IN THE MATTER OF THE CLAIM	*	**BEFORE HARRIET C. HELFAND,**
OF LESLEY MACHERELLI,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF MARJORIE MASON	*	
KEHNE T/A MASON KEHNE	*	**OAH No.: LABOR-HIC-02-21-19988**
LANDSCAPE DESIGN &	*	**MHIC No.: 20 (75) 1110**
CONTRACTING, INC.	*	
RESPONDENT	*	

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PROPOSED DECISION

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STATEMENT OF THE CASE

On or about October 26, 2020, Lesley Macherelli (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of $43,660.00 for actual losses allegedly suffered as a result of a home improvement contract with Marjorie Mason

Kehne, trading as Mason Kehne Landscaping Design and Contracting, Inc. (Respondent).[1] On August 2, 2021, the MHIC issued a Hearing Order on the Claim and forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.[2]

On September 3, 2021, the OAH notified the parties a hearing was scheduled for October 8, 2021, at the OAH office located in Rockville, Maryland. After correspondence from the parties, including a postponement request and a request for a remote hearing, I converted the original hearing date to a remote prehearing conference.

Following the October 8, 2021 prehearing conference, I granted the request for remote hearing. The hearing was rescheduled to November 8, 2021. On October 18, 2021, the Respondent filed a Motion to Dismiss, or in the alternative, a Motion for Summary Decision (Motion). By letter dated October 20, 2021, I notified the parties that I was converting the November 8, 2021 hearing date to solely hear arguments on the Motion.

I held the hearing on the Motion on November 8, 2021, via the Webex videoconferencing platform.[3] Shara Hendler, Assistant Attorney General, represented the Fund. The Claimant represented herself. Jennifer A. Maged, Esquire, represented the Respondent, who was present.[4]

I issued a Ruling on the Motion on December 7, 2021. I denied the motion and ordered that the hearing on the merits scheduled for January 12, 2022 proceed.

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[1] The Claimant's original claim included the Respondent's work in both the front and back of her home. On the second day of the hearing, the Claimant stated that she would be amending her claim to $11,420.00, which would only cover work in the back of her home. Code of Maryland Regulations (COMAR) 09.08.03.02C. Although the original contract between the Claimant and the Respondent covered the entire job, this Proposed Decision will only address the subject of the Claimant's amended claim, the Respondent's work in the back of the Claimant's home.
[2] Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015). Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.
[3] Md. Code Ann., Bus. Reg. §§ 8-407(a); 8-312; COMAR 28.02.01.20B(1)(b).
[4] At the November 8, 2021 hearing, the parties agreed that if a merits hearing were needed it would be scheduled for January 12, 2022 and, if necessary, be continued on January 13, 2022.

On January 12 and 13, 2022, I held a hearing by videoconferencing over the Webex platform.[5] John Hart, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. Jennifer A. Maged, Esquire, represented the Respondent, who was present.[6]

In her submission of documents prior to the hearing, the Respondent offered "Respondent's Evidentiary Hearing Brief." This document essentially reiterated the Motion on which I previously ruled, with some additional argument. I addressed this document, which I considered to be a renewal of the original Motion, during the January 12, 2022 hearing. I orally denied the renewed Motion on the record, and have further elaborated my ruling in the body of this decision.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case.[7]

ISSUES

1. Should the Respondent's Motion be granted?
2. If not, did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
3. If so, what is the amount of the compensable loss?

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[5] *Id.*

[6] The original plan was for the hearing to be conducted in a hybrid fashion, with the Claimant, the Fund, and the Respondent's attorney to appear in person at the OAH office in Rockville and for the Respondent, who lives in Massachusetts, to participate remotely. Due to the resurgence of the COVID-19 pandemic and safety considerations, I converted the entire hearing to the remote platform.

