THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

RECEIVED
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SC Court of Appeals

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

Karyn Cavanaugh, Appellant,

v.

New Age Contractors, LLP, Respondent.

FINAL BRIEF OF APPELLANT

Ransome H. Helmly, SC Bar # 78081
Law Office of Ransome H. Helmly, LLC
409 Coleman Blvd., Ste. 200
Mt. Pleasant, SC 29464
Telephone: 843-884-0184
Email: rhh@helmlylaw.com
Attorney for Appellant

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STATEMENT OF THE ISSUES

I. Did the Circuit Court apply the wrong standard of review on the appeal from Magistrate Court thus compelling it to find that the issues on appeal were not preserved for review on appeal?

II. Did the Circuit Court err in affirming the Magistrate's finding that the terms of Appellant's and Respondent's original contract were materially altered such that a new contract was formed despite the lack of evidence of indispensable terms such as price, time, and scope?

III. Did the Circuit Court err in finding Appellant suffered no prejudice as a result of the Magistrate's exclusion of relevant and admissible evidence offered by Appellant while, at the same time, allowing inadmissible collateral source evidence offered by Respondent?

STATEMENT OF THE CASE

On March 26, 2018, Appellant Karyn Cavanaugh ("Ms. Cavanaugh") filed the underlying lawsuit against Respondent New Age Contractors, LLP ("New Age") in the Charleston County Magistrate Court for breach of contract, seeking $7,500.00 in reimbursement for draws taken on work not completed. The case was heard by the Magistrate on September 10, 2018. Ms. Cavanaugh appeared *pro se*, while New Age was represented by counsel. After considering the evidence and testimony, the Magistrate denied Ms. Cavanaugh's breach of contract claim and found in favor of New Age on its counterclaim for breach of contract. New Age was awarded $7,500.00 and judgment was entered against Ms. Cavanaugh.

On October 10, 2018, Ms. Cavanaugh filed her Notice of Appeal of the Magistrate's decision in Circuit Court. The Magistrate's Return was filed on March 4, 2019 and, on July 31, 2019, the appeal was heard. After consideration of the arguments of counsel, a review of the record, and the magistrate's Return, the Circuit Court issued an order affirming the magistrate's decision. Ms. Cavanaugh received written notice of entry of the Circuit Court's Order on August

20, 2019. On September 18, 2019, Ms. Cavanaugh timely filed her Notice of Appeal seeking review from the Court of Appeals. (R. p. 1.)

STATEMENT OF THE FACTS

On June 17, 2015, Ms. Cavanaugh and New Age entered into a contract for home repairs for damages to Ms. Cavanaugh's home caused by water intrusion. (R. p. 161.) An estimate or "Exactimate" prepared by Ms. Cavanaugh's home insurer, Frontline Insurance Company ("Frontline"), was incorporated in the contract by reference and explicitly set forth the scope of repair. (R. p. 161.); (R. p. 68, line 2.) The contract and corresponding scope of repair identified forty-five (45) line items that were to be completed by New Age at an agreed upon cost of $32,594.10. The funds for the repairs were held by TD Bank and disbursed to New Age in requested draws. (R. p. 31, lines 1-4.)

One of the items of repair was the removal and reapplication of a section of exterior stucco. (R. p. 161.) During these repairs New Age discovered additional water damage as well as evidence of termite damage. Consequently, New Age unilaterally began tearing off more and more stucco from the side of the home, eventually removing all of the stucco on the left side of the home as well as a portion of the stucco on the right side. The cost of this "additional" work was never disclosed to Ms. Cavanaugh nor discussed in specific detail. Nevertheless, New Age requested and received draws from TD Bank exhausting the entirety of the insurance proceeds. (R. pp. 178-179). On September 10, 2015, New Age packed up and abandoned the job site without having completed the agreed upon scope of repairs. (R. p. 31, line 25.) Subsequently, New Age sent Ms. Cavanaugh an "overage" invoice in the amount of $9,870.00 for labor and supplies beyond the contract price. (R. p. 180.)

