RECEIVED
Apr 02 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Judge

Case No. 2006-CP-42-3337
Appellate Case No. 2023- 000572

Fast Formliners Company, …….Appellant/Respondent,

v.

Construction Resource Group, Inc.…….Respondent/Appellant.

FINAL BRIEF OF APPELLANT/RESPONDENT IN RESPONSE TO THE APPEAL TAKEN BY RESPONDENT/APPELLANT

Thomas H. Coker, Jr., Esquire
Christopher B. Major, Esquire
Haynsworth Sinkler Boyd, PA
ONE North Main, 2nd Floor (29601)
P.O. Box 2048
Greenville, SC 29602
O: (864) 240-3200
F: (864) 240-3300

Attorneys for Attorneys for Appellant/Respondent Fast Formliners Company

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Court Rules

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

STATEMENT OF THE CASE

This appeal arises from a contract dispute between Plaintiff/Appellant Fast Formliners Company ("Formliners"), a manufacturer of urethane form liners, and Defendant/Respondent Construction Resource Group, Inc. ("CRG"), a contractor, in regard to a contract for Formliners to supply CRG with liners for the construction of concrete sound panels for a highway project in North Carolina. The sound panels were made by attaching liners to metal forms and pouring concrete between the liners. Formliners provided the urethane panels to CRG but was not paid for the material provided. (R. pp. 278-282). CRG's basis for non-payment was the claim that the liners were not according to specification and had to be replaced when they became damaged during the manufacturing process. (R. p. 31, ¶ 46).

Part of the evidence offered by Plaintiff included video taken by a Formliners employee during a site visit requested by CRG. CRG filed a motion in limine seeking to exclude the videos from evidence, arguing that they violated a purported company policy on filming in the CRG plant.[1] (R. pp. 45-47; R. pp. 51-53). The Trial Court denied the motion in limine as to the video of what Loudl saw in the plant given that there was no dispute as to the authenticity of what the videos showed. (R. pp. 132-134). The Court did require that the audio on the recordings be muted when played for the jury to avoid any hearsay issues. *Id.*

At the conclusion of the trial, the jury found that CRG breached the contract with Formliners and awarded Formliners $112,792.60, which was the balance owed by CRG on the unpaid invoices. (R. pp. 291-298; R. p. 244). On the verdict form, the jury also expressly found that Plaintiff did not breach the contract. (R. pp. 1-2).

[1] The motion attached a photo of a sign prohibiting recording without any authentication as to whether the sign was in place at the time the Loudl site visit occurred.

After the entry of the verdict, CRG filed a Motion for a New Trial seeking to overturn the jury verdict on the following grounds: (1) that a juror should have disclosed that she worked with the spouse of a CRG employee at *voir dire*; (2) that the Court should reduce the verdict to "take into consideration the additional monies required by CRG to replace the Formliners of the Plaintiff;" and (3) that the videos from Defendant's facility were "improperly taken" and should not have been admitted. Beyond the juror issue, CRG's motion did not cite to any evidence or authority to support the grounds summarily stated in the motion. (R. pp. 67-69).

On the juror issue, CRG submitted an affidavit from someone named Zach Blackwood who indicates he is a CRG employee.[2] (R. p. 70). The affidavit claims that another person named Jimmy Belue came into Blackwood's office to relate a conversation Belue supposedly had with his wife about yet another hearsay communication that the wife supposedly had with a juror in the case. Neither Belue, his wife, nor the juror in question submitted affidavits regarding this chain of hearsay. According to Blackwood's third hand retelling, the juror is purported to have said "CRG lost a lawsuit with Fast Formliners" and that she was on the jury.

[2] On page 6 of its Initial Brief, CRG represents that an affidavit from a CRG employee named Jimmy Belue was submitted to the Trial Court. This is false. The only affidavit submitted in support of the motion for a new trial was the Blackwood Affidavit. Blackwood does reference Jimmy Belue by name and recount a supposed hearsay conversation Blackwood had with Belue, as part of a longer chain of hearsay conversations stretching back from Belue to his wife to the juror.

