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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-02-02382
Appellate Case Tracking No.: 2015-001115

Prescott & Sons Construction, LLC, ... Respondent,

v.

Larry Rogers and Michelle Rogers, ... Appellants.

FINAL REPLY BRIEF OF APPELLANTS LARRY ROGERS AND MICHELLE ROGERS

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I. The trial court committed a prejudicial abuse of discretion by admitting emails sent by Mrs. Prescott to Appellants when those emails were not disclosed during discovery, the emails were the only proof that any subcontractor invoices were sent to Appellants, and the trial court failed to properly consider whether exclusion was the appropriate sanction for Respondent's failure to disclose.

In its brief, Respondent contends that Appellants have misrepresented when Mrs. Prescott produced the emails with invoices attached. In fact, Appellants have accurately characterized what happened and *never* contended that Mrs. Prescott introduced the email with attachments during her direct examination. (*See* Appellants' Br. at 6 ("Later in the trial, seemingly aware that Respondent's breach of contract case *required* such evidence, Respondent's counsel informed the trial court that he had obtained some emails indicating that the subcontractor invoices were indeed sent to the Appellants.")).

In any event, that evidence was not disclosed during discovery despite Appellants' discovery requests and motion to compel that were filed as a result of Respondent's failure to comply with this State's discovery rules. (*See* R. pp. 59–69). This Court's precedent requires trial courts to "weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice" when deciding whether to admit evidence concealed during the discovery process. *Jamison v. Ford Motor Co.*, 373 S.C. 248, 270, 644 S.E.2d 755, 767 (Ct. App. 2007). That was not done in this case, and the error is a *per se* abuse of discretion. *See id.*

Moreover, the trial court's abuse of discretion was not harmless, as this evidence was the *only* documentary evidence demonstrating what invoices were sent to Appellants. *See Senn v. J.S. Weeks & Co.*, 255 S.C. 585, 591, 180 S.E.2d 336, 338 (1971) (finding the

exclusion of evidence that was relevant to the basis of plaintiff's action was not harmless because of the "crucial nature of the evidence").

II. The trial court committed an error of law by not granting a directed verdict for Appellants on Respondent's breach of contract claims.

A. Appellants are entitled to a directed verdict on Respondent's First and Second Causes of Action (Breach of Contract) because Respondent did not introduce any evidence that Appellants did not pay any invoices that they actually received.

Respondent misstates what happened at trial. Although there was testimony and evidence offered at trial that Appellants did not pay some invoices, there was no admissible testimony or evidence about *which invoices* were unpaid. The only evidence that attempted to conform the proof at trial to the allegations in the Complaint—that eight invoices were unpaid—was the email and attachments introduced during Mrs. Prescott's testimony. As detailed above and in Appellants' principal brief, that evidence was admitted in error, and more importantly only *three* invoices were attached to the email. Accordingly, due to Respondent's failure of proof, the trial court should have granted Appellants' motion for a directed verdict.

B. Appellants are entitled to a directed verdict on Respondent's Fourth Cause of Action (Breach of Contract) because a certificate of occupancy was never issued.

Respondent relies on language from *Bensch v. Davidson*, 354 S.C. 173, 580 S.E.2d 128 (2003), in making the argument that the failure to obtain a Certificate of Occupancy is excusable. Respondent misreads this language, which relates only to what *damages* are recoverable in a breach of contract action. *See Bensch*, 354 S.C. at 177, 580 S.E.2d at 130 ("The trial court charged that after partially performing a contract, one who is wrongfully prevented from completing the contract may recover actual expenditures and damages for

lost profits."). Indeed, the language quoted by Respondent is a recitation of a jury charge on damages given in the *Bensch* case. *Id.*

Respondent's reliance on this language misapprehends Appellants' argument, which is simply that Respondent drafted a contract that only permitted him to be paid upon the issuance of a Certificate of Occupancy. No such Certificate of Occupancy was issued in this case, due primarily to the numerous violations found by the building inspector. Respondent puts the proverbial cart before the horse in discussing what damages are recoverable when there was no breach in the first instance.