[7] Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 09.01.03; and COMAR 28.02.01.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

Cl. #1 (Not offered)

Cl. #2 Packet of documents containing the following:

- Home Improvement Claim Form, dated October 26, 2020
- Complaint Outline
- Complaint Narrative, dated October 28, 2020
- Complaint Form including narrative and photographs, dated December 19, 2019
- Letter to Claimant from MHIC, dated May 15, 2020
- Order from MHIC to Respondent, dated April 27, 2020
- Letter from MHIC to Respondent, dated May 27, 2020
- Email from MHIC to Claimant, dated April 22, 2020
- Letter from MHIC to Claimant, dated July 27, 2020
- Estimate, dated August 14, 2019[8]
- Invoice, dated October 28, 2019[9]
- Invoice, dated November 17, 2019
- Invoice from Johnson Chimney Service/Home Vent Service to Claimant, dated August 25, 2020
- Estimate from The Hardscape Store to Claimant, dated September 21, 2020
- Proposal from Shorb Landscaping to the Claimant, dated January 16, 2020
- Photographs (8 pages)
- Text messages between Claimant and Respondent, dated September 4, 5, 20, 21; October 15, 16, 22, 31; November 14, 26, 2019
- Email from Scott Wilets to Claimant, dated September 23, 2019
- Emails between Claimant and Respondent, dated September 24, 2019; October 25, 2019; November 17,18, 19, 2019

Cl. #3 Estimate, dated August 14, 2019; Invoice, dated October 28, 2019[10]

Cl. #4 Text message between Claimant and Respondent, dated September 4, 2019

Cl. #5 Email from Scott Wilets to Claimant, dated September 23, 2019; Email between Respondent and Claimant, dated September 24, 2019 and October 25, 2019

[8] This document was entitled "Estimate," but offered by the Claimant as the "Original Contract."
[9] This document was entitled "Invoice," but offered by the Claimant as "Revised Contract."
[10] These are the same documents included in Cl. #2.

Cl. #6 (Not offered)

Cl. #7 Photographs (4 pages)

Cl. #8 Photographs (4 pages)

Cl. #9 Photographs (2 pages)

Cl. #10 Photographs (3 pages)

Cl. #11 Photographs (2 pages)

Cl. #12 (Not admitted)

Cl. #13 Photographs (3 pages)

Cl. #14 Photographs (4 pages)

Cl. #15 Photograph (4 pages)

Cl. #16 (Not admitted)

Cl. #17 Repair Estimates, including:

- Invoice from Johnson Chimney Service, dated August 25, 2020
- Email from Luis Zelaya to Claimant, dated October 29, 2020
- Proposal from Shorb Landscaping, dated January 16, 2020
- Estimate from The Hardscape Store, dated September 21, 2020

Cl. #18 Schedule of Payments table and the following:

- Check # 4659 for $20,000.00
- Check # 4669 for $10,000.00
- Check # 4673 for $10,000.00
- Check # 4687 for $10,000.00
- Check # 4693 for $5,000.00
- Collection Notice from CSRS, Inc. to Claimant, dated December 12, 2019
- Letter from Claimant to CSRS, Inc., dated December 19, 2019
- Letter from Protas, Spivok & Collins, LLC to Marcello B. Macherelli, dated February 28, 2020
- Letter from Claimant to Protas, Spivok & Collins, LLC, dated March 24, 2020

Cl. #19 Email between Claimant and Respondent, dated November 18, 19, 22, 24, and 26, 2019

I admitted the following exhibits offered by the Respondent:

Resp. #1-12 (Not admitted)[11]

Resp. #13 Photograph

Resp. #14 Photograph

Resp. #15 Email from Claimant to Respondent, dated June 15, 2019

Resp. #15A Emails between Scott Wilets and Respondent, dated June 19 and 20, 2019

Resp. #16 Packet of documents containing the following:

- Emails between Claimant and Respondent, dated August 1, 2, 8, 12, 16, 23, 2019
- Architectural and Landscape drawings
- Email between Scott Wilets and Respondent, dated June 19, 2019
- Emails from Claimant and Lorna Blumen to Respondent, dated June 26, July 3 and 4, 2019
- Landscape drawings
- Emails between Lorna Blumen and Respondent, dated July 18, 2019

Resp. #17 Photographs (2 pages)

Resp. #18 Architectural drawing

Resp. #19 Landscape drawing

Resp. #20 (Not offered)

Resp. #21 Text messages between Respondent and Claimant, dated December 2, 2019

I admitted the following exhibits offered by the Fund:

Fund #1 Hearing Order, dated August 2, 2021

Fund #2 Notices of Hearing, dated September 3, 2021, October 12, 2021, and November 9, 2021

Fund #3 Home Improvement Claim Form, dated October 26, 2020; Letter from HIC to Claimant, dated November 20, 2020

[11] Resp. #1-12 consisted of the Settlement Agreement, Notice of Dismissal, and other documents that formed the basis of the Respondent's Motion. Also included were copies of the contract and other documents submitted with the Claimant's complaint and claim that were duplicative. As I denied the Motion on the record, I found these to be irrelevant to the case on the merits. They are, however, included in the file and exhibits returned to the MHIC.