STANDARD OF REVIEW

A. Standard Applicable to Claims of Juror Non-Disclosure

A motion for a new trial based on alleged juror non-disclosure during *voir dire* is subject to an abuse of discretion standard. *State v. Galbreath*, 359 S.C. 398, 402, 597 S.E.2d 845, 846-847 (Ct. App. 2004). It is within the trial court's discretion to grant a new trial based on *voir dire* responses only if the juror "**intentionally** concealed" information from the Court. *State v. Woods*, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001).

B. Standard Applicable to New Trials *Nisi*

"A new trial *nisi* is one in which a new trial will be granted unless the party opposing it complies with a condition set by the court." *Waring v. Johnson*, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct.App.2000). The grant or denial of new trial motions rests within the discretion of the trial judge, and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 88–89, 610 S.E.2d 852, 856 (Ct.App.2005).

C. Standard Applicable to Arguments Regarding Admission of Evidence

Decisions on the admission or exclusion of evidence is a matter "within the trial court's sound discretion, and may only be disturbed "upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *Burke v. Republic Parking System, Inc.*, 421 S.C. 553, 558, 808 S.E. 2d 626, 628 (Ct. App. 2017) (*quoting State v. Commander*, 396 S.C. 254, 262–63, 721 S.E.2d 413, 417 (2011).

ARGUMENT

CRG appeals on three grounds: (1) that CRG should have been granted a new trial on the grounds that one of the jurors works with someone who is married to a CRG employee and that this tenuous connection should have been disclosed by the juror at *voir dire* (even though there is no evidence any such connection was known to the juror at *voir dire* or was actually responsive to any question asked at *voir dire*); (2) that the Court should have reduced the verdict to "account for the undisputed evidence of CRG's costs to cover" and (3) that the videos from Defendant's facility were improperly taken and should not have been admitted into evidence. These arguments fail because: (1) the affidavit submitted regarding the juror, which contains at least three layers of hearsay, does not actually allege any wrongdoing by a juror and does not come close to the standard for granting a new trial over juror misconduct; (2) the jury found, correctly, that Formliners did not breach the contract which negates any right of CRG to now seek an offset or credit for any other liners it purchased do to its misuse of Formliners' products, and CRG has not offered any evidence to contradict the jury's finding that Formliners did not breach the contract; and (3) contrary to the mischaracterizations made by CRG in its brief, there is ample evidence that the videos where taken with the full knowledge and consent of CRG, and CRG has not offered any case law or statutory authority for excluding the videos, which CRG's own witness admitted accurately depicted CRG's manufacturing process.

I. CRG has not come close to showing that the juror intentionally misled the Court or even that any of her answers at *voir dire* were in any way untruthful.

CRG has not offered any actual evidence of any concealment of information by a juror, much less intentional concealment as required under the relevant caselaw. Instead, CRG asks the Court to make numerous unsupported inferences based upon an affidavit from a CRG employee named Zach Blackwood containing multiple layers of hearsay that cannot serve as the basis for

granting a new trial.[3]

The actual standard for granting a new trial for juror misconduct is very high. It is "well established that verdicts found after regular and legal trial in a competent court ought not lightly be disturbed." *Harrington v. Nicholson*, 182 S.C. 38, 41, 188 S.E. 372, 373 (1936). A motion for a new trial must be supported by competent evidence. Hearsay statements are not competent evidence and should not be considered on a motion for new trial. *Id.*; *see also* 66 C.J.S. *New Trial* § 228 (2023) ("an affidavit in support of a motion for a new trial should be based on the knowledge of the affiant and not on hearsay or information and belief").

