

<p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF ZENOBLA GARDNER,</b></p> <p><b>CLAIMANT</b></p> <p><b>AGAINST THE MARYLAND HOME</b></p> <p><b>IMPROVEMENT GUARANTY FUND</b></p> <p><b>FOR THE ALLEGED ACTS OR</b></p> <p><b>OMISSIONS OF JAMES MARTIN,</b></p> <p><b>T/A PROMPT RESTORATION, INC.,</b></p> <p><b>RESPONDENT</b></p>	<p><b>* BEFORE JOY L. PHILLIPS,</b></p> <p><b>* AN ADMINISTRATIVE LAW JUDGE</b></p> <p><b>* OF THE MARYLAND OFFICE</b></p> <p><b>* OF ADMINISTRATIVE HEARINGS</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>* OAH No.: LABOR-HIC-02-20-24924</b></p> <p><b>* MHIC No. : 16 (90) 933</b></p>
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**REVISED PROPOSED DECISION<sup>1</sup>**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
PROPOSED FINDINGS OF FACT  
DISCUSSION  
PROPOSED CONCLUSIONS OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On November 9, 2016, Zenobia Gardner (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),<sup>2</sup> for reimbursement of \$231,000.00 in actual losses allegedly suffered as a result of a home improvement contract with James Martin,

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<sup>1</sup> COMAR 28.02.01.27C provides that a decision may be revised at any time due to a clerical mistake. The Proposed Decision issued on February 23, 2021 contained an incorrect MHIC Case Number. This Revised Proposed Decision is issued to correct that clerical mistake.

<sup>2</sup> On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

trading as Prompt Restoration, Inc. (Respondent).<sup>3</sup> Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).<sup>4</sup> On November 2, 2020, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on December 18, 2020 via a video conferencing platform. Md. Code Ann., Bus. Reg. § 8-407(c). Nicholas Sokolow, Assistant Attorney General, Department, represented the Fund. Mark C. Miller, Esquire, represented the Claimant, who was present.

After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. Code of Maryland Regulations (COMAR) 28.02.01.23A. On November 13, 2020, notice of the hearing was mailed to the Respondent at the address of record on Marthas Vineyard Lane by regular and certified mail, COMAR 09.08.03.03A(2), and was not returned as undeliverable. The Fund informed the OAH of an additional address for the Respondent on Bayside Beach Road in Pasadena, Maryland. A notice of hearing was sent to that address on December 8, 2020 and was not returned as undeliverable. The Respondent did not notify the OAH of any change of address. COMAR 28.02.01.03E. He did not request a postponement. He did not call the OAH to report difficulties logging onto the video conferencing platform. I determined that the Respondent had received proper notice, and I proceeded to hear the captioned matter.

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. Md.

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<sup>3</sup> The Claim was dated May 16, 2016 but was not marked as received by the MHIC until November 9, 2016.

<sup>4</sup> Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); COMAR 09.01.03; and COMAR 28.02.01.

### ISSUES

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?

### SUMMARY OF THE EVIDENCE

#### Exhibits

I admitted the following exhibits on the Claimant's behalf:

- Clmt. Ex. 1 - Photograph of Claimant's home, undated
- Clmt. Ex. 2 - Photograph of Respondent, undated
- Clmt. Ex. 3 - Contract, March 2, 2015
- Clmt. Ex. 4 - Release with Goodman-Gable-Gould Company (GGG), April 8, 2015
- Clmt. Ex. 5 - Check to Respondent, April 8, 2015
- Clmt. Ex. 6 - Email from GGG to Claimant, July 30, 2015, with attachment
- Clmt. Ex. 7 - Email chain between Claimant and GGG, July 30, 2015 and September 8, 2015
- Clmt. Ex. 8 - Item Profit Detail, February 20, 2004 through October 18, 2015
- Clmt. Ex. 9 - Photograph, November 12, 2015
- Clmt. Ex. 10 - Photograph, November 20, 2015
- Clmt. Ex. 11 - Email from GGG to Claimant, November 23, 2015, with attached letter from Respondent, November 22, 2015
- Clmt. Ex. 12 - Check to Respondent and Claimant, November 24, 2015
- Clmt. Ex. 13 - Email from Claimant to Respondent, January 6, 2016, with attached photographs
- Clmt. Ex. 14 - Email from Claimant to Respondent, January 18, 2016, with attached photographs
- Clmt. Ex. 15 - Voluntary Petition for Non-Individuals Filing for Bankruptcy, filed February 5, 2016
- Clmt. Ex. 16 - Classic Design + Build<sup>5</sup> Estimate Value for Work in Place, May 10, 2016
- Clmt. Ex. 17 - Classic Design Remodeling, LLC Contract with Claimant, August 19, 2016
- Clmt. Ex. 18 - Verdict Sheet, Circuit Court for Prince George's County, Maryland, CAL 16-42265, undated
- Clmt. Ex. 19 - (Not admitted)
- Clmt. Ex. 20 - (Not admitted)
- Clmt. Ex. 21 - Certification from PNC Bank, May 3, 2017, and partial bank records for Respondent, October 31 – November 30, 2015
- Clmt. Ex. 22 - (Not admitted)

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<sup>5</sup> In Exhibit 17, this company is called Classic Design Remodeling, LLC.

