THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2018-CP-10-4907
Appellate Case No. 2019-001599

Karyn Cavanaugh ..... Appellant

v.

New Age Contractors, LLP ..... Respondent

INITIAL BRIEF OF RESPONDENT

SMITH | CLOSSER | WHEELER, PA

March 20, 2020

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III. The Circuit Court did not err in finding that Appellant suffered no prejudice from the Magistrate Court's exclusion or admission of evidence during the trial of the case.

STATEMENT OF THE CASE

This is an appeal by Karyn Cavanaugh ("Cavanaugh") of the judgment issued against her for $7,500.00 in the Charleston County Magistrate Court on September 10, 2018. Cavanaugh filed the Complaint on March 26, 2018 alleging reimbursement for work not performed by New Age Contractors, LLP ("New Age") and the same was served on New Age on May 9, 2018. New Age then filed an Answer and Counterclaim on May 29, 2018 denying the allegations in the Complaint and alleging breach of contract against Cavanaugh for failing to pay for labor and materials provided by New Age.

A bench trial was held on September 10, 2018, wherein Cavanaugh appeared pro se with no additional witnesses and New Age was represented by counsel. After considering the evidence and testimony of each party, the Magistrate denied Cavanaugh's claim and ruled in favor of New Age on its counterclaim. The Notice of Appeal was filed on October 10, 2018 appealing the judgment issued in favor of New Age. The Magistrate's Return was filed on March 4, 2019 and the appeal was heard before the Circuit Court on July 31, 2019. After careful consideration of the arguments of counsel and a review of the record, including the Magistrate Court's Return, the Circuit Court dismissed Cavanaugh's appeal and affirmed the Magistrate Court's judgment by order dated August 13, 2019. The Notice of Appeal to the Court of Appeals was filed on September 18, 2019, seeking review of the Circuit Court's decision.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Associates, Ltd. V. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "[T]he Court of Appeals will presume that an affirmance by the Circuit Court of a magistrate's judgment was made upon the merits where the testimony was sufficient to sustain the judgment of the magistrate and there are no facts that show the affirmance was influenced by an error of law..." *Burns v. Wannamaker*, 281 S.C. 352, 357, 315 S.E.2d 179, 182 (Ct. App. 1984).

"The finding of fact in the circuit court in any appeal from magistrate's court will not be disturbed by this court where there is any evidence to sustain that finding." *Powell v. Cobb*, 107 S.C. 503, 93 S.E.2d 191 (1917). "Where a finding by the circuit court on appeal from magistrate court is supported by any evidence, it is final." *Brown v. Missouri State Life Ins. Co.*, 136 S.C. 90, 134 S.E.2d 224 (1926). Further, an appellate court should still give deference to the trial court because it was in the best position to assess and weigh the witness' credibility. *Matter of Estate of Kay*, 423 S.C. 476, 480, 816 S.E.2d 542, 544-45 (2018).

FACTS

On June 17, 2015, Appellant Karyn Cavanaugh ("Cavanaugh") and her husband, Kenneth Cavanaugh, entered into a contract with New Age Contractors, LLP ("New Age") for home repairs identified by Cavanaugh's insurance company as damage from water intrusion. (Mag. Hrg. Transcr. 71: 6-8). The insurance company, Frontline Insurance Company, prepared an estimate for what it believed to be the work necessary to repair the water damage to Cavanaugh's home. (Mag. Hrg. Transcr. 71: 6-8). Specifically, the estimate called for repairing water damage under the scuppers, which necessitated the removal of the exterior stucco and sheathing, repairing the damage, then replacing the sheathing and stucco, as necessary. (Mag. Hrg. Transcr. 74: 1-22). Once the repairs began, it became clear that the damage was more extensive than originally contemplated in the estimate, to include the presence of live termites. (Mag. Hrg. Transcr. 72: 1-6).

When it became clear that New Age was going to exceed the scope of the original estimate, the parties discussed the need to repair additional damage and perform additional work beyond the original scope. (Mag. Hrg. Transcr. 75: 12-21). In fact, New Age even assisted Cavanaugh in working with her insurance company to obtain additional funds to cover the additional damage and work necessary to repair that damage. (Mag. Hrg. Transcr. 76: 1-21). However, the insurance company did not provide additional funds to keep up with the work that New Age performed, and Cavanaugh eventually informed New Age that there was no more money. (Mag. Hrg. Transcr. 77: 17-25). New Age only billed for work actually performed and completed, and did not bill for items in the contract that were not done. (Mag. Hrg. Transcr. 78: 15-24). After being informed by Cavanaugh that she could no longer pay for New Age to continue working, the remaining unpaid balance owed and due to New Age was $9,862.08. (Mag. Hrg. Transcr. 79: 1-14).