Moreover, Respondent appears to have drafted the second contract, and "[i]t is well settled that ambiguities arising within a contract must be construed against the drafter." *S. Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (2002). If Respondent wanted a contractually guaranteed right to finish construction of the property in order to receive payment under the contract, it should have included such a provision in the contract. It did not, and the natural result of this omission is a failure of proof in Respondent's breach of contract case. Thus, the trial court should have granted Appellants' motion for a directed verdict.

III. The trial court erred by denying Appellants' motion for a new trial.

A. Appellants are entitled to a new trial on Respondent's breach of contract claims because the jury verdict is so confused that it is not clear what was intended.

"[W]hen a verdict is so confused that the jury's intent is unclear, the safest and best course is to order a new trial." *Johnson v. Parker*, 279 S.C. 132, 135, 303 S.E.2d 95, 97 (1983) (citing *Lorick & Lowrance, Inc. v. Julius H. Walker & Co.*, 153 S.C. 309, 150 S.E. 789, 792 (1929)). Respondent claimed that eight invoices were unpaid, but only introduced

evidence that three invoices (which may not have been a subset of those eight invoices) were sent to Appellants in compliance with the second contract. (R. pp. 24–25; R. p. 85; R. 244, lines 14–24). Respondent does not dispute this fact in its brief, instead offering only conclusory statements that the verdict is clear. Contrary to Respondent's unsupported assertions, the trial court should have ordered a new trial as the basis of the jury's verdict is entirely unclear.

B. Appellants are entitled to a new trial on Respondent's breach of contract claims because the jury verdict is contrary to the fair preponderance of the evidence.

It is uncontested that no Certificate of Occupancy was issued in this case. Thus, under the plain and unambiguous terms of the second contract, Respondent was not entitled to the $15,000 remaining balance. Thus, any damage award including that $15,000 amount is necessarily contrary to the fair preponderance of the evidence. The trial court should have granted Appellants a new trial.

IV. The trial court erred by awarding Respondent attorney's fees and costs because the trial court did not make findings of fact about the reasonableness of the attorney's fees and costs.

Despite Respondent's lengthy argument discussing the propriety of attorneys' fees in this case, the fact remains that the trial court's order is facially defective. It bears noting that Respondent's recitation of the trial court's findings on pages 9 and 10 of its brief, is plainly inaccurate and misleading. The order contains no analysis of the nature, extent, and difficulty of the legal services rendered. The order contains no analysis of the amount of time and labor devoted to the case. And there is no analysis of what the customary rate for such legal services is in the Aiken area. In fact, the trial court's order contains *no analysis* whatsoever.

While Respondent may have submitted an affidavit or other evidence at the hearing as to each of the factors that the trial court was required to analyze, the trial court did not impliedly or expressly incorporate those arguments into its order. Simply labeling something as "reasonable" does not actually render it "reasonable." The trial court's attorneys' fees order should be reversed.

CONCLUSION

For the reasons stated above, this Court should enter a directed verdict for Appellants on all of Respondent's breach of contract claims. Alternatively, this Court should grant Appellants a new trial. Regardless of the Court's holding on the directed verdict and new trial issues, the award of attorney's fees and costs should be reversed.

February 18, 2016

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Respondent Prescott & Sons Construction, LLC with a copy of the *Record on Appeal*, *Final Brief of Appellants Larry Rogers and Michelle Rogers*, and *Final Reply Brief of Appellants Larry Rogers and Michelle Rogers* by hand-delivery, at the below listed addresses clearly indicated on said envelope this the 22nd day of February, 2016, addressed as follows:

Lir Patrick Derieg
1924 Barnwell St.
Columbia, South Carolina 29201
Attorney for Respondent

By: _____
M. David Scott