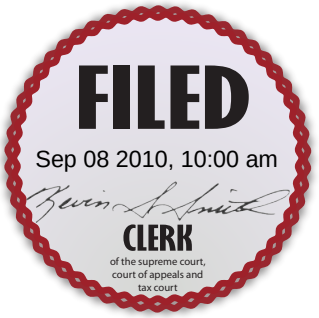

ATTORNEY FOR APPELLANT:

ALAN D. WILSON
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IN THE
COURT OF APPEALS OF INDIANA

STEVEN GRIGGS,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 34A02-1003-SC-287
	)	
STEVE QUERRY,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Douglas A. Tate, Judge
Cause No. 34D03-0906-SC-1938

September 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Steven Griggs appeals the trial court's judgment in favor of Appellee/Plaintiff Steve Querry in the amount of $3970.31 for damages suffered by Querry. Griggs contends that the trial court's determination that he was liable for Querry's damages was clearly erroneous because the determination was not supported by the probative evidence. We affirm.

FACTS AND PROCEDURAL HISTORY

Griggs and Querry are both homeowners in the Deer Knoll subdivision in Greentown. In approximately December of 2007, Querry noticed that his sump pump was not working and that there was an excess amount of water pooling on the northeast corner of his property. The excess water and the failure of the sump pump was later attributed to a clogged and damaged septic drain that ran just outside the perimeter of Querry's property.

On June 5, 2009, Querry filed a small claims complaint against Griggs seeking compensation from Griggs for the property damage he incurred as a result of the clogged and damaged drain. The trial court heard testimony regarding the matter on August 26, 2009 and February 10, 2010. On February 18, 2010, the trial court entered a judgment in favor of Querry in the amount $3970.31 after determining that the drain line which caused the property damage and sump pump failure was connected to Griggs's waterline and, as a result, Griggs was liable for the maintenance and repair of the line. This appeal follows.

DISCUSSION AND DECISION

Initially, we note that Querry has failed to file an appellee's brief. When an appellee fails to submit a brief, an appellant may prevail by making a prima facie case of error. *Dado*

v. Jeeninga, 743 N.E.2d 291, 293 (Ind. Ct. App. 2001). "The prima facie error rule protects this court and takes from us the burden of controverting arguments advanced for reversal, a duty which appropriately remains with the appellee." *Id.* Prima facie error is error appearing at first sight, on first appearance, or on the face of the argument. *Tamko Roofing Prods., Inc. v. Dilloway*, 865 N.E.2d 1074, 1077 (Ind. Ct. App. 2007).

"Judgments in small claims actions are 'subject to review as prescribed by relevant Indiana rules and statutes.'" *City of Dunkirk Water & Sewage Dept. v. Hall*, 657 N.E.2d 115, 116 (Ind. 1995) (quoting Ind. Small Claims Rule 11(A)). "In the appellate review of claims tried by the bench without a jury, the reviewing court shall not set aside the judgment 'unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.'" *Id.* (quoting Ind. Trial Rule 52(A)). In determining whether a judgment is clearly erroneous, the appellate tribunal does not reweigh the evidence or determine the credibility of witnesses but considers only the evidence that supports the judgment and the reasonable inferences to be drawn from the evidence. *Id.* A judgment in favor of a party having the burden of proof will be affirmed if the evidence was such that from it a reasonable trier of fact could conclude that the elements of the party's claim were established by a preponderance of the evidence. *Id.*

This deferential standard of review is particularly important in small claims actions, which according to Small Claims Rule 8(A), "shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law, and shall not be bound by the statutory provisions or rules of practice, procedure, pleadings, or

evidence except provisions relating to privileged communications and offers of compromise." Evidentiary rules are relaxed and hearsay evidence is admissible in small claims actions. *Fortner v. Farm Valley-Applewood Apts.*, 898 N.E.2d 393, 398 (Ind. Ct. App. 2008). However, although the evidentiary rules are relaxed, parties bear the same burdens of proof as they would in a regular civil action. *Tamko*, 865 N.E.2d at 1078. Thus, the fact finder may not award damages on the mere basis of conjecture or speculation. *Id*.

Griggs argues that the trial court erred in determining that he was liable for Querry's damages because the trial court's determination was based on mere conjecture or speculation. Griggs claims that all of the evidence of probative value supported a finding that he was not liable to Querry because the drain line in question was not connected to his waterline, and as such, he should not be liable for its maintenance and repair. We disagree.