On March 26, 2018, Ms. Cavanaugh filed the underlying lawsuit against New Age in the Charleston County Magistrate Court for breach of contract and damages of $7,500.00 for draws taken on items not completed. The case was tried by the magistrate on September 10, 2018 with Ms. Cavanaugh appearing *pro se* and New Age represented by counsel. The entire proceeding was conducted over approximately a two-hour period, an hour and twenty minutes of which consisted of a "tag-team" examination of Ms. Cavanaugh by the Magistrate and counsel for New Age. Despite insufficient evidence, the Magistrate denied Ms. Cavanaugh's claim entirely and awarded New Age $7,500.00 on its counterclaim for breach of contract. In doing so, the Magistrate disregarded the only valid contract between the parties and, in contortionist fashion, found a contract where, as a matter of law, one could not exist.

On appeal to the Circuit Court, Ms. Cavanaugh raised multiple issues and arguments. (R. pp. 247-263.) Relevant to this appeal, Ms. Cavanaugh argued that the evidence presented at trial was, as a matter of law, insufficient to support the magistrate's judgment. Specifically, she argued that there was no evidence of a mutual agreement or understanding on price, time, and scope – indispensable material terms necessary for the formation of a contract. Ms. Cavanaugh further argued that the magistrate excluded relevant evidence she attempted to introduce and allowed irrelevant and inadmissible evidence introduced by New Age, both of which were detrimental to her case. Lastly, she argued that the magistrate's judgment was the result of errors of fact related to work contemplated by the parties' original contract. (R. pp. 247-263.)

In its Order, the Circuit Court found that the issues on appeal were not raised during the magistrate proceeding or on post-trial motion and were not preserved for review. (R. pp. 2-7.) Alternatively, the Circuit Court found that there was adequate evidence to support a finding that the terms of the original contract were materially altered by the conduct of the parties such that a

new contract was formed, and, more importantly, that Ms. Cavanaugh breached that contract. (R. pp. 2-7). This appeal followed.

STANDARD OF REVIEW

Section 18-7-170 of the South Carolina Code of Laws (1985) articulates the broad standard of review to be applied by the Circuit Court in an appeal of a magistrate's judgment:

> Upon hearing the appeal, the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact.

See also Hadfield v. Gilchrist, 343 S.C. 88, 92-93, 538 S.E.2d 268, 270 (Ct. App. 2000).

The Court of Appeals maintains a slightly narrower standard of review on appeals of magistrates decisions from Circuit Court and "will presume that an affirmance by a Circuit Court of a magistrate's judgment was made upon the merits where the testimony is 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). Still, the Court of Appeals retains *de novo* review of whether the facts of the case show the Circuit Court's affirmance was controlled or affected by errors of law and will not grant the presumption where "it clearly appears that the Circuit Court applied an erroneous standard of review and failed to accord the contested facts the scrutiny which § 18-7-170 contemplates." Hadfield at 92-93, 538 S.E.2d 268, 53 S.E.2d at 270; see also Burns, 281 S.C. at 357, 315 S.E.2d at 182.

ARGUMENT

I. The Circuit Court applied the wrong standard of review on the appeal from Magistrate Court compelling it to find that the issues on appeal were not preserved for review.

In its order affirming the magistrate's decision, the Circuit Court explicitly stated the standard of review it applied in this case:

> On appeal from the Magistrate's Court, the Circuit Court, acting as the appellate court, reviews matters raised in the notice of appeal. S.C. Code Ann. § 18-3-70 (2013) ("The appeal must be heard by the Court of Common Pleas upon the grounds of exceptions made and upon the papers required under this chapter, without examination of witnesses.") "Upon hearing the appeal, the appellate court *shall* give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits." S.C. Code Ann. § 18-7-170 (2013) (emphasis added).

(R. p. 3.)

Though the court properly referenced Section 18-7-170 in articulating the standard it applied, its specific reference to, and primary reliance upon, Section 18-3-70 is a blatant error as this section applies to appeals from magistrates in *criminal cases* only. In fact, the title of the entire chapter is "Appeals From Magistrates in Criminal Cases." Nonetheless, the court employed this standard on review and used it as its primary basis for affirming the Magistrate's decision. Specifically, the Court stated that Ms. Cavanaugh "raised no issue that forms the basis of her appeal to the Magistrate Court during the hearing, nor did she make any post-trial motions to address any of these issues." (R. p. 5) Thus, it seems clear that from the outset the Circuit Court intended to undertake a more constrained review of the appeal despite the mandate of Section 18-7-170.

