

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Eugene P. Warr, Jr., Special Referee

Appellate Case No. 2019-001062

Vincent C. Carter d/b/a Elite
Construction Co.,

Respondent,

v.

Eagles Landing Restaurants,
LLC,

Appellant.

PETITION FOR REHEARING

Petitioner-Appellant, Eagles Landing Restaurants, LLC, respectfully requests the Court rehear the case. The Court's unpublished opinion issued on August 24, 2022. Petitioner respectfully posits that the Court misapprehended the impact of Petitioner's point about the special referee employing the wrong standard.

Petitioner begins with the final section of the Court's opinion.

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A. Regarding Section IV of the Court’s Opinion, Entitled “Rule 59(e) motion”

The Court recognizes that the Special Referee applied the wrong standard in ruling on Petitioner’s Rule 59(e) motion. (Op. p. 7). But it holds the error to in effect be harmless. It quotes the order below,

“After considering the grounds raised in the motions of the Plaintiff and Defendant, and after reviewing the transcript of the trial, including the testimony of the witnesses and the exhibits that were admitted into evidence, as well as the notes from the trial, this Court denies both the Plaintiff’s Motion to Reconsider and the Defendant’s Motion to Amend. The testimony and exhibits admitted into evidence at trial support the Court’s findings and conclusions.”

(Op. pp. 7-8) (quoting order on motion to reconsider). “Because the special referee based its denial of the post-trial motions on the testimony and exhibits admitted into evidence—and the evidence supports the referee’s findings,” the Court writes, the error is harmless. (Op. p. 8).

The problem may be seen by combining the lower court’s error with the quotation above. Had a lower court written,

After considering, **under the wrong standard**, the grounds raised in the motions of the Plaintiff and Defendant, and after reviewing the transcript of the trial, including the testimony of the witnesses and the exhibits that were admitted into evidence, as well as the notes from the trial, this Court denies both the Plaintiff’s Motion to Reconsider and the Defendant’s Motion to Amend,

the error would be obvious.

Nor is application of the wrong standard saved by the next sentence, which states, “The testimony and exhibits admitted into evidence at trial support the Court’s findings and conclusions.” *Of course* the testimony and exhibits support the lower court’s findings and conclusions. They also undermine the lower court’s findings and conclusions. That is why the original order is such a tortuous order: the lower court was grappling with competing facts and claims.

The Court at oral argument seemed to agree that it was hard to make sense of aspects of the original order. The order’s discussion of how the referee arrived at the various expenses paid, credited, and not credited is obtuse. The Court has done its best to make sense out of it. But the written order below obviously contains errors and misstatements. The special referee was entitled to change his mind, but erroneously thought he could not.

Having filed a motion under Rule 59 of the South Carolina Rules of Civil Procedure, Petitioner was entitled to have it heard under the proper standard.

B. Regarding the remainder of the Court’s opinion.

In evaluating the lower court’s mix-up in Calculation and Crediting of Payments by Eagles Landing (Part II of the Court’s opinion), the Court writes,

The trial court is vested with considerable discretion over the amount of a damages award, and our review of the amount of damages is limited to the correction of errors of law. In reviewing a damages award, we do not weigh the evidence, but determine if any evidence supports the award.

Op. p. 5 (emphasis added) (quoting *Oaks at Rivers Edge Prop. Owners Ass’n, Inc. v. Daniel Island Riverside Devs., LLC*, 420 S.C. 424, 446, 803 S.E.2d 475, 487 (Ct. App. 2017)). Thus, this Court declined to weigh the evidence and deferred to the special referee’s discretion as to the amounts—even though he wrongfully thought he was precluded from reweighing the evidence and reconsidering the discretion employed in the extremely one-sided decision.

Similarly with Part I of this Court’s opinion, which concerns the requested Setoff for Carolina Construction Solutions Payments. Eagles Landing ended up paying for both the workers who did the work **and** paying Respondent for the workers whom Respondent had planned to have do the work, but did not in fact do it. That might seem unfair, but as the Court

accurately notes, “The Court will not disturb the trial court’s findings unless they are found to be without evidence that reasonably supports those findings.” Op. p. 4. That is an incredibly hard standard for many appellants to meet. That is why it is so important that the Special Referee, who can disturb his own findings under a much less taxing standard, be given the chance to change his mind, and know that he has the chance to change his mind.

Conclusion

Petitioner was entitled to have his motion heard under the right standard. The special referee’s findings and conclusions regarding making Petitioner pay Respondent twice for electrical work, and regarding the calculation and crediting of payments by Eagles Landing, are things on which reasonable minds can disagree, including the mind of the Special Referee, who might be and appears to be of two minds about many of his findings. It should be returned to that reasonable mind for a reconsideration in conformity with the rules.

Respectfully Submitted,

LAW OFFICE OF BROOKS R.
FUDENBERG LLC

September 8, 2022

s/Brooks R. Fudenberg

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PROOF OF SERVICE

I certify that I have today served Appellant-Petitioner's Petition for Rehearing on Vincent C. Carter d/b/a Elite Construction Co., the Respondent, by emailing a copy as an attachment to its attorney of record Patrick B. Ford, Esq. at pford@finklealaw.com.

A copy of the email is attached to this document.

September 8, 2022

s/Brooks R. Fudenberg _____

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Patrick,

Please find attached Appellant's Petition for Rehearing, which I hereby serve upon you.

If you have questions or concerns, feel free to contact me.

Regards,

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