

RECEIVED

Feb 22 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable Steven C Kirven
Case Nos. 2019CP3700687 and 2020CP3700188

Appellate Case No. 2022-001189

Montgomery Holdings, LLC d/b/a IBI Builders,..... Respondent,

v.

Christopher J. Merlo and Grandsouth Bank, Defendants

AND

Christopher J. Merlo,..... Appellant,

v.

Gregory K. Grissinger, Jr. and John Montgomery,Respondents.

**INITIAL BRIEF OF APPELLANT
CHRISTOPHER J. MERLO**

Townes B. Johnson III (SC Bar# 75412)
TOWNES B. JOHNSON III, LLC
PO BOX 9246
GREENVILLE, SC 29604
PH: (864) 757-4899

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES2

STATEMENT OF ISSUES ON APPEAL1

STATEMENT OF THE CASE2

STATEMENT OF FACTS3

ARGUMENT8

 I. THE COURT ERRONEOUSLY DENIED MERLO’S MOTION FOR DIRECTED
 VERDICT8

 II. THE COURT ERRONEOUSLY RULED ON QUESTIONS OF LAW10

 III. THE COURT MADE FINDING OF FACT UNSUPPORTED IN THE RECORD.....14

CONCLUSION.....17

TABLE OF AUTHORITIES

Rules

Rule 803(18), SCRE14

Cases

Silver v. Aabstract Pools & Spas, Inc. 658 S.E.2d 539, 376 S.C. 585 (S.C. App. 2008) 8, 9

Henderson & Dempsey v. Skinner 146 S.C. 281, 143 S.E. 875 (S.C. 1928)9

Willard v. Finch, 123 S.C. 56, 116 S.E. 96 (1923)10

Stoudenmire Heating & Air Conditioning Co. v. Craig Bldg. Partnership,
308 S.C. 298, 301, 417 S.E.2d 634, 63610

EState S. Tenney v. the South Carolina Dep't of Health, 393 S.C. 100,
712 S.E.2d 395 (S.C. 2011).....10

Verenes v. Alvanos, 387 S.C. 11, 14, 690 S.E.2d 771, 772–73 (2010)10

U.S. for Use and Benefit of Williams Elec. Co., Inc. v. Metric Constructors, Inc.,
480 S.E.2d 447, 325 S.C. 129 (S.C. 1996)11

Kennedy v. Columbia Lumber and Mfg. Co., Inc., 384 S.E.2d 730, 299 S.C. 335 (S.C. 1988)...12

Ellis v. Davidson, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct.App.2004).....13

O'Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992)13

Butler Contracting v. Court Street, 631 S.E.2d 252, 369 S.C. 121 (S.C. 2006).....14

STATEMENT OF ISSUES ON APPEAL

- I. THE COURT ERRONEOUSLY DENIED MERLO'S MOTION FOR DIRECTED VERDICT
- II. THE COURT ERRONEOUSLY RULED ON QUESTIONS OF LAW
- III. THE COURT MADE FINDING OF FACT UNSUPPORTED IN THE RECORD

STATEMENT OF THE CASE

On or about November 8, 2019, Plaintiff/Respondent Montgomery Holdings, LLC d/b/a IBI Builders (“IBI” or “Plaintiff”) brought the main action, C. A. No. 2019CP3700687, against Defendant/Appellant Christopher J. Merlo (“Merlo” or “Defendant”) as well as other defendants, Bank of Travelers Rest and Grandsouth Bank, for foreclosure of its Mechanic’s Lien, breach of contract, unjust enrichment and quantum meruit. *See IBI’s Complaint.*

On November 21, 2019 Merlo filed his Answer, Counterclaim and Third-party Complaint against IBI for breach of contract, negligence, negligent misrepresentation, fraud, violation of the South Carolina Unfair Trade Practices Act and breach of fiduciary duty and against Third-party Defendants/Respondents Gregory K. Grissinger, Jr. (“Grissinger”) and John Montgomery (“Montgomery” and collectively with Grissinger “Third-party Defendants”) for negligence, negligent misrepresentation, fraud, violation of the South Carolina Unfair Trade Practices Act and breach of fiduciary duty. *See Merlo’s Answer and Counterclaim.* On December 20, 2019, Third-party Defendants moved to strike/dismiss Merlo’s Third-party Complaint and on February 18, 2020, the Honorable R. Lawton McIntosh ordered that the Third-party Complaint be commenced in a separate action.