While our courts have generally held that issues not raised or argued at trial will not be considered on magistrate appeals to the Circuit Court, the Court here imposed a technical requirement on Appellant which runs afoul of the plain language of Section 18-7-170, which states

"the court *shall* give judgment according to the justice of the case, *without regard to technical errors and defects which do not affect the merits*." This language makes it obvious that our legislature intended to equip the Circuit Court with a broad scope of review on civil appeals from the Magistrate Court – one that allows it to make its own determination based on an independent review of the facts.

Even so, our Supreme Court has cautioned that issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). Indeed, when an Appellant's arguments are neither clearly preserved nor clearly unpreserved and thus subject to multiple interpretations, "any doubt should be resolved in favor of preservation." Johnson v. Roberts, 422 S.C. 406, 411-12, 812 S.E.2d 207, 210 (Ct. App. 2018) (citing Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)).

Notwithstanding the Court's application of a statutory provision applicable to criminal cases, Ms. Cavanaugh unquestionably raised and argued to the magistrate the issues at the forefront of this appeal. The Circuit Court's finding that Ms. Cavanaugh raised "no issue that forms the basis for her appeal … during the hearing" is contradicted by the testimony and evidence offered at trial. The Circuit Court needed only to review the certified transcript of the hearing to realize that these issues were not only raised and argued, but central to Ms. Cavanaugh's case.[1] In fact, the legal and factual theory Ms. Cavanaugh argued on appeal to the Circuit Court is the same legal and factual theory on which she proceeded at trial.

[1] Appellant obtained a certified transcript of the Magistrate Court hearing that was submitted into the Circuit Court Record without objection.

There are numerous instances where Ms. Cavanaugh argued the sufficiency of the evidence presented by New Age to establish a change or alteration of the terms of the original contract:

> The Court: It was never discussed that this was needed work or not?
>
> Ms. Cavanaugh: Mr. Newell said when – when – "We are going to get to the point where we are going to need to sit down and have a discussion about the insurance money is going to run out, and we are going to probably need it to go further. We're going to have to sit down and have a discussion." *We never sat down and had that discussion.*
>
> R. p. 50, lines 6-11 (emphasis added).
>
> …
>
> Mr. Smith: Actually, you said – you said, 'as opposed to'. What, as opposed to the bank paying for extras? That's my point. How do you know it was under the original contract versus paying for extras?
>
> Ms. Cavanaugh: *Because I didn't contract for extras. I did not contract for extras.*
>
> Mr. Smith: But you knew they were doing it.
>
> Ms. Cavanaugh: *I did not know that until after it was already done.*
>
> R. p. 55, line 20 (emphasis added).
>
> …
>
> Ms. Cavanaugh: *Did you ever, ever ask me to sign another contract for any other additional work outside the scope of the original contract.*
>
> Mr. Newell: *We did not.*
>
> R. p. 96, lines 12-15 (emphasis added).
>
> …

> Ms. Cavanaugh: *Well, could you tell me what dates you had the discussions*?
>
> Mr. Newell: *I don't know those dates*.
>
> Ms. Cavanaugh: *Do you have any emails that show me that you were going to – that it was going to cost more*?
>
> Mr. Newell: *No, I don't*.
>
> R. p. 92, lines 1-8

…

> Ms. Cavanaugh: I did not see Junior. He did not sit down with me. He did not sit down with me and Ken. And he did not tell us – – at one point he told us, "oh I think this is going to be more," but *there was no specifics talked about. There was no authorization to do additional work. We had a contract. It was very specific.* He did not fulfill his part of the contract.
>
> R. p. 112, lines 12-18 (emphasis added).

Clearly, Ms. Cavanaugh raised and argued this issue multiple times throughout the trial. She continued to raise the issue post-trial after the Magistrate rendered his decision:

> The Court: All right, then. After considering the evidence and testimony, I find in favor of the defendant. The plaintiff's claim is denied. The defendant's counterclaim is granted, $7,500.00 owed by Miss Cavanaugh to New Age. Thank you all very much.
>
> Ms. Cavanaugh: *I don't get that. I don't have a contract with him*.
>
> The Court: I'm sorry?
>
> Ms. Cavanaugh: *I don't get it. I don't have a contract with him. I – I didn't –*
>
> The Court: You're done. Thank you.

Ms. Cavanaugh: I just want a little bit of insight on it.

The Court: I'm sorry?

Ms. Cavanaugh: I just – can you just give me a little insight on your – on your –

The Court: I just did. You lost.

Ms. Cavanaugh: *But I didn't have a contract with him*.

