

<p>IN THE MATTER OF THE CLAIM</p> <p>OF CYNTHIA BETTERSON,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR,</p> <p>OMISSIONS OF CHUKUEMEKA</p> <p>OKORO,</p> <p>T/A UK CONSTRUCTION &</p> <p>MANAGEMENT, LLC</p> <p>RESPONDENT</p>	<p>* BEFORE CARLTON A. CURRY,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-23-01545</p> <p>* MHIC No.: 22 (75) 1289</p> <p>*</p> <p>*</p>
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STATEMENT OF THE CASE

On June 28, 2022, Cynthia Betterson (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$31,506.42 for actual losses allegedly suffered as a result of a home improvement contract with Chukumeka Okoro, trading as UK Construction & Management, LLC (Respondent). Md. Code

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).

Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).¹ On January 6, 2023, the MHIC issued a Hearing Order on the Claim. On January 17, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On March 30, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. The Claimant was self-represented. Nicholas Sokolow, Assistant Attorney General, Department, represented the Fund. Lara Wilkerson, Esquire, represented the Respondent, who was present. At the start of the hearing, the Respondent made an oral motion requesting that the Claim be dismissed on the basis of collateral estoppel and *res judicata*. I treated the motion as a Motion to Dismiss, or in the alternative, a Motion for Summary Decision (Motion).² I reserved ruling on the Motion and proceeded with the hearing on the merits.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

**ISSUES FOR THE MOTION TO DISMISS OR IN THE ALTERNATIVE A MOTION
FOR SUMMARY DECISION**

Should the Claim be dismissed for failure to state a claim upon which relief can be granted on the basis of *res judicata*?

ISSUES FOR THE MERITS HEARING

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, what is the amount of the compensable loss?

¹ Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

² At the hearing, the Motion was referred to as both a motion to dismiss and a motion for summary decision.

SUMMARY OF THE EVIDENCE

Motion Exhibits

I admitted the following exhibit on behalf the Respondent:

Mot. Resp. 1 – Official Transcript of Proceedings (Trial), District Court of Maryland for Howard County, Case No. D-10-20-011453, May 23, 2023

Merits Exhibits

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 – Contract proposal between the Claimant and the Respondent, October 27, 2020
- Clmt. Ex. 2 – Photographs of bathroom demolition, undated
- Clmt. Ex. 3 – Not admitted¹
- Clmt. Ex. 4 – Photographs of basement framing, undated²
- Clmt. Ex. 5 – Not admitted
- Clmt. Ex. 6 – Contract between the Claimant and Sheldon and Sons, November 10, 2020
- Clmt. Ex. 7 – Not offered
- Clmt. Ex. 8 – Not offered
- Clmt. Ex. 9 – Not offered
- Clmt. Ex. 10 – Not admitted
- Clmt. Ex. 11 – Not offered
- Clmt. Ex. 12 – Not offered
- Clmt. Ex. 13 – Not offered
- Clmt. Ex. 14 – Not offered
- Clmt. Ex. 15 – True Copy, District Court of Maryland for Howard County, Case No. D-10-20-011453, containing copies of judgements entered on May 23, 2023
- Clmt. Ex. 16 – True Copy, Circuit Court for Howard County Order, Case No. C-13-CV-000594, October 17, 2022
- Clmt. Ex. 17 – True Copy, Circuit Court for Howard County Order, Case No. C-13-CV-000594, September 29, 2023
- Clmt. Ex. 18 – True Copy, Circuit Court for Howard County Order, Case No. C-13-CV-000594, January 26, 2023
- Clmt. Ex. 19 – True Copy, Circuit Court for Howard County Order, Case No. C-13-CV-000594, January 19, 2023

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 – Notice of Hearing, February 2, 2023
- Fund Ex. 2 – MHIC Hearing Order, January 6, 2023

¹ All exhibits not admitted as evidence are retained with file for completeness. COMAR 28.02.01.22C.

² Only page one of Clmt. Ex. 4 was admitted into evidence.

