[Cite as *Warren v. Denes Concrete, Inc.*, 2009-Ohio-2784.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

JAMES WARREN Appellee/Cross-Appellant v. DENES CONCRETE, INC., et al. Appellants/Cross-Appellees	C. A. Nos. 08CA009414 08CA009422 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 07CV149695

DECISION AND JOURNAL ENTRY

Dated: June 15, 2009

WHITMORE, Judge.

{¶1} Appellants/Cross-Appellees, Denes Concrete, Inc., Thomas Denes, Sr., and Thomas J. Denes, Jr. (collectively "the Denes"), appeal from the decision of the Lorain County Court of Common Pleas, awarding judgment to Appellee/Cross-Appellant, James Warren. Additionally, Warren cross-appeals from the trial court's judgment on several grounds. This Court affirms in part and reverses in part.

I

{¶2} In 2005, Warren expressed an interest in having the Denes replace his driveway, which ran alongside his house from his detached garage and out to the street. After further consideration, Warren also decided to have the Denes replace the concrete slab underneath the concrete steps of his front door. According to the Denes, Denes, Sr. recommended that Warren allow them to install a footer underneath the concrete slab to stop the front steps from heaving upwards in the winter when ground conditions changed, but Warren refused because he did not

want to pay the extra cost. According to Warren, the Denes never recommended that he have them install a footer.

{¶3} Warren and the Denes also disagreed over the matter of Warren's driveway. According to the Denes, Warren requested that his driveway run flush with the side door of his house because his wife was ill and wanted to avoid having to step up or down when exiting or entering the house. This required the new driveway to be several inches higher than the old driveway. After the Denes removed the old driveway and measured the slope of Warren's property, they discovered that Warren's garage sat "quite low" on the property. Denes, Sr. contacted Warren and recommended that, if Warren insisted on the driveway being high enough to be even with the side door of his house, he allow the Denes to install a French drain in order to divert water from the area. Once again, however, Warren refused to pay the extra cost for the French drain and told the Denes to "do the best you can." According to Warren, the Denes did recommend that he have a French drain installed, but never warned him as to the "potential water issues" that he might have if he rejected it. He also denied ever asking the Denes to raise the height of the driveway.

{¶4} After the Denes finished their work, they sent Warren an invoice for $5,705. Warren paid the Denes $5,460 in cash, but had to owe them the rest because he "wasn't expecting *** that it would be that much." While Warren was initially satisfied with the Denes' work, he contacted them soon after they finished about problems with water pooling in one part of the driveway and some water coming into the garage. The Denes inspected the problem, replaced a part of the driveway, and ground grooves into another part of the driveway to try to divert more water. The Denes did not charge Warren for their additional work. Shortly thereafter, however, Warren again contacted the Denes to tell them that water was coming into

his basement. The Denes again inspected Warren's property and discovered that he had dug out and cut down the expansion joint that ran between his house and the driveway. At this point, the Denes informed Warren that they would not attempt to correct his water problem or any future problem that he might have.

{¶5} On February 15, 2007, Warren filed suit against Denes Concrete, Inc. and Thomas Denes, Sr. for breach of contract, breach of warranty, and multiple violations of the Consumer Sales Practices Act ("CSPA"). By the agreement of the parties, the trial court later joined Thomas J. Denes, Jr. to the suit as a defendant. The matter proceeded to a bench trial on April 2, 2008. On May 23, 2008, the trial court issued its decision, granting judgment in favor of Warren for $32,815. The court specified that $400 of that award stemmed from two separate CSPA violations and the remaining $32,415 represented treble damages on Warren's $10,805 breach of contract award. The court further held that while the Denes were jointly and severally liable for $22,010 of Warren's $32,415 award, Denes Concrete, Inc. bore sole responsibility for the $10,805 portion of the award. The trial court denied Warren's request for injunctive relief and attorney fees.

{¶6} Subsequently, both the Denes and Warren appealed from the trial court's judgment. This Court consolidated the two appeals on August 1, 2008 and designated Warren as the Cross-Appellant. On appeal, the Denes raise five assignments of error for our review, and Warren raises four cross-assignments of error.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED IN ITS DETERMINATION THAT DENES VIOLATED THE CSPA BY FAILING TO DISCLOSE THE 'MATERIAL TERMS' OF THE CONTRACT."

{¶7} In their first assignment of error, the Denes argue that the trial court erred in determining that their failure to disclose "material terms" of their contract with Warren in writing constituted an unfair, deceptive, or unconscionable act under the CSPA. Specifically, the Denes argue that: (1) Ohio law permitted them to verbally amend their agreement with Warren; (2) the parol evidence rule does not bar evidence of subsequent modifications to an existing contract; and (3) because Warren requested that the Denes install the driveway without a French drain and the front slab without a footer, the Denes never took part in a deceptive act or misrepresentation upon which Warren reasonably relied.

{¶8} In reviewing a manifest weight challenge, this Court will affirm a trial court's judgment if it is "supported by some competent, credible evidence going to all the essential elements of the case[.]" *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶24, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. In applying the foregoing standard, this Court recognizes its obligation to presume that the trial court's factual findings are correct and that while "[a] finding of an error in law is a legitimate ground for reversal, [] a difference of opinion on credibility of witnesses and evidence is not." *Calame v. Treece*, 9th Dist. No. 07CA0073, 2008-Ohio-4997, at ¶15, quoting *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 81.