I admitted no exhibits on the Respondent's behalf.

I admitted the following exhibits on the Fund's behalf:

- Fund Ex. 1 - Notice of Remote Hearing, December 8, 2020
- Fund Ex. 2 - Hearing Order, October 28, 2020
- Fund Ex. 3 - Home Improvement Claim form, received November 9, 2016
- Fund Ex. 4 - Respondent's Licensing Information, November 30, 2020
- Fund Ex. 5 - Affidavit of Charles Corbin, December 2, 2020

Testimony

The Claimant testified and did not present other witnesses.

The Respondent did not present witnesses because he did not appear for the hearing.

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 01-100702 and 05-120758. His licenses expired October 19, 2017.
2. On November 16, 2014, the home in which the Claimant lived with her family was destroyed by fire. Only the brick foundation, basement, and exterior porches remained.
3. The Claimant hired the Goodman-Gable-Gould Company (GGG) to help her navigate her insurance claims with Travelers Insurance. GGG promised her she would receive all possible insurance proceeds and would ensure her home was restored in a timely manner. GGG acted as a funnel for the Claimant's proceeds and a conduit with the contractor. It maintained an escrow account and made payments out of that account.
4. GGG recommended the Claimant hire the Respondent to rebuild her home.

5. On March 2, 2015, the Claimant and the Respondent entered into a contract to rebuild the Claimant's home (Contract). The Contract provided that work would be completed by October 2, 2015.

6. The original agreed-upon Contract price was \$624,000.00, to be paid in four installments.

7. On April 8, 2015, the Claimant paid the Respondent \$156,000.00.

8. The Respondent assured the Claimant in the ensuing months that he was working hard on obtaining a permit to rebuild the house, but the Claimant learned in June 2015 that he had only recently applied for a demolition permit, not a rebuild permit. The Claimant learned this when she went to the permit office personally to investigate the permit delay.

9. On July 30, 2015, the Claimant and the Respondent met at GGG's office to discuss the delays in the work. The Claimant presented the Respondent with a list of her concerns. Regular meetings were scheduled in an effort to keep the work progressing and improve communication between the parties.

10. By September 2015, the house was demolished. Lumber to reframe the house arrived at the site at the end of October 2015. Much of the lumber was left exposed to the elements as delays continued.

11. The Respondent framed the house in November 2015. The Claimant was not satisfied with his framing job. The Respondent asked for a second draw, but the Claimant wanted the Respondent's work to be inspected before releasing more money to him. The Respondent became very upset. A representative from GGG met them at the jobsite and agreed that there were problems with the Respondent's framing job. Ultimately, it was decided the

problems could easily be repaired, so the Claimant agreed to release a second draw to the Respondent.

12. As part of the agreement to release a second draw to the Respondent, the Respondent agreed to pay a penalty of \$200.00 per day for any delay in completing the project after the new completion date of February 15, 2016 and agreed to pay the Claimant's additional living expenses that were not paid by the insurance company.

13. On November 24, 2015, the Claimant paid the Respondent \$143,000.00.<sup>6</sup>

14. The Respondent never returned to the Claimant's home. No additional materials were delivered to the home. No more work was done on the home by the Respondent.

15. The Claimant called or emailed the Respondent regularly, but the Respondent only provided excuses for why the work had stopped. At meetings arranged by GGG, the Respondent never appeared but sometimes sent a representative.

16. In January 2016, cracks developed in the foundation. Tyvek covering that had previously been applied to the framing began to come off, exposing the framing to the elements.

17. On February 5, 2016, the Respondent filed for bankruptcy.

18. On August 22, 2016, the Claimant entered into a contract with Classic Design Remodeling, LLC, to repair and complete the Respondent's work. The original contract amount was \$361,500.00.<sup>7</sup>

19. On June 21, 2017, the Claimant moved back into her completely rebuilt home.

20. Sometime in 2017, the Claimant sued the Respondent and GGG in Circuit Court.

After a week-long jury trial, the jury returned a verdict in favor of the Claimant, finding that

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<sup>6</sup> The Claimant explained that \$13,000.00 of what would have been paid to the Respondent was used to pay off the Claimant's mortgage. This was another part of the agreement to release a second draw to the Respondent.