R. p. 115, line 17 – p. 116, line 21 (emphasis added).

This is but one instance. The issues Ms. Cavanaugh raised regarding the inclusion and exclusion of evidence, also deemed unpreserved by the Circuit Court, were also raised and argued throughout the trial. Specifically, Ms. Cavanaugh raised concerns over the solicitation and consideration of evidence regarding proceeds received from the settlement of an entirely separate and independent construction defect claim:

Mr. Smith: How much did you get from your lawsuit?

Ms. Cavanaugh: I don't think I'm allowed to disclose.

Mr. Smith: How much did you get from your lawsuit?

Ms. Cavanaugh: I don't think I am allowed to disclose.

The Court: Why not?

Ms. Cavanaugh: I think they – they made me sign a non-disclosure.

The Court: Would you show me that?

Ms. Cavanaugh: I don't have that with me.

Mr. Smith: Well, we're in court right now. That's going to be a source of revenue for this job, so I think I can ask. It's relevant.

> Ms. Cavanaugh: Okay, as long as – I don't mind telling you as long as I don't get in trouble for it, if it's okay to disclose it.
>
> The Court: I'm not a party to that, so I have no earthly idea. But, I mean, I'm not going to publish the proceedings unless –

R. p. 26, line 8 – p. 27, line 12.

…

> The Court: Okay. Anything in closing? I think that was a closing argument.
>
> Mr. Smith: Well, the only thing is, clearly, Your Honor, when this thing was contemplated and the original contract was signed, everybody thought it was a $50,000 issue. What resulted was a $600,000 settlement, which means that she left some money on the table. It must have been a million dollar claim.
>
> The Court: *Right*.

R. p. 112, line 9 – p. 113, line 2.

This evidence was both collateral source in nature and unfairly prejudicial as it was clearly intended to confuse the issues.[2]

And while the issues raised on appeal to the Circuit Court may not have been raised with the same skill and formality a licensed South Carolina attorney would be expected to, Ms. Cavanaugh, as a *pro se* litigant, nonetheless stated her arguments and the Magistrate, expressly and impliedly, ruled on those issues throughout the proceeding. Johnson v. Roberts, *supra* (an

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[2] The Circuit Court erroneously concluded that Ms. Cavanaugh inserted the subject of her construction defect lawsuit and settlement by filing insurance documents with her Summons and Complaint. This a factual error. Ms. Cavanaugh included documents related to a first-party insurance claim which formed the basis of the subject contract. Documents related to a subsequent and separate construct defect claim filed in Circuit Court were not inserted into the record.

issue should *clearly* be unpreserved for a court sitting in appellate capacity to deny review on that basis) (emphasis added).

By applying the wrong standard of review, the Circuit Court compelled itself to focus on issue preservation, as indicated by its primary holding. In doing so, the Court expressly declined to exercise its broad statutory grant of authority to review the merits of the case and draw its own conclusion. Seemingly, the Circuit Court made no attempt to review the facts of the case as the factual recitation contained in its Order is nearly identical to that of the Return. Had the Circuit Court done so, it would have noticed the factual discrepancies between the Return and the testimony and evidence offered at trial. It is axiomatic that where the facts relied upon to render a decision are misstated, the decision itself is undermined.

For instance, Respondent testified that "[his company] was hired to repair the damage underneath each scupper, based on the insurance report." (R. p. 19, lines 18-24; R. p. 161.) However, the Circuit Court's recitation of the facts (seemingly incorporated from the Return) states something entirely different:

> The Court found that a contract to replace a *series of down spouts* that ultimately resulted in repairing damage to the entire side of the house constituted a massive change or alteration of the original contract. … Specifically, the original contract was for the *replacement of a series of drains*, which scope was ultimately enlarged by agreement of the parties resulting in extensive additional repairs to the entire side of the home because of moisture and termite damage.

(R. pp. 2-7). Neither drains nor scuppers were mentioned in the original contract yet the both tribunals used these facts as the basis for their decisions.

Based on the above, the Circuit Court should not be granted the presumption espoused in Burns as it is evident the Circuit Court applied an erroneous standard of review and failed to accord the contested facts the scrutiny mandated by statute. Burns at 357, 315 S.E.2d at 182.

II. The Circuit Court erred in affirming the Magistrate's finding that the terms of Appellant's and Respondent's original contract were materially altered such that a new contract was formed despite the lack of evidence of indispensable terms such as price, time, and scope.