{¶9} The Denes do not dispute the trial court's findings of fact. They admit that they never notified Warren in writing of their recommendations to install a French drain and footer or of the possible consequences of his failure to have those items installed. They further admit that they never altered the terms of their written contract with Warren to specify that the parties agreed, with full knowledge of the possible risks, that the Denes would install Warren's driveway without a French drain and his front slab without a footer. The Denes only dispute the

trial court's legal conclusions with regard to these facts. That is, they dispute that their failure to put the foregoing items in writing and to obtain Warren's signature on the same amounted to a CSPA violation. Accordingly, we review the trial court's judgment solely to determine whether the trial court made an error in law based on the foregoing, undisputed facts. See *Seasons Coal, Co., Inc.*, 10 Ohio St.3d at 81.

{¶10} The trial court determined that the Denes' failure to include "all material terms" in its written contract constituted an unfair and deceptive practice under the CSPA and entitled Warren to a statutory violation award in the amount of $200. The trial court specified that "[t]hose terms included caveats and limitations of warranties due to the insistence of [Warren] to raise the [driveway] grade, refusal to pay for a footer for the front step pad, and refusal to pay for a French drain at the front of the garage." While the court admitted that the Denes' failure to include the foregoing terms in its written contract did not violate any specific provision of the CSPA or the Ohio Administrative Code, the court reasoned that its decision comported with the CSPA's overarching purpose. Specifically, the court reasoned that a requirement that all material terms be included in a written contract has the benefit of protecting consumers from hidden or misrepresented caveats in their agreements.

{¶11} The CSPA prohibits "unfair or deceptive" and "unconscionable" acts or practices by suppliers in consumer transactions. *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29. R.C. 1345.02(B) provides several non-exclusive examples of deceptive acts or practices. The CSPA also authorizes the Attorney General to "[a]dopt *** substantive rules defining with reasonable specificity acts or practices that violate [the CSPA]." R.C. 1345.05(B)(2). "These rules are found in the Ohio Administrative Code." *Gallagher v. WMK, Inc.*, 9th Dist. No. 23564, 2007-Ohio-6615, at ¶35, citing R.C. 1345.05(F). "In general, the CSPA defines 'unfair or

deceptive consumer sales practices' as those that mislead consumers about the nature of the product they are receiving[.]" *Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St.3d 177, 2006-Ohio-5481, at ¶10. "The CSPA is remedial in nature, and is to be liberally construed in favor of the consumer." *Dennie v. Hurst Const., Inc.*, 9th Dist. 06CA009055, 2008-Ohio-6350, at ¶8, citing *Einhorn*, 48 Ohio St.3d at 29.

{¶12} While it certainly may behoove contracting parties to put all the material aspects of their agreement in writing, this Court cannot agree with the trial court's conclusion that a supplier's failure to do so constitutes a per se violation of the CSPA. The Ohio Administrative Code contains numerous provisions that require suppliers to provide consumers with information in writing in specific circumstances. See, e.g., O.A.C. 109:4-3-07(B)-(C) (providing that supplier must provide consumer with written receipt containing specific information upon the consumer's payment of any deposits); O.A.C. 109:4-3-08(D) (providing that motor vehicle suppliers must disclose to consumers, in writing, that a motor vehicle has been operated as a demonstrator); O.A.C. 109:4-3-16(B)(22) (providing that dealers, manufacturers, and advertisers must integrate all prior, material statements or representations into any written sales contract). Yet, neither the CSPA nor the Ohio Administrative Code requires all suppliers, regardless of the circumstances, to place their entire agreement with a consumer in writing. Furthermore, while several Ohio trial courts have concluded that a supplier's failure to place material terms in writing violates the CSPA, those courts failed to cite any authority in support of that conclusion. See *Teeters Constr. v. Dort* (2006), 142 Ohio Misc.2d 1, 2006-Ohio-7254, at ¶42; *Lardakis v. Martin*, Summit Cty. Comm. Pl. No. CV 94-01-0234, at *2. This Court is not convinced that a supplier's failure to place all aspects of an agreement in writing, by itself, misleads consumers about the nature of the product being sold. *Whitaker* at ¶10. See, also, *Ganson v. Vaughn*

(1999), 135 Ohio App.3d 689, 694 (concluding that supplier's "sole failure to report the use of the fictitious name" does not constitute an unfair or deceptive act under the CSPA); *Conley v. Lindsay Acura* (1997), 123 Ohio App.3d 570, 575 (concluding that supplier's failure to include the limitation of one discount per customer in its written advertisement did not constitute an unfair or deceptive act under the CSPA).

{¶13} The trial court erred in concluding that the Denes' failure to place all of the material aspects of its agreement with Warren in writing constituted an unfair or deceptive act under the CSPA. Consequently, the trial court further erred by awarding Warren $200 on that basis. The Denes' first assignment of error is sustained.

Assignment of Error Number Two

"THE TRIAL COURT ERRED WHEN IT DETERMINED THAT DENES CONCRETE BREACHED THE WARRANTY UNDER THE CONTRACT."

Assignment of Error Number Three

"THE TRIAL COURT ERRED WHEN IT DETERMINED THAT DENES CONCRETE, TOM DENES AND TJ DENES KNOWINGLY BREACHED THE CONTRACT IN VIOLATION OF THE CSPA."