It is within the trial court's discretion to grant a new trial based on *voir dire* responses only if the juror "**intentionally** concealed" information from the Court. *State v. Woods*, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001) (Emphasis added); *see also State v. Galbreath*, 359 S.C. 398, 402, 597 S.E.2d 845, 847 (Ct. App. 2004) (finding that there was no intentional concealment where a juror failed to disclose a relationship with relatives of one of the victims in the case). Intentional concealment "occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." *Woods*, 345 S.C. at 588, 550 S.E.2d at 284. "Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." *Id.*

The South Carolina Supreme Court has set a two-part test for when failure to disclose during *voir dire* would justify a new trial. *Lynch v. Carolina Self Storage Centers, Inc.*. 409 S.C.

[3] As noted above, the CRG brief falsely states that Belue submitted an affidavit in support of CRG's new trial motion. The only affidavit submitted was the one from Blackwood.

146, 155, 760 S.E.2d 111, 116 (Ct. App. 2014). First, CRG must provide competent evidence that the juror **intentionally** concealed information from the Court. *Id.* If the Court finds the concealment was not intentional, then the inquiry stops there. *Id.* Only if there was intentional concealment does the Court move on to step two, determining whether the concealed information "would have been a material factor in the use of the party's peremptory challenges." *Id.*

A. The Blackwood Affidavit contains multiple layers of inadmissible hearsay.

The juror in question has not submitted an affidavit and Blackwood never spoke directly to the juror. Instead, Blackwood's affidavit recounts a chain of hearsay communications allegedly stretching back to the juror through several intermediaries. R. p. 70. Even after working through the at least three layers of hearsay found in the affidavit, at worst the affidavit accuses the juror of making a truthful and completely benign statement about her jury service – that she served on a jury where CRG was found liable to Formliners.

The first layer of hearsay involves a supposed conversation between Blackwood and an individual named Jimmy Belue. Belue's connection to CRG is not expressly noted in the affidavit, but he appears to be a CRG employee based on statements made by CRG in its Initial Brief (CRG Initial Brief p. 6) and to the Trial Court during the hearing on the motion for a new trial. R. pp. 254-256. Blackwood then adds another layer of hearsay to the affidavit by relating a supposed conversation between Jimmy Belue and Belue's wife that occurred outside Blackwood's presence. The third layer of hearsay relates to another separate conversation between the wife and a juror in this case in which the juror is accused of saying that "CRG lost a lawsuit with Fast Formliners" and that she served on the jury.

Inadmissible hearsay is not competent evidence for awarding a new trial. *Harrington*, 182 S.C. at 41, 188 S.E. at 373. CRG was either unwilling or unable to get Belue, his wife, or

the juror – Mrs. Belue's supposed "best friend" at work -- to submit affidavits in support of its argument. Instead, it relies on a chain of inadmissible conversations to undermine the credibility of the jury. The presence of any one of these layers of hearsay renders the affidavit inadmissible and not competent as evidence to support a new trial. As such, the Trial Court's denial of the motion should be affirmed.

B. There is no evidence that the juror in question concealed anything, intentionally or otherwise.

CRG seeks to overturn the jury's verdict on the slenderest of reeds – that one of the jurors told her coworker after the trial that she served on a jury and "CRG lost a lawsuit with Fast Formliners". [4] This is an entirely benign and accurate account of what happened at the trial.[5] There is no evidence in the affidavit that the juror was aware of a connection between her coworker and a CRG employee. Nothing in the statement attributed to the juror, which is simply a factual recitation of the outcome of the jury trial she served on, suggests such knowledge. Moreover, there was no question asked at *voir dire* that would have unambiguously called for disclosure of that information if it was known.

The relevant questions asked of the jury panel during *voir dire* were as follows:

> Is there anybody on the jury panel related by blood or marriage or have a close business or personal relationship with either Mr. Cox, the attorney, or Mr. Bailey, who is an officer for Construction Resource Group?
>
> ****
>
> We did have one individual earlier who indicated he had worked for Construction Resource Group. Is there any member of the jury panel have [sic] any connection

[4] Note that it is not even clear what language is being attributed to the unidentified juror in the affidavit, as there is one quotation mark before the word CRG and then another after the word Formliners, while a third quotation mark appears at the end of the sentence.

