

**[Cite as *Blue Chip Pavement Maintenance, Inc. v. Ryan's Family Steak Houses, Inc.*,
2004-Ohio-3357.]**

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

BLUE CHIP PAVEMENT	:	
MAINTENANCE, INC.,	:	CASE NO. CA2003-09-
072	:	
Plaintiff-Appellant,	:	<u>O P I N I O N</u>
	:	6/28/2004
-vs-	:	
	:	
RYAN'S FAMILY STEAK	:	
HOUSES, INC.,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2001-CVE-0459

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for plaintiff-appellant

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POWELL, P.J.

{¶1} Plaintiff-appellant, Blue Chip Pavement Maintenance,
Inc., appeals the decision of the Clermont County Court of Common

Pleas' determination of an unjust enrichment claim. We affirm the decision of the trial court.

{¶2} In the summer of 2000, Ryan's Steakhouse ("Ryan's") began construction on a new restaurant in Union Township. Ryan's acted as its own general contractor but subcontracted the majority of the work. J&J Construction Co. ("J&J") was hired to perform "site work." J&J's contract called for it to prepare the site for construction of a building, parking lot, and entranceway. Ryan's also entered into a separate contract with J&J to perform the paving work for the parking lot and entranceway.

{¶3} Ryan's two contracts prohibited J&J from subcontracting any aspect of the project without Ryan's prior approval. Although prohibited by the contract, J&J entered into subcontracts with CJ&L Construction Company ("CJ&L") for performance of the site work and Blue Chip Pavement Maintenance, Inc. ("Blue Chip"), for performance of paving work. During the course of the construction, Ryan's had no direct contact, communication, or relationship with CJ&L or Blue Chip. J&J was the only entity that gave directions to and paid the subcontractors.

{¶4} At trial, Steve Hicks, an employee of CJ&L, testified that CJ&L had completed the site work sub-grade for the parking lot on August 31, 2000. While the parking lot could have been graveled and paved at that time, Blue Chip was unable to start working on the pavement as originally planned due to weather conditions and J&J's failure to complete other site work on time.

Blue Chip alleges that it incurred extra work beyond the scope of its contract with J&J because the work site was not properly prepared. Specifically, Blue Chip claims that building materials and debris had to be physically removed from the future parking lot.

{¶5} Blue Chip submitted orders for the extra work to J&J. Ryan's had no interaction with Blue Chip on any of these change orders. Ryan's made one payment to J&J for paving work. When Ryan's learned that J&J had not paid Blue Chip for completed paving work, Ryan's issued a two-party check to J&J and Blue Chip after receiving another invoice for completed pavement work.

{¶6} However, both J&J and Blue Chip failed to complete the paving work under their respective contracts. Ryan's hired Affordable Paving to complete the paving work. Blue Chip brought an action against Ryan's seeking damages on a claim of unjust enrichment for the extra work performed. The trial court found that Ryan's was unjustly enriched by three tasks performed by Blue Chip: (1) the removal of snow prior to placing the asphalt in December of 2000; (2) the reworking of the gravel in the entranceway prior to the placement of the asphalt in January of 2001; and (3) the placement of asphalt in the winter of 2001 at a premium cost. Consequently, Blue Chip was awarded \$20,968.30 for the additional work.

{¶7} Ryan's concedes that Blue Chip should be paid for work performed outside of the scope of Ryan's contract with J&J. However, Ryan's contends that Blue Chip has been fairly compen-

sated by Ryan's via J&J for the contracted work and the "extra" work. Blue Chip appeals the decision raising four assignments of error.

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY MAKING CONCLUSIONS OF LAW NOT SUPPORTED BY OHIO LAW."

{¶10} Blue Chip argues that when "a subcontractor seeks recovery under an equitable theory of unjust enrichment against a property owner for 'extra' work the subcontractor provided for the benefit of that property owner, the subcontractor is entitled to receive damages measured by a 'total cost method,' if it is a fair and equitable method of establishing the amount of unjust enrichment, and it is error for the trial court to conclude otherwise." Blue Chip also argues that it is "entitled to receive profit under its claim of unjust enrichment if it is fair and equitable for profit to be included in the subcontractor's damages, and it is error for the trial court to conclude otherwise."

{¶11} An appellate court reviews a trial court's findings of fact and conclusions of law to determine whether the lower court properly applied the law to the facts and determined the facts consistent with the evidence. Freeman v. Westland Builders, Inc. (1981), 2 Ohio App.3d 212, 214. Normally, a reviewing court must presume the trial court's findings are correct in the absence of evidence to the contrary. Miller v. Miller (1988), 37 Ohio St.3d 71, 74.