{¶14} In their second assignment of error, the Denes argue that the trial court erred in determining that Denes Concrete, Inc. breached its warranty with Warren by failing to perform its services in a workmanlike manner. Specifically, the Denes argue that: (1) the parties orally amended the terms of the warranty by agreeing that the Denes would replace Warren's driveway without a French drain and his front slab without a footer; and (2) after the Denes verbally informed Warren of the risks of failing to install a French drain and footer, Warren was not also required to "sign off" on these risks. In their third assignment of error, the Denes argue that the trial court erred in determining that their alleged breach violated the CSPA. Once again, the

Denes argue that their performance was not actionable because they orally advised Warren of the problems that might arise if he did not allow the Denes to install a French drain and a footer.

{¶15} We incorporate the manifest weight standard of review set forth in the Denes' first assignment of error. As such, we will affirm a trial court's judgment if it is "supported by some competent, credible evidence going to all the essential elements of the case." *Wilson* at ¶24.

{¶16} When a contract contains an express warranty in which a contractor undertakes a duty to perform in a workmanlike manner, a claim against the contractor for an alleged breach of that duty sounds in contract. *Barton v. Ellis* (1986), 34 Ohio App.3d 251, 252-53. To prove a breach of contract claim, a plaintiff must show that: "(1) a contract existed, (2) the plaintiff fulfilled his obligations, (3) the defendant failed to fulfill his obligations, and (4) damages resulted from this failure." *Zeck v. Sokol*, 9th Dist. No. 07CA0030-M, 2008-Ohio-727, at ¶18, quoting *Ligman v. Realty One Corp.*, 9th Dist. No. 23051, 2006-Ohio-5061, at ¶5. "One who contracts to have work done in a 'workmanlike manner' is entitled to have what was contracted for or its equivalent." *Vernon Nagel, Inc. v. Smith* (May 28, 1993), 6th Dist. No. 92WD067, at *1. "[A] warranty indemnifies *** for losses arising out of defects in the thing built." *Gualtieri v. DeMund Homes, Inc.* (June 6, 1979), 9th Dist. No. 9050, at *2. "The test for a 'defect' is reasonableness, not perfection." Id. If a contractor breaches his contract by performing in an unworkmanlike manner in violation of his express warranty, the aggrieved party "shall recover the amount reasonably estimated to correct the defect in the home." Id. at *3.

{¶17} The trial court found that Warren requested that the Denes raise the grade of his driveway in order to accommodate his wife. The court further found that:

> "[T]he [Denes] did advise [Warren] of the need for a French drain in front of the garage to prevent the rain water from running into the garage. The [Denes] also

> warned [Warren] that he should have a footer under the concrete pad, but he rejected this suggestion due to the extra cost."

The trial court concluded, however, that the Denes breached their warranty with Warren because "absent a written agreement where the consumer plaintiff 'signs off' stating that he has been warned by the supplier not to proceed in this fashion, the finished product is the supplier's responsibility." The trial court further concluded that the Denes breached their warranty and contract with Warren because they knowingly failed to perform their services in a "workmanlike manner." The court reasoned that the Denes were liable because:

> "No objective observer could conclude that a finished driveway should allow or cause water to run into the basement or back into a garage especially where such problems did not exist to any significant degree before the installation of the new driveway. Likewise, a properly installed pad for the front steps should not cause the top step to compress against the threshold so that the door can not (sic) open or that cracks the adjacent walls and frame."

The trial court awarded Warren $10,805 in damages for his breach of warranty claim, but specified that "[t]his claim only applies to the corporate defendant Denes Concrete Inc." The court then trebled Warren's award to $32,415, however, and concluded that Denes, Sr. and Denes, Jr. were jointly and severally liable for $21,613 of that award for violating the CSPA by breaching the contract with Warren.

{¶18} Warren testified that the Denes never told him that he needed a footer and that they did not inform him of their recommendation to install a French drain until after they had completed the installation of his driveway. Warren also testified that he never asked the Denes to raise the grade of his driveway. According to Warren, the Denes raised his driveway several inches of their own accord. On the contrary, both Denes, Sr. and Denes, Jr. testified that they told Warren about the need for a French drain after they tore up his old driveway and measured the slope of Warren's property. Both Denes, Sr. and Denes, Jr. testified that Warren rejected the

installation of a French drain. Denes, Sr. further testified that he recommended the installation of a footer to Warren when he quoted Warren a price for the installation of a new concrete pad beneath the front steps, but that Warren rejected the footer because of the extra cost. Additionally, both Denes, Sr. and Denes, Jr. testified that Warren requested that the Denes raise the grade of his driveway. Denes, Jr. testified that the Denes used stone to raise the grade of Warren's driveway. He specified that the reason that the parties' written contract provided that the Denes would "add [a] stone base" and included a separate price for "extra stone at $16.50 [per] ton" was that the parties had agreed at the time of their original contract to raise Warren's driveway.

{¶19} Our review of the record convinces us that the trial court's factual findings are supported by competent credible evidence. Apart from his own testimony, nothing in the record supports Warren's assertions that: (1) the Denes decided to raise the height of his driveway several inches of their own accord; (2) they did not recommend installation of a French drain until after they had completed their work on the driveway; and (3) they never recommended that Warren install a footer. Both the Denes testified that Warren requested that his driveway be raised, and the inclusion of additional stone for the base of the driveway in the parties' contract supports that testimony. Although Warren's and the Denes' testimony differed as to when the Denes informed Warren about the need for a French drain and whether they advised him at all about the need for a footer, the trial court was in the best position to judge the credibility of the witnesses. *Seasons Coal Co., Inc.*, 10 Ohio St.3d at 81. Because nothing in the record causes us to question the trial court's findings, we must conclude that they are supported by the weight of the evidence. Id.

