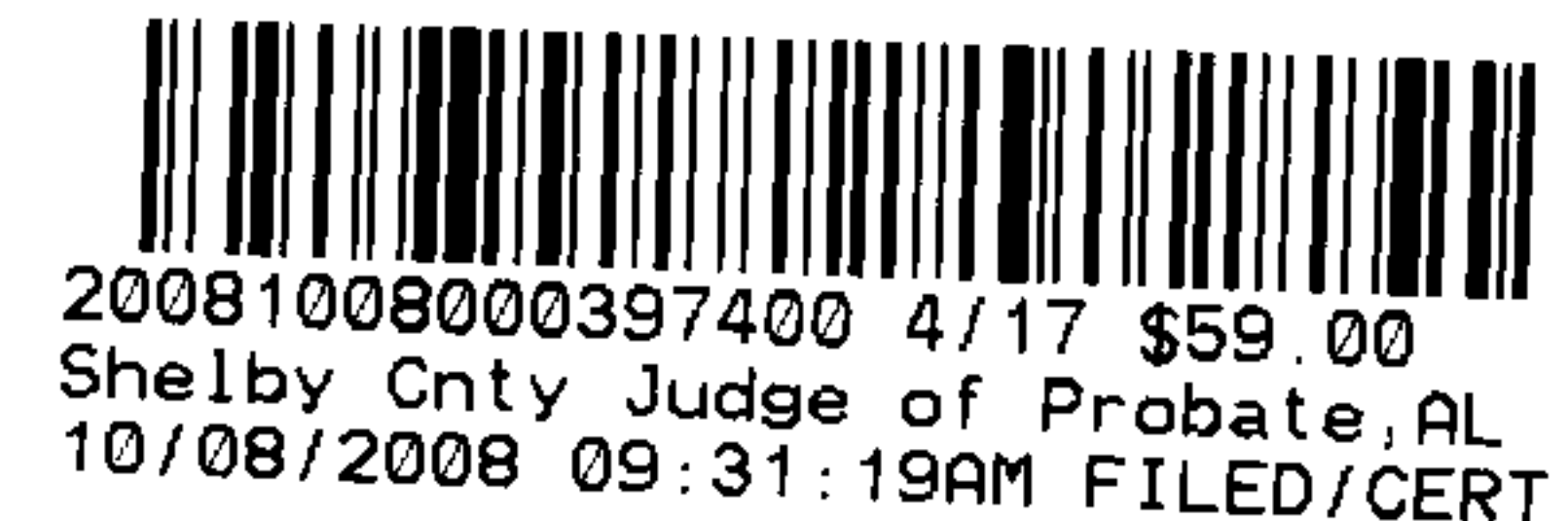
Byrd maintains Long Branch told it the City of Calera had approved Long Branch's plans. Based upon this representation, Long Branch directed Byrd to begin work on May 19, 2005. Long Branch admits it asked Byrd to start working to get the Project moving⁹, but denies it represented to Byrd that the plans had been approved by the City of Calera.

Byrd begin working on the Project and installed a portion of the storm drainage piping based upon the plans given to it by Long Branch. On June 14, 2005¹⁰, the City of Calera disapproved Long Branch's plans as submitted but approved Long Branch's plans, with modifications. These modifications included, *inter alia*, a change in the pipe size of the pipe already installed by Byrd. Because of the changes required by the City of Calera, Byrd had to remove the piping previously installed which it understood had been approved and replace it a different size piping. Byrd did not charge Long Branch its additional labor costs. Byrd maintains this additional work took an additional week. Long Branch maintains Byrd's

⁸ Paragraph 12.1 of Plaintiff's Exhibit 1.

⁹ Floyd deposition, page 209, lines 7-14.

¹⁰ Plaintiff's Exhibit 3 to the deposition of Christopher Dale Pappas.



additional work only took 3 days¹¹.