Fund #4 Respondent's Licensing Record

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and presented the testimony of Alberto Ordonez Orellana. I accepted the Respondent as an expert in the landscape industry and patio installation.

The Fund did not offer any witnesses.

PROPOSED FINDINGS OF FACT.

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 5633686. The Respondent's most recent license expired on October 17, 2021. The Respondent, who is retired and currently lives in Massachusetts, is no longer licensed in Maryland.

2. In 2019, the Claimant planned an extensive renovation to her home to accommodate caring for her elderly father. Scott Wilets, an architect, designed the renovation and Steve Howes, a contractor, directed the bulk of the project. Part of the plan included constructing an extensive front walkway and rear patio adjacent to the home and accompanying landscaping.

3. The Respondent performed landscaping services for 30 years in the Maryland/District of Columbia area. Her company handled landscape design, installation, renovation, and maintenance. The Respondent's company successfully completed several jobs in the Claimant's neighborhood, and she was introduced to the Claimant by a neighbor who previously hired the Respondent to perform work at her home.

4. On or about August 14, 2019, the Claimant and the Respondent entered into a contract (Contract) for the Respondent to perform hardscaping and landscaping services at the Claimant's home in Bethesda, Maryland.[12] The contract was entitled "Estimate," and included extensive hardscaping and landscaping work in the front and back of the Claimant's home.

5. The original agreed-upon amount of the Contract was approximately $60,500.00.

6. Initially, the Respondent wanted to complete the entire project in six weeks, although no date for completion was noted in the Contract. The work covering the front and side yards would be done first and the back patio would follow.

7. The portions of the Contract concerning the back patio of the Claimant's home contained the following features:

- Rear Patio, approximately 620 square feet.
- Remove excess soil and compact remaining.
- Using existing stone and new flagstone lay new patio. Prepare a compacted base of CR6[13] and lay patio in stone dust.
- At finish, sweep coarse polymeric sand into joints.
- Not all saved stone can be used.

8. The cost attributable to the rear patio project was $16,500.00.

9. No rear patio existed at the time of the Contract. There had been a rear patio in the past, but it no longer existed when the Respondent began work on the rear patio portion of the Contract. The Claimant retained old flagstone from the prior patio and requested that the

[12] The Contract was executed by the Claimant and her husband; however, only the Claimant is named on the MHIC claim.
[13] CR6 is a product used in constructing the base for roads. Also called "stone dust," it is a byproduct of quarries and gravel. When compacted, CR6 hardens quickly. Stone dust must be periodically added to maintain such a patio.

Respondent use it in the new patio to save costs. The repurposed flagstone is also termed "salvaged flagstone."

10. Natural flagstone is irregular. The stones contain variations in size, thickness, and surface. Flagstone is not smooth.

11. Before the Contract was executed, the Respondent met with Mr. Howes, the contractor. He told her he needed to change the grade in the back of the home, behind a pair of sliding back doors, as it was currently too steep.

12. The Respondent wanted to build a step down to the patio to address a grading issue, but the Claimant did not agree.

13. The Respondent told Mr. Howes she wanted to install the flagstone on undisturbed soil, rather than installed soil.

14. Undisturbed soil is preferable when placing flagstones. With installed soil, the flagstone pieces have a greater chance of moving. Soil must be compacted to achieve a solid base. When air is added to soil, it will move.

15. The Respondent's work on the entire project began August 20, 2019.

16. The Respondent's work on the back patio began in October 2019.

17. The Respondent staked and roped-out the proposed shape of the patio. The Claimant approved the parameters of the patio.

18. The contractor placed a great deal of soil in the back for grading. The Respondent had to remove half of the soil, then tamp it to provide an adequate surface for the flagstone. In order to do this, the Respondent had to incorporate additional CR6 to the soil to tamp and flatten it. This task involved more work than originally planned.

19. There is an industry standard for the preparation of the base for installation and the grade, but none for the placement of natural, irregular, flagstones.

20. When laying flagstone, care should be taken to avoid "four corners" issues,[14] which may create excessive flow of water by having long channels not broken up by the surface of stones. Having this layout may allow water to puddle in the immediate area of the four corners.