{¶20} We cannot agree, however, that the trial court's legal conclusions with regard to these facts are correct. The Denes' written contract with Warren contains the following express warranty:

> "All material is guaranteed to be as specified. All work is to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from specifications involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate. ***"

The trial court essentially concluded that the Denes were liable for a breach of this warranty because after the Denes orally informed Warren that he needed a French drain and a footer, the Denes never placed these recommendations in writing or had Warren "sign off" to indicate that he had been told of the Denes' recommendations, but rejected them. The trial court cited no law in support of this proposition. While it may be prudent to do so, this Court is unaware of any law that requires a seller to have a consumer "sign off" in writing on the seller's recommendations in order for the seller to avoid liability for a breach of warranty. Furthermore, Warren could not have reasonably relied upon the Denes' express, written warranty. The Denes orally advised Warren that he needed a French drain and a footer. Warren rejected both recommendations. Accordingly, Warren was not deprived of "what was contracted for or its equivalent." *Vernon Nagel, Inc.*, at *1. The trial court erred in concluding that the Denes' failure to place their oral advisements to Warren in writing constituted a breach of warranty and in awarding Warren $10,805 for that breach.

{¶21} We agree with the Denes' that the trial court's judgment, with regard to Warren's claim for breach of warranty, is against the manifest weight of the evidence. Although the trial court's factual findings are supported by competent, credible evidence, we conclude that the trial court reached the wrong legal conclusion based on those findings. See *Seasons Coal Co., Inc.*, 10 Ohio St.3d at 81. Consequently, the Denes' second assignment of error is sustained.

{¶22} The trial court also concluded that the Denes' performance violated the CSPA and trebled Warren's damage award pursuant to that conclusion. The trial court reasoned that the Denes' performance entitled Warren to treble damages because the performance caused substantial harm to Warren's home and because the Denes performed the work knowing that these damages might occur. The trial court concluded that "[a]s treble damages are mandatory where actual damages were incurred, the court is required to award an additional $21,610 in damages."

{¶23} A CSPA claim will not be successful unless the contractor's performance amounted to a deceptive, unfair, or unconscionable act. *Tucker Const., Inc. v. Kitchen* (Mar. 1, 1995), 9th Dist. No. 16636, at *2-3; *Bush v. Coy* (July 3, 1991), 9th Dist. No. 90CA004941, at *2-3. This Court has held that:

> "Treble damages may be assessed against a party under R.C. 1345.09(B), when the violation was *** an act expressly enumerated as deceptive or unconscionable under R.C. 1345.05(B)(2)[.] *** [I]f an act has not been expressly enumerated as deceptive or unconscionable under R.C. 1345.05(B)(2), *** [the] party praying for treble damages [must prove]: (1) *** that an Ohio case has determined the act to violate R.C. 1345.02 or 1345.03[;] and (2) that the case had been made available for public inspection under R.C. 1345.05(A)(3)." *Fit 'N' Fun Pools, Inc. v. Shelly* (Jan. 3, 2001), 9th Dist. No. 99CA0048, at *4, quoting R.C. 1345.09(B).

If a plaintiff meets these prerequisites, then the CSPA mandates an award of treble damages. *Stultz v. Artistic Pools, Inc.* (Oct. 10, 2001), 9th Dist. No. 20189, at *3.

{¶24} The record does not contain competent, credible evidence that Warren proved that the Denes committed a deceptive, unfair, or unconscionable act. *Tucker Const., Inc.*, at *2-3. The Denes advised Warren that he should allow them to install a French drain and a footer and that he might experience problems if he rejected the items. The record reflects that Warren chose not to have the items installed. Warren testified that he was satisfied with the Denes' work

when they completed it. He further testified that he only became dissatisfied with the work after heavy rainfall caused water drainage problems and ground freezing caused the concrete beneath his front steps to heave. After Warren experienced water drainage problems, the Denes replaced a portion of his driveway and cut additional grooves into the driveway in an attempt to divert more of the water. The Denes performed this work at no charge even though they had told Warren that problems might arise if he failed to have a French drain and footer installed. The Denes only refused to take further measures after these additional measures failed to alleviate the problems and after they discovered that Warren had dug out and cut down the expansion joint running between his house and driveway.

{¶25} The trial court awarded Warren treble damages after concluding that a "failure to complete services in a workmanlike manner is a violation of the CSPA." By itself, however, a failure to perform services in a workmanlike manner does not constitute a CSPA violation. Id.; *Bush*, at *2-3. The performance also must amount to an unfair, deceptive, or unconscionable act. *Tucker Const., Inc.*, at *2-3; *Bush*, at *2-3. The foregoing facts do not support a conclusion that the Denes' performance amounted to such an act. See, e.g. *Bush*, at *2-3 (concluding that supplier's acts did not violate the CSPA). Consequently, the trial court erred in concluding that the Denes' performance violated the CSPA and in awarding Warren treble damages. The Denes' third assignment of error is sustained.

Assignment of Error Number Four

> "THE TRIAL COURT ERRED WHEN IT DETERMINED THAT DENES CONCRETE, TOM DENES AND TJ DENES VIOLATED THE CSPA BY FAILING TO PROVIDE A RECEIPT TO WARREN."