[5] To the extent that CRG suggests that the supposed juror statement might relate to her thought process in arriving at a verdict, SCRE 606(b) prohibits the use of such evidence to attack a jury verdict.

> with anybody or the site, the location of Construction Resource Group at Brown Creek Road here in Union?
>
> ****
>
> Does any member of the jury panel know about any dispute between Fast Formliners Company Construction and Resource Group or anything related to this particular case?
>
> ****
> Does any member of the jury panel know of any reason whatsoever why you should not be – why you should not serve as a juror in this case with particular emphasis being placed on your ability to be fair and impartial to both the plaintiff and defendants?
>
> (R. pp. 122-126).

CRG does not specify which question that it contends the juror should have answered differently. However, there is no question presented to the panel that would have called for the information supposedly "concealed" here - whether the jury panel members worked with someone who has a connection to any of the parties.

The third question asks whether the jury panel members have knowledge of the dispute. There is nothing in the Blackwood affidavit or CRG's arguments in its brief suggesting that the juror had prior knowledge of the dispute. So that question does not appear to be the one that CRG contends should have been answered differently.

The fourth question is almost identical to one challenged in *Galbreath* regarding whether the juror believes he or she can be fair and impartial to the parties. There is no indication in this record that the juror was unfair or biased. And as this Court concluded in *Galbreath*, a juror's "decision not to respond to this question [about impartiality] suggests that she felt she could be an impartial and fair juror" rather than suggesting intentional concealment. *Id.* at 404, 597 S.E.2d at 848.

That leaves only the remaining two questions as possible candidates. But both of those

questions ask if the members of the jury panel **themselves** had connections to the parties. For the second question, the Trial Court even provides specific context in mentioning another panel member who informed the Trial Court that he used to work for CRG. So the context for the question was another panel member who had a direct connection to CRG and the Court asking if any other panel members had a connection to CRG. None of the questions in any way asked if the panel members worked with someone who had a connection to CRG.

As an initial matter, CRG has not offered a shred of evidence that the juror was even aware of any connection between Mrs. Belue's husband and CRG prior to the workplace discussion that took place after the trial had concluded. To the extent any inference can be made from the vague information provided in the affidavit, the most obvious inference is that **Mrs. Belue** made the connection between her husband's employer and the information from her coworker about the parties in the case where she was a juror. There is nothing in the record indicating that the juror was aware of such a connection during *voir dire*. An award of a new trial cannot be based on such wild speculation about juror conduct or knowledge. *See Lynch*, 409 S.C. at 154, 760 S.E.2d at 116 (finding that an affidavit from the foreperson that contains only speculation about bias in an unidentified juror was not admissible as evidence).

Even if the juror was aware that her coworker's husband worked at CRG, a juror is only required to disclose information that is "unambiguously called for" by the questions presented to the panel. *Id.* at 155, 760 S.E.2d at 116. The questions asked at *voir dire* in this case do not unambiguously ask for information about the spouses of the panel members' coworkers, and this Court has repeatedly rejected requests to require that jurors disclose indirect or tenuous connections that go beyond the precise language of the questions asked.

In *Lynch*, the plaintiff made a motion for a new trial based upon the failure of one of the

jurors to disclose that the law firm representing the plaintiff had previously represented the juror's ex-husband during their divorce proceedings. Two questions asked during the *voir dire* in that case touched on relationships with the law firms representing the parties:

> Is there any member of the jury panel related by blood, connected by marriage or has a close personal or social relationship with any of the attorneys involved in this case?
>
> Does any member of the jury panel have any type of business relationship ... with the law firms [involved in the case]?

Id. This Court found that neither of these questions unambiguously called for the juror to disclose the information about her ex-husband's connection to the law firm representing the plaintiff. Since "it was not **the juror, herself**, who had a business relationship with the firm" (emphasis added), the Court held that there could be no finding of intentional concealment.

