Missouri Court of Appeals
Southern District

In Division

GILBERT MUCKE and AMY MUCKE,

Appellants,

v.

SRC CUSTOM HOMES, LLC, ET AL.,

Respondents.

No. SD39113

Filed: July 21, 2026

APPEAL FROM THE CIRCUIT COURT OF LACLEDE COUNTY

Honorable Aaron G. Koeppen, Judge

AFFIRMED

Gilbert and Amy Mucke (collectively "the Muckes") appeal from a judgment finding that SRC Custom Homes, LLC ("SRC") did not breach a construction contract. The Muckes allege error in the reading of a deposition at trial. We find those allegations of error are unpreserved and deny plain error review. The Muckes also allege error in the granting of a continuance. We find no error and affirm the judgment.

Background

The Muckes entered into an agreement with SRC to build a home on January 24, 2019. On March 4, 2019, work began on the Muckes' home when Moppin Concrete began forming the foundation.

On May 21, 2020, the Muckes filed suit against SRC, alleging breach of contract due to construction defects.[1] The case was initially set for trial on October 31, 2022. On October 24, 2022, SRC filed a "Joint Motion for Continuance"[2] due to the unavailability of a witness, Michael Moppin ("Moppin"). The motion stated Moppin was the "concrete subcontractor" and "one of the primary issues originates to the manner in which the concrete footings and foundation walls were poured/erected[.]" The trial court granted the continuance and reset the jury trial for April 24, 2023. The Muckes filed a Second Amended Petition on February 7, 2023, adding a count for violation of the Missouri Merchandising Practices Act. The Muckes then filed a motion for continuance on April 4, 2023 "in order to obtain further experts" following an unfavorable ruling on a motion in

[1] The Muckes also sued Brad and Sonja Chaney individually for fraudulent misrepresentation (Count 2) and defamation (Count 3). SRC was included in Count 2. The trial court granted summary judgment as to Count 3 and a directed verdict as to Count 2. These issues are not addressed in the Muckes' motion for new trial or in their briefs and are not part of this appeal.

[2] Several filings referred to in this Opinion were titled in all capital letters. When referring to such, this Opinion reverts to conventional capitalization for ease of readability.

limine regarding damage calculations. The trial court granted the Muckes' motion for continuance over SRC's objection, resetting the trial for October 30, 2023.

The parties filed a Joint Stipulation for Scheduling Order on May 9, 2023. Pursuant to the scheduling order, the Muckes disclosed Moppin as a non-retained expert witness on May 15, 2023, and SRC cross-designated all of the Muckes' experts. Moppin's deposition took place on August 10, 2023.

On October 19, 2023, SRC filed a motion for continuance which was sustained on October 20, 2023, over the Muckes' objection. Trial was ultimately rescheduled for March 31, 2025. Both parties filed deposition designations on March 21, 2025, which included portions of Moppin's deposition to be read to the jury. On March 26, 2025, the parties made counter designations as to Moppin's deposition. The designated portions of Moppin's deposition were read at trial during SRC's case in chief. The Muckes did not object before or after the reading of Moppin's deposition.

On April 3, 2025, a Jury found in favor of SRC.[3] A formal Judgment was entered on April 28, 2025. On April 29, 2025, the Muckes filed a motion for change of counsel. The Muckes' counsel was granted leave to withdraw on May 6, 2025. The Muckes then filed a *pro se* motion for new trial on May 19, 2025, which was denied on July 22, 2025. The Muckes filed a timely notice of appeal on July 29, 2025.

[3] The jury also found in favor of the Muckes on a counterclaim by SRC. This is not at issue in this appeal.

Analysis

The Muckes' points 1, 2, and 4 all allege the trial court erred in allowing the reading of Moppin's deposition at trial. Specifically, the Muckes allege this was improper as:

> (1.) There was no showing of unavailability and the deposition was hearsay.
>
> (2.) Moppin was improperly characterized as an "expert" without meeting the requirements of § 490.065.
>
> (4.) Moppin's deposition was obtained under "deceptive discovery practices."

We address these points together. We must first decide whether the error alleged by these points was properly preserved. The Muckes allege that they properly preserved these allegations of error by including these objections in their motion for a new trial. We disagree. As outlined above, the Muckes did not object to the reading of Moppin's deposition at trial. "In order to preserve an alleged error for appellate review, an objection must be made at the time of the alleged error." ***Roberson v. Weston***, 255 S.W.3d 15, 18 (Mo. App. S.D. 2008). "If the objection is not made at the time of the incident giving rise to the objection, the objection may be deemed waived or abandoned." ***Id.*** (quoting ***R & J Rhodes, LLC v. Finney***, 231 S.W.3d 183, 190 (Mo. App. W.D. 2007)). "A party's failure to object to testimony, evidence, or argument preserves nothing for appellate review." ***Arnold v. Minger***, 334 S.W.3d 650, 653 (Mo. App. S.D. 2011) (quoting ***Riddell v. Bell***, 262 S.W.3d 301, 304 (Mo. App. W.D. 2008)). "Raising an

issue for the first time in a motion for new trial, when an objection could have been made at trial, is insufficient to preserve the claimed error for appellate review." ***State v. Shockley***, 410 S.W.3d 179, 195 (Mo. banc 2013) (quoting ***State v. Goeman***, 386 S.W.3d 873, 881 (Mo. App. S.D. 2012)).[4] Accordingly, the Muckes did not preserve any of these issues for review.

