

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the  
City of Richmond on* Friday *the* 21st *day of* February, 2014.

Aaron Marlow, Appellant,

against Record No. 130973  
Circuit Court No. CL12-469

CSF, Inc., Appellee.

Upon an appeal from a  
judgment rendered by the Circuit  
Court of the City of Suffolk.

Upon consideration of the record, briefs, and the argument of counsel, the Court is of opinion that there is no reversible error in the judgment of the Circuit Court of the City of Suffolk.

CSF, Inc. (CSF) filed a cause of action against Aaron Marlow, M.D. (Marlow) claiming that Marlow breached a contract by refusing to pay CSF money owed for construction of a pier and other structures. Marlow filed a counterclaim for breach of contract and alleged that CSF breached the contract first by, among other things, failing to install stringer bolts<sup>1</sup> in constructing the pier.

The Circuit Court of the City of Suffolk ruled in favor of CSF and dismissed Marlow's counterclaim. Marlow appeals. His assignment of error is as follows:

The circuit court erred as a matter of law when it found there was no mutually agreed upon contract modification to include the use of stringer bolts.

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<sup>1</sup> Stringer bolts may be used to attach vertically situated boards (called stringers) that support a pier deck above to the pilings below. CSF used nails as called for in the original contract.

Marlow and CSF entered a contract for CSF to construct a pier on Marlow's property that abuts the Nansemond River in the City of Suffolk. After the parties executed the written contract, Marlow requested several changes. One of the requested changes concerned the use of stringer bolts in constructing the pier.

During construction of the pier, Marlow sent an email to CSF asking CSF to use stringer bolts on the pier. An agent of CSF responded, "I will include what you are requesting, which is stringer bolts." Upon receiving an invoice approximately one month later, Marlow noticed that it did not reflect his request for stringer bolts. Marlow then contacted CSF and was told that the stringer bolts could not be added to the pier "because you requested it too late."

Marlow expressed frustration with this reply, asking if there was an alternative way to install the stringer bolts, and also stating that a written warranty could be an option instead of installation of the stringer bolts. CSF offered to visit the site again to determine "if there was another option."

A couple of weeks later, Hurricane Irene struck, damaging a large portion of Marlow's nearly completed pier. Marlow notified CSF that he was terminating the contract with it. Marlow did not pay a subsequent final invoice sent by CSF, claiming that CSF breached the contract by not installing the stringer bolts.

After a bench trial, the circuit court found that the parties had not modified the contract to include stringer bolts in the construction of the pier. It stated that although the parties had been in negotiation, there had been no clear meeting of the minds regarding such a modification to their written contract. The

circuit court ruled that CSF was entitled to be compensated for the work it had done prior to termination of the contract. In addition to finding no contract modification, the circuit court also ruled against Marlow regarding his claim that storm damage to his pier was the result of CSF's alleged breach of contract due to its failure to install the stringer bolts.

Assuming, arguendo, that the contract between Marlow and CSF was modified to include the use of stringer bolts in the construction of the pier, the circuit court's dismissal of Marlow's counterclaim because of the deficiency in Marlow's evidence regarding damages has not been challenged and still stands. The circuit court ruled that Marlow did not offer any competent evidence establishing that but for CSF's failure to install stringer bolts, the pier would not have been damaged by Hurricane Irene. Thus, even if failing to install the stringer bolts was a breach of contract, Marlow failed to prove that it was a material breach that would preclude CSF from being compensated for work it undisputedly did on the pier prior to Marlow's termination of the contract. See Decipher, Inc. v. iTRiBE, Inc., 262 Va. 588, 592, 596, 553 S.E.2d 718, 720, 722 (2001). The error alleged by Marlow is not sufficient to support reversal of the circuit court's judgment.

Accordingly, we affirm the judgment of the Circuit Court of the City of Suffolk. The appellant shall pay to the appellee damages according to law.

This order shall be certified to the said circuit court.

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JUSTICE McCLANAHAN, concurring in part and dissenting in part.

