

**IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
SENECA COUNTY**

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**JEFFREY L. RUTHERFORD,**

**PLAINTIFF-APPELLEE,**

**CASE NO. 13-14-38**

**v.**

**KELLY CARTWRIGHT,**

**OPINION**

**DEFENDANT-APPELLANT.**

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**Appeal from Tiffin-Fostoria Municipal Court  
Trial Court No. 14CV11222**

**Judgment Reversed and Cause Remanded**

**Date of Decision: April 6, 2015**

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**APPEARANCES:**

*Kelly Cartwright, Appellant*

**WILLAMOWSKI, J.**

{¶1} Defendant-appellant, Kelly Cartwright (“Cartwright”), brings this appeal from the judgment of the Tiffin-Fostoria Municipal Court, in Seneca County, Ohio, ordering him to pay \$1,781.49 to Plaintiff-appellee, Jeffrey Rutherford (“Rutherford”), for damages stemming from alleged breaches of contract by Cartwright. For the reasons that follow, we reverse the trial court’s judgment.

***Background and Procedural History***

{¶2} In this pro se appeal, we are reviewing claims stemming from two construction tasks undertaken by Cartwright to be performed on Rutherford’s property. The facts indicate that in October 2012, Cartwright was hired to install a new furnace and ductwork in the house located at 217 East Perry Street in Tiffin, Ohio (“the property”). Cartwright was paid \$1,800.00 for the entire furnace project, which included \$1,200.00 for the furnace itself and \$600.00 for the ductwork. About nine or ten months after the furnace installation, the gas company prohibited its use “because the furnace and/or ductwork was not installed properly.” (R. at 7, at 2.) Rutherford hired another party to remedy the deficiencies.

{¶3} In August 2013, Rutherford again hired Cartwright to roof the property and paid him \$1,500.00 for the job. Rutherford started the project, but suffered a neck injury and was unable to complete the task. A year later, the roof

was not finished, which allegedly caused water damage to the ceiling in the property. Rutherford hired another party to complete the job. Several various other jobs were performed by Cartwright on Rutherford's property, at the rate of \$15.00 an hour, for which Cartwright was not paid in full.

{¶4} On September 19, 2014, Rutherford filed a small claims complaint in the Tiffin-Fostoria Municipal Court, claiming damages that resulted from the alleged breaches of contract by Cartwright. (R. at 1.) In addition to the contract claims, the complaint alleged damages resulting from a purported rent agreement, and certain property theft, including "new dual flush toilet" and bathroom tile. (*Id.*) Rutherford asked for a judgment against Cartwright in the sum of \$3,000.00.

{¶5} Cartwright filed a counterclaim. (R. at 4.) In his statement of claim, Cartwright first listed explanations of his defenses to Rutherford's complaint. Cartwright alleged that he performed the furnace work for Rutherford as a favor, charging him only "to cover materials," and not charging him for labor. (*Id.*, Attach. at ¶ 1.) He thus claimed that he was not required to return the money Rutherford had paid him, as that would result in unjust enrichment, allowing Rutherford to retain "a free furnace." (*Id.*) Cartwright denied liability for defective furnace operation and claimed that Rutherford was not justified in firing him from the furnace job, which he intended to finish. (*Id.*) He similarly contended that he had planned to complete the roof job upon his recovery from the neck injury, but was prevented from doing so because Rutherford had already paid

someone else to do it. (*Id.*, Attach. at ¶ 2.) Of note, Cartwright admitted that he owed \$11.49 in unreturned money left after a purchase of supplies. (*Id.*, Attach. at ¶ 3.) As a counterclaim, Rutherford claimed to have suffered damages in the amount of \$1,628.51, which included \$1,640.00 for eighty-two hours of labor at \$20.00 per hour, diminished by \$11.49.<sup>1</sup> (*Id.*, Attach. at ¶ 3, 4.)

