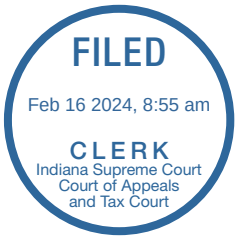
MEMORANDUM DECISION



ATTORNEY FOR APPELLANT

Robert T. Miles
Kolb Roellgen & Traylor LLP
Vincennes, Indiana

IN THE COURT OF APPEALS OF INDIANA

B&E Excavation, Connor Brown,

Appellant-Respondent

v.

John K. Ruppel, Jr.,

Appellee-Petitioner.

February 16, 2024

Court of Appeals Case No. 23A-SC-537

Appeal from the Daviess Circuit Court

The Honorable Gregory A. Smith, Judge
The Honorable Tonya R. Hosford, Referee

Trial Court Cause No. 14C01-2211-SC-413

Memorandum Decision by Judge Pyle

Judges Vaidik and Mathias concur.

Pyle, Judge.

Statement of the Case

[1] Connor Brown ("Brown") appeals, following a bench trial, the small claims court's award of damages in favor of John K. Ruppel, Jr. ("Ruppel"). Brown argues that the small claims court erred when it awarded a $4,000.00 judgment in favor of Ruppel. Concluding that the small claims court did not err, we affirm the small claim court's judgment.

[2] We affirm.

Issue

> Whether the small claims court erred when it awarded a $4,000.00 judgment in favor of Ruppel.

Facts

[3] In August 2021, Ruppel asked B&H Excavation[1] ("B&H Excavation"), a company operated by Brown, to give an estimate for the construction of a pond. Brown told Ruppel that he could build the pond for $9,000.00. Ruppel and Brown agreed on this price, but they did not have a written contract. Brown finished building the pond in November 2021. Thereafter, Ruppel noticed that the main overflow pipe was sitting above the dam.

[4] One week after Brown had finished building the pond, the "dam blew out." (Tr. 10). The pond was damaged "as a result of a rainfall." (Tr. 16). Brown

[1] Although the caption lists the company as B&E Excavation, Brown testified at the bench trial that the company's name was B&H Excavation. (Tr. 19).

returned and "reset" the pipe. (Tr. 5). In February 2022, Brown returned to make additional repairs to the pond. Specifically, Brown installed an emergency spillway pipe. However, the pond had already sustained damage that was never repaired.

[5] In March 2022, Ruppel went to Brown's place of employment and asked him to return the $9,000.00 that Ruppel had paid for the construction of the pond. In May 2022, Ruppel asked Kemp Construction ("Kemp") to examine the damaged pond and give an estimate for repair costs. Kemp estimated that "repairing pond levee and replacing overflow pipe with 24" pipe" would cost $10,412.00. (Ex. Vol. at 19). Ruppel made multiple attempts to recover the $9,000.00 from Brown.

[6] In November 2022, Ruppel filed a notice of claim alleging that he had hired Brown to "put a pond in." (App. Vol. 2 at 8). Ruppel further alleged that the pond had not been installed correctly and that the pond was "not holding water" and had a "damaged dam[.]" (App. Vol. 2 at 8).

[7] In January 2023, the small claims court held a bench trial. At the bench trial, the small claims court heard the facts as set forth above. Additionally, Ruppel testified that when Brown had finished the pond, "the ground was wet" and Ruppel could not "get an excavator" in order to seed and place riprap[2] around

[2] Riprap is defined as "a layer of large stones that protects soil from erosion in areas of high or concentrated flows." United States Environmental Protection Agency, Stormwater Best Management Practice, https://www.epa.gov/system/files/documents/2021-11/bmp-riprap.pdf.

the pond. (Tr. 17). Ruppel further testified that Brown had not told him that, during the initial construction of the pond, an emergency spillover pipe was necessary.

[8] Brown also testified at the bench trial. Brown testified that, during the initial construction of the pond, he had told Ruppel that an emergency spillover pipe, seeding, and riprap were all necessary. Additionally, Brown presented testimony from Don Gress ("Gress"), who owns Don Gress Construction. Gress testified that repairing the pond would cost between $2,000.00 and $3,000.00. Gress also testified that he had never seen the pond in person and that he had based his estimates solely on the photographs of the pond.

[9] In February 2023, the small claims court entered judgment in favor of Ruppel in the amount of $4,000.00. The order provided, in part, that:

> 7. [Ruppel] presented an estimate from Kemp to redo the pond at over Ten Thousand Dollars ($10,000). There was no testimony as to why the pond had to be redone as opposed to repaired.
>
> * * * * *
>
> 9. [Gress] testified that based on the pictures presented, he believed the pond could be repaired for Four Thousand Dollars ($4,000). He stated he had not seen the pond in person.

(App. Vol. 2 at 5).