{¶26} In their fourth assignment of error, the Denes argue that the trial court erred in determining that they violated the CSPA by failing to provide Warren with a receipt for his

$5,460 payment. Specifically, the Denes argue that Warren's partial payment for their completed work did not constitute a "deposit" such that they were required to issue Warren a receipt. We disagree.

{¶27} We incorporate the civil manifest weight of the evidence standard of review set forth above. The Ohio Administrative Code provides that a supplier must provide a consumer with a dated, written receipt for each deposit that the consumer makes. O.A.C. 109:4-3-07. The term "deposit" means "any amount of money tendered or obligation to pay money incurred by a consumer *** as partial payment for goods or services." O.A.C. 109:4-3-07(D). A supplier's failure to provide the consumer with a receipt constitutes a deceptive act or practice. O.A.C. 109:4-3-07(B)-(C). A supplier's unfair or deceptive act or practice violates the CSPA regardless of whether it occurred before, during, or after the consumer transaction. R.C. 1345.02(A). If the supplier's violation does not result in actual damages to the consumer, the consumer may recover $200 for the statutory violation itself. R.C. 1345.09(B).

{¶28} Warren testified that he paid the Denes $5,460 after receiving their invoice for $5,705. He further testified that when he later asked for a receipt, the Denes refused to give him one. The Denes admitted that Warren paid them $5,460 in cash after they completed their work. Although Denes, Jr. testified that he did not recall Warren ever requesting a receipt, Denes Sr. testified that Warren asked him for one. Denes, Sr. stated that he refused to give Warren a receipt because Warren had not paid the Denes the full $5,705 amount that he owed them.

{¶29} By its plain language, O.A.C. 109:4-3-07 requires suppliers to provide dated, written receipts to consumers for any amount of money tendered as a partial payment for goods or services. It is irrelevant whether the consumer tenders his payment before or after the supplier completes its work. See *Ganson v. Vaughn* (1999), 135 Ohio App.3d 689, 692-93 (concluding

that O.A.C. 109:4-3-07 applies to payments made in completed transactions). Because the record contains competent, credible evidence that the Denes did not provide Warren with a receipt upon accepting his partial payment of $5,460, the trial court correctly concluded that the Denes violated O.A.C. 109:4-3-07 and the CSPA. The Denes' fourth assignment of error lacks merit.

Assignment of Error Number Five

"THE TRIAL COURT ERRED WHEN IT DENIED DENES CONCRETE'S, TOM DENES', AND TJ DENES' MOTION FOR DIRECTED VERDICT."

{¶30} In their fifth assignment of error, the Denes argue that the trial court erred in denying their motion for a directed verdict. "[A] motion for directed verdict which is denied at the close of the plaintiff's evidence must be renewed at the close of all evidence in order to preserve the error for appeal." *Chemical Bank of New York v. Neman* (1990), 52 Ohio St.3d 204, 206. The record reflects that the Denes never renewed their motion for a directed verdict at the close of all the evidence. Consequently, they have not preserved this issue for appeal. Id. The Denes' fifth assignment of error is overruled.

Cross-Assignment of Error Number One

"THE TRIAL COURT ERRED WHEN IT DENIED INJUNCTIVE RELEIF (sic) ENJOINING APPELLANTS FROM CONTINUING TO ENGAGE IN THE ACTS AND PRACTICES THE TRIAL COURT DETERMINED VIOLATED THE CONSUMER SALES PRACTICES ACT."

{¶31} In his first cross-assignment of error, Warren argues that the trial court erred as a matter of law in refusing to issue an injunction, prohibiting the Denes from engaging in any further unfair, deceptive, or unconscionable acts or practices. Specifically, Warren argues that the trial court erred in balancing interests to determine whether to issue an injunction because, by itself, a CSPA violation entitles a consumer to an injunction. We disagree.

{¶32} "Because this assignment of error raises issues of law only, our review is de novo." *State v. Hochstetler*, 9th Dist. No. 03CA0025, 2004-Ohio-595, at ¶10. R.C. 1345.09(D) provides that "[a]ny consumer may seek *** an injunction *** against an act or practice that violates this chapter." The trial court considered Warren's request for an injunction, but denied the injunction because the parties' relationship had ended, the Denes' wrongdoing appeared to stem from this "one time event arising out of the peculiar circumstances presented," and the judgment against the Denes was likely sufficient motivation for them to amend their business practices. Warren argues that the trial court had no authority to engage in this type of balancing analysis because when a statute authorizes the issuance of an injunction the trial court is obligated to award the injunction.

{¶33} "In general, courts will consider [four] factors in deciding whether to grant injunctive relief: (1) the likelihood or probability of a plaintiff's success on the merits; (2) whether the issuance of the injunction will prevent irreparable harm to the plaintiff; (3) what injury to others will be caused by the granting of the injunction; and (4) whether the public interest will be served by the granting of the injunction." *Mt. Eaton Community Church, Inc. v. Ladrach*, 9th Dist. No. 07CA0092, 2009-Ohio-77, at ¶15, quoting *Corbett v. Ohio Bldg. Auth.* (1993), 86 Ohio App.3d 44, 49. The Ohio Supreme Court held, however, that "when a statute grants a specific injunctive remedy to an individual or to the state, the party requesting the injunction 'need not aver and show, as under ordinary rules in equity, that great or irreparable injury is about to be done for which he has no adequate remedy at law[.]'" *Ackerman v. Tri-City Geriatric & Health Care, Inc.* (1978), 55 Ohio St.2d 51, 56, quoting *Stephan v. Daniels* (1875), 27 Ohio St. 527, 536. Further, if a government agent is seeking an injunction to enforce public policy pursuant to a statute designed to provide that government agent with a means for doing so,

a trial court need not balance the equities before issuing the injunction. *Ackerman*, 55 Ohio St.2d at 57-58.