{¶6} The matter proceeded to a bench trial and resulted in the trial court finding in favor of Rutherford in the amount of \$3,000.00, plus interest and court costs. The trial court awarded \$330.00 to Cartwright “for unpaid labor minus other expenses.” (R. at 5.) Following this judgment, Cartwright filed a Request for Findings of Fact and Conclusions of Law, which ultimately resulted in a modification of the total damage award. Although the trial court still awarded \$3,000.00 to Rutherford, the award to Cartwright for “unpaid labor” was set at \$1,218.51.

{¶7} Of note, while the trial court’s Findings of Fact and Conclusions of Law indicated that Rutherford suffered various damages, including water damage to the ceiling (R. at 7, at ¶ 9), the \$3,000.00 award was only “for the monies he paid to Defendant on the incomplete roof installation and the improper furnace installation.” (R. at 7, at 3.) This number consisted of \$1,500.00 that Rutherford paid for the roof and \$1,800.00 that he paid for the furnace, a total of \$3,300.00. But because the trial court recognized that “damages must be no more than

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<sup>1</sup> The trial court found that the actual agreed-upon rate was \$15.00 an hour. (R. at 7, at ¶ 10.)

\$3,000.00, as that is the maximum monetary jurisdiction for small claims court,” the damages award for the two breached contracts was capped at \$3,000.00. (*Id.*) The trial court then reduced the award to Rutherford by the amount he owed to Cartwright. Accordingly, Rutherford was awarded \$1,781.49, plus interest.

{¶8} A review of the Findings of Fact and Conclusions of Law indicates that the trial court focused on the parties’ contractual claims, awarding damages to Rutherford for the furnace and the roof projects only. Although the trial court did not address Rutherford’s allegations concerning unpaid rent or any other damages, Rutherford did not appeal the trial court’s judgment to complain about an inadequate damage award.<sup>2</sup> Similarly, Cartwright does not appeal the part of the trial court’s judgment that awards him damages for unpaid labor. The instant appeal concerns the following five assignments of error, alleged by Cartwright.

- 1. The trial court erred by granting the judgment to the plaintiff in plain and obvious contradiction to the manifest weight of the evidence (*State v. Tompkins* [sic]).**
- 2. The judge hearing the case was not elected to office nor was he acting as a magistrate. (Ohio Revised Code Annotated Title 19, Ch. 1925.01(B)).**
- 3. Judge erred in amount awarded to plaintiff by exceeding maximum amount allowed by law. Ohio Revised Code Annotated Title 19, Ch. 1925.02(A)(1).**
- 4. The judge erred by showing Bias because defendant was not a bonded contractor. (Tr. 15, 23).**

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<sup>2</sup> Rutherford did not file a brief on appeal in response to Cartwright’s assignments of error.

**5. The judge erred by being distracted and confused. (Tr. at 20, 15.)**

***First Assignment of Error—  
Manifest Weight of the Evidence***

{¶19} In the first assignment of error, Cartwright alleges that the trial court’s judgment was against the manifest weight of the evidence. The “ ‘manifest weight of the evidence’ refers to a greater amount of credible evidence and relates to persuasion.” *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 19. Under this standard, the reviewing court “does not reweigh the evidence” but it applies the presumption that the findings of the trier fact are correct. *Southeast Land Dev., Ltd. v. Primrose Mgt. L.L.C.*, 193 Ohio App.3d 465, 2011-Ohio-2341, 952 N.E.2d 563, ¶ 7 (3d Dist.); accord *Drummer v. Drummer*, 3d Dist. Putnam No. 12-11-10, 2012-Ohio-3064, 2012 WL 2559461, ¶ 7. “Mere disagreement over the credibility of witnesses or evidence is not sufficient reason to reverse a judgment.” *Drummer* at ¶ 7; citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 40. Therefore, “[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *C.E. Morris Co. v. Foley Const. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶10} With respect to both construction projects, Cartwright does not dispute the trial court's finding that he had breached the agreements. He alleges, however, that the trial court erred in awarding damages for the full price of each contract. We review the awards of damages with respect to each of the jobs separately using the following standard for award of damages in a construction contract:

The proper measure of damages, when a contract for remodeling or construction changing the condition of real property has been breached, is the "reasonable cost of placing the building in the condition contemplated by the parties at the time they entered into the contract." *Jones v. Honchell* (1984), 14 Ohio App.3d 120, 123. The more traditional way of expressing this measure of damages is that the party damaged by the breach is awarded the "benefit of his bargain," or, its equivalent. See *Platner v. Herwald* (1984), 20 Ohio App.3d 341, 342.