Long Branch instructed Byrd all of its dealing with Long Branch would be with Floyd and all of Byrd's dealings with Long Branch were with Floyd. Byrd performed work and submitted its invoices for progress payments to Floyd. Floyd would provide Byrd with lien waivers for Byrd's signature at the time Long Branch paid Byrd's invoices. Long Branch never notified Byrd in writing of any objection to any of its invoices or any of its work.

The parties both agree Byrd's work on the Project was substantially complete on October 18, 2005 and that this date is the end date for calculating liquidated damages¹². The parties do not dispute Byrd is entitled to a credit for the number of days it was unable to work on the Project because of excusable delays. However, the parties do dispute the starting date for the calculation of liquidated damages as well as the number of days credit to which Byrd is entitled.

Long Branch kept a rain gauge on site at the Project. Although Floyd admits not being on site much in the month of August, Long Branch contends it rained 10 days at the site from when Byrd started the work until September 1, 2005. As Long Branch did not maintain a daily log book of the time and amount of rain or the individual recording the information, Floyd's contention is based upon his recollection and a compilation from his notes or

¹¹ Exhibit 1 to deposition of Marshall Floyd.

¹² Plaintiff's Exhibit 26.

note of others which do not now exist.

On the other hand, Byrd maintains it was not able to work for 29 1/2 days as a result of conditions at the job site caused by rain. These conditions included times when it was unable to work because of rain and times it was unable to work because of wet conditions caused by rain the preceding day. In making its calculations, many of the times Byrd claims it was unable to work were 1/2 days.

Brian Peters, a professional meteorologist, testified to the number of days measurable rain was recorded at the weather station located at the Shelby County Airport ("*Shelby Cty*") which is approximately 6 miles from the job site and City of Calera's ("*Calera*") weather station located at its water treatment plant which is approximately 2.5 miles from the job site. Mr. Peters testified that for the time period of May 19, 2005 until August 31, 2005 (104 days), measurable rain fell at the Shelby Cty station on 59 days and measurable rain fell at the Calera station on 47 days¹³.

Byrd's work was substantially complete on October 18, 2005 and it had cut the roadway to curb grade¹⁴. Byrd could not backfill the curbs until Long Branch installed the curbs.

On November 10, 2005 Long Branch provided Byrd with its engineer's volume calculations which Byrd used in preparing its invoice and as well as in preparing the detailed summary

¹³ Plaintiff's Exhibits 28, 29, 30, and 31.

¹⁴ Exhibit 1 to the deposition of Marshall Floyd.

information contained in Plaintiff's Exhibits 12 and 20.

On November 16, 2005, Byrd submitted its invoice 3478¹⁵ to Long Branch, the majority of which was for the water main and storm drain installed by Byrd. Long Branch did not pay invoice 3478 and it did not notify Byrd in writing of any objection to the invoice. Byrd maintains that when it requested payment of invoice 3478, Long Branch advised that its bank was holding up its money.

Long Branch did not begin to install the curbs until November 18, 2005¹⁶ which was 30 days after Byrd's work was substantially complete. It is noteworthy that this 30 day period was extremely dry¹⁷ and a period which would have been conducive to Byrd to backfill the curbs, had the curbs been timely installed by Long Branch.

After Long Branch installed the curbs, Byrd began to remove the excess material in the roadbed placed in the roadbed and backfill the curbs. Rainfall had dampened the roadbed¹⁸. Byrd cut out the soft spots, which is custom and practice. During this time Shelby Cty recorded rainfall in excess of 1/2 inch on 5 of the 15 days preceding December 16, 2005¹⁹ (and the 2 days immediately next preceding December 16, 2005). Long Branch fired Byrd on December 16, 2005. Long Branch gave Byrd no written notification

¹⁵ Plaintiff's Exhibit 9.

¹⁶ Exhibit I to the deposition of Marshall Floyd.

¹⁷ Plaintiff's Exhibits 33 and 34.

¹⁸ Plaintiff's Exhibits 34 and 35.

¹⁹ Plaintiff's Exhibit 35.

of its termination or any reason for which it was fired and has never provided Byrd with any written complaint of Byrd's work or invoices. After its termination, Byrd returned to the job site for 2 days after the rain subsided and contends it finished its the work required by the contract.