A similar result was reached in *Galbreath*. In that case, Anna Stinnett was one of the victims in the case and was a witness at the Defendant's criminal trial. In seeking a new trial, Galbreath submitted an affidavit alleging that one of the jurors knew Anna Stinnett's mother and had business dealings with other members of Stinnett's family. This Court ruled that the question asked during *voir dire* about friendship or business relationships with the witnesses was not specific enough to support a finding that the juror intentionally concealed her relationship with the witness's family. *Galbreath*, 359 S.C. at 402-403, 597 S.E.2d at 847-848.

The connection CRG relies upon in this case is even more tenuous than those raised in *Lynch* and *Galbreath*. At least in those cases there was a basis for arguing that bias could be inferred given the typically adversarial nature of divorce proceedings (*Lynch*) and the personal relationship to a victim in a criminal trial (*Galbreath*). In this case, the only connection alleged is that someone else (the juror's coworker) had a connection to CRG. That simply was not a question posed to the panel during *voir dire*, and it is not even a connection that would have

likely justified a challenge. There is not even anything inherent in a juror working with someone who is married to someone at CRG that raises a negative inference. It is just as likely that the juror would have a favorable impression of the employer of her coworker's husband as a negative one. If the more direct and relevant connections in *Lynch* and *Galbreath* were insufficient, the tenuous one alleged here certainly does not rise to the level of intentional concealment.

Even if the Court were to move on to the second stage of the *Woods* analysis and consider the effect on peremptory challenges, CRG's appeal still fails because CRG bears the responsibility of the parties to "request precise *voir dire* questions" that elicit information sought. *Lynch*, 409 S.C. at 156, 760 S.E.2d at 117; *see also Southern Welding Works, Inc. v. K & S Constr. Co.*, 286 S.C. 158, 162, 332 S.E.2d 102, 105 (Ct. App. 1985) (An objection to a juror made after the Court impanels the jury is deemed waived unless the objecting party shows that the party could not, in the exercise of due diligence, have discovered grounds for the objection before the judge impaneled the jury). CRG did not request any follow up *voir dire* to the jury panel beyond the standard questions posed by the Court. If CRG was seriously concerned about indirect connections such as relationships jurors might have with spouses of CRG employees, then CRG should have requested further *voir dire* on that subject. Its failure to do so constitutes a waiver of this argument.

II. Defendant's request for an offset ignores the fact that the jury found that only CRG was in breach and wildly mischaracterizes the evidence offered at trial.

CRG's next ground for seeking a new trial is the argument that the jury should have reduced the verdict to "to account for the undisputed evidence of CRG's costs to cover." This argument is classic question begging. CRG has not provided any argument why it should be

entitled to an offset[6] in any amount given that the jury found that CRG was the only party that breached the agreement. The evidence submitted at trial, which is blatantly mischaracterized by CRG in its brief, amply justified the jury's verdict.

A. CRG has misrepresented the evidence submitted on replacement costs.

CRG represents to the Court that "the undisputed testimony at trial was that the total amount of CRG's costs to cover was $214,000.00." This is a blatant misrepresentation of the record. First, the $214,000 number was never even presented to the jury. The only time that number appears in the trial transcript is during a proffer outside the presence of the jury. In that proffer, counsel for Formliners examined CRG's witness, Tim Bailey, regarding inconsistencies in the documents produced by CRG regarding its supposed replacement cost documents that had been produced in discovery. R. pp. 187-199. The conclusion of the proffer was that the parties stipulated that certain invoices from the "replacement" vendor, Architectural Polymers, and checks to Architectural Polymers were not relevant to the dispute at all and should not be entered into evidence. *Id.* Far from being undisputed, the $214,000 number was never even presented to the jury given the lack of relevant evidence to support it.