*Lamb v. McCue*, 3d Dist. Allen No. 1-91-32, 1992 WL 63287, \*1 (Mar. 23, 1992).

*a. The Furnace Project*

{¶11} Cartwright asserts that because the furnace was installed and working, he should not have been required to return the entire \$1,800.00 paid to him for the furnace job. Specifically, he argues that even if there were deficiencies in the ductwork, "he should have been given credit for fully installed and operational furnace," which he claims cost \$1,200.00. (App't Br. at 2; *accord id.* at 7.)

{¶12} We have previously affirmed an award of damages for the full contract price where the trial court based it on the evidence that plaintiffs were

prevented “from receiving any benefit from their bargain.” *Lamb* at \*1. Here, the trial court did not determine that Rutherford was prevented from receiving any benefit from his bargain. The trial court’s finding of breach only indicated that the furnace installation was defective according to the gas company “because the furnace and/or ductwork was not installed properly.” (R. at 7, at ¶ 6.) The trial court also found that Rutherford “hired another party to properly install ducts on the furnace.” (*Id.*) Although these findings are supported by the evidence (*see* Tr. at 7-8), these findings do not justify a damage award for the full contract price.

{¶13} Based on the evidence before us, we are unable to determine whether the number of \$1,800.00 could represent the proper measure of damages in this case, to place Rutherford’s property or his furnace “in the condition contemplated by the parties at the time they entered into the contract.” *Lamb*, 3d Dist. Allen No. 1-91-32, 1992 WL 63287, at \*1. There was no testimony as to how much Rutherford paid to have the furnace fixed or installed properly after the breach was discovered. No testimony was provided as to the cost of the allegedly missing cold air return or any possible additional damages stemming from the improperly working furnace. Furthermore, neither party provided any testimony as to the monetary benefit of the bargain, if any, to Rutherford. While there was some evidence to support a \$600.00 award in damages for the missing ductwork, and there was testimony to support a finding that the furnace was not working properly

due to Cartwright's breach of contract, there was no evidence that \$1,800.00 was required to award Rutherford the "benefit of his bargain." *Lamb* at \*1.

{¶14} Accordingly, we cannot affirm an award of \$1,800.00 in damages for the furnace project, as it is not supported by the evidence in the case.

*b. The Roof Project*

{¶15} With respect to the roof project, Cartwright argues that he was never paid \$1,500.00 for the roof job. He asserts that only a \$1,000.00 payment was made. Therefore, he claims that the trial court's order, requiring him to refund \$1,500.00 was against the manifest weight of the evidence.

{¶16} Rutherford testified that he had paid Cartwright \$1,500.00 for the new roof in August 2013. (Tr. at 5.) Cartwright cross-examined Rutherford about the \$1,500.00 payment and adduced Rutherford's testimony about a signed receipt for \$1,000.00 and another receipt for \$500.00. (Tr. at 12-13.) Rutherford stated,

That's 1,500. One thousand cash that I paid you on, inside the house with witnesses that you signed, and you signed this one here, too, this was for the roof. And that was from the ATM machine. That's \$1,500 in cash.

(Tr. at 9.) Although this fragment suggests that Rutherford referred to some sort of exhibits, no exhibits are attached to the trial transcript. The complaint filed in the trial court does include copies of what appears to be handwritten receipts. (*See* R. at 1, Attach.) One such receipt states:

Paid \$1000.00 to roof house on 217 E Perry St.  
Kelly's Auto Repair

31 Allen St.  
Tiffin, OH 44883  
[signature]

(*Id.*) The other receipt appears to be an ATM withdrawal receipt for \$500.00, with a handwritten note:

Down  
Payment  
For Roof  
217 E Perry St.  
[signature]  
Balance 1000.00

(*Id.*)