On December 21, 2005, Byrd filed a lien in the Probate Court of Shelby County, Alabama based upon the non-payment of invoice 3478²⁰.

On January 4, 2006, Byrd submitted its final 2 invoices to Long Branch - invoice 3496²¹ and invoice 3497²². Again, Long Branch failed to pay these invoices yet made no written objection to them. On February 3, 2006, Byrd filed a lien in the Probate Court of Shelby County, Alabama based upon the non-payment of invoices 3496 and 3479²³. On February 8, 2006, Byrd filed this action to enforce its liens as well as its claims on breach of contract, work and labor done, violations of §8-29-1, et seq., Code of Ala., 1975.

At trial, Byrd presented the Court with a summary²⁴ of the work described in the contract, the work described in the change order and "as built" work performed on the Project by Byrd²⁵. Each

²⁰ Plaintiff's Exhibit 22.

²¹ Plaintiff's Exhibit 10.

²² Plaintiff's Exhibit 20.

²³ Plaintiff's Exhibit 24.

²⁴ The documents from which Plaintiff's Exhibit 12 was prepared were the contract (Plaintiff's Exhibit 1), the Change Order (Plaintiff's Exhibit 2), and Byrd's invoices (Plaintiff's Exhibit 3 through 11, inclusive).

²⁵ Plaintiff's Exhibit 12.

item of work was further described by its unit price, unit type and number of units. Base upon the work Byrd actually perform, Byrd contends it was entitled to \$464,612.20 under the contract and change order unit pricing. Byrd further presented the Court with a summary²⁶ of Long Branch's payments to Byrd which totaled \$307,819.14²⁷. Byrd finally presented the Court with a summary²⁸ of "as built" work performed on the Project by Byrd indexed by unit price, unit type, invoice number, date, exhibit number, and actual units, with totals for the actual work performed by Byrd, the payments to Byrd by Long Branch and the amounts due Byrd from Long Branch as of January 4, 2005, that amount being \$156,793.06²⁹.

John L. Hartman, III, testified he was an attorney licensed to practice law in the State of Alabama and that he was familiar with the provisions of *Alabama Code § 8-29-1, et seq. (Timely Payment to Contractors and Subcontractors)* and its provision for interest to accrue at the rate of 12% per annum and its provisions to recovery of reasonable attorney's fee in civil actions. Hartman further testified his firm has contracted to represent Byrd on a 1/3 basis plus out of pocket expenses and that contingency fee of 1/3 was a reasonable fee. Hartman further testified that \$7,469.63 in expenses had been advanced³⁰ and that, should Byrd net the total

²⁶ The documents from which the summary was prepared were Plaintiff's Exhibits 13 through 18, inclusive.

²⁷ Plaintiff's Exhibit 19.

²⁸ The documents from which the summary was prepared were the contract (Plaintiff's Exhibit 1), the Change Order (Plaintiff's Exhibit 2), and Byrd's invoices (Plaintiff's Exhibit 3 through 11, inclusive), and Long Branch's payments (Plaintiff's Exhibits 13 through 18, inclusive).

²⁹ Plaintiff's Exhibit 20.

³⁰ Pages 10 through 12, inclusive of Plaintiff's Exhibit 36.

amount of its loss claimed, an attorney's fee of \$92,933.14 would not be unreasonable. Hartman presented the Court with a summary which detailed the total damages claimed by Byrd of \$286,279.06, which amount would net Byrd the total amount of its loss³¹. On cross-examination, Hartman testified Byrd's counsel had spent no less than 197.80 hours representing Byrd in this matter, that counsel's hourly rate was \$250.00 per hour and that the extension of this rate would be \$49,450.00. Hartman testified it was normal and reasonable for an attorney's fee on a contingent fee basis to be in excess of an attorney's hourly rate because of the risk associated with a contingent fee basis.