In their reply brief[5], the Muckes request plain error review.

> Plain error review is discretionary and involves two steps: first, we must determine whether the trial court committed evident, obvious, and clear error affecting the defendant's substantial rights; second, if plain error is found, we then consider whether the error actually resulted in manifest injustice or a miscarriage of justice.

M.D.M. v. A.W.S., 730 S.W.3d 340, 344 (Mo. App. E.D. 2026) (internal citation omitted). In civil cases, plain error review is rarely granted and only appropriate where there is a miscarriage of justice "so egregious as to weaken the very foundation of the process and seriously undermine confidence in the outcome of the case." ***Freedom Bank of S. Mo v. Ross***, Nos. SD38963, SD38975 Consolidated, 2026 WL 763176, at *6 n.7 (Mo. App. S.D. March 18, 2026) (quoting ***Ampleman v. Dish Network Serv., LLC***, 467 S.W.3d 845, 849

[4] Plain error rules for criminal and civil cases are substantially similar such that cases construing one may be equally applicable to plain error review under the other. *See* ***Interest of J.C.S.***, 658 S.W.3d 260, 265 (Mo. App. S.D. 2023).

[5] We also note that any "failure to object to a matter at trial – a very important fact in determining the appropriate standard of review – should be disclosed in the appellant's brief and not left to the respondent to point out to the Court." *See* ***Arrington v. Goodrich Quality Theaters, Inc.***, 266 S.W.3d 860, 865 n.3 (Mo. App. S.D. 2008).

(Mo. App. S.D. 2015)). Plain error is not a doctrine available to revive abandoned arguments. *See* ***J.C.S.***, 658 S.W.3d at 265.

Points 1, 2, and 4 do not show any evident, obvious, or clear error. The Muckes' allegation that Moppin had to be unavailable in order for his deposition to be read at trial is simply wrong. *See* Rule 57.07(a); *see also* ***Qureshi v. American Family Mut. Ins. Co.***, 604 S.W.3d 721, 728 (Mo. App. E.D. 2020).[6] Both parties endorsed Moppin as a non-retained expert. The Muckes filed deposition designations and counter designations for Moppin's deposition, seeking that parts of that deposition be read into evidence. We have reviewed all the portions of the Moppin deposition that were read to the jury, and nearly all of that testimony is lay witness, factual testimony. The portions of the deposition that possibly go into expert opinion testimony are based on Moppin's extensive experience as a concrete contractor. The record we have before us[7] is devoid of any evidence of "deceptive discovery practices." Thus, we decline plain error review. Points 1, 2, and 4 are denied.

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[6] All rule references are to Missouri Court Rules (2025).

[7] We also note the Muckes only filed a small portion of the trial transcript showing counsel's narrative when Moppin's deposition was read to the jury and a portion of SRC's closing argument. "The transcript shall contain the portions of the proceedings and evidence not previously reduced to written form and necessary to determination of the issues on appeal." Rule 81.12 (c)(2). Were we to find the first part of plain error review was met, there is no way the record in front us could show manifest injustice or a miscarriage of justice as it is simply not before this Court and not addressed in the Muckes' briefing.

Points 3 and 5 allege the trial court erred in granting a "Joint Motion for Continuance" filed on October 24, 2022. Thus, we address both these points together.

The "Joint motion for Continuance," while denominated "Joint," was filed by SRC. The Muckes' counsel did not sign the motion nor is his consent explicitly noted. It is unclear from the record whether the Muckes' counsel consented to this continuance. However, if we assume, for purposes of preservation, that there was an objection, the Muckes have failed to demonstrate any abuse of discretion or prejudice in the granting of this continuance.

The decision to grant or deny a continuance is within the sound discretion of the trial court. ***State v. Eagleton***, 733 S.W.3d 530, 535 (Mo. App. E.D. 2026). We review that decision for abuse of discretion and will reverse only upon a very strong showing that the trial court abused its discretion and prejudice resulted. ***Id.***; *see also* ***Collins v. Collins***, 586 S.W.3d 282, 288 (Mo. App. W.D. 2019).

The motion at issue here seeks a continuance due to the unavailability of a witness material to both parties, who both parties would eventually designate as a non-retained expert witness[8]. Thus, the trial court's action in granting a continuance is reasonable and certainly not an abuse of discretion. The Muckes used the time granted to file a Second Amended Petition to bring additional allegations and causes of action

[8] Points 3 and 5 contain unverified and vague allegations that counsel "colluded" with each other and made "false representations" to obtain the continuance. The record before us is again devoid of any actual evidence.

against SRC. The Muckes then obtained their own continuance on April 7, 2023, in order to "obtain further experts." These actions clearly show the Muckes suffered no prejudice from the continuance and indeed benefited from its entry. Points 3 and 5 are denied.

Conclusion

The judgment of the trial court is affirmed.

BRYAN E. NICKELL, J. – OPINION AUTHOR

BECKY J. WEST, C.J. – CONCURS

JACK A. L. GOODMAN, J. – CONCURS