<sup>7</sup> There was an addendum to the contract with Classic Design resulting in the Claimant paying them an additional \$28,000.00. She also paid a separate company to finish the kitchen and bathrooms, for \$33,000.00.

GGG defrauded the Claimant, conspired with the Respondent to defraud the Claimant, and acted with actual malice.<sup>8</sup> In January 2015, the jury recommended an award of \$125,032.00 in economic damages, \$1,000,000.00 in non-economic damages, and \$5,000,000.00 against GGG and, separately, against the Respondent, in punitive damages.

21. The Claimant has received no money from GGG or the Respondent pursuant to the jury verdict.

22. There is no bar to the Claimant receiving an award from the Fund based upon her or her family's relationship with the Respondent or the number of homes she owns.

### DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. § 8-407(e)(1); State Gov't § 10-217 (2014); 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 Cty. 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." Md. Code Ann., 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."). "[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

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<sup>8</sup> The Respondent failed to appear at the jury trial, so the verdict sheet focused on GGG. (Clmt. Ex. 18).

The Claimant suffered a terrible loss. Her home was devastated by fire in November 2014. In the years following, she was victimized by the Respondent and GGG when they made promises they did not keep and received money for work that was inadequate or incomplete. The Respondent did demolish some of the ruined portions of the home and completed some framing work on the home, but that framing work required repairs. (Clmt. Ex. 16). She had to resort to suing the Respondent and GGG in court after the Respondent cashed the second draw check, deposited the money, filed for bankruptcy, and never returned to work on her home. Two years later than the originally contemplated finish date of the Contract, the Claimant was able to move into her home after hiring another contractor to repair some of the Respondent's work and rebuild the house. Without question, the evidence shows that the Respondent performed unworkmanlike, inadequate, or incomplete home improvements. I thus find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). At COMAR 09.08.03.03B(3), the MHIC provides three formulas to measure a claimant's actual loss, depending on the status of the contract work:

Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

- (a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.
- (b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.



(c) If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

When a contractor abandons the contract without having performed any work at all, subsection (a) of COMAR 09.08.03.03B(3) applies. In this case, however, the Respondent did some work under the Contract, took a second draw, then abandoned the Contract.

Subsection (b) of COMAR 09.08.03.03B(3) is not applicable to this case because the Claimant has had the house rebuilt by another contractor.

When a homeowner hires someone else to repair improper work and complete the original contract, subsection (c) of COMAR 09.08.03.03B(3) applies. In this case, although the Respondent's framing work required some repair, most of the work required by the Contract was not done at all. Thus, the Fund noted subsection (c) does not strictly apply.

The Fund argued that because the usual formulas do not apply to the facts of this case, I should apply a unique formula in fashioning an award, essentially taking into account the Respondent's abandonment of the project after receiving the second draw of \$143,000.00.<sup>9</sup> In other words, I could apply the formula from subsection (a) even though the Respondent did some

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<sup>9</sup> The Fund reached this conclusion after discussion at the hearing regarding the lack of receipts for payments made to complete the Contract. Had I accepted the Claimant's testimony regarding the costs to repair the Respondent's work and complete the Contract, using the formula in subsection (c), I would have reached the following conclusion:

Amount paid to Respondent	\$299,000.00
Plus amount paid to repair and complete Contract	+ \$422,500.00
Subtotal	= \$721,500.00
Minus Contract price	- \$624,000.00
Equals Actual Loss	= \$97,500.00

This amount also exceeds the maximum that can be awarded any claimant and thus, using this formula would not impact my proposed award of \$20,000.00.

work on the Contract before abandoning the job. COMAR 09.08.03.03B(3). Following the Fund's suggestion, I conclude the Claimant's actual loss is \$143,000.00.

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss of \$143,000.00 exceeds \$20,000.00. Therefore, the Claimant's recovery is limited to \$20,000.00. Md. Code Ann., Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

### **PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss of \$143,000.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3). I further conclude that the Claimant is entitled to recover \$20,000.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a).

### **RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00; and

**ORDER** that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;<sup>10</sup> and

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<sup>10</sup> See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

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

**CONFIDENTIAL**

March 17, 2021  
Date Decision Issued

Joy L. Phillips  
Administrative Law Judge

JLP/dlm  
#190221

**PROPOSED ORDER**

***WHEREFORE, this 31<sup>st</sup> day of March, 2021, 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.***

***Joseph Tunney***

***Joseph Tunney***

***Chairman***

***Panel B***

***MARYLAND HOME IMPROVEMENT  
COMMISSION***