While Long Branch does not dispute that it is indebted to Byrd in some amount, it denies owning the amount claimed by Byrd. Long Branch maintains: (1) Byrd breached the contract by failing to provide lien waivers with its applications for payments; (2) Byrd charged Long Branch the contract unit cost for each time Byrd moved material on the job which it contends amounted to double charging; (3) Byrd's damage claim of \$286,279.06 did not credit Long Branch for: (a) liquidated damages Long Branch claims are due under the contract; (b) restaking costs; (c) Long Branch's permitting fees; and (d) the amounts Long Branch maintains it spent to complete Byrd's work under the contract.

The Court finds the parties did enter into a contract for Byrd to perform the work described in Byrd's bid which is attached to

³¹ Plaintiff's Exhibit 37.

the contract. The Court further finds that Floyd was the agent, servant and employee of Long Branch and that Floyd discussed with Byrd and understood the type and scope of each item of work described in Byrd's bid proposal prior to the execution of the contract which was prepared by Long Branch. The Court also finds the parties did enter into a change order for Byrd to perform the work described in the change order. The Court further finds that Floyd was the agent, servant and employee of Long Branch, that Floyd discussed with Byrd and understood the type and scope of each item of work described in the change order prior to the execution of the change order and that Floyd had the actual or apparent authority to execute the change order³².

The Court finds Long Branch's claim that Byrd's failure to submit lien waivers is fatal to be without merit. The undisputed testimony is Long Branch prepared the lien waiver form which, by its terms, is only effective upon payment³³. Moreover, it was the pattern and practice of the parties for Long Branch to prepare its lien waiver form for signature at the time it delivered payment to Byrd.

The Court further finds that Byrd completed the work³⁴

³² The Court notes that Long Branch had knowledge of the existence of the change order at all material times and never objected to Floyd's execution of the change order. If fact, Long Branch's own records evidence Long Branch has paid Byrd for a portion of the work described in the change order.

³³ Defendant's Exhibit 6.

³⁴ Gunnar Byrd's testimony that Byrd completed all work is undisputed. Long Branch offered no evidence (demonstrative, factual or expert) disputing Byrd's completion of the work described in the bid proposal and change order nor did Long Branch offer any evidence of any timely written notification disputing or claiming Byrd did not complete the work. Although Byrd agrees normal practice would contemplate the City of Calera publishing a punch list at so future date, no punch list had been prepared or published at the time Byrd was fired. Moreover, Byrd never received a copy of the punch list until it was produced by Long Branch in discovery and Byrd was never given the opportunity to address any items on the punch list related to it work.

described in Byrd's bid proposal attached to the contract and the work described in the change order and that the contractual price of that work is \$464,612.20, which the Court also finds to be a reasonable value for the work performed by Byrd.

The Court further finds Long Branch failed to comply with the notice requirements of the Miller Act which is now codified in Ala.Code §8-29-1, et seq., entitled "*Timely Payments to Contractors and Subcontractors*". The purpose of the Miller Act is to set forth a procedure to insure timely payment to contractors and subcontractors of invoices not disputed in writing as required by the Act and to further award the contractor or subcontractor 12% interest on the unpaid balance of the invoice plus a reasonable attorney's fee occasioned by the owner's and/or contractor's non-compliance with the Act. Under the Miller Act, performance by a subcontractor in accordance with the provision of its contract entitles the subcontractor to payment in accordance with the terms of the contract³⁵. Under the terms of the contract, Long Branch agreed to pay Byrd within fifteen (15) days from the date of the invoiced work which Long Branch did not do.

The Miller Act did not leave Long Branch without remedy to dispute any invoice with which it had a bona fide disagreement. Ala.Code 1975, §8-29-4(a)(1), (3). However, if Long Branch had a bona fide dispute with any invoice of Byrd, it must, as a condition precedent, timely notify Byrd in writing as required by Ala.Code

³⁵ Performance by a contractor, subcontractor, or sub-subcontractor in accordance with the provisions of his or her contract entitles them to payment from the party with whom they contract. All contracts between parties require a date of payment. Ala.Code 1975, §8-29-2.