On June 17, 2015, the parties entered into an unambiguous written contract which stated: "New Age Contractors, LLP will maintain and complete all repairs as outlined in the insurance exactimate. Estimate prepared by Ellen Westcoat on April 8, 2015. Total cost reflected via the exactimate provided from Frontline Insurance Claim No. 090026094 is for $32,594.10." (R. p. 161.) There is no dispute as to the terms of this contract and scope of repair encompassed. (R. p. 179.) There is also no dispute that the work that the repairs outlined in the scope of repair were not completed. (R. p. 14, line 7.) (stipulated that no stucco had been reapplied). Ms. Cavanaugh also presented evidence that New Age requested and received draws which exhausted all of the funds set aside for the repairs. (R. p. 31, lines 1-25.) At the hearing, Ms. Cavanaugh presented evidence that the line items New Age admittedly did not complete totaled $7,642.00. (R. p. 179.)

The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties. Chan v. Thompson, 302 S.C. 285, 395 S.E.2d 731 (Ct. App. 1990). In determining the intention of the parties, a court first looks to the language of the contract. C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Commission, 296 S.C. 373, 373 S.E.2d 584 (1988). If the language is clear and unambiguous, the language alone determines the contract's force and effect. Conner v. Alvarez, 285 S.C. 97, 328 S.E.2d 334 (1985). The terms in an unambiguous contract are to be given their plain, ordinary, and popular meaning. C.A.N. Enterprises, Inc., 296 S.C. at 377, 373 S.E.2d at 586. If a contract is unambiguous, extrinsic

evidence cannot be used to give the contract a meaning different from that indicated by its plain terms. Id. at 377-78, 373 S.E.2d at 586. Also, the purport of a written agreement is to be gleaned from the contents of the whole instrument. Carr v. United Van Lines, Inc., 289 S.C. 194, 345 S.E.2d 734 (Ct. App. 1986). United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 413 S.E.2d 866, 307 S.C. 102 (Ct. App. 1991).

Here, it is fairly simple. The parties had an unambiguous contract. New Age admitted that it did not complete all of the repairs outlined in the scope of repair. Nonetheless, it requested and received all of the monies set aside for those repairs. Despite the undisputed and unambiguous terms of the contract, as well as the evidence presented, the Magistrate seemingly failed to give the original contract any consideration whatsoever and, instead, found that a new contract had been created and that Ms. Cavanaugh had breached it.[3] (R. pp. 173-177.)

To reach such a decision, the Magistrate would have had to find that either the original contract was altered or that a new contract for the "additional" work had been formed between the parties. Yet, the record is entirely devoid of any evidence that would, as a matter of law, allow the Magistrate to find such a contract. The subsequent review by the Circuit Court likewise provides minimal insight in affirming the Magistrate's conclusion.

> There is more than adequate evidence in the record to support a finding that the terms of the original contract were materially altered by the conduct of the parties. Specifically, the original contract was for the replacement of a series of drains, which was ultimately enlarged by agreement of the parties resulting in extensive additional repairs to the entire side of the home because of moisture and termite damage.

(R. pp. 2-7.)

[3] The Return merely states "[a]fter considering the evidence and testimony of each party the court denied the Plaintiff's Complaint and ruled in favor of the Defendant on its counter claim." Return, p. 2. However, New Age's sole counterclaim against Ms. Cavanagh was for breach of contract and therefore it is necessarily inferred that the Magistrate found a new contract.

The evidence here is not just inadequate – it is insufficient as a matter of law. A written contract may be modified by a subsequent agreement of the parties, "provided the subsequent agreement contains *all the requisites of a valid contract*." Florence City-County Airport Comm'n v. Air Terminal Parking Co., 283 S.C. 337, 341, 322 S.E.2d 471, 473 (Ct. App. 1984) (emphasis added). Those requisite terms include an offer, acceptance, and valuable consideration. Id. Critically, in the context of a construction contract, certain terms, such as price, time, and place, are considered to be indispensable and must be set out with reasonable certainty. McPeters v. Yeargin Const. Co., Inc., 290 S.C. 327, 331, 350 S.E. 2d 208, 211 (Ct. App. 1986); see also Stanley Smith & Sons, 283 S.C. at 434, 322 S.E.2d at 477 (noting price is an *essential* term in a construction contract) (emphasis added). Even if the parties intend to be bound by an agreement, the absence of material terms renders the agreement unenforceable. Rose Elec., Inc. v. Cooler Erectors of Atl., Inc., 418 S.C. 424, 794 S.E.2d 382 (Ct. App. 2016). Additionally, material terms cannot be left for future agreement – the scope of the work to be performed and the amount of compensation must be *initially* established. Aperm of S.C. v. Roof, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct. App. 1986); W.E. Gilbert & Assocs. v. S.C. Nat. Bank, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985) (emphasis added.)