{¶34} Even if Warren was not required to demonstrate irreparable injury for which no adequate remedy at law existed, *Ackerman* does not stand for the proposition that the trial court had no authority to balance the equities in this matter. Warren is not a government agent seeking to enforce public policy through a statute specifically designed for that purpose. See id. Accordingly, the trial court did not err as a matter of law in balancing the equities while considering whether to grant or deny Warren's request for injunctive relief. See *Mt. Eaton Community Church, Inc.* at ¶15 (setting forth the traditional four factors that courts look to in deciding whether to issue injunctions). Compare *Brown v. East Ohio Heating Co.* (Sept. 23, 1981), 9th Dist. No. 10176, at *2 (concluding that trial court did not have to balance the equities to issue injunction under CSPA on behalf of governmental agent using the statute to enforce public policy). Warren's first cross-assignment of error lacks merit.

Cross-Assignment of Error Number Two

> "THE TRIAL COURT ERRED WHEN IT DENIED APPELLEE/CROSS-APPELLANT HIS ATTORNEYS FEES WHEN IT FOUND THAT THE APPELLANTS HAD KNOWINGLY VIOLATED THE CONSUMER SALES PRACTICES ACT AND WITHOUT HOLDING THE REQUESTED HEARING AND WITHOUT FOLLOWING THE PROPER PROCEEDURES (sic)."

{¶35} In his second cross-assignment of error, Warren argues that the trial court erred in denying his request for attorney fees. Specifically, Warren argues that once the trial court determined that the Denes knowingly violated the CSPA, it was required to hold a fee hearing and award Warren fees. We disagree.

{¶36} Under the CSPA, "[a] court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if *** [t]he supplier has knowingly

committed an act or practice that violates this chapter." R.C. 1345.09(F)(2). "A trial court's determination in regards to an award of attorney fees will not be disturbed on appeal absent an abuse of discretion." *Jarvis v. Stone*, 9th Dist. No. 23904, 2008-Ohio-3313, at ¶33, quoting *Crow v. Fred Martin Motor Co.*, 9th Dist. No. 21128, 2003-Ohio-1293, at ¶38. The phrase "abuse of discretion" connotes more than an error of judgment; rather, it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶37} Warren argues that, as a matter of law, the trial court was required to allow evidence on attorney fees and to award Warren attorney fees once it determined that the Denes had knowingly violated the CSPA. There is no requirement, however, that a trial court award attorney fees under the CSPA. *Charvat v. Ryan*, 116 Ohio St.3d 394, 2007-Ohio-6833, at ¶27. "The trial court has the discretion to determine whether attorney fees are warranted under the facts of each case." Id. Because Warren has not argued that the trial court abused its discretion in refusing to award attorney fees under the facts and circumstances in this case, we need not address that issue. See App.R. 16(A)(7); *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *8 ("If an argument exists that can support this assignment of error, it is not this court's duty to root it out."). Warren's second cross-assignment of error is overruled.

Cross-Assignment of Error Number Three

> "THE TRIAL COURT ERRED WHEN IT FAILED TO HOLD THE APPELLANTS JOINTLY AND SEVERALLY LIABLE FOR THE ENTIRE JUDGMENT AMOUNT OF $32,815."

{¶38} In his third assignment of error, Warren argues that the trial court erred in refusing to hold Denes, Sr. and Denes, Jr. jointly and severally liable in their individual capacities for Warren's entire damage award. Specifically, he argues that because Denes, Sr.'s

and Denes, Jr.'s actions in performing the work on his property gave rise to his claims against the Denes, they should be liable for the full amount of his damage award along with Denes Concrete, Inc., the corporate entity. Based on our conclusion that the Denes are not liable to Warren under either his breach of warranty or his breach of contract claims, Warren's third assignment of error is moot. App.R. 12(A)(1)(c).

Cross-Assignment of Error Number Four

> "THE TRIAL COURT ERRED WHEN IT FOUND THAT THE APPELLANTS ADVISED THE APPELLEE OF THE CONSEQUENCES OF NOT USING A FRENCH DRAIN AND WARNED THE APPELLEE OF THE CONSEQUENCES OF NOT USING A FOOTER."

{¶39} In his fourth cross-assignment of error, Warren argues that the trial court's judgment is against the manifest weight of the evidence. Specifically, he argues that "[t]he facts do not support the Trial Court's findings of fact that the [Denes] warned James Warren of the consequences of not using a footer and a French drain." This Court has already determined that the trial court's factual findings with regard to the French drain and footer are not against the manifest weight of the evidence. Consequently, Warren's fourth assignment of error is overruled.

III

{¶40} The Denes' first, second, and third assignments of error are sustained. Their fourth and fifth assignments of error are overruled. Warren's first, second, and fourth cross-assignments of error are overruled. His third cross-assignment of error is moot. The judgment of the Lorain County Court of Common Pleas is affirmed in part, reversed in part, and remanded for the entry of judgment consistent with the foregoing opinion.

Judgment affirmed in part,
and reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to all parties.