21. After the flagstones had been placed, the Respondent was informed a new gas line had been installed. This installation required the Respondent take the patio apart and reinstall the flagstone.

22. On or about October 28, 2019, per the Claimant's request for a larger patio, the parties revised the Contract.[15] The revision increased the size of the rear patio to 700 square feet and added $2,760.00 to the price.

23. Because of the ultimate enlargement of the patio, and because some of the salvaged flagstone was too damaged to reuse, the project required new flagstone in addition to the salvaged flagstone.

24. To address compacting of the surface and small gaps at the edge of the patio, the Respondent suggested building a low wall. The Claimant did not agree to the wall, but allowed the Respondent to place edging along the patio border.

25. During the course of the project, at the Claimant's request, the Respondent performed additional work outside of the Contract. The Respondent did not charge for the additional work. This work included rerouting an underground pipe leading from the downspout to divert water away from the home; removing some trees from portions of the Claimant's yard;

[14] This configuration was also called "four square," and occurs when four stones share a joint.
[15] This document was entitled "Invoice."

fixing mortar in cracks between bricks in the structure of the Claimant's home; and replanting azalea bushes in another portion of the Claimant's yard.

26. Following the completion of the rear patio, the Claimant complained that the patio was poorly done, with specific complaints about joints and corners. She told the Respondent she would be obtaining estimates to fix or remake the patio to her satisfaction. The Respondent offered to return to the patio to correct one "four corner" issue she observed. The Claimant did not allow the Respondent to do so.

27. After the Respondent completed the patio, the Claimant had an unlicensed landscaper rearrange some of the patio flagstones.

28. In total, the Claimant paid the Respondent $55,000.00 for the entire landscaping project under the Contract.[16]

DISCUSSION

Motion to Dismiss/Motion for Summary Decision

At the outset of the hearing, the Respondent renewed her Motion and offered another version of the original Motion that included additional argument.[17] I allowed argument on the Motion and rendered an oral ruling denying the motion on the record before proceeding with the hearing on the merits. I informed the parties that I would elaborate on my ruling on the Motion as part of this decision.

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[16] The Claimant made the following payments: 8/20/19-$20,000.00; 9/9/19-$10,000.00; 9/20/19-$10,000.00; 11/18/19-$10,000.00; 11/26/19-$5,000.00. The Claimant did not pay the remaining $5,000.00 balance due to her stated dissatisfaction with the project. The non-payment precipitated the District and Circuit Court actions that followed.

[17] On the day of the hearing, the Respondent's counsel offered numerous documents, labeled as exhibits, to support the Motion, including the various District and Circuit Court complaints and settlement documents. She also planned to present witnesses to support the contention that the Fund claim was precluded by the resolution of the two court disputes. Since I orally denied the Motion, based on much of the argument made at the November 8, 2021 motions hearing and the December 7, 2021 Ruling, I found these documents (identified as Resp. #1-12) to be irrelevant and did not accept them for admission into the record. They are labeled and included with this Proposed Decision. The Respondent, therefore, did not present witnesses to support the Motion.

I issued my original Ruling on the Motion on December 7, 2021,[18] and nothing offered in the Respondent's document, entitled "Respondent's Evidentiary Hearing Brief" (Brief), alters my determination. In a nutshell, following the parties' dispute over the work performed under the Contract and financial remuneration, they engaged in dueling lawsuits. The Respondent sued the Claimant in the District Court of Maryland for Montgomery County to seek the balance under the Contract that the Claimant had not paid. Months later, the Claimant sued the Respondent in the Circuit Court for Montgomery County for breach of contract, unjust enrichment, and negligence. These actions were filed prior to the instant MHIC Fund Claim.

In November 2020, the parties executed a Settlement Agreement and Mutual General Release. Shortly thereafter, the parties dismissed their District and Circuit Court actions. For the reasons expressed in my December 7, 2021 Ruling, I found the Respondent's Motion unavailing.

The Brief included additional argument, this time asserting that the doctrine of *res judicata* barred the Claimant's Fund Claim. I will not repeat the basis of my December 7, 2021 ruling, but will address this argument on its own.