The evidence presented by New Age was insufficient to establish that a modification of the original contract, a change order, or a new agreement had been agreed upon by the parties. New Age failed to establish with any reasonable certainty the extent of the scope of the "additional" repairs, the time frame for the additional repairs, and, most importantly, the cost of those repairs. Even if certain materials terms were discussed (*i.e.*, scope), the testimony clearly indicates they were not discussed with any degree of certainty and that no price term was ever discussed. It is well-established that the lack of a price term is *fatal* to the finding that an express or implied

contract exists. Rose Elec., Inc. v. Cooler Erectors of Atl., Inc., 418 S.C. 424, 794 S.E.2d 382 (Ct. App. 2016). Ms. Cavanaugh testified, and Respondent admitted, that no price term was ever discussed before. The only evidence offered that even remotely addressed the costs associated with the "additional" work was an invoice submitted to Ms. Cavanaugh *after* New Age had left the job site and after the all the funds earmarked for the project had been exhausted. (R. p. 180.)

In addition to the lack of evidence of indispensable terms, there is also minimal evidence of words or conduct between the parties evidencing their mutual intent to make any change. If an agreement is manifested by words, the contract is said to be express. Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 322 S.E.2d 474 (Ct. App. 1984). If it is manifested by conduct, it is said to be implied. Dowling v. Charleston & W.C. Ry. Co., 105 S.C. 475, 81 S.E. 313 (1913). In either case, the parties must manifest a mutual intent to be bound. Hughes v. Edwards, 265 S.C. 529, 220 S.E.2d 231 (1975).

An implied contract, like an express contract, rests on an actual agreement of the parties to be bound to a particular undertaking. The parties must manifest their mutual assent to all essential terms of the contract in order for an enforceable obligation to exist. Edens v. Laurel Hill, Inc., *supra*. If one of the parties has not agreed, then a prerequisite to formation of the contract is lacking. Shealy v. Fowler, *supra*.; Stanley Smith & Sons v. Limestone College, 322 S.E.2d 474, 283 S.C. 430 (1984).

In the Magistrate proceeding, Respondent testified that oral conversations took place regarding the additional work being carried out. (R. p. 105, 14). Specifically, Respondent stated it was given authorization, through oral conversations, to carry out the additional work. (R. p. 105, 14.) However, Respondent was unable to provide any specifics, such as date and time, or evidence regarding these conversations, such as an email or text message. (R. p. 91, line 11.) Ms.

Cavanaugh, on the other hand, testified repeatedly that she was never made aware of the specific nature of the enlarged scope nor was told what the cost would be. (R. p. 105, 14.) Even if the Magistrate did not believe Ms. Cavanaugh, as he stated, it does not change the fact that Respondent, admittedly, was unable to provide any evidence, whether through testimony or by exhibit, of an agreed upon *price* term for the modified contract. The absence of such a term, as a matter of law, should have been fatal claim. Rose Elec., Inc. v. Cooler Erectors of Atl., Inc., 418 S.C. 424, 794 S.E.2d 382 (Ct. App. 2016) (a missing price term in an alleged contract is fatal to finding an express contract where parties are contemplating a construction project).

Given that no evidence of a price term was ever presented, much less any other essential term, neither the Magistrate nor the Circuit Court could have, as a matter of law, found an enforceable agreement upon which New Age's counterclaim could be based, much less granted.

III. The Circuit Court erred in finding Appellant suffered no prejudice as a result of the Magistrate's exclusion of relevant and admissible evidence offered by Appellant while, at the same time, allowing inadmissible collateral source evidence offered by Respondent.