{¶12} The trial court found that Ryan's contracted with J&J to act as a paving subcontractor. One contract, in the amount of \$133,000, was for all paving along with construction of curbs and gutters. A second contract between Ryan's and J&J, in the amount of \$140,000, was for all the site work.

{¶13} Both contracts provide, "[n]either Ryan's Project Manager, or Ryan's Superintendent, nor Ryan's store Management Personnel have the authority to change the terms and conditions or scope of work or authorize additional work to be performed. It is specially agreed that there are to be no extras, additions or claims for an increase in the Contract Sum except by written Change Order ***."

{¶14} J&J executed a contract with Blue Chip as a sub-subcontractor to perform elements of the paving as well as the curb and gutter work. The trial court found that Ryan's had no privity of contract with Blue Chip. Blue Chip performed work beyond the scope of its original contract with J&J and submitted written change orders to J&J for the additional work. However, neither J&J nor Blue Chip submitted any written change orders for additional work to Ryan's.

{¶15} The trial court found that except for snow removal, gravel reworking, and incurring winter asphalt premium costs, all of the written change orders submitted by Blue Chip to J&J were within the scope of work to be performed by J&J under its paving or site work contract with Ryan's. The trial court also found

that Ryan's paid full value for the site work and for the paving work under its contracts with J&J.

{¶16} However, the trial court determined that Blue Chip is not entitled to receive damages for the "extra" work measured by the "total cost method." The "total cost method" measures damages by calculating the difference between the total amount actually expended on a project and the amount that should have been spent under an applicable contract. Nevertheless, the "total cost method" should not be employed when another reliable method of calculating damages is available. In re Meyertech Corp. (C.A.3, 1987), 831 F.2d 410, 420.

{¶17} Blue Chip argues that it is "impractical, if not impossible" to segregate the "extra" work it performed from the rest of the work it performed. Therefore, Blue Chip contends that the "total cost method" is applicable. However, the trial court was able to segregate the "extra" work Blue Chip performed from the other work. The trial court determined that Blue Chip did "extra" work in performing snow removal, gravel reworking, and incurring winter asphalt premium costs. Consequently, the "total cost method" for determining damages is not appropriate.

{¶18} The trial court also determined that Blue Chip is not entitled to receive an award of profit under its claim for unjust enrichment. Unjust enrichment, like other quasi-contract doctrines, is derived from the equitable principal that no person ought to retain a benefit which, if retained by him, would result in inequity and injustice. Hambleton v. R.G. Barry Corp. (1984),

12 Ohio St.3d 179, 183. Because recovery for unjust enrichment does not rest upon the intentions of the parties, damages for unjust enrichment are calculated differently from damages for breach of contract. See Shaw v. J. Pollock & Co. (1992), 82 Ohio App.3d 656, 662. A party proving breach of contract is entitled to the "benefit of his bargain." Garofalo v. Chicago Title Ins. Co. (1995), 104 Ohio App.3d 95, 108. However, unjust enrichment entitles a party only to restitution of the reasonable value of the benefit conferred. St. Vincent Med. Ctr. v. Sader (1995), 100 Ohio App.3d 379, 384. The trial court determined that reasonable value of Blue Chip's "extra" work in performing snow removal, gravel reworking, and incurring winter asphalt premium costs is \$20,968.30.

{¶19} After conducting a complete review of the record, we find that the lower court properly applied the law to the facts and determined the facts consistent with the evidence. We are cognizant of the fact that the parties presented conflicting testimony and their versions of events varied. However, we are unable to substitute our judgment for that of the trial court. Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80. Accordingly, the first assignment of error is overruled.

{¶20} Assignment of Error No. 2:

{¶21} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY MAKING FACTUAL FINDINGS THAT ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND BY FAILING TO MAKE FACTUAL FINDINGS THAT ARE ESTABLISHED BY THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶22} Blue Chip argues when "the 'scope of work' provision of a site work contract drafted by an owner of property is ambiguous and capable of two different interpretations, the 'scope of work' provision is to be construed against the owner/drafter, and it is error for the trial court to do otherwise."

{¶23} The standard of review when a party challenges the factual findings of the trier of fact is as follows: A reviewing court "will not disturb the findings of the trier of fact unless they are against the manifest weight of the evidence." State ex rel. Shady Acres Nursing Home, Inc. v. Rhodes (1983), 7 Ohio St.3d 7, 8. Where the judgment of the trial court "is supported by some competent, credible evidence, *** [it] will not be reversed by an appellate court as being against the manifest weight of the evidence." C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279, 280.