The actual number Bailey provided to the jury as a summary of its total payments to the Architectural Polymers, was $165,000. *Id.* at R. p. 200. Yet even that number was a moving target at trial. Counsel for Formliners established on cross that the $165,000 number included change order work that CRG agreed to perform over a year after it terminated Formliners that had absolutely nothing to do with Formliners or the dispute. *Id.* at R. pp. 201-205. In closing,

[6] Formliners would note that CRG did not request that any offset or setoff charges be included in the jury instructions. Counsel for CRG even agreed with the Court that no setoff instruction was needed. (R. p. 217).

CRG's trial counsel admitted that it could not ask to recover change order work and reduced the amount being sought to "$121,000 that we had to pay to replace the liner." *Id.* at R. p. 231.

Even the $121,000 is heavily disputed by Formliners. For instance, the invoices introduced from Architectural Polymers (R. pp. 303-317) do not match up with the amounts of the checks introduced (R. pp. 318-321) as proof of payment for the replacement materials. R. pp. 187-199) Additionally, CRG only ever purchased "replacement" liners for two of the four patterns supplied by Formliners yet still never paid a penny for even the patterns for which replacement was not even an issue. *Id.* at R. pp. 205-208. Obviously, replacement costs cannot be used to offset material from the patterns that CRG clearly used on the project and admittedly never actually replaced.

Given CRG's unreliable and constantly shifting testimony about its damages, it defies explanation how CRG can represent to the Court that it is "undisputed" that CRG incurred $214,000 in replacement costs. The weight of the evidence, and the lack of credibility in CRG's evidence, more than justify the jury's determination that CRG was not entitled to recover any replacement costs.

B. CRG has not explained why it is entitled to an offset when the jury found that only CRG was in breach of the agreement.

Beyond CRG's mischaracterization of the numbers involved, the amount of the claimed offset is ultimately irrelevant because the jury found that Formliners did not breach the contract. CRG can only be entitled to an offset if the liners provided by Formliners failed to comply with the contract. CRG obviously could not recover replacement costs for liners damaged through its own misuse or because CRG ordered the wrong material. Here, the jury found that Formliners did not breach the contract. This finding is supported by the overwhelming weight of the evidence.

To the extent Defendant's motion is seeking the Court to act as the thirteenth juror and set aside the jury verdict as to the absence of a breach by Formliners, CRG has not offered any argument about the preponderance of the evidence to support such an argument. *See Norton v. Norfolk Southern Ry. Co.*, 350 S.C. 473, 567 S.E.2d 851 (2002).

The evidence submitted to the jury clearly shows that the products supplied by Formliners met the specifications included by CRG in the purchase order. When CRG sent a termination letter to Formliners, the given reason was that Formliners providing liners that had two layers of plywood backing and that they should instead have had a single layer of backing. R. pp. 300-301. Yet the Contract between the parties, a purchase order issued by CRG and signed by Formliners, specifically called for two layers of plywood. R. pp. 278-282.

To argue that the contract language on double layer plywood was not controlling, CRG relied on a shop drawing from Formliners showing a single layer and argued this drawing modified the language of the Contract. R. pp. 283-290. However, Paragraph 1 of the CRG "PURCHASE ORDER TERMS AND CONDITIONS" included in the parties' Contract clearly says that "in the event of any conflict between or among the terms and conditions set forth in this Purchase Order and those set forth in any document referenced herein, the terms and conditions set forth in this Purchase Order shall prevail." (R. pp. 278-282). Drawings from the manufacturer were contemplated in Paragraph 9 of the Contract. R. p. 281. Thus, any inconsistency between the Contract and the shop drawings would be controlled by the language in the Contract requiring two layers of plywood.[7] That is especially true given that CRG was the drafter of the terms and conditions. *See Southern Atlantic Financial Services, Inc. v. Middleton,*

[7] The absurdity of CRG's argument becomes even clearer given that the "replacement" material from Architectural Polymers actually had three layers of plywood on it. R. pp. 209-212.