1975, §8-29-4(c)³⁶. Long Branch failed to supply Byrd with any such timely written notification articulating any one of the seven (7) reasons set forth in *Ala.Code* 1975, §8-29-4(a)³⁷.

The Court finds Long Branch paid Byrd \$307,819.14 and is entitled to a credit in like amount against the total amount due Byrd of \$464,812.20, leaving a balance due Byrd of \$156,793.06 as of January 4, 2006.

The Court finds that Byrd did not double charge Long Branch for any work performed but rather charged Long Branch for each item of work actually performed. Byrd and Floyd both reviewed each item of work described on Byrd's proposal and both understood the work to be performed. Byrd testified specifically as to each item of work described on it proposal, the manner and method in which the work was performed and charged. The fact Bob Johnson³⁸ did not have the same understanding of the work described in the bid proposal as Floyd, Long Branch's employee, is of no consequence. The Court finds Byrd's charges to be proper and reasonable.

³⁶ An owner is required to notify a contractor in writing within 15 days of receipt of any disputed request for payment. A contractor, subcontractor and sub-subcontractor is required to provide written notification within 5 days of disputed request for payment or notice of disputed request for payment. *Ala.Code* 1975, §8-20-4(c).

³⁷ Nothing in this chapter shall prevent the owner, contractor, or subcontractor from withholding application and certification for payment for any of the following reasons if there is a bona fide dispute over one or more of the following:

- (1) Unsatisfactory job progress.
- (2) Defective construction not remedied.
- (3) Disputed work.
- (4) Third party claims filed or reasonable evidence that a claim will be filed.
- (5) Failure of the contractor, subcontractor, or sub-contractor to make timely payments for labor, equipment, and materials.
- (6) Property damage to owner, contractor, or subcontractor.
- (7) Reasonable evidence that the contract, subcontract, or sub-contract cannot be completed for the unpaid balance of the contract or contract sum. *Ala.Code* 1975, §8-29-4(a).

³⁸ At trial Bob Johnson testified that while he was not a member of Long Branch, LLC, he was a member (or shareholder) in another entity which was a non-managing member of Long Branch, LLC and that he had no active involvement in the Project or in dealing with Byrd.

Regarding Long Branch's claims to set-off, the Court finds as follows:

(1) Liquidated Damages.

Long Branch contends: (a) the beginning date for calculating liquidated damages was May 19, 2005; (b) the end date for calculating liquidated damages, subject to additional days for excusable delays, is August 17, 2005; (c) 59 days elapsed between August 17, 2006 and October 18, 2005, the date of substantial completion; (d) Byrd was entitled to 13 days of excusable delay (10 rain days and 3 additional days for replacing the pipe); (e) resulting in unexcusable delay of 46 days for which it is entitled to a credit.

On the other hand, Byrd contends: (a) the beginning date for calculating liquidated damages was June 14, 2005, the date the City of Calera approved the plans; (b) the end date for calculating liquidated damages, subject to additional days for excusable delays, is September 12, 2005; (c) 36 days elapsed between September 12, 2006 and October 18, 2005, the date of substantial completion; (d) Byrd was entitled to 36 1/2 days of excusable delay (29 1/2 rain days and 7 additional days for replacing the pipe); (e) resulting in an amount additionally due Byrd of \$250.00 for 1/2 it substantially completing the Project within 90 days, after accounting for the days of excusable delays.

After considering the evidence and testimony of the parties

and witness, the Court finds Long Branch is not entitled to any set-off for liquidated damages and Byrd is not entitled to any additional amounts for substantially completing its work early.

2. Restaking Costs.

Long Branch claims it is entitled to a set-off for its costs it claims to have incurred in "restaking" the project. While the Court notes that there are charges for "restaking" contained on some of the invoices presented at trial, the Court notes that many charges on these invoices are not for "restaking" and are not relevant to Long Branch's claim for set-off. The Court also notes the Long Branch never provided Byrd with any invoice or other writing making claim for restaking fees during the pendency of the Project. Moreover, after considering the testimony and the exhibits, the Court is not persuaded that Byrd's conduct was the contributing cause of any need to re-stake. Consequently, the Court finds Long Branch is not entitled to any set-off for restaking costs it claims from Byrd.