Res judicata protects litigants from the burden of relitigating an identical issue with the same party or his privy and promotes judicial economy by preventing needless litigation. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971). The doctrine of *res judicata* precludes the repeated litigation of a claim where:

1. The parties in the present litigation are the same or in privity with the parties to the earlier dispute;
2. The claim presented in the current action is identical to the one determined in the prior adjudication; and

[18] See OAH-LABOR-02-21-19988, Ruling on Respondent's Motion to Dismiss or in the Alternative, Summary Decision, issued December 7, 2021.

3. There was a final judgment on the merits.

North Am. Specialty Ins. Co. v. Boston Med. Co., 1, 170 Md. App. 128, 137 (2006) (*quoting Colandrea v. Wilde Lake Cmty. Ass'n, Inc.*, 361 Md. 371, 392 (2000)).

The Respondent argued that the instant claim satisfies the elements of *res judicata* on all counts. I do not agree and will address each assertion in turn.

The parties are the same or in privity with the parties to the earlier dispute.

While the Claimant and the Respondent have engaged in prior litigation involving the Claimant's home improvement project, contrary to the Respondent's assertion, the Fund cannot be considered in privity with the Claimant.

In this matter, the Fund is a party to the action. Its role is not in concert with the Claimant; as guarantor, it has a fiduciary responsibility to protect the proceeds of the Fund against non-meritorious claims. It is not uncommon for the Fund to argue against a claim, should it not be supported by evidence. The interest of the Fund is to protect it from unproven claims and to preserve and provide reimbursement for those with merit.[19]

The right of reimbursement cited by the Respondent in section 8-410(a)(1) of the Business Regulation Article does not place the Fund in privity with a Claimant. Ordinarily, a contractor who does not prevail must reimburse the Fund in order to retain its MHIC license. It is not an assignment of rights, as asserted by the Respondent, but a method of sustaining a licensing program to protect worthy claimants in general from poor or unscrupulous contractors. The Fund had no role in either the District or Circuit Court actions involving the Claimant and Respondent. Neither was it aligned with the Claimant in the instant case.

[19] Md. Code Ann., Bus. Reg. §8-405 (2015); COMAR 09.08.03.

The claims are identical.

The Respondent contends that since each action arose from the Contract, the instant case meets the second requirement for *res judicata*. To support this, the Respondent cites the "transaction test" and defines a claim as one that includes "all rights of the plaintiff to remedies against the defendant with respect to any part of the transaction, or series of connected transactions, out of which the claim arose. Therefore, when the claim is extinguished, all such rights of the plaintiff to such remedies are extinguished as well." *Boyd v. Bowen,* 145 Md. App. 635, 656 (2002).

The claims are not identical. There may be a common relationship between the Claimant and Respondent in their dispute, but the instant matter is a case of the Fund versus the claim of the Claimant. The Fund was neither a party to the Contract nor to any of the District or Circuit Court actions involving the Claimant and Respondent. In the administrative action at hand, the Claimant must prove actual loss, a term explicitly defined in the relevant regulations, and not a concept involved in either of the other actions. The fact that the Claimant and Respondent settled their respective court disputes does not preclude an administrative adjudication involving the Fund.

The dismissals with prejudice of the prior actions were final judgments.

The Respondent also contended that the settlement of the parties and the subsequent dismissal of their respective court cases created a final judgment precluding the Fund claim. The nature and substance of the instant administrative action does not reflect the issues settled by the Claimant and Respondent in their court cases. Whether the Claimant sustained an actual loss compensable by the Fund was not determined in their settlement agreement. In their settlement of the District and Circuit Court cases, the Claimant and Respondent agreed on terms and to dismiss their respective court actions. No final judgment was ever rendered regarding an administrative proceeding.

The Respondent paired this assertion with an alternative—that if I did not find a final judgment that would preclude the instant case, section 8-408(b)(2) of the Business Regulation Article requires an MHIC action be stayed until a related court matter is resolved. Therefore, the Respondent argued, without a final judgment, the instant administrative hearing cannot go forward.

This contradictory assertion is similarly unavailing, as well as circular. Even if the dismissals in District and Circuit Court were not considered "final judgments" for the purpose of preclusion under *res judicata*, the cases are no longer pending in their respective jurisdictions and no longer require a stay of this proceeding.

Independent of the Respondent's assertions that were not previously addressed, the primary factor prohibiting a dismissal of this case remains. COMAR 09.01.03.05B provides that "[a] motion to dismiss or any other dispositive motion may not be granted by the [Administrative Law Judge] without the concurrence of all parties." At the hearing, the Claimant and the Fund made clear they opposed the Motion. This opposition, in and of itself, precludes dismissing the case.