I agree with the result in this case but disagree with the majority's rationale in affirming the judgment of the trial court. Marlow's appeal does not fail due to a procedural default, as he assigned error to the trial court's threshold ruling that no contract modification for CSF to install the stringer bolts occurred. However, as to the merits of Marlow's counterclaim, even assuming without deciding that the contract modification occurred, I believe Marlow's appeal fails because he did not present competent expert evidence establishing that but for CSF's failure to install the stringer bolts, Marlow's pier would not have been damaged by Hurricane Irene.<sup>2</sup>

According to the majority, the trial court made two separate rulings against Marlow in dismissing his counterclaim, to-wit: (i) there was no contract modification (allegedly requiring CSF to use stringer bolts on Marlow's pier) upon which Marlow based his breach of contract action; and (ii) Marlow's evidence of damages arising from this alleged breach of contract was deficient. The majority concludes that Marlow's appeal fails on a procedural default because he only challenged in his one assignment of error the trial

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<sup>2</sup> The essence of Marlow's counterclaim was that (i) there was a contract modification for CSF to install the stringer bolts to Marlow's pier, (ii) Marlow breached the contract by failing to install the stringer bolts, and (iii) as a result of that breach, Marlow's pier sustained "structural damage" when "tropical storm/Hurricane Irene struck the Hampton Roads area."

court's ruling that there was no contract modification.<sup>3</sup> The majority reasons that, even if there had been a contract modification as Marlow alleged, he was also required on appeal to assert error to the trial court's purported ruling as to damages. Thus, absent such challenge, "[t]he error alleged by Marlow is not sufficient to support reversal of the circuit court's judgment," the majority declares.

I do not agree that the trial court rendered a second ruling, dictating that Marlow assign error to that purported ruling as well or lose this appeal on a procedural default. Following a bench trial on CFS' claim against Marlow and Marlow's counterclaim against CFS, the trial court judge orally announced his rulings from the bench. As to Marlow's counterclaim, the trial judge discussed at length the evidence regarding the parties' communications about the installation of stringer bolts and concluded that "clearly there was never a contract to have these cross-bolts installed." Immediately afterwards, the trial judge stated: "Insofar as damages then from that . . . I think the court would have to rule . . . against [Marlow] in that case." (Emphasis added.) The trial judge said nothing else about damages in regard to Marlow's counterclaim, much less anything specifically regarding the merits of Marlow's damage evidence. That is, the trial judge did not rule that Marlow's damage evidence was insufficient, in and

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<sup>3</sup> Marlow's assignment of error states: "The circuit court erred as a matter of law when it found there was no mutual agreed upon contract modification to include the use of stinger bolts."

of itself, as an independent (i.e., alternative) basis for dismissing his counterclaim. Rather, the trial judge did no more than state the obvious - because the trial judge found there was no contract modification upon which Marlow based his breach of contract claim, he would not be entitled to damages. Therefore, given the trial court's ruling against Marlow on the threshold element of his breach of contract action, Marlow need only have appealed that ruling in order to effect a procedurally sufficient appeal following dismissal of his counterclaim. Moreover, there was no other ruling against him on the counterclaim to appeal.<sup>4</sup>

However, upon my review of the record, I would conclude on the merits of Marlow's counterclaim that his damage evidence was, in fact, insufficient as a matter of law. That is because he presented no competent expert evidence that but for CSF's failure to install the stringer bolts, Marlow's pier would not have been damaged by Hurricane Irene. See Orebaugh v. Antonious, 190 Va. 829, 834, 58 S.E.2d 873, 875 (1950) (compensatory damages for breach of contract "must be proven by competent evidence" and not assumed). Thus, even if we assume without deciding that the contract between Marlow and CSF was modified as Marlow contends, Marlow's breach of contract claim would still fail. See, e.g.,

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<sup>4</sup> For this reason, were Marlow to have prevailed in this appeal resulting in this Court holding that there was a contract modification, without more, the proper disposition would have been for the Court to remand the case to the trial court for further proceedings. I believe, however, that the judgment of the trial court can be affirmed upon assuming, without deciding, that there was a contract modification, as discussed *infra* - but not on a procedural default basis, as the majority holds.

Sorrels v. Foreign Mission Bd. of Southern Baptist Convention, 227 Va. 6, 7, 313 S.E.2d 370, 371 (1984) (assuming without deciding existence of contract in deciding the case). Under this scenario, the circuit court would have reached the right result in dismissing Marlow's counterclaim, though for the wrong reason. Accordingly, I concur.

A Copy,

Teste:

*John L. Harrington*

Clerk