In addition to the errors already addressed, Ms. Cavanaugh was prevented from offering relevant testimony and evidence during the course of the Magistrate proceeding. Specifically, the Magistrate refused to admit a Certificate of Completion Respondent asked Ms. Cavanaugh to sign after leaving the job site permanently. (R. p. 28, line 24 – p. 29, line 6.) The document stated that all items under the contract were completed for the agreed upon price and that, if executed, no liens would be placed on Ms. Cavanaugh's home. Ms. Cavanaugh introduced the evidence to show inconsistencies in Respondent's testimony as well as prior admissions regarding fulfillment the original contract. The Magistrate arbitrarily refused to consider the evidence because Ms. Cavanaugh, admittedly, refused to sign it at the time:

> Mr. Smith: But you don't know how those payments were applied?
> You don't know if the original contract has been paid in full, or—

> Ms. Cavanaugh: Yes, I do, because I received that thing from New Age that says it was paid in full and that there's going to be no liens on my house.
>
> Mr. Smith: But you didn't sign that did you, because you didn't agree with it?
>
> Ms. Cavanaugh: Well, I don't think that they finished it, so, no, I didn't. I thought it was a little underhanded. I was like, that just didn't seem—
>
> The Court: But see, now you can't take advantage of it because you didn't agree with it then, and you're not going agreeing with it now. So….

(R. p. 44, line 4.)

On the other hand, the Magistrate allowed collateral source evidence to be repeatedly discussed throughout the Magistrate proceeding. Specifically, New Age discussed at length a lawsuit filed by Ms. Cavanaugh against the builder of the home in November 2015 and the settlement obtained as a result. The evidence was used to argue that the original contract amount between Ms. Cavanaugh and New Age was insufficient and the overages invoiced by New Age were justified. The Magistrate clearly gave considerable weight to this evidence.

> Mr. Smith: Well, the only thing is, clearly, Your Honor, when this thing was contemplated and the original contract was signed, everybody thought it was [a] $50,000 issue. What resulted was a $600,000 settlement, which means that she left some money on the table. It must have been a million-dollar claim.
>
> The Court: *Right*.

(R. p. 112, line 21 – p. 113, line 2.) (emphasis added).

South Carolina has long followed the collateral source rule that compensation received by an injured party from a source wholly independent of the wrongdoer should not be deducted from the amount of the damages owed by the wrongdoer to the injured party. The only requirement for

qualification as a collateral source is that the source be wholly independent of the wrongdoer. A source is wholly independent and therefore collateral when the wrongdoer has not contributed to it and when payments to the injured party were not made on behalf of the wrongdoer. Pustaver v. Gooden, 566 S.E.2d 199, 350 S.C. 409 (Ct. App. 2002) (internal citations omitted). Clearly, the settlement Ms. Cavanaugh obtained in a subsequent lawsuit is a collateral source and any discussion of it should have been precluded. The settlement amount was nothing more than a red herring used to confuse the issues and paint Ms. Cavanaugh as unreasonable. It bore no relevance to the contract dispute at hand and its consideration was erroneous and prejudicial.

CONCLUSION

Based on the foregoing, the Circuit Court's August 13, 2019 Order affirming the September 10, 2018 judgment of the Magistrate should be reversed in its entirety.

Respectfully submitted,

s/Ransome H. Helmly
Ransome H. Helmly, SC Bar # 78081
Law Office of Ransome H. Helmly, LLC
409 Coleman Blvd., Ste. 200
Mt. Pleasant, SC 29464
Telephone: 843-884-0184
Email: rhh@helmlylaw.com
Attorney for Appellant

Mt. Pleasant, South Carolina

Dated: June 30, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

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Jun 30 2020
SC Court of Appeals

Appellate Case No. 2019-001599
Trial Court Case No. 2018-CP-10-04907

Karyn Cavanaugh, Appellant,

v.

New Age Contractors, LLP, Respondent.

RULE 211(b), SCACR CERTIFICATE OF COMPLIANCE

Ransome H. Helmly, SC Bar # 78081
Law Office of Ransome H. Helmly, LLC
409 Coleman Blvd., Ste. 200
Mt. Pleasant, SC 29464
Telephone: 843-884-0184
Email: rhh@helmlylaw.com
Attorney for Appellant

The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

Respectfully submitted,

s/Ransome H. Helmly
Ransome H. Helmly, SC Bar # 78081
Law Office of Ransome H. Helmly, LLC
409 Coleman Blvd., Ste. 200
Mt. Pleasant, SC 29464
Telephone: 843-884-0184
Email: rhh@helmlylaw.com
Attorney for Appellant

Mt. Pleasant, South Carolina

Dated: June 30, 2020