Upon review, we acknowledge that Griggs offered evidence at trial supporting his claim that the drain line in question was not connected to his waterline, including building plans that showed that the builders of his home originally planned to connect Griggs's waterline to a different drain. However, we find that Querry also offered testimony that supported his claim that the drain in question was in fact connected to Griggs's waterline. Querry introduced the testimony of John and Patty Christianson, whose property was adjacent to the parcels in questions at all times relevant to the instant appeal. Mr. Christianson testified that the drain in question actually runs along his property line, that it was laid about the time that Griggs's home was built, and that at the time it was laid, it was connected to Griggs's property. Mr. Christianson further testified that at that time, the drain

was not connected to any other individual's property or parcel of land. Moreover, Mrs. Christianson testified that she and Mr. Christianson were aware of when the drain was laid because about the time that Griggs's home was built, the developer of the subdivision came to the Christiansons' door and notified them that a trench would be dug and a drain would be laid along their property line.

We conclude that the Christiansons' testimony is sufficient to support the trial court's finding that Querry carried his burden of proving by a preponderance of the evidence that the drain in question was connected to Griggs's waterline. Griggs's challenge to the trial court's judgment on appeal amounts to nothing more than a request that we reweigh the evidence presented before the trial court, which we will not do. *See City of Dunkirk*, 657 N.E.2d at 116. Thus, in light of the Christiansons' testimony regarding the drain line in question, we conclude that the trial court's determination that Griggs should be held liable for Querry's damages was not based upon mere conjecture and speculation, but rather on sufficient probative evidence.

The judgment of the trial court is affirmed.

DARDEN, J., concurs.

BROWN, J., dissents with opinion.

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STEVEN GRIGGS,	)	
	)	
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	)	
STEVE QUERRY,	)	
	)	
Appellee/Plaintiff.	)	

BROWN, Judge dissenting

I respectfully dissent and would find that Querry did not present substantial evidence of probative value to support the elements of his claim and therefore failed to meet his burden of proof. Querry's claim as stated in his Complaint was for "Water damage to my property from [Griggs's] perimeter tile[] on his property; caused sump pumps to fail in my basement due to volume of water." Appellant's Appendix at 6. Querry claimed at trial that the water damage was caused by Griggs's septic perimeter drain which Querry claimed runs between Querry's lot and his neighbors, the Christiansons' lot. After both sides presented their case on August 26, 2009, the court apprised the parties that "in any event, at this point, I mean again, I, I don't know, I don't know where the lines [sic] comes from. I don't know whose line is, I don't know who put the line in. . . ." Transcript at 29. At that point Mr. Querry volunteered to dig up the corner of the line where Querry's property, Christiansons' property, and Griggs's property meet. The court suggested blocking off the line and said that

if there would be run off water coming from Griggs's property it would all pool at the end of his property, then added ". . . but it may not, it may come from somewhere else. We don't know." Id. at 30.

Griggs's attorney then interjected: ". . . [Querry]'s suing one person out of all these homes surrounding that property, his surface water can come from four or five different directions." Id. at 31. The court responded:

> It could, we don't, we don't know that, yeah we don't know, I mean he's, he's taking his best guess, at where it was, where it was coming from, and, it may be.
>
> * * * * *
>
> . . . . I would have made the same guess, but there's not enough evidence here to say.

Id.

The court then gave Querry six months to have the line dug up and continued the hearing to February 10, 2010. However, Querry did not have the line or any portion of it excavated and presented only live testimony from the Christiansons who testified essentially to the same facts as were stated by them in a letter presented by Querry to the court at the first hearing. On cross examination Mr. Christianson was asked: "How do you know that line is not yours, the one that Mr. Querry says is plugged by tree roots?" Id. at 37. He responded "I don't know." Id. at 37.

Following additional discussion, the following colloquy occurred:

> Court: Ok, now and this, this is the Engle's house, this is the defendant's house right here, correct? Ok, now is there any, do we have any evidence, or do we know, I mean. .

> Mr. Querry: I think that the evidence that we have, explicitly is. .
>
> Court: Well no we've got a bunch of speculation, I don't have, I don't have the, I have a, I have speculation upon which I can make a determination, but I'm trying to make sure that, how do we know that's not the Engle's run off.

Id. at 40. At that point Mrs. Christianson gave hearsay testimony from the deceased Mr. Millsworth, the developer of the property: "He told me that there was going to be a trench dug between, over on that side of our property for [Griggs's] house." Id.

I simply do not find that the testimony presented by Querry constituted evidence of sufficient probative value to support the findings and judgment of the trial court and would reverse and remand with instructions to enter judgment in favor of defendant, Griggs.