Accordingly, on March 6, 2020, Merlo commenced the separate action, C. A. No. 2020CP3700188, against Third-party Defendants for negligence, negligent misrepresentation, fraud, violation of the South Carolina Unfair Trade Practices Act and breach of fiduciary duty. *See Merlo’s Complaint.* Third-party Defendants filed their answer to Merlo’s complaint on March 23, 2020.

On August 30, 2021, the cases were re-consolidated for trial by the order of the Honorable R. Scott Sprouse and referred to the Master-in-Equity for Oconee County, the Honorable Steven

C. Kirven to take the testimony arising under the pleadings and to make his findings of fact and conclusions of law. *See August 30, 2021 Consent Order for Order of Reference to Master-in-Equity.* The trial in the consolidated cases commenced before the Honorable Steven C. Kirven on May 24, 2022 and concluded on May 27, 2022.

On July 20, 2022, judgment in the amount of \$402,861.66 was entered against Merlo and foreclosure of Merlo's real property was ordered. *See July 20, 2022 Master-in-Equity's Order and Judgment of Foreclosure and Sale.* On July 29, 2022, Merlo filed his Motion to Alter or Amend the Court's July 20, 2022 Order of Judgment and Foreclosure setting forth twenty-two (22) grounds to alter or amend the judgment. *See Merlo's Motion to Alter or Amend.* On August 17, 2022, Judge Kirven denied Merlo's motion and this appeal ensued with Merlo's Notice of Appeal, filed August 22, 2022. *See Order dated August 17, 2022.*

STATEMENT OF FACTS

IBI and Merlo entered into an agreement (hereinafter the "Contract") wherein IBI agreed to be the general contractor for the construction of a residence for Merlo (hereinafter the "Project") located in Oconee County, South Carolina at 548 Marina Bay Dr., Seneca, South Carolina 29762. *See Plaintiff's Trial Exhibit 2.* Pursuant to the Contract, the parties agreed that:

- 1) IBI would build the Project "per plans and scope (attached to this contract)" for the lump sum amount of \$625,000.00;
- 2) "all change orders shall be Approved by both parties, or via email" and "all changes desired in the current floor plan will contained in writing in a change order signed by all parties or approved via email."

- 3) IBI would be “solely responsible for all construction means, methods, techniques, sequences, and procedures, and the coordinating all portions of the work under the contract”;
- 4) IBI would warrant that all materials and equipment incorporated in the work would be “new unless otherwise specified, and that all work will be of good quality, free from faults and defects, and in conformance with the contract documents”; and
- 5) IBI would be responsible “for the acts and omissions of his employees, subcontractors. and their agents and employees. and other persons performing any of the work under a contract with IBI.

Id. Pursuant to the Contract’s “Spec Sheet”, ten foot ceilings were to be constructed in the basement. *Id.*

For the Project, Merlo chose an architectural design from Don Gardner called “Sandy Creek” and Merlo provided those plans to IBI on August 18, 2017. *Transcript, Pg. 137.* By October 11, 2017, IBI, unbeknownst to Merlo, had taken the “Sandy Creek” plan and obtained a site plan for their own use on a separate lot, located on Lot 57, Riverstone. *Transcript, Pg. 138.* IBI did not purchase a license for those plans until January 6, 2020. *Transcript, Pg. 142.*

IBI commenced its work on the Project in or around February 2018. *Transcript, Pg. 30.* Throughout the course of construction, IBI would periodically provided Merlo with “balance sheets” which were a rolling accounting of the Project showing how much of the lump sum contract balance remained as adjusted for changes and payments. *See e.g. Plaintiff’s Trial Exhibits 6, 8, 10, 12, 15, 17, 19, 22, 24, 26, 28 and 39.* Beginning in December 2018 and then consistently throughout 2019, Merlo would send IBI his re-work lists of items to be remedied. *See e.g. Defendant’s Trial Exhibits 1, 8, 10, 19, 21, 23, 25, 27, 29, 31, 33 and 35.* In his December 2018

correspondence, Merlo advised IBI that the “Downstairs should be 10’ ceilings but only 9’8”. *See Defendant’s Trial Exhibit 1*. The downstairs ceiling height was never corrected to be in accord with the ten-foot (10’) Contract specification. *Transcript, Pg. 313*.