Fund Ex. 3 – Correspondence from the MHIC to the Respondent with Home Improvement Claim Form attached, July 6, 2022

Fund Ex. 4 – Respondent’s MHIC Licensing History, February 15, 2023

Testimony

The Claimant testified and did not present other witnesses. The Respondent testified and did not present other witnesses. The Fund presented no 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 numbers 01-86359 and 05-121978.
2. In October 2020, the Claimant and the Respondent entered into a contract to perform the following scope of work: interior demolition; bathroom construction; exterior demolition; and basement laundry renovation (Contract).
3. Exterior demolition included the removal and disposal of abandoned oil tanks as required.
4. The original agreed-upon Contract price was \$11,000.00. Payment terms were as follows:
 - \$ 500.00 on acceptance of the Contract
 - \$2,000.00 on 11/20/2020 for completion of interior demolition
 - \$2,750.00 on 11/20/2020 for completion of interior framing
 - \$2,750.00 on completion of interior finishes
 - \$3,000.00 on 11/20/2020 for completion of interior demolition
5. The Claimant paid the Respondent a \$500.00 deposit for work to begin. No other payments were made.
6. Sharon Havens served as the Claimant’s project manager for the Contract.
7. Work pursuant to the Contract began on November 2, 2020.

8. On November 3, 2020, exterior demolition began, including the removal of the oil tanks. The oil tanks were placed in the Claimant's yard and oil spilled into the soil.

9. On November 9, 2020, upon visiting the property, the Claimant detected an odor of oil, and had a discussion with the Respondent about the oil spill on November 10, 2020.

10. The Respondent and his subcontractor attempted to mitigate the spill by removing several layers of soil.

11. The Contract was terminated November 20, 2020.

12. The Respondent filed an action in the District Court of Maryland for Howard County against the Claimant, her husband,¹ a subcontractor, Ms. Havens, and SLH Designs, LLC. The Claimant filed a cross-complaint.

13. In his ruling dated May 23, 2022, the Honorable Wayne Brooks, District Court of Maryland for Howard County (Court), made a factual determination that the Respondent had performed work valued at \$7,750.00 and entered judgment in favor of the Respondent in that amount.²

14. On the same day, May 23, 2022, pursuant to the filing of the cross-complaint, Judge Brooks made the factual determination that the Respondent was liable for the remediation cost and consequential damages in the amount of \$30,000.00 and awarded the Claimant and her husband that amount.

A. DECISION ON THE MOTION TO DISMISS OR IN THE ALTERNATIVE A MOTION FOR SUMMARY DECISION

The Claimant objected to the Motion. In its response to the Motion, the Fund cited to COMAR 09.01.03.05B, which states, "A motion to dismiss or any other dispositive motion may not be granted by the ALJ [Administrative Law Judge] without the concurrence of all parties."

¹ The Claimant's husband was a party to the District Court proceedings.

² The judgment was entered in favor of the Respondent held the Claimant and her husband, jointly and severally liable.

Because all parties did not concur that the Motion should be granted, the Respondent's Motion to Dismiss, or in the alternative, Motion for Summary Decision, is denied.

B. DECISION ON THE MERITS DISCUSSION

Legal Framework

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); State Gov't § 10-217; COMAR 09.08.03.03A(3). 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. *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Bus. Reg. § 8-405(a) (Supp. 2022); *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."). "[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has not proven eligibility for compensation.

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant's recovery. The Claim was timely filed. Bus. Reg. §§ 8-405(g) (Supp. 2022). The Claimant resides in the home that is the subject of the Claim and do not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2022). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022). The Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2022).

Position of the Parties

The Claimant asserted she is entitled to compensation for the Respondents' inadequate, unworkmanlike, and incomplete home improvements regarding the interior and exterior demolition and the interior construction under the Contract. The Claimant argued that the Respondent's failure to timely communicate an oil spill related to the external demolition cost the Claimant more than \$30,000.00 in remediation costs. The Claimant maintained that she is entitled to a refund of her deposit of \$500.00 and monies to offset the \$7,750.00 Court judgement in favor of the Respondent.

The Respondent argued that this case was previously adjudicated and the doctrine of *res judicata* precludes any award by the Fund. Moreover, the Respondent contended that he was only paid a \$500.00 deposit and any award from the Fund would be limited to an actual loss in that amount; remediation costs related to the oil spill are consequential damages and not recoverable from the MHIC.

The Fund argued that an award from Fund may not be made for consequential damages or an amount in excess of the amount the Claimant paid the Respondent. Bus. Reg §§ 8-405(e)(3) (Supp. 2022); COMAR 09.08.03.03B. The Fund also that the doctrine of collateral estoppel may apply in this case.