3. Permitting Fees.

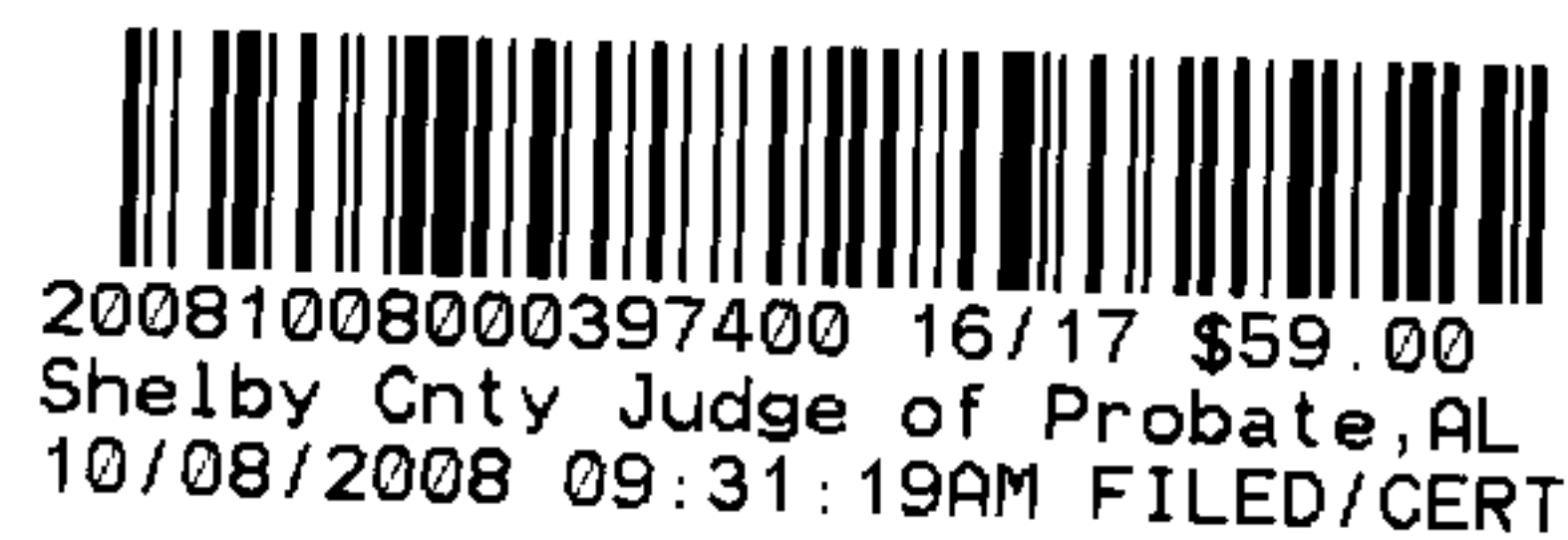
Long Branch claims it is entitled to a set-off for its costs it claims to have incurred in "permitting" the project, including the costs of permits which enure to the benefit of Long Branch and contractors other than Byrd long after Byrd departure from the project. The Court notes the Long Branch never provided Byrd with any invoice or other writing making claim for permitting fees

during the pendency of the Project and that the parties course of dealing on Long Branch, Phase I, were directly opposite. However, the Court finds that the Defendant paid monies under the contract for which it should be allowed reimbursement pursuant to paragraph 7.1. Those claims are as follows: a) Compaction Test fees in the amount of \$3,131.50; b) ADEM fees in the amount of \$1,775.00; and c) Material testing in the amount of \$1,620.50. Those costs were shown by the Defendant through live testimony, as well as business records and exhibits.