When New Age was informed by Cavanaugh that she could not pay the final invoice, it was forced to pull off the job and discontinue work. (Mag. Hrg. Transcr. 78: 8-14). However, even though there was no more money to pay New Age, they waterproofed the exposed areas and advised Cavanaugh they would pick back up when the financial issues were resolved, even returning to the job two or three times at the request of Cavanaugh to perform additional waterproofing. (Mag. Hrg. Transcr. 86: 5-25; 87: 1-10). In November 2015, after New Age stopped work, Cavanaugh filed suit against the original home builder for construction defects, which required the exposed areas to remain exposed. (Mag. Hrg. Transcr. 43: 11-25).

At the trial of the case on September 10, 2018, Cavanaugh presented evidence of the estimate from the insurance company, but acknowledged that New Age exceeded the scope of the estimate and was paid in an amount that exceeded the estimate. (Mag. Hrg. Transcr. 36: 4-10). At the trial, as is typical in Magistrate Court trials, the Magistrate questioned the witnesses for both sides, and allowed questioning from Cavanaugh and counsel for New Age. After considering the evidence and testimony, the Magistrate found that the need to repair damage and perform work beyond the scope of the estimate constituted a change or alteration of the original contract based on the conduct of the parties. (Mag. Return p. 2). Based on this finding, and the evidence and testimony presented establishing the work performed by New Age, the Magistrate denied Cavanaugh's claim and ruled in favor of New Age on its counterclaim.

The ruling in favor of New Age was affirmed on appeal to the Circuit Court after careful consideration of the arguments of counsel and a review of the record. (Circuit Court Order, p. 1). Specifically, the Circuit Court found that Cavanaugh's arguments on appeal were not preserved for appellate review because the issues were not raised at the trial or in post-trial motions. (Circuit Court Order, p. 4). However, the Circuit Court also addressed the merits of the arguments and

found no evidence in the record to support Cavanaugh's arguments on appeal. (Circuit Court Order, p. 5-6). Further, the Circuit Court found evidentiary support for the Magistrate's ruling, and found no error of law or abuse of discretion in that decision. (Circuit Court Order, p. 6).

ARGUMENT

I. The Circuit Court applied the appropriate standard of review on appeal from the Magistrate Court and did not limit its findings to the issues raised and preserved at the trial.

The Circuit Court applied the appropriate standard of review in its affirmation of the Magistrate Court's decision. While the court cited and referenced S.C. Code Ann. §18-3-70, it did not primarily rely on that section to establish the standard of review. The quoted language from Section 18-3-70 contained in the Order is substantially similar to the language used in Section 18-7-130, which Appellant acknowledges is the Chapter that contains the proper standard. (Initial Brief of Appellant, p. 5). "The appeal shall be heard by the Court upon all the papers in the case... without the examination of witnesses in court." S.C. Code Ann. §18-7-130. The language from Section 18-3-70 referenced in the Circuit Court's Order does not establish the standard of review, but merely constrains the review to the papers in the case, which is the same requirement for all appeals from Magistrate Court to Circuit Court. *See Id.* Moreover, Appellant acknowledges that the Circuit Court was provided with a certified transcript of the Magistrate Court hearing, and the Order specifically states that "[t]he record, more specifically the transcript..." was reviewed in rendering its decision. (Circuit Court Order, p. 6). This shows that the Circuit Court did not limit its review and ruling to issue preservation.

Further, the Circuit Court did not impose a technical requirement on Appellant that runs afoul of Section 18-7-170. The Circuit Court Order specifically cites and references Section 18-7-170 in its Conclusions of Law and, while noting that Appellant failed to raise the issues on appeal before the Magistrate Court, went on to address the merits of the issues on appeal. The Circuit Court did not limit itself to issue preservation and explicitly exercised its broad statutory grant of authority to review the merits and facts of the case. The fact that the Magistrate Court and Circuit Court both identified the contract as calling for work related to "a series of down spouts" and "a

series of drains" shows that they both performed a diligent review of the record, to include the evidence and testimony presented. A "scupper", as testified to by Respondent in the trial, is a drainage system, which in this case, was draining from the roof of the home. Characterizing the work as related to "down spouts" and/or "drains" would be an accurate characterization by someone who had conducted a thorough review of the facts of the case.

Regardless, the Circuit Court did not err in finding that the issues raised by Appellant were not preserved for review. "While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 30 S.E.2d 282, 285 (2012). While Appellant points to excepts from the record where she challenged the sufficiency of the evidence presented by New Age, both the Magistrate Court and the Circuit Court found that there was more than adequate evidence in the record to support a finding that the terms of the contract were materially altered by the conduct of the parties. Further, Appellant never objected to the introduction or alleged exclusion of evidence during the trial in the Magistrate Court.