Analysis

The doctrines of *res judicata* (direct estoppel) and collateral estoppel are related, but the distinction between them is "not often clearly understood." *Klein v. Whitehead*, 40 Md. App. 1, 12 (1978). For *res judicata* to apply, the causes of action in the two proceedings must be the same. *Id.* at 15. Collateral estoppel, however, does not require that the causes of action be the same. It "applies only with respect to issues of fact actually determined in the earlier

proceeding.” *Id.* Importantly, for either to apply, “the second action must be between the same parties or those in privity with them.” *Id.* (footnote omitted).

To determine whether *res judicata* precludes the litigation of a claim, courts apply a three-part test: 1) the parties in the present hearing are the same or in privity with the parties to the earlier action, 2) the claim in the current action is identical, or could have been raised and determined, in the prior action, and 3) there was a final judgment on the merits in the prior action. *See, e.g., Powell v. Breslin*, 430 Md. 52, 64 (2013); *Comptroller of the Treasury v. Sci. Applications Int’l Corp.*, 405 Md. 185 (2008).

To determine whether collateral estoppel precludes the litigation of a claim, courts utilize a four-part test: 1) the parties in the present hearing are the same or in privity with the parties to the earlier action, 2) the issue in the current action is identical with the issue in the prior action, 3) there was a final judgment on the merits in the prior action, and 4) the party against whom the plea is asserted had a full and fair opportunity to be heard. *Bank of NY Mellon v. Georg*, 456 Md. 616, 668 (2017). “Collateral estoppel is concerned with the issue implications of the earlier litigation of a different case.” *Id.* at 626 (quoting *Colandrea v. Wilde Lake Cmty. Ass’n, Inc.*, 361 Md. 371, 390 (2000)).

Privity is defined as a “mutuality of interest” or “the connection or relationship between two parties, each having a legally recognized interest in the same subject matter.” *Black’s Law Dictionary* 1453 (11th ed. 2019). The *Georg* Court elaborated that in collateral estoppel, privity “focuses on whether the interests of the party against whom estoppel is sought were fully represented, with the same incentives, by another party in the prior matter.” *Id.* at 658 (internal quotation marks omitted). In *res judicata*, “privity generally involves a person so identified in interest with another that [the person] represents the same legal right.” *Id.* at 659.

As the potential payee, the Fund has an identified interest in this present matter and was not a party to either of the Court actions. Because there was no privity between the Claimant, Respondent, and the Fund in the Court, *res judicata* does not apply to this Claim.

The Commission may not award consequential damages from the Fund; the Fund may only reimburse the Claimant for an actual loss suffered as a result of misconduct by the Respondent. 8-405e)(3) (Supp. 2022); COMAR 09.08.0303B(2), (3). The factual findings of the Court are relevant. The Court determined that the work performed by the Respondent was valued at \$7,750.00. It is undisputed that the Claimant paid the Respondent \$500.00, which is \$7,250.00 less than the amount at which his work was valued. Therefore, the Claimant has failed to demonstrate that she has suffered an actual loss which is recoverable from the Fund.

Moreover, the Court determined that costs associated with the remediation of the oil spill were consequential damages and awarded the Claimant the Court's jurisdictional limit of \$30,000.00. Collateral estoppel applies in this instance; the Court placed a value on the work performed and categorized the remediation costs as consequential damages. While unfortunate, the oil spill and the subsequent need for remediation, even if a result of the Respondent's poor workmanship, constitutes a consequential damage because it does not include the cost to restore, repair, replace, or complete the Respondent's work. As consequential damages are not compensable by the Fund, the Claimant may not recover for these costs. Because these issues have been fully litigated, I am precluded from reaching a different conclusion.

I thus find that the Claimant is not eligible for compensation from the Fund.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(1), (3).

RECOMMENDED ORDER

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

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

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

June 28, 2023
Date Decision Issued

Carlton A. Curry

Carlton A. Curry
Administrative Law Judge

CAC/at
#205907

PROPOSED ORDER

WHEREFORE, this 31st day of August, 2023, 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.

Michael Newton

Michael Newton

Panel B

**MARYLAND HOME IMPROVEMENT
COMMISSION**