[10] The following day, Brown filed a motion to correct error. In his motion, Brown argued that the small claims court had erred when it had failed to consider

contributory negligence on the part of Ruppel and that it had erred when it had made a finding that Gress had testified that the pond repair would cost $4,000.00. Ruppel did not respond to Brown's motion to correct error. The small claims court granted the motion in part and denied it in part. Specifically, the small claims court concluded the following:

> Court did not find sufficient evidence of contributory negligence. Therefore, the Motion to Correct Error is DENIED as to that issue.
>
> Testimony from [Gress] was that it would cost Two Thousand ($2,000.00) to Three Thousand ($3,000.00) dollars to fix the pipe and compact the soil. Therefore, the Motion to Correct Error is GRANTED as to that part of [Gress'] testimony.
>
> [Gress] also testified that it could cost more if the levee needed repaired and reiterated that he had not seen the pond in person. The court considered [Gress]'s statement in conjunction with the estimate for a $10,000 repair, as well as the other exhibits and testimony in reaching its decision.
>
> Judgment stands.

(App. Vol. 2 at 7).

[11] Brown now appeals.

Decision

[12] At the outset, we note that Ruppel has not filed an appellee's brief. In such cases, we do not undertake the burden of developing an argument for the

appellee, and we will reverse the judgment if the appellant presents a case of prima facie error, which is an error at first sight, on first appearance, or on the face of it. *DECA Fin. Servs., LLC v. Gray*, 12 N.E.3d 897, 899 (Ind. Ct. App. 2014).

[13] Brown argues that the small claims court erred when it awarded a $4,000.00 judgment in favor of Ruppel. Judgments in small claims actions are "subject to review as prescribed by relevant Indiana rules and statutes." Ind. Small Claims R. 11(A). "[O]ur standard of review in small claims cases is particularly deferential in order to preserve the speedy and informal process for small claims." *Heartland Crossing Found., Inc. v. Dotlich*, 976 N.E.2d 760, 762 (Ind. Ct. App. 2012). Indiana Trial Rule 52 provides that claims tried in a bench trial are reviewed pursuant to a clearly erroneous standard. *Vance v. Lozano*, 981 N.E.2d 554, 557-58 (Ind. Ct. App. 2012). The appellate court cannot 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 witness. *Id.* We neither reweigh the evidence nor reassess witness credibility. *Heartland*, 976 N.E.2d at 762.

[14] Here, our review of the record reveals that the small claims court entered a judgment in favor of Ruppel for $4,000.00. In its final order, the small claims court noted that it based its determination on Gress' testimony, which estimated the repair cost of the pond at $2,000.00 to $3,000.00, and the Kemp estimate, which estimated the repair cost of the pond and the replacement of the

pipe at $10,412.00.[3] Importantly, the small claims court also noted that Gress had never seen the pond in person and that his estimate was based solely on what he saw in photographs of the pond.

[15] Brown attempts to argue that the small claims court based its judgment on "a misrepresentation of Mr. Gress's testimony." (Brown's Br. 19). Brown argues that the small claims court had mistakenly awarded Ruppel the $4,000.00 judgment because it believed that Gress had testified that this was the cost of the repair. However, in its final order in response to Brown's motion to correct error, the small claims court corrected the factual finding related to Gress' testimony about the repair cost of the pond. Further, it explained that it had based its judgment on multiple factors, including Gress' testimony about the repair cost, Gress' admission that he had not seen the pond in person, and the more costly Kemp estimate provided by Ruppel.

[16] Finally, Brown argues that the small claims court erred when it failed to consider Ruppel's contributory negligence when it entered judgment in favor of Ruppel. However, in its final order, the small claims court explicitly stated that it "did not find sufficient evidence of contributory negligence." (App. Vol. 2 at 7). Brown's request for us to reconsider contributory negligence is no more

[3] We note that the small claims court, in its original order, referred to the Kemp estimate as a reconstruction of the pond instead of a repair. However, both the Kemp estimate and the small claims court's final order refer to the quote as a repair.

than a request to reweigh the evidence, which we will not do. *Heartland*, 976 N.E.2d at 762.

[17] Based on the evidence before us, we conclude that the small claims court did not clearly err when it awarded a $4,000.00 judgment in favor of Ruppel. Accordingly, we affirm the small claim court's judgment.

[18] Affirmed.[4]

Vaidik, J., and Mathias, J., concur.

[4] Brown also argues that the Kemp estimate provided by Ruppel was inadmissible hearsay. However, we have long held that hearsay evidence is admissible in small claims proceedings. *See Matusky v. Sheffield Square Apartments*, 654 N.E.2d 740, 742 (Ind. 1995). *See also Hitchens v. Collections Specialists, Inc.*, 5 N.E.3d 418, 423 (Ind. Ct. App. 2014) (reaffirming the principle that hearsay is admissible in small claims proceedings).

Brown also argues that the small claims court erred when it included findings that Brown had initially offered to refund Ruppel's $9,000.00. However, Brown has waived this argument on appeal. Brown's counsel did not object to any of Ruppel's testimony about Brown's intent to return Ruppel's money. Further, Brown's counsel elicited testimony from Brown about the specifics of his offer to return Ruppel's money.