349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct. App. 2002) ("It is well settled that ambiguities arising within a contract must be construed against the drafter").

The jury heard and saw evidence that the Formliners products were damaged by CRG's misuse of the liners rather than any defect in the liners themselves. For instance, the jury saw videos of CRG's manufacturing process where it was dragging large, heavy concrete panels across the face of the urethane liners from Formliners, causing pieces of the liner to visually break off. R. pp. 170-178; Formliners' Trial Exhibit 6 (USB drive delivered to this Court on February 29, 2024). There was also testimony that CRG violated the manufacturer's application guide, which is available on Formliners' publicly accessible website, by using crowbars and other tools that can damage the soft urethane. *Id.* at R. pp. 136-144. This evidence clearly showed that the damage to the Formliners' products was caused by CRG's carelessness.

III. The videos of CRG's facility are indisputably authentic depictions of CRG's mishandling of liners made by Formliners and other manufacturers, and Defendant has offered no legal basis for excluding this clearly relevant evidence.

CRG's final argument is that it is entitled to a new trial because the Court allowed the videos taken by Petr Loudil in CRG's facility to be admitted into evidence. CRG claims that the recordings were not authorized by CRG and that these videos are inadmissible under a portion of the wiretapping statute found at S.C. Code Ann. § 17-30-65. This argument completely misreads the statute at issue. In reality, the wiretapping statute actually provides that Loudl's recordings were lawful.

§ 17-30-65 is part of the statute dealing with illegal wiretapping. S.C. Code Ann. § 17-30-10 *et seq*. The specific provision cited by CRG is inapplicable here for a host of reasons. First, the broader wiretapping Code section specifically states that it is lawful for a person "to intercept a wire, oral, or electronic communication **where the person is a party to the**

communication or where one of the parties to the communication has given prior consent to the interception." S.C. Code Ann. § 17-30-30(C) (Emphasis added). This broad exception applies even if the recorder was "not acting under color of law." *Id.* Since Loudl was a party to everything captured on the recordings, the recordings by definition cannot constitute illegal wiretapping. CRG's claims regarding its policies against recording in its facility are irrelevant under the wiretapping statute, since there is no provision to in the statute allowing CRG to unilaterally turn South Carolina from a one party consent State to a two party consent State. Moreover, the evidence submitted to the jury clearly established that Loudl was in the plant and recording the manufacturing process with the knowledge and consent of CRG. (R. pp. 145-174).

Second, § 17-30-65, the portion of the wiretapping statute cited by CRG, applies only to illegally **intercepted** communications. The statute provides that "whenever any wire, oral, or electronic communication has been **intercepted**, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court…." (Emphasis added). CRG misleadingly omits the word "intercepted" from its quotation from the statute.[8] Notably, CRG's brief contains no argument that the videos shown to the jury were intercepted from CRG. The undisputed evidence is that the videos were recorded by a Formliners employee of what he personally observed during his visit to the CRG facility. There is no allegation they were taken from CRG's surveillance systems or otherwise intercepted in any way. Tim Bailey of CRG conceded that the videos accurately depict CRG's manufacturing practices regarding the liners provided by Formliners. More specifically, Bailey admitted that "those are the means and methods we use every day…."

[8] In CRG's motion in limine first raising this argument to the Trial Court, CRG quoted language that does not even appear in the statute.

(R. p. 215). There can be no legal prejudice to CRG from showing the jury accurate depictions of how CRG handled the products at issue in the case.

CRG seems to suggest on Page 8 of its Initial Brief that the audio on the recordings might be within the scope of § 17-30-65 when it writes that the "audio component of the [Loudl] recording was obtained in violation of law." First, no audio was played for the jury. The videos shown were muted so that only the visuals were seen by the jury. It is axiomatic that "error without prejudice is not a basis for granting a new trial." *State v. Greene*, 255 S.C. 548, 180 S.E.2d 179 (1971). As such, the audio could not serve as the basis for ruling in favor of CRG even if there was some argument that it falls within the scope of the statute. However, the audio clearly does not constitute illegally intercepted communications.