Additionally, at the conclusion of the Claimant's case, the Respondent made a motion for judgment. The Claimant opposed this motion. Based on COMAR 09.01.03.05B, granting this dispositive motion would not be permitted as well, absent the parties' agreement. Thus, I cannot find that all parties concurred with the granting of the Motion or the Respondent's motion for judgment, and they are denied.

The Case on the Merits

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence.[20] To prove a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered.[21]

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor."[22] "'[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement."[23] For the following reasons, I find that the Claimant has not proven eligibility for compensation.

The landscaping project contracted between the Claimant and Respondent has been rife with contention, albeit mostly after the completion of the project. The original project envisioned by the Claimant was immense, and not confined to the work of the Respondent. In seeking to adapt her residence to house and care for her aging father, the Claimant sought to enlarge her home with extensive remodeling, which included improving accessibility from the driveway. This area is where the Respondent entered the picture to create hardscaping and planting to facilitate the adaptation and aesthetics of the project. Another portion of the work was to construct a patio in the back of the home.

Although the original claim encompassed the entire contract, on the second hearing date, after spending the first day presenting lengthy evidence on the original Claim, the Claimant

[20] Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2021); COMAR 09.08.03.03A(3).
[21] *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).
[22] Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) ("The Fund may only compensate claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor.").
[23] Bus. Reg. § 8-401.

decided to amend the Claim and confine it to the work performed in the back of the home. This amendment considerably altered and reduced the original Claim.

It was clear that the entire project, including the home renovation, became stressful for the Claimant. The period of time envisioned for the work extended many months past its original estimate. The project involved numerous changes, for both aesthetic and financial reasons. It was multi-layered, with many moving parts, workmen of various skills and proficiencies, and several alterations. That things went awry was not unpredictable.

Concentrating on the rear patio and associated issues only, as requested by the Claimant on the second day of the hearing, I cannot find that the problems described by the Claimant occurred as a result of poor workmanship by the Respondent. For example, the Claimant complained that the grout lines in the back patio did not look "right," and were of different widths and uneven. She contended that faulty grading caused water to pool improperly on the stones in the patio.[24] The Claimant was unhappy with the placement of the flagstones, the spaces between the flagstones, and the length and condition of the joints between them, and virtually everything about the patio. The Claimant insisted that the only remedy was for the back patio to be completely removed and reconstructed at a cost that exceeded that of the original Contract.

The Respondent testified that upon the completion of the patio, the Claimant complained it was not level. The Respondent took a level and demonstrated that the patio was, in fact, level. The Claimant accused the Respondent of using a broken level, at which point the Respondent offered to buy a new one, as well as bring another landscape designer with expertise in flagstone

[24] The Claimant offered photographs into evidence purporting to show water pooling on patio flagstones. The Respondent objected to the admission, as the flagstones in the photos had been altered by paint applied to their surfaces by the Claimant that could possibly affect the surface retention of water. The Claimant stated that she painted the stones to better indicate water pooling. I did not admit the photos into evidence based on their alteration, as they did not reflect the original work of the Respondent.

patios to the site, to confirm that the patio was level. The Respondent and another landscape designer returned to the Claimant's home, with a brand-new level in a box, and determined the patio to be level and properly sloped. The Claimant did not venture from her home to speak to the Respondent or anyone else at this time, nor did she acknowledge their inspection. This situation was but one that demonstrated how the relationship between the Claimant and the Respondent devolved.

Several times during her testimony, the Respondent was asked why she and her crew did so much work over and above the work described in the Contract. The Respondent's consistent answer was "we wanted the customer to be happy." It became clear that nothing the Respondent or her crew could do would make the Claimant happy.

I found the Respondent's testimony credible and persuasive. She had over thirty years of landscape design and installation experience and designed and built hundreds of patios over the years. Her tone was measured and her command of the details of the business and process impressive.

The Respondent painstakingly explained that natural flagstones are irregular on every side and surface, with naturally occurring imperfections. She offered that when purchasing new flagstone, she chooses the best available, but in this case, the Claimant insisted on using the salvaged flagstones, which had been used in her previously demolished patio. The Respondent offered that she followed the industry standard for the preparation of the base for installation and the grade of the patio. She emphasized, however, there is no industry standard for the placement of natural, irregular, flagstones, and that she and her crew did the best they could to create a safe and aesthetically pleasing patio with the available material.