BETH WHITMORE
FOR THE COURT

CARR, J.
CONCURS, IN PART, AND DISSENTS, IN PART, SAYING:

{¶41} I respectfully dissent in regard to the second assignment of error and the third cross-assignment of error.

{¶42} In their second assignment of error, the Denes argue that the trial court erred in determining that Denes Concrete, Inc. breached its warranty with Warren by failing to perform its services in a workmanlike manner. Specifically, the Denes argue that: (1) the parties orally amended the terms the warranty by agreeing that the Denes would replace Warren's driveway without a French drain and his front slab without a footer; and (2) after the Denes verbally

informed Warren of the risks of failing to install a French drain and footer, Warren was not also required to "sign off" on these risks.

{¶43} In reviewing a manifest weight challenge, this Court will affirm a trial court's judgment if it is "supported by some competent, credible evidence going to all the essential elements of the case[.]" *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶24, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. In applying the foregoing standard, this Court recognizes its obligation to presume that the trial court's factual findings are correct and that while "[a] finding of an error in law is a legitimate ground for reversal, [] a difference of opinion on credibility of witnesses and evidence is not." *Calame v. Treece*, 9th Dist. No. 07CA0073, 2008-Ohio-4997, at ¶15, quoting *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 81.

{¶44} The trial court determined that the Denes breached their warranty with Warren because "absent a written agreement where the consumer plaintiff 'signs off' stating that he has been warned by the supplier not to proceed in this fashion, the finished product is the supplier's responsibility." The trial court further concluded that the Denes breached their warranty and contract with Warren because they knowingly failed to perform their services in a "workmanlike manner." The court reasoned that the Denes were liable because:

> "No objective observer could conclude that a finished driveway should allow or cause water to run into the basement or back into a garage especially where such problems did not exist to any significant degree before the installation of the new driveway. Likewise, a properly installed pad for the front steps should not cause the top step to compress against the threshold so that the door can not (sic) open or that cracks the adjacent walls and frame."

The trial court awarded Warren $10,805 in damages for his breach of warranty claim, but specified that "[t]his claim only applies to the corporate defendant Denes Concrete Inc." The court then trebled Warren's award to $32,415, however, and concluded that Denes, Sr. and

Denes, Jr. were jointly and severally liable for $21,613 of that award for violating the CSPA by breaching the contract with Warren.

{¶45} The Denes written contract with Warren contains the following express warranty:

> "All material is guaranteed to be as specified. All work is to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from specifications involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate. ***"

Warren and the Denes signed their written contract before the Denes began working on Warren's driveway. Consequently, the written contract between the parties only outlines the costs associated with removing and replacing Warren's driveway. It does not refer to the French drain that the Denes recommended because, according to the Denes, they did not discover the need for the drain until after they removed Warren's existing driveway. The contract also does not refer to the replacement of the concrete slab beneath Warren's front steps because Warren decided to have the Denes perform this additional work after the parties executed their contract. The Denes never executed another written contract with Warren to reflect these additional items. They merely invoiced Warren for all their work after they completed it.

{¶46} The Denes argue that Warren could not have reasonably relied upon the express, written warranty in the parties' contract because Warren requested additional work, the Denes orally advised him of the risks of completing that work in the manner that Warren requested, and Warren still allowed the work to be performed. Yet, the warranty did not contain any caveats that it would not apply in certain instances, such as if the homeowner rejected a recommendation of the contractor. See, e.g., *Leonard v. Brock*, 9th Dist. No. C-060635, 2007-Ohio-4601, at ¶7 (noting that contract addendum disclaimed the warranty on items that contractor recommended and homeowner rejected in writing). Moreover, Denes, Sr. testified that he "suggested" to Warren that Warren should install a French drain. He also testified that he told Warren that he

did not "suggest" that Warren have the concrete slab installed beneath his steps without a footer. There is no evidence in the record, however, that the Denes informed Warren that his failure to adopt these "suggestions" would result in a cancellation of his express, written warranty. Compare id. We cannot agree with the Denes that Warren's acquiescence to their work constituted a rescission or modification of the warranty. See *Fraher Transit, Inc. v. Aldi, Inc.*, 9th Dist. No. 24133, 2009-Ohio-336, at ¶12 (noting that one party cannot unilaterally modify a contract and that modification requires mutual consent to the modification and to the new terms of that modification). Consequently, the Denes remained bound to perform their services in a workmanlike manner under Warren's express, written warranty.

{¶47} When a contract contains an express warranty in which a contractor undertakes a duty to perform in a workmanlike manner, a claim against the contractor for an alleged breach of that duty sounds in contract. *Barton v. Ellis* (1986), 34 Ohio App.3d 251, 252-53. To prove a breach of contract claim, a plaintiff must show that: "(1) a contract existed, (2) the plaintiff fulfilled his obligations, (3) the defendant failed to fulfill his obligations, and (4) damages resulted from this failure." *Zeck v. Sokol*, 9th Dist. No. 07CA0030-M, 2008-Ohio-727, at ¶18, quoting *Ligman v. Realty One Corp.*, 9th Dist. No. 23051, 2006-Ohio-5061, at ¶5. "One who contracts to have work done in a 'workmanlike manner' is entitled to have what was contracted for or its equivalent." *Vernon Nagel, Inc. v. Smith* (May 28, 1993), 6th Dist. No. 92WD067, at *1. "[A] warranty indemnifies *** for losses arising out of defects in the thing built." *Gualtieri v. DeMund Homes, Inc.* (June 6, 1979), 9th Dist. No. 9050, at *2. "The test for a 'defect' is reasonableness, not perfection." Id. If a contractor breaches his contract by performing in an unworkmanlike manner in violation of his express warranty, the aggrieved party "shall recover the amount reasonably estimated to correct the defect in the home." Id. at *3.