First, the audio would be subject to the same blanket authorization from S.C. Code Ann. § 17-30-30 since the audio at issue consisted of narrative by Loudl of what he saw in the CRG plant. Any audio captured on the recordings was necessarily made in Loudl's presence. There is no allegation that Loudl planted listening devices or otherwise used devices to capture audio outside his presence. Since Loudl was a party to any such communications, CRG's attempt to shoe horn the audio into the wiretapping statute fails on its face.

Similarly, the Act defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication." S.C. Code Ann. § 17-30-15. For the recordings made by Loudl, any oral statements captured on the videos were made in Loudl's presence while he was openly recording with his phone. Indeed, the audio consists of Loudl's

voice narrating what he sees in the plant. To the extent that CRG is contending that Loudl "intercepted" his own voice, the argument is frivolous on its face.

The jury heard evidence that the videos were recorded with the full knowledge and consent of CRG. As Mr. Loudil testified, he recorded the videos openly over a roughly four-hour window when visiting CRG's facility **at CRG's request** to investigate the damage to the liners that formed the basis of both CRG's refusal to pay Formliners and CRG's counterclaim.[9] (R. pp. 145-174). A cursory review of the recordings themselves refute any implication that they were made surreptitiously, since CRG employees can be seen acknowledging Mr. Loudl's presence while he is recording the manufacturing process.

It is also hard to square CRG's insistence that it had strict rules against recording inside its facility with the fact that any visitor to CRG's website is greeted with video from a drone as it makes multiple flights right through the facility as operations take place.[10] Stills from this drone footage of CRG's manufacturing processes were provided in Formliners' brief in opposition to the motion in limine. R. pp. 93-101.

CONCLUSION

For all of these reasons set forth herein, Formliners respectfully requests that this Court affirm the verdict and the Trial Court's ruling on CRG's motion for a new trial. CRG has not offered any credible evidence to undermine the result at trial.

[9] The initial motion in limine contained the absurd claim that CRG did not know who shot the videos, a contention that was abandoned in a revised version of the motion. CRG also abandoned its earlier argument, noted in Formliners' opposition memorandum to the motion in limine, that Loudil had snuck in through the side door without authorization.

[10] https://www.crgsc.net/

HAYNSWORTH SINKLER BOYD, P.A.

/s/ Christopher B. Major
Thomas H. Coker, Jr., Esquire (S.C. Bar No. 1312)
Christopher B. Major, Esquire (S.C. Bar No. 72872)
Haynsworth Sinkler Boyd, PA
ONE North Main, 2nd Floor (29601)
P.O. Box 2048
Greenville, SC 29602
O: (864) 240-3200
F: (864) 240-3300

tcoker@hsblawfirm.com
cmajor@hsblawfirm.com

Attorneys for Appellant/Respondent Fast Formliners Company

March 28, 2024
Greenville, South Carolina

RECEIVED
Apr 02 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Judge

Case No. 2006-CP-42-3337
Appellate Case No. 2023- 000572

Fast Formliners Company, …….Appellant/Respondent,

v.

Construction Resource Group, Inc.…….Respondent/Appellant.

CERTIFICATE OF COUNSEL

I certify that the Brief of Appellant/Respondent in Response to the Appeal Taken by Respondent/Appellant in this matter complies with Rule 211(b), SCACR.

Respectfully submitted,

s/ Christopher B. Major
Thomas H. Coker, Jr., Esquire
Christopher B. Major, Esquire
Haynsworth Sinkler Boyd, PA
ONE North Main, 2nd Floor (29601)
P.O. Box 2048
Greenville, SC 29602
O: (864) 240-3200
F: (864) 240-3300

Attorneys for Attorneys for Appellant/Respondent Fast Formliners Company

March 28, 2024
Greenville, South Carolina