{¶24} Blue Chip argues that when "the manifest weight of the evidence establishes a property owner, serving as a general contractor on a construction site, is generally responsible for coordination of all subcontractors on site, and is specifically responsible for refusing to allow the paving contractor on site to perform paving work, it is error for the trial court to [find] otherwise." Blue Chip also argues that when "the manifest weight of the evidence establishes a subcontractor performed extensive 'extra' work for the benefit of a property owner and the 'extra' work was not paid for by the owner, then the owner has been

unjustly enriched to the extent of that 'extra' work and is obligated to pay that subcontractor for that 'extra' work."

{¶25} The trial court found that "Ryan's had no privity of contract or contractual relationship with Blue Chip." Therefore, Ryan's "scope of work" provision in the site work contract is inapplicable to Blue Chip. Furthermore, the trial court found that except for snow removal, gravel reworking and incurring winter asphalt premium costs, all of the written change orders for "extra" work submitted by Blue Chip to J&J were within the scope of work to be performed by J&J under its paving or site work contract.

{¶26} The judgment of the trial court is supported by some competent, credible evidence, therefore, it will not be reversed as being against the manifest weight of the evidence. C.E. Morris Co., 54 Ohio St.2d at 280. Accordingly, the second assignment of error is overruled.

{¶27} Assignment of Error No. 3:

{¶28} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY MAKING A CONCLUSION OF LAW THAT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶29} Blue Chip argues when "the trial court finds certain 'extra' work performed by a subcontractor is additional work beyond the scope of the applicable contract and recoverable, and the subcontractor establishes by the manifest weight of the evidence the time and material work ("T+M work") it expended in performing that 'extra' work, it is error for the trial court to

award damages for only part of the T+M work attributable to that 'extra' work, where there is no rational basis for the partial award."

{¶30} An appellate court will not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial court. Myers v. Garson, 66 Ohio St.3d 610, 1993-Ohio-9. Deference is to be given to the trial court's factual findings and legal conclusions where supported by the record. Id.

{¶31} The trial court found that except for snow removal, gravel reworking, and incurring winter asphalt premium costs, the "extra" work Blue Chip claims it performed was within the scope of work to be performed by J&J under its paving or site work contract with Ryan's. The trial court also found that "Ryan's has paid full value for the site work and has also paid full value for the paving work under its contracts with J&J." Therefore, Blue Chip was not awarded damages for that "extra" work because the trial court determined that "[o]ther than to award Blue Chip the reasonable value of the benefit conferred for the three elements of work noted above, an award to Blue Chip of damages for unjust enrichment would require Ryan's to pay twice for the work it was entitled to receive." See Fairfield Ready mix v. Walnut Hills Assoc. (1998), 60 Ohio App.3d 1. Consequently, the trial court determined that the reasonable value for performing snow removal, gravel reworking, and

incurring winter asphalt premium costs is \$20,968.30.

{¶32} We find that the trial court's findings of fact and conclusions of law were supported by competent and credible evidence and there is no reason to disturb these findings. Therefore, the third assignment of error is overruled.

{¶33} Assignment of Error No. 4:

{¶34} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY ISSUING FINDINGS OF FACT AND CONCLUSIONS OF LAW DEFICIENT UNDER OHIO LAW."

{¶35} Blue Chip argues when "a trial court's findings of fact and conclusions of law are insufficient for a court of appeals to determine whether or not the trial court was correct in its application of the law to the facts, and whether or not the court's findings of fact were consistent with the evidence, then the court must remand the matter back to the trial court to enter sufficient findings of fact and conclusions of law in accordance with the opinion of the court of appeals."

{¶36} The trial court's opinion sets forth four pages of factual findings and two pages of legal conclusions. The function of findings of fact and conclusions of law "is to determine whether or not the court was correct in its application of the law to the facts; and further, whether or not the court's findings of fact were consistent with the evidence in the case." Trimble v. Oakley Bank (App. 1930), 9 Ohio Law Abs. 145, 146. Normally, a reviewing court must presume the trial court's find-

ings are correct in the absence of evidence to the contrary.
Miller v. Miller (1988), 37 Ohio St.3d 71, 74.

{¶37} The major disputed facts were resolved in Ryan's favor and the court's opinion explicitly revealed the court's main legal conclusions; thus, the trial court's findings of fact and conclusions of law are sufficient for a court of appeals to determine whether or not the trial court was correct in its application of the law to the facts. See Civ.R. 52. Consequently, the fourth assignment of error is overruled.

Judgment affirmed.

WALSH and VALEN, JJ., concur.