Not only did the Circuit Court apply the appropriate and proper standard of review, it went further by conducting a thorough review of the contested facts and evidence in the record. The Circuit Court did not err in finding the issues were not preserved for appeal as none of the arguments on appeal were raised before the trial judge except for the sufficiency of evidence. However, that issue was resolved in favor of the Respondent by the trial judge who had the unique perspective of being able to assess and weigh the credibility of the witnesses and testimony.

II. The Circuit Court did not err in affirming the Magistrate's finding that the terms of Appellant's and Respondent's original contract were materially altered by the conduct of the parties.

The Circuit Court properly affirmed the Magistrate's finding that the original contract was materially altered by the conduct of the parties. As with many construction contracts, the contract between the parties was an estimate of the cost to perform a scope of work. In this case, the estimate was created by the Appellant's insurance company to address water damage from failing scuppers on the roof. However, when Respondent began to perform the work, it uncovered much more extensive damage that was originally anticipated.

Here, it is undisputed that the parties had an express contract to perform a scope of work. However, while performing the initial stages of that scope of work, it was determined that the scope needed to be enlarged due to the existence of more damage than originally anticipated. The contract itself set forth specific items to be repaired and provided a quantity based on square footage or labor hours, and a unit cost. (Compl. Exhibit). The quantity was to be multiplied by the unit cost and an estimate was given for what the insurance company would pay, based on their initial report. (Compl. Exhibit). However, when it was discovered that the damage greatly exceeded the estimate, the parties met to discuss the necessity of expanding the scope of work to uncover and repair the damage. (Mag. Hrg. Transcr. 75: 12-21).

A written contract may be modified by oral agreement, and this rule applies to construction contracts. *Lazer Const. Co., Inc. v. Long*, 296 S.C. 127, 130, 370 S.E.2d 900, 902 (Ct. App. 1988). While the record shows a dispute as to whether the parties agreed to modify the contract, it is undisputed that Respondent performed work above and beyond the original scope of work and was paid more than the original contract amount. (Mag. Hrg. Transcr. 36: 4-10). The material terms of the contract did not change, merely the amount of work that would need to be performed to repair the newly discovered damage.

Both the Magistrate and the Circuit Court found sufficient evidence to support the finding that the original contract had been altered by the conduct of the parties. Where there is "any evidence" to support a magistrate's judgment, there is no error in affirming that judgment. *Brown v. Missouri State Life Ins. Co.*, 136 S.C. 90, 134 S.E.2d 224 (1926); *see also Powell v. Cobb*, 107 S.C. 503, 93 S.E.2d 191 (1917).

III. The Circuit Court did not err in finding that Appellant suffered no prejudice from the Magistrate Court's exclusion or admission of evidence during the trial of the case.

The Magistrate Court did not exclude from evidence the alleged certificate of completion provided to the Appellant from the Respondent. In fact, the court allowed Appellant to testify about the certificate and what it meant to her when she received it. (Mag. Hrg. Transcr. 20: 17-25; 21: 1-3). However, Appellant did not agree with the certificate of completion at the time it was provided by Respondent and therefore the Magistrate did not give the evidence much, if any, weight. (Mag. Hrg. Transcr. 36: 17-25). The actual document itself was not offered into evidence and no ruling was made as to its admissibility. Therefore, the evidence was not excluded by the Magistrate Court and whatever weight may have been given to it was assessed based on the testimony related to the document.

Further, the Magistrate Court did not allow collateral source evidence when it admitted testimony related to the settlement with the home builder. That evidence was not introduced to argue that Appellant's damages should be deducted, but merely to show the extent of the damage to Appellant's home. Moreover, Appellant did not object to the question on the grounds of the collateral source rule, or even to its admissibility. Her sole objection was that she believed the information to be subject to a non-disclosure agreement. (Mag. Hrg. Transcr. 18: 10-22). The

evidence was relevant because it showed that the damage to Appellant's home was much greater than originally anticipated in the original contract, or even when Respondent left the job.

The Circuit Court properly found that these issues were not preserved for appellate review. Further, even if they were preserved, there was no prejudice because Appellant was given a full and fair opportunity to make a complete presentation of her claims. Appellant suffered no prejudice from the introduction, or lack thereof, of the evidence because it was all testified to by the Appellant.

CONCLUSION

For all of the above-stated reasons, this Court should confirm the Circuit Court's ruling, dismiss Appellant's appeal and award costs to the Respondent as allowed by South Carolina Appellate Court Rule 222. This Court should also affirm the Circuit Court's ruling for any other grounds appearing in the Record on Appeal as provided by Rule 220(c), SCACR.

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Karyn Cavanaugh . . . . . Appellant

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PROOF OF SERVICE

I certify that I have served a copy of Respondent New Age Contractors, LLP's Initial Brief by depositing a copy of it in the United States Mail, post prepaid, on March _____, 2020 addressed to all attorneys of record, listed on the attached.

Respectfully Submitted,

SMITH | CLOSSER | WHEELER, PA

March 20, 2020

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March 20, 2020

VIA FIRST CLASS MAIL
The Honorable Jenny Abbott Kitchings
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P.O. Box 11629
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RE: Karyn Kavanaugh, Appellant v. New Age Contractors, LLP, Respondent
Appellate Case No. 2019-001599
SCW File No. 18-163

Dear Ms. Kitchings:

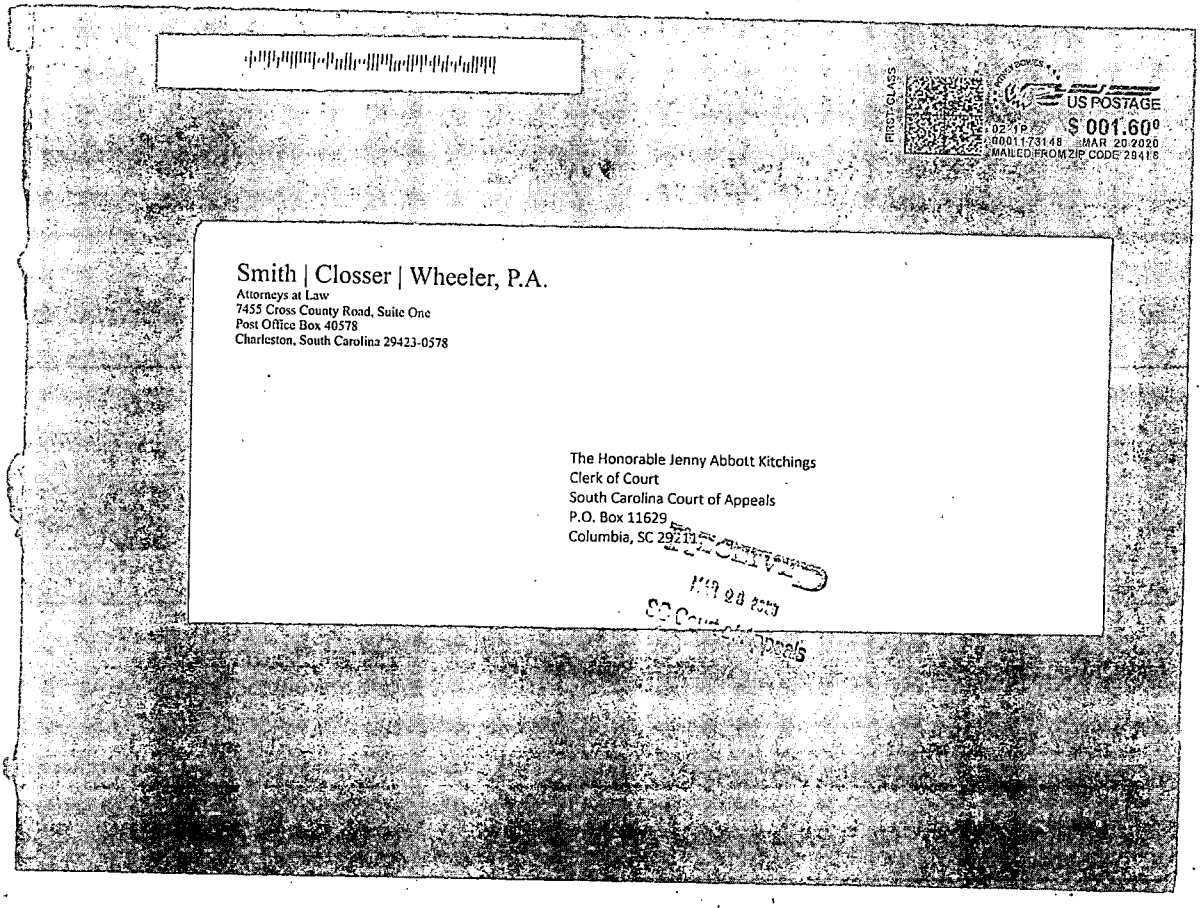
Enclosed for filing in connection with the above referenced case, please find the original and one copy of Respondent's Initial Brief, as well as the Proof of Service. Please return one clocked copy in the self-addressed stamped envelope provided.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

William K. Kalivas

cc: Ransome H. Helmly, Esq.



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