On May 1, 2019, in conjunction with the April 30, 2019 balance sheet, IBI sent Merlo a “Guaranty” to sign regarding the obligations of the guarantor. *See Plaintiff’s Trial Exhibit 30*. The April 30, 2019 balance sheet had additions to the Contract amount of \$71,672.00 and showed payments made in the amount of \$513,290.00, leaving a contract balance to complete the Project of \$183,382.00. *See Plaintiff’s Trial Exhibit 28*. The April 30, 2019 balance sheet additionally showed three changes orders as “pending”; including the “Haul Dirt”, “Staining Each Door \$45 each” and “Making Theater room larger” categories. *Id.* Merlo executed the “Guaranty” document on May 3, 2019 and acknowledged the change orders to date and that other items would be added to the balance sheet “such as Boulder Retaining walls, plumbing overages etc.”. *See Plaintiff’s Trial Exhibit 31*.

The August 9, 2019 balance sheet had further additions to the Contract amount of \$54,471.00 and an additional payment in the amount of \$62,410.00, leaving a contract balance to complete the Project of \$175,443.00. *See Plaintiff’s Trial Exhibit 26*. The August 9, 2019 balance sheet maintained the “Haul Dirt”, “Staining Each Door \$45 each” and “Making Theater room larger” categories as pending and added “Landscape Overage (Landscape Lights)” and “Deck extension Flooring and Rail” as pending categories. *Id.* On August 26, 2019, Lee Matthew West, III performed an inspection of the Project for GrandSouth Bank finding that the Project was 93% complete. *Transcript, Pgs. 172*. On August 30, 2019, Merlo made a payment to IBI in the amount of \$31,250.00. *See Plaintiff’s Trial Exhibit 39*.

On October 9, 2019, Merlo sent IBI his October re-work list which consisted of 21 exterior items and 33 interior items that needed to be addressed and remedied. *See Defendant's Trial Exhibits 34 and 35.* On October 12, 2019, Merlo terminated the Contract with IBI stating: “[a]fter careful consideration, I have decided to terminate my contract with IBI Builders effective immediately. The contract began 11/16/17, and 695 days have passed, 2 years to build a house of 4000 SF. It remains unfinished & the re-work required is extensive. I cannot in good conscience devote another year of my life to this partnership. While I believe your team is very qualified, the contractors hired & decisions made on my project have been less than stellar. Mismanagement would be an understatement.” *See Plaintiff's Trial Exhibit 37.*

Shortly after termination and in conjunction with IBI's mechanics lien against the Project, IBI provided its final balance sheet. *See Plaintiff's Trial Exhibit 39.* The final balance sheet had further additions to the Contract amount of \$111,341.86 and showed the August 9, 2019 payment of \$31,250.00, leaving a contract balance to complete the Project of \$255,534.86. *Id.* The Contract amount, pursuant to the final balance sheet, after adding all charges was \$862,484.86 of which \$606,950.00 had been paid. *Id.*

Included in the additions to the Contract amount of \$111,341.86 were costs associated with the prior pending categories. *Id.* For the “Haul Dirt” category IBI added \$14,075.00 in charges, but at trial only had invoices to support charges of \$11,825.00. *Transcript, Pgs. 102-4.* For the “Making Theater room larger” category, IBI added \$7,975 in charges but at trial did not have any invoices to support the charges. *Transcript, Pgs. 108.* For the “Landscape Overage (Landscape Lights)” category, IBI added \$30,945.00 in charges but at trial only had invoices to support \$29,945.00, after the \$15,000.00 allowance. *Transcript, Pgs. 116-7.* For the “Deck extension Flooring and Rail” category, IBI added \$6,415.00 in charges but at trial did not have any invoices

to support the charges. *Transcript, Pgs. 119-20*. The final balance sheet introduced a new change for “2 extra floor recepticals” wherein IBI added \$550.00 in charges but at trial did not have any invoices to support the charges. *Transcript, Pgs. 120-1*.

On November 12, 2019, Ronald Marchant, III inspected the Project for GrandSouth Bank and found the Project to be consistent with Mr. West’s August 26, 2019 inspection, which found the Project to be 93% complete. *Transcript, Pg. 347 and see Plaintiff’s Trial Exhibit 51*. 93% of the final balance sheet Contract amount of \$862,484.86 equals \$802,110.92. *Id. and see Plaintiff’s Trial Exhibit 39*. Accordingly, \$60,373.94 worth of work on the Project had not performed by IBI as of termination per the inspections from GrandSouth Bank. *Id.*

After termination, Merlo hired Joy Construction to remediate IBI’s deficient work and complete the Project. *Transcript, Pg. 405*. After termination, Merlo learned that:

- 1) IBI had placed his driveway, landscaping and irrigation lines such that they encroached on his neighbor’s property. *Transcript, Pg. 383 and see Defendant’s Trial Exhibit 81*;
- 2) IBI had placed a portion of his boulder retaining wall such that it encroached on his other neighbor’s property. *Transcript, Pg. 498; and*
- 3) IBI had built a wood framed exterior wall where the plans called for a poured-in-place concrete exterior wall. *Defendant’s Trial Exhibits 13 and 14*.

At trial, Merlo testified to the deficient items on the October 2019 re-work list and the other deficient items Joy Construction or Merlo found as the scope of work for the Project was performed. *See Defendant’s Trial Exhibits 35, 75 and 77 and Transcript, Pgs. 380-98, 481-3, 489-505 and 525-535*. At trial, Merlo presented evidence that the electrical panel IBI’s subcontractor installed needed to be replaced because it was in excess of the 140-degree threshold

for circuit breakers under United Listing Standards 489, Section 7.1.4.1.6. *Transcript, Pgs. 422-3 and 526-7.*

Merlo paid Joy Construction \$137,000 before terminating them from the Project and paid \$35,712.10 directly to several vendors to remediate IBI's work and finish the Project; totaling \$172,712.10. *See Defendant's Trial Exhibits 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 48, 50, 51, 54, 60, 61, 62, 63, 64, 67, 68, 70, 71 and 72 and Transcript, Pgs. 408-11, 413-19, 421-28, 430-1, 463-476.*

ARGUMENT

I. THE COURT ERRONEOUSLY DENIED MERLO'S MOTION FOR DIRECTED VERDICT

At trial, Merlo set forth three distinct grounds for directed verdict motions after the close of IBI's case in chief, during which there had been no expert testimony. As to Count II of IBI's Complaint for Breach of Contract, Merlo set forth that IBI must bear all liability for its non-performance citing Silver v. Aabstract Pools & Spas, Inc. *See Silver v. Aabstract Pools & Spas, Inc.*, 658 S.E.2d 539, 376 S.C. 585 (S.C. App. 2008) (“*Where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom all liability for the nonperformance rests.*”)

In the matter at hand, IBI agreed to construct the Project “per plans and scope (attached to this contract)” and agreed to construct 10-foot ceilings in the basement. *See Plaintiff's Trial Exhibit 2.* It is undisputed that IBI deviated from the plans and scope and constructed the basement ceiling to 9-foot, 8-inch and Merlo advised IBI of this deviation in December 2018. *Defendant's Trial Exhibit 1 and Transcript, Pg. 313.* Furthermore, no where in the record did IBI provide any change order which affected the floor plan to adjust the ceiling height from 10 feet down to 9 feet, 8 inches.

As IBI breached the agreement by deviating from the plans and scope in December 2018, all liability for the nonperformance after that rests on IBI. See *Silver*, 658 S.E.2d 539 (S.C. App. 2008). As all liability for the nonperformance rests on IBI, the Court's denial of Merlo's motion for directed verdict was erroneous.

For the second part of the motion for directed verdict, Merlo contended that there was no consideration to support the Guaranty because it was based on prior consideration. It is elementary that a promise founded upon a past consideration cannot be enforced, unless it be shown to be supported by a new legal consideration, growing out of and connected with the original contract. *Henderson & Dempsey v. Skinner*, 146 S.C. 281, 143 S.E. 875 (S.C. 1928). Under the Contract, Merlo was already personally liable for the Project and valid change orders so the full consideration to attempting to support the Guaranty was past consideration. As a promise founded upon a past consideration cannot be enforced, the Court's denial of Merlo's motion for directed verdict with regard to the validity of the Guaranty was erroneous.

For the third part motion for directed verdict, Merlo sought a directed verdict on his causes of action for negligent misrepresentation, fraud, Unfair Trade Practices Act violation and breach of fiduciary duty based on fabricated numbers for which IBI sought payment and deviating from the change order provision in the Contract. With regard to some of the alleged change orders, IBI did not have documentation to support the following charges:

- 1) \$14,075.00 added for the "Haul Dirt" category, but only had invoices to support charges of \$11,825.00. *Transcript, Pgs. 102-4.*
- 2) \$7,975 added for the "Making Theater room larger" category, but did not have any invoices to support the charges. *Transcript, Pgs. 108.*

- 3) \$30,945.00 added for the “Landscape Overage (Landscape Lights)” category, but at trial only had invoices to support \$29,945.00, after the \$15,000.00 allowance. *Transcript, Pgs. 116-7.*
- 4) \$6,415.00 added for the “Deck extension Flooring and Rail” category, but did not have any invoices to support the charges. *Transcript, Pgs. 119-20.*
- 5) \$550.00 added for “2 extra floor recepticals”, but did not have any invoices to support the charges. *Transcript, Pgs. 120-1.*

It was further undisputed that none of these change orders were approved in accordance with the Contract. As IBI sought payment on fabricated numbers and deviated from the change order provision in the Contract, the Court’s denial of Merlo’s motion for directed verdict was erroneous.

II. THE COURT ERRONEOUSLY RULED ON QUESTIONS OF LAW

A. STANDARD OF REVIEW

A proceeding for the enforcement of a statutory lien, such as a mechanic’s lien, is legal in nature. *Willard v. Finch*, 123 S.C. 56, 116 S.E. 96 (1923); *Stoudenmire Heating & Air Conditioning Co. v. Craig Bldg. Partnership*, 308 S.C. 298, 301, 417 S.E.2d 634, 636 (Ct. App. 1992). In an action at law, “[a]n appellate court may determine questions of law with no particular deference to the trial court.” *Estate S. Tenney v. the South Carolina Dep’t of Health*, 393 S.C. 100, 712 S.E.2d 395 (S.C. 2011) *citing Verenes v. Alvanos*, 387 S.C. 11, 14, 690 S.E.2d 771, 772–73 (2010).

B. FIRST BREACH RULE

Merlo hereby incorporates the portion of Section I, above, regarding the first breach rule as if it was restated verbatim herein. As this Court can determine questions of law with no particular deference to the trial court, Merlo respectfully asks that this Court reverse the lower

Court and find that IBI's failure to construct the Project "per plans and scope (attached to this contract)" by not constructing 10-foot ceilings in the basement was a breach of the Contract which would require that IBI bear all liability for its non-performance.

C. BREACH OF CONTRACT

Pursuant to the Contract, IBI agreed to build the Project "per plans and scope (attached to this contract)" and agreed to be "solely responsible for all construction means, methods, techniques, sequences, and procedures, and the coordinating all portions of the work under the contract". In addition to failing to construct 10-foot ceilings in the basement as discussed above, it is undisputed that IBI: i) placed Merlo's driveway, landscaping and irrigation lines such that they encroached on his neighbor's property. *Transcript, Pg. 383 and see Defendant's Trial Exhibit 81*; ii) placed a portion of Merlo's boulder retaining wall such that it encroached on his other neighbor's property. *Transcript, Pg. 498*; and iii) built a wood framed exterior wall where the plans called for a poured-in-place concrete exterior wall. *Defendant's Trial Exhibits 13 and 14*.

Additionally, the Court erroneously failed to find to that IBI breached the Contract by violating the implied duty of good faith and fair dealing their fiduciary duty with the stealing Merlo's house plans and using them for their own gain. *See U.S. for Use and Benefit of Williams Elec. Co., Inc. v. Metric Constructors, Inc., 480 S.E.2d 447, 325 S.C. 129 (S.C. 1996) (in South Carolina, there exists in every contract an implied obligation of good faith and fair dealing.)*

As this Court can determine questions of law with no particular deference to the trial court, Merlo respectfully asks that this Court reverse the lower Court and find that IBI's failure to construct the Project "per plans and scope", failure to take responsibility for the erroneous work performed on the Project and stealing Merlo's house plans and using them for their own gain were breaches of contract.

D. NEGLIGENCE

IBI had a duty to protect Merlo against the foreseeable risk of harm from its actions and to construct the residence in a good and workmanlike manner, to use due care to supervise construction of the residence, to ensure that all aspects of work performed on the project were acceptable and in accordance with the plans and specifications, and to accomplish the work undertaken in a manner appropriate to the residential construction industry. *See e.g. Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 384 S.E.2d 730, 299 S.C. 335 (S.C. 1988). In the matter at hand, IBI breached its duty to Merlo by i) failing to follow the plans and construct 10-foot ceilings in the basement. *Defendant's Trial Exhibit 1 and Transcript, Pg. 313*; ii) failing to follow the plans and build a wood framed exterior wall where the plans called for a poured-in-place concrete exterior wall. *Defendant's Trial Exhibits 13 and 14*; iii) placing Merlo's driveway, landscaping and irrigation lines such that they encroached on his neighbor's property. *Transcript, Pg. 383 and see Defendant's Trial Exhibit 81*; and iv) placing a portion of Merlo's boulder retaining wall such that it encroached on his other neighbor's property. *Transcript, Pg. 498*.

As this Court can determine questions of law with no particular deference to the trial court, Merlo respectfully asks that this Court reverse the findings of the lower Court that IBI's deviations from industry standards were not negligent.

E. NEGLIGENT MISREPRESENTATION

Merlo hereby incorporates the portion of Section I, above, regarding IBI's negligent misrepresentation as if it was restated verbatim herein. As this Court can determine questions of law with no particular deference to the trial court, Merlo respectfully asks that this Court reverse the lower Court and find that IBI's fabricated numbers and deviation from the change order provision in the Contract was a breach of IBI's duty to communicate truthful information.

F. NO CONSIDERATION TO SUPPORT ‘GUARANTY’

Merlo hereby incorporates the portion of Section I, above, regarding the lack of consideration for the Guaranty as if it was restated verbatim herein. As this Court can determine questions of law with no particular deference to the trial court, Merlo respectfully asks that this Court reverse the lower Court and find that the Guaranty was not a valid and binding agreement.

G. UNJUSTIFIED TERMINATION

Merlo hereby incorporates the portion of Section I, above, regarding the first breach rule and Section II(C) as if it was restated verbatim herein. As this Court can determine questions of law with no particular deference to the trial court, Merlo respectfully asks that this Court reverse the lower Court and find that Merlo’s termination of the Contract was justified based on IBI’s breaches of contract and performance.

H. CHANGE ORDER APPROVAL

The Court erroneously found that Merlo approved of all the change orders when IBI did not present any change orders in accordance with the Contract in regard to the “Haul Dirt”, “Making Theater room larger”, “Landscape Overage (Landscape Lights)”, “Deck extension Flooring and Rail” or “2 extra floor recepticals” categories which added to IBI’s final balance sheet.

I. BREACH OF FIDUCIARY DUTY

The Court erroneously failed to find to that IBI, Grissinger and Montgomery had breached their fiduciary duty, established by the parties’ contractual relationship, by stealing Merlo’s house plans and using them for their own gain. *Transcript, Pg. 138. See Ellis v. Davidson*, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct.App.2004) (*a fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another*) and *See O’Shea v. Lesser*,

308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992) (*a fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.*)

J. FAILURE TO TAKE JUDICIAL NOTICE

The Court erroneously failed to take judicial notice of UL489 Paragraph 7.1.4.3.3 as a learned treatise and, in doing so, failed to find that IBI had, in violation of code, overloaded the project's electrical panel resulting in temperatures exceeding the maximum specified by UL489 Paragraph 7.1.4.3.3. *See Rule 803(18), SCRE (stating that a learned treatise is admissible if 'established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.)*

K. DAMAGES

In its Order, the Court erroneously established damages to IBI in the amount of \$255,534.86 as if IBI had fully completed the Project when the only evidence of record shows that 7% of the work (in the amount of \$60,373.94) had not been performed.

III. THE COURT MADE FINDING OF FACT UNSUPPORTED IN THE RECORD

In an action at law, when a case is tried without a jury, the trial court's findings of fact will be upheld on appeal when they are reasonably supported by the evidence. Stated another way, the trial court's findings of fact will not be disturbed on appeal unless wholly unsupported by the evidence or unless it clearly appears the findings were influenced or controlled by an error of law. The trial court's findings in such a case are equivalent to a jury's findings in a law action. *Butler Contracting v. Court Street*, 631 S.E.2d 252, 369 S.C. 121 (S.C. 2006).

In its Order, the Court made the following findings which are wholly unsupported by the evidence:

- 1) That IBI had added charges for change orders and allowance overages to the balance sheet at or near the time they were incurred when the record shows that the “Haul Dirt” and “Making Theater room larger”, in particular, were performed early on in the Project. *Transcript, Pgs. 102-4, 108.*
- 2) That IBI had “accurately monetized and documented” all change orders on its balance sheet and “was very thorough and accurate in its accounting of the project by virtue of its balance sheet” when the record shows that the “Haul Dirt”, “Making Theater room larger”, “Landscape Overage (Landscape Lights)”, “Deck extension Flooring and Rail” or “2 extra floor recepticals” categories were wholly unsupported.
- 3) That the percentage of completion was greater than 93% when there was no testimony proffered to support any contention.
- 4) That the supervision of the Project was proper and in compliance with the standard of care of the residential construction industry when IBI had the sole responsibility of construction and then failed to construct 10-foot ceilings in the basement, failed to follow build a wood framed exterior wall where the plans called for a poured-in-place concrete exterior wall, placed the driveway, landscaping and irrigation lines such that they encroached on his neighbor’s property and placed a portion of Merlo’s boulder retaining wall such that it encroached on his other neighbor’s property.
- 5) That the house was constructed in accordance with the plans selected by Merlo when IBI constructed 9 foot, 8 inch basement ceiling instead of 10 foot, failed to follow build a wood framed exterior wall where the plans called for a poured-in-place concrete exterior wall.

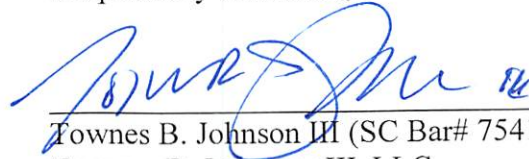
- 6) That the various photographs presented by Merlo and relied upon by him as showing substandard work were all taken during the midst of construction and do not represent the final product when the undisputed testimony was otherwise.
- 7) That Merlo only start raising issues related to construction quality and compliance with plans after IBI filed and served its mechanic's lien when the documentary evidence shows Merlo started raising concerns in December of 2018 and continued to do so routinely afterwards.
- 8) That Merlo did not present a definitive scope of work for which Joy Construction performed when Merlo went through all scopes; and
- 9) That Merlo made significant changes and additions to the Project after IBI was terminated when the only testimony about additional scopes of work were concerning the wine room which both Merlo and his wife, Karen N. Merlo, testified independently that work was not part of the monies they were seeking from IBI.

As these findings are erroneous and not supported by the record, Merlo respectfully asks that this Court find facts in accordance with the testimony presented at trial.

CONCLUSION

For the foregoing reasons, Christopher J. Merlo respectfully asks that this Court reverse the findings of the lower Court, find that Montgomery Holdings, LLC d/b/a IBI Builders breached the agreement between the parties and remand the matter back for the entry of an Order consistent with this Court's findings.

Respectfully submitted,



Townes B. Johnson III (SC Bar# 75412)
TOWNES B. JOHNSON III, LLC
PO Box 9246
GREENVILLE, SC 29604
PH: (864) 757-4899

Attorney for Appellant

February 22, 2023
Greenville, SC