The Respondent further noted that one of the Claimant's estimates for the replacement of the patio used manufactured stones, a material completely unlike that of natural flagstone. The Respondent believed that the Claimant's stated dissatisfaction with the "four corners" and joints could be remedied by some rearrangement, but that her observation was there was only one example of that in the patio. This was contrasted with the Claimant's assertion that there were sixteen examples of this defect. Because the photographs offered by the Claimant were taken after her unlicensed contractor reassembled the patio flagstones, no documentary evidence exists to support her claim. The Claimant rejected the Respondent's offer to return to correct the single problem she observed.

Mr. Ordonez, the Respondent's foreman, testified that he worked on the entirety of the project at the Claimant's home. He confirmed that he and his crew did additional work outside of the Contract for the Claimant. Mr. Ordonez noted that over his many years of experience, he had installed numerous patios like the one in the rear of the Claimant's home. He described the project as somewhat more challenging due to the salvaged flagstone the Claimant directed them to use. He described the salvaged flagstone as having rough surfaces and irregular edges, and generally more difficult to work with than flagstone that had not been previously used. Mr. Ordonez recounted how, after initially installing the patio, it had to be altered and redone to accommodate the installation of a gas line of which the Respondent had been unaware. He also described how, after the patio and border were laid, the Claimant requested that the patio be enlarged, which necessitated a longer joint. Mr. Ordonez recalled the Claimant expressing satisfaction with the work at the time.

Mr. Ordonez examined the estimates submitted by the Claimant for the replacement of the patio. He distinguished the proposals from the one built by the Respondent by size, materials,

and method of installation. Mr. Ordonez confirmed the many additions to the work requested by the Claimant, such as removing trees and rerouting a pipe that had nothing to do with the patio, that were performed by the Respondent's workers outside of the Contract.

The Fund offered its assessment of the case and recommendation. It found the Claimant's allegations unproven to demonstrate an unworkmanlike job. Counsel for the Fund described the Claimant's criticisms of the work and noted the lack of evidence or expertise to support them. For example, although the Claimant asserted that due to poor installation, water pooled on a small portion of the entire patio, her sole documentary evidence consisted of a photograph that was not admitted into the record because the surface of the installed flagstone had been altered by paint. The Claimant offered no expert testimony that any pooling was caused by deficient grading or other poor workmanship by the Respondent.

Similarly, the Claimant presented no expert testimony to support her contention that the joints in the patio or the arrangement of the flagstones violated industry standards. This was contradicted by the Respondent, whose expertise was accepted. As for the dispute over "four corners," any contention by the Claimant was compromised by her admission that the photographs she offered to support her claim were taken after another contractor had intervened and repositioned the flagstones. Moreover, the Claimant rejected the Respondent's offer to correct the single "four corner" problem she recognized.

The Fund also observed that even if there were small defects that could have been corrected, this did not necessitate the entire removal and replacement of the patio. The Fund further pointed out that the estimates provided by the Claimant obtained from licensed

contractors,[25] were not comparable to the original patio, and consisted of upgrades to the work agreed to in the Contract in both size and materials.

It is unfortunate that the relationship between the Claimant and the Respondent ended on such a low note. It appeared that it was not until the end of the project that the Claimant registered displeasure with the Respondent's work. Up to that time, the Respondent and her crew did much to try to please the Claimant, including reworking the patio whenever the Claimant made changes, performing other landscaping work gratis, and coordinating with other contractors throughout the entire project.

The conclusion, however, is that the Claimant has not met her burden in this matter. The Respondent did not perform unworkmanlike, inadequate, or incomplete home improvements. As a result, there has been no actual loss and I find that the Claimant is not eligible for compensation from the Fund.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Respondent's Motion to Dismiss or in the alternative, for Summary Decision should be denied.[26]

I further conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts or omissions.[27]

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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[25] Two of the estimates offered by the Claimant were from unlicensed contractors.
[26] COMAR 09.01.03.05B
[27] Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

Harriet C. Helfand

April 8, 2022
Date Decision Issued

Harriet C. Helfand
Administrative Law Judge

HCH/kdp
196270

PROPOSED ORDER

WHEREFORE, this 13th day of June, 2022, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Lauren Lake

Lauren Lake
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION