IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CAROL STRATTON and M. LISA ATTEBERRY, Plaintiffs, v. MCCONNELL LANDSCAPE AND CONSTRUCTION, LLC and BELAIR ROAD SUPPLY OF DELAWARE, LLC Defendants.	))))))))))))	C.A. No. CPU4-16-001376

Submitted: November 21, 2017
Decided: December 29, 2017

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ORDER ON DEFENDANT'S MOTION FOR REARGUMENT

SMALLS, C.J.

This matter is back before the Court on Defendant's Motion for Reargument pursuant to Court of Common Pleas Civil Rule 59(e). The provisions of the rule provide that such motions shall be filed within five (5) days after the filing of the Court's opinion on decision.[1] This motion is timely. The purpose of the motion is to allow the trial court an opportunity to correct errors prior to appeal.[2] "New arguments, or arguments that could have been raised prior to the Court's decision, cannot be raised in a Motion for Reargument."[3] A Motion for Reargument is limited to "reconsideration by the Trial Court of its findings of fact, conclusions of law, or judgment."[4] "A Motion for Reargument is granted only if 'the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision.'"[5] "A party seeking to have the trial court reconsider [an] earlier ruling must demonstrate newly discovered evidence, a change in the law, or manifest injustice."[6] "A Motion for Reargument will generally be denied absent abuse of discretion by the trial court."[7]

This case arises in the context of a breach of contract where compensation is sought for damages to Plaintiff's property during the construction of a rear patio. The complaint alleges that Carol Stratton and Lisa Atteberry ("Plaintiffs") entered into a contract with McConnell Landscape and Construction, LLC ("McConnell") to build an outdoor backyard patio for their vacation home. McConnell subcontracted with Belair Road Supply of

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[1] DE R COM PL CT CIV Rule 59.
[2] *Beatty v. Smedley*, 2003 WL 23353491, at *2 (Del. Super. Mar. 12, 2003).
[3] *Citimortgage, Inc. v. Bishop*, 2011 WL 1205149, *1 (Del. Super. Mar. 29, 2011).
[4] *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969).
[5] *State Farm Fire & Cas. Co. v. Middleby Corp.*, 2011 WL 2462661, at *2 (Del. Super. June 15, 2011). (*quoting Kennedy v. Invacare Corp.*, 2006 WL 488590, at *1 (Del. Super. Jan. 31, 2006)).
[6] *Parisan v. Cohan*, 2012 WL 1066506, at *1 (Del. Com. Pl. Mar. 29, 2012).
[7] *Id.*

Delaware, LLC ("Belair") (collectively, "Defendants") for materials. During construction, damages were sustained to Plaintiff's lawn and driveway. Following a trial, on August 31, 2017, the Court issued its opinion on November 7, 2017, concluding Defendants damaged Plaintiff's property and were ordered to pay $4,677.50, for the damage to the driveway; $3,309.00 for the lawn; costs of proceedings, and post-judgment interest until paid.

Based upon the conclusions below, I find no basis for reargument therefore, the Motion is **DENIED**.

DISCUSSION

Defendant raises six arguments in support of his Motion which will be considered seriatim.

First, Defendant argues that the judgment entered by the court against McConnell Landscaping and Construction, in the amount of $3,309.00, was based upon an "estimate" which it objected to at trial.[8] Defendant's objection was based on hearsay because no witness was introduced to authenticate the document. Plaintiff's response is in two parts to this position. First, that Plaintiff's testimony is permissive because she was testifying regarding an estimate she obtained to repair the damage and Defendant had the opportunity to cross examine her on the issue. Secondly, Plaintiff argues that Delaware case law permits an owner to testify regarding the value of damage to her property.

"Since 1960, Delaware has recognized a property owner's right to give an opinion as to the value of real estate."[9] "Reasonable estimates are permissible even if they lack

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[8] Plaintiff's Exhibit 5.

[9] *E. Shore Nat. Gas Co. v. Glasgow Shopping Ctr. Corp.*, No. CIV.A.05C-07-299MMJ, 2007 WL 3112476, at *2 (Del. Super. Ct. Oct. 3, 2007) *See State v. 0.15 Acres or Land*, 164 A.2d 591, 593 (Del.1960).

mathematical certainty if the Court is given a reasonable basis to make a responsible estimate of damages."[10] "Thus, a repair estimate may be used to measure damages."[11] Delaware Rules of Evidence Rule 701 governs the testimony of a lay witness and provides:

> "If the witness is not testifying as an expert, the witness testimony or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness testimony or the determination of fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702."[12]

In the case at hand, Plaintiff testified that they received estimates to repair the lawn from Wharton's Landscaping in the amount of $3,309.00 and moved to admit the estimate as "Exhibit 5." Defendant objected to the estimate document on hearsay grounds since there was no one from Wharton's Landscaping to authenticate it. I find that it is reasonable for Plaintiff to testify to estimates she received in correcting the damages incurred by Defendants, not for the truth therein, but to the extent of the damage sustained. These estimates can be used in conjunction with Plaintiff's testimony to support a judgment of damages.

Second, Defendants argue that the estimates regarding the driveway damage was also objected to on the basis of hearsay. Defendants objected to these Exhibits on grounds there were no witness to authenticate the documents. The Court permitted Plaintiff to testify to the damages using the Exhibits for limited purposes to show Plaintiff sought and received

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[10] *CIT Tech. Fin. Servs. v. Owen Printing Dover, Inc.*, No. CIV.A.06C-08-047 WLW, 2008 WL 2586683, at *5 (Del. Super. Ct. Apr. 30, 2008), *on reargument sub nom. CIT Techs. Fin. v. Owen Printing Dover, Inc.*, No. CIV.A. 06C-08-047WLW, 2008 WL 2583030 (Del. Super. Ct. June 13, 2008); See also *In re Fuqua Indus., Inc.*, 2005 WL 1138744, at *8 (Del.Ch., May 6, 2005) (internal citations omitted).
[11] *Bennett, Debra & William v. Plantations E. Condo. Assoc., Inc.*, No. CIV.A. S12C-04-002ES, 2013 WL 493329, at *1 (Del. Super. Ct. Jan. 16, 2013).
[12] *E. Shore Nat. Gas Co.*, 2007 WL 3112476, at *2.

estimates to repair her driveway.[13] Defendant argues that the Court admitted the driveway estimate documents only to "show that the Defendant's had not solicited or received their own estimates" and they were not being admitted for the purpose of proving damages.[14] During trial, Plaintiff testified that the estimates were for a temporary fix. Furthermore, Plaintiff testified she paid $750 to "treat and seal the driveway's damaged areas."[15] These documents with Plaintiff's testimony are sufficient for the Court to find damages. Plaintiff testified that they received estimates to repair the lawn from Wharton's Landscaping in the amount of $3,309.00, an estimate of $3,927.50, to repair the driveway and an estimate of $750 to treat and seal the driveway which coupled with receipts of estimates, is proof of damages to support the Court's conclusion.

Third and Fourth arguments of Defendants state that the Court's analysis recognizes that in order to show a breach of an implied warranty, a Plaintiff must prove Defendants failure to display the degree of skill or knowledge possessed by a member of the profession or trade at issue. Defendant's then argue that at trial, there was no testimony, expert or otherwise, offered by Plaintiff to identify the applicable standard of care, or how Defendant's breached any such implied warranty of good quality and workmanship standard of care.

As the Court held in its decision at page six (6), "the issue of good quality and workmanship extends not only to the work contracted but how that work is performed." Clearly, if one performs the work contracted as required but damages other property during

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[13] Plaintiff's Exhibit 4.

[14] Defendant's Motion for Reargument, argument 2.

[15] Plaintiff's Exhibit 6.

performance, that such person shall be responsible. Here, damage was sustained to the lawn due to Defendant leaving planks across the grass for several days during the month of August. Additionally, the area where the construction materials were stored damaged the driveway. The testimony clearly supports the existence of damages.

Furthermore, McConnell testified during trial and admitted through text messages that he in fact caused damage to Plaintiff's lawn and made attempts to cure. McConnell further acknowledged that he was aware his re-sodding attempts did not remedy the damage to the lawn. Additionally, McConnell testified he was aware of the fork lift damage to the driveway and told Plaintiff that he would contact Defendant Belair to make repairs.

In its analysis, the Court applied Delaware's implied warranty of good quality and workmanship stating that a contractor will be in breach of this implied warranty if he fails to "display[ ] the degree of skill or knowledge normally possessed by members of [his] profession or trade."[16] Good quality and workmanship extends beyond the contracted work to include how that work is conducted and performed. If the subject matter is within the common knowledge of a lay person, then they can establish the standard of care without the necessity of expert testimony.[17]

Fifth, Defendants argue that Plaintiff failed to identify a theory of recovery and it was not until trial when Plaintiff's counsel first mentioned negligence but never addressed a standard of care. Here, the standard of care for negligence was established through testimony at trial. McConnell testified that as part of a contract with a client, any damaged

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[16] *Afilipoaei v. Fruehauf*, No. CIV.A.CPU6-12-000309, 2013 WL 5970491, at *2 (Del. Com. Pl. Oct. 31, 2013).
[17] *Jackson v. Hopkins Trucking Co. Inc.*, No. CIV.A.07C-12-129CHT, 2009 WL 6784741, at *3 (Del. Super. Ct. Dec. 31, 2009), *aff'd*, 3 A.3d 1097 (Del. 2010).

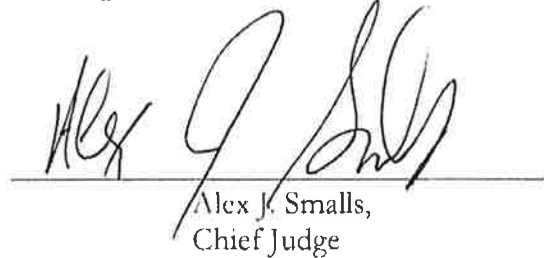
caused by him or subcontractors would breach that contract. Belair testified that damage to Plaintiff's driveway would be a breach and require repairs.

Sixth, Defendants argue that Plaintiff failed to articulate how Defendant's breached the contract since the contract work was completed to satisfaction and Plaintiff's did not complain about the quality of the work stated in the contract. Defendant further asserts that the contract did not require McConnell to re-sod the lawn after completion of the patio.

During trial, the contract between Plaintiff and McConnell was admitted and Plaintiff testified the patio was completed satisfactorily. The contract does not specify where the installers would park or how they would travel through the yard in order to complete the patio. Additionally, there is nothing in the contract stating that McConnell is to re-sod the lawn after completion. Regardless, McConnell testified that in his line of work and under the workmanship standard, if there is damage done to the property during construction, it is mostly his duty to fix the damage even if it is not directly stated in the original contract. Causing damage to a client's property, even though not part of the contract, will breach a workmanship standard.

For all the foregoing reasons, the Motion for Reargument is **DENIED**.

IT IS SO ORDERED.



Alex J. Smalls,
Chief Judge