{¶17} Cartwright testified about the payment receipts, referring to “[t]he little one” and stating, “I don’t ever remember signing it. It doesn’t even look like my signature.” (Tr. at 19.) He further stated “it doesn’t even really make any sense why I would sign one for 500 and one for a thousand \* \* \* .” (Tr. at 19.) Cartwright then referred to a check from 2007, alleging that the check had something to do with the 2013 roof project. (Tr. at 19.) Cartwright testified, “He purposely stale dated it and the bank wrote on it and sent it back to me.” (*Id.*) Cartwright testified, “So I think he didn’t pay me for this \$400 check.” (Tr. at 20.) Again, no check is attached to the trial transcript, although a photocopy of a 2007 check was attached to a Motion for Relief, which Cartwright filed with the trial court after the trial. (*See R.* at 8, Attach.)

{¶18} We hold that there is competent, credible evidence to support the trial court's finding that "[i]n late 2013, Defendant accepted, in the course of two payments, the total amount from Plaintiff of \$1500.00" for the roof project. (R. at 7, ¶ 7.) Although Cartwright claimed that he did not remember signing a receipt for \$500.00 and asserted that an old invalid check represented the unpaid balance for the roof job, the trial court was charged with resolving the conflicting testimony in this case. We must apply the presumption that the trial court's findings of fact are correct "because the trial judge had an opportunity 'to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.'" *Grdn. Alarm Co. v. Portentoso*, 196 Ohio App.3d 313, 2011-Ohio-5443, 963 N.E.2d 225, 230, ¶ 16 (3d Dist.), quoting *Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, at ¶ 24 (2007).

{¶19} We must, however, reverse the trial court's award of \$1,500.00 in damages for the roof project because this number is again, unsupported by the evidence in the case. While there is testimony that Cartwright was paid \$1,500.00 for the roof job, no testimony was provided as to the amount of damages that Rutherford suffered. There was some indication that Rutherford hired another party to complete the roof work, but no number was provided as to the cost of the roof completion. (Tr. at 7.) Furthermore, although there is support for the trial court's finding that Cartwright's breach with respect to the roof project "led to

further damages to the Real Estate, as water was able to enter the house and cause ceiling damage to a room,” no evidence as to the dollar amount of these damages was provided. (R. at 7, at 2, ¶ 9; Tr. at 6-7.) The trial court did not find that Rutherford was prevented “from receiving any benefit” from his bargain with respect to the roof project. *See Lamb*, 3d Dist. Allen No. 1-91-32, 1992 WL 63287, at \*1. Therefore, the trial court was not justified in awarding a judgment for the full contract price as a measure of damages in this case.

{¶20} For all of the foregoing reasons, we sustain the first assignment of error, which alleges that the trial court’s judgment is against the manifest weight of the evidence.<sup>3</sup>

***Second, Third, Fourth, and Fifth Assignments of Error***

{¶21} Our resolution of the first assignment of error renders the remaining assignments of error either not well taken or moot, as the trial court will have an opportunity to cure any potential deficiencies upon remand.

***Conclusion***

{¶22} Having reviewed the arguments, the briefs, and the record in this case, we find error prejudicial to Appellant in the particulars assigned and argued.

The judgment of the Tiffin-Fostoria Municipal Court, in Seneca County, Ohio, is

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<sup>3</sup> It is not to say that Rutherford did not suffer \$3,000.00 in damages resulting from the breaches of contract and other actions by Cartwright, as Rutherford alleged and testified to other losses caused by Cartwright. (*See, e.g.* Tr. at 10-12; 26, 27). But the trial court awarded damages only for the breaches of contractual agreements with respect to the furnace and the roof projects. The award of full contract price for these two projects was not supported by the evidence in this case and Rutherford did not appeal the trial court’s failure to award damages on his other claims.

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therefore reversed and the case is hereby remanded to the trial court for further proceedings consistent with this opinion.

***Judgment Reversed and  
Cause Remanded***

**SHAW and PRESTON, J.J., concur.**

**/jlr**