{¶48} The record reflects that after the Denes replaced Warren's driveway and the concrete slab under his front steps, Warren experienced water damage and damage to his front door frame. Warren testified that although he had some problems with water leaking into his home before the Denes replaced his driveway, the problems exponentially increased after the Denes finished the driveway. Furthermore, Warren testified that he never experienced damage to his front door frame until after the Denes replaced the concrete slab beneath his front steps. Denes, Jr. testified that after Warren notified the Denes of the water problems he was experiencing, the Denes returned to the property and ground additional grooves into Warren's driveway to try to divert more water away from Warren's house and garage. Denes, Sr. testified, however, that the Denes refused to take any further measures to remedy the problems Warren was experiencing after that point.

{¶49} Mark Sellers, a contractor who specialized in concrete replacement, testified that he examined Warren's property and the work that the Denes performed for Warren. Sellers testified that it was not unworkmanlike for the Denes to raise Warren's driveway to be flush with the side door threshold of his home and to raise the height of his front steps when replacing his concrete slab in order to match the raised height of the driveway. Sellers testified, however, that Warren's driveway should have had a drain and the concrete slab below his front step should have had a footer. Randy Sherrill, another contractor specializing in concrete replacement, testified that the Denes' work would have to be torn out and replaced to repair the problems that Warren was experiencing.

{¶50} Based on all of the foregoing, I would conclude that the record contains competent, credible evidence that the work that the Denes performed for Warren was defective in contravention of Warren's express, written warranty. Accordingly, I believe Warren was

entitled to recover "the amount reasonably estimated to correct the defect." Id. The trial court determined that Warren was entitled to $10,805. Because the Denes do not challenge the trial court's damage award, I would not determine whether the record contains competent, credible evidence in support of that amount. See App.R. 16(A)(7). I would overrule the Denes' second assignment of error.

{¶51} Because I would overrule the second assignment of error, I would address the third cross-assignment of error on the merits.

{¶52} In his third cross-assignment of error, Warren argues that the trial court erred in refusing to hold Denes, Sr. and Denes, Jr. jointly and severally liable in their individual capacities for Warren's entire damage award. Specifically, he argues that because Denes, Sr.'s and Denes, Jr.'s actions in performing the work on his property gave rise to his claims against the Denes, they should be liable for the full amount of his damage award along with Denes Concrete, Inc., the corporate entity. The record reflects, however, that Warren never named Denes, Sr. or Denes, Jr. in the portions of his complaint alleging violations of his express warranty. Warren's complaint reads, in relevant part, that:

> "22. Denes Concrete expressly stated in its contract that '[a]ll work is to be completed in a workmanlike manner according to standard practices.' See Exhibit A.
>
> "***
>
> "25. Denes Concrete has breached its express warranty.
>
> "26. As a proximate result of the misconduct of Denes Concrete as alleged herein *** it has been necessary for Mr. Warren to employ the legal services of the below signed attorney.
>
> "***
> "28. Breach of express warranty is also a violation of the CSPA.
>
> "29. Specifically, in connection with said transaction, Denes Concrete committed acts and practices which have been determined by courts of this state to violate

> RC 1345.02 and 1345.03. Said acts and practices were committed after such decisions were made available for public inspection under RC 1345.05(A)(3).
>
> "30. Denes Concrete knowingly committed said unfair, deceptive, unconscionable acts and practices."

{¶53} Warren's remaining damage award of $10,805 stems solely from the Denes' breach of Warren's express, written warranty. Because Warren only sought damages from Denes Concrete, Inc. for this claim, the trial court did not err in holding only Denes Concrete, Inc. liable for those damages. Accordingly, I would overrule Warren's third cross-assignment of error.

{¶54} I concur with the majority in regard to the remaining assignments and cross-assignments of error.

MOORE, P. J.
CONCURS, IN PART, AND DISSENTS, IN PART, SAYING:

{¶55} I respectfully dissent from the majority's conclusion in the first assignment of error that the trial court erred in determining that the Denes' failure to place in writing all of the material aspects of its agreement with Warren constituted a violation of the CSPA. The majority correctly concludes that the trial court's factual findings are supported by competent, credible evidence. It further acknowledges that, inasmuch as the CSPA is remedial in nature, it is to be liberally construed in favor of consumers. We part company, however, at the finding that the trial court incorrectly applied the law to the facts.

{¶56} The trial court did not determine that *every* term should have been included in the written contract, but that *every material* term needed to be placed in writing. I agree with the trial court that its decision comports with the overarching purpose of the legislation. Accordingly, I would affirm the court's judgment and overrule the first assignment of error.

Consistent with this decision, I would not determine cross appellant's third cross assignment of error to be moot, but would address it on the merits, finding that the trial court did not err in holding only the Denes liable. I would overrule cross appellant's third cross assignment of error.

{¶57} I concur with the majority on the remaining assignments of error.

APPEARANCES:

JEFFREY H. WEIR, II, and JOSHUA E. LAMB, Attorneys at Law, for Appellants/Cross-Appellees.

JACK MALICKI, Attorney at Law, for Appellee/Cross-Appellant.

ANTHONY J. AMATO, Attorney at Law, for for Appellee/Cross-Appellant.