4. Completion of the Work.

Long Branch claims it is entitled to a set-off for its costs it claims to have incurred to complete Byrd's work described in bid proposal and the change order. Although Long Branch claims Byrd did not complete its work, Long Branch fails to introduce any photographs or other demonstrative exhibits evidencing any incomplete work of Byrd. Moreover, while Long Branch did offer evidence as to the costs it incurred to install its road in the weather conditions which then existed, Long Branch offered no evidence, expert or otherwise, that costs it incurred to install its roadway were in any manner attributable to any specific item of work described in the contract or change order.

Some months after Byrd's firing, the City of Calera did publish a punch list for the Project which contain some items of work which were within the scope of Byrd's work. The environmental issue on the punch list were not in the scope of Byrd's work but rather within the scope of the work performed by the environmental sub-contractor.




Rather than contacting Byrd to address the punch list items, Long Branch chose to hire Wade Booth to address these matters and paid him \$10,000.00. Based on the testimony of Booth, much of his work was necessitated by the digging conducted by utility installers who performed their work on the project after Byrd was fired. The Court is not persuaded that Long Branch's costs in installing its roadway is attributed to any failure of Byrd to perform any of the work described in the contract or change order. Moreover, Long Branch's failure to give Byrd an opportunity to address the items on the punch list which were related to Byrd's work operated as a waiver to its claim for set-off to its costs. Consequently, the Court finds Long Branch is not entitled to any set-off for costs it claims it incurred to finish Byrd's work.

It is **ORDERED and ADJUDGED** that Byrd is entitled to recover from Long Branch, in the amount of \$234,243.57, (comprised of \$150,266.06 due under the contract, \$27,047.88 of interest on the amount due under the contract at 12% per annum from January 4, 2006 until July 22, 2007, litigation costs of \$7,479.63 and attorney's fee of \$49,450.00) and costs of court and that a judgment is hereby entered in favor of Byrd and against Long Branch in said amount and costs of court for all of which let execution issue.


It is **FURTHER ORDERED and ADJUDGED** that the Byrd's liens heretofore filed in the Shelby County Probate Court at 20051221000657600 1/2 and 20060203000057370 1/2 are established and that the property which is the subject of said liens is hereby condemned for sale by the Sheriff of

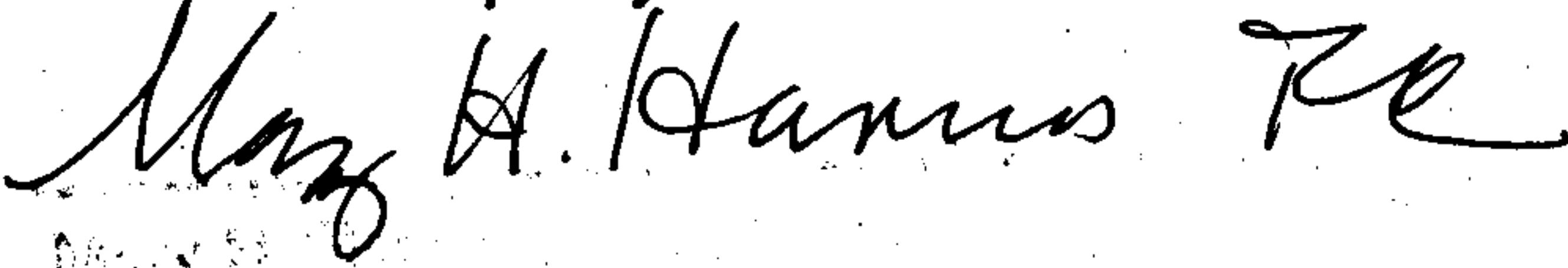
CV 2006-199
FINAL JUDGMENT
Page 17


20081008000397400 17/17 \$59.00
Shelby Cnty Judge of Probate, AL
10/08/2008 09:31:19AM FILED/CERT

Shelby County, Alabama for the satisfaction of the monetary judgment
herein entered.

Date: 2/21/08


HEWITT L. CONWILL
Judge, Circuit Court
Shelby County, Alabama

10/8/08
 Mary A. Harris RL