[Cite as *Mullen v. Byers*, 2001-Ohio-4292.]

COURT OF APPEALS

ELEVENTH DISTRICT

TRUMBULL COUNTY, OHIO

	J U D G E S
THOMAS E. MULLEN, et al., Plaintiffs-Appellees, - vs – CHUCK BYERS, et al., Defendants-Appellants.	HON. WILLIAM M. O'NEILL, P.J., HON. JUDITH A. CHRISTLEY, J., HON. DIANE V. GRENDELL, J. ACCELERATED CASE NO. 2000-T-0066 **O P I N I O N**

CHARACTER OF PROCEEDINGS: Civil Appeal from the Trumbull County Court, Eastern Division Case No. 99 CVF 106

JUDGMENT: Affirmed.

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excessive water in the basement tends to prove that Byers did not elevate and employ the standard of care commensurate with the situation presented. A properly constructed brand new basement should not have a serious water problem. While, as per *Floyd*, proof of the existence of a defect standing alone is insufficient, Mullen did present sufficient testimony on the workmanlike standard of care to carry his burden.

{¶14} Mullen presented two witnesses who testified as to the measures and materials that should have been utilized in order to meet the water hazard inherent in the site. Between the two witnesses, they had a combined fifty years of experience in the field. While their testimony regarding the standard of care was presented in a piecemeal fashion, a thorough review of the transcript indicates that, between the two of them, they did set forth the measures that would be required to build a dry basement under the circumstances. They also indicated several areas where their observations indicated the proper measures were not taken. The weight to be given evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *Hollenbeck v. McMahon* (1875), 28 Ohio St. 1, paragraph one of the syllabus. There was competent, credible evidence going to all the essential elements of the claim before the trial court. Likewise, there was competent, credible evidence before the trial court with respect to the other defects. Byers' first assignment of error is without merit.

{¶15} In Byers' second assignment of error, he argues that the trial court's assessment of damages was against the manifest weight of the evidence. In the case of a breach of a construction contract by the contractor, the proper measure of damages is the

reasonable cost of placing the building in the condition contemplated by the parties at the time they entered into the contract. *Chess v. Scott* (Dec. 23, 1994), Portage App. No. 94-P-0044, unreported, 1994 Ohio App. LEXIS 5907, at *11, citing *Jones v. Honchell* (1984), 14 Ohio App.3d 120, 123. "In order to place a building in the condition contemplated by the parties at the time of the contract, 'repair of deficient work may involve both additional activities necessitated by the deficient work, and activities previously omitted, but necessary, to proper performance in a workmanlike manner.'" *McCray v. Clinton Cty. Home Improvement* (1998), 125 Ohio App.3d 521, 523-524, quoting *Craft Builders v. McCloud* (Jan. 14, 1997), Franklin App. No. 96APE05-716, unreported, 1997 Ohio App. LEXIS 107. In new construction cases such as this, the injured party is entitled to recover the full cost of repairing the damage from negligent construction, regardless of whether this amount exceeds the diminution of the market value of the house as a result of the negligent construction. *Moore v. McCarty's Heritage, Inc.* (1978), 62 Ohio App.2d 89, 91-92.

{¶16} With respect to the cost of repairing the roof shingles, a contractor testified on Mullen's behalf that it would cost $1,000 to repair the shingles. In contrast, Byers presented testimony that the repairs could be done for $500. The existence of some conflicting testimony does not render Mullen's evidence incompetent or incredible. The weight of the evidence and credibility of the witnesses are primarily for the trier of the fact to determine. With respect to this item, there was competent, credible evidence before the trial court establishing the amount.

{¶17} With respect to the remedial work done by the landscaper, the trial court found Mullen suffered damages in the amount of $400. Mullen hired the landscaper at his own expense in an attempt to remedy the water problem. So far as the record reveals, this was a good faith effort to resolve the problem. Mullen incurred this expense as a result of the defective construction. In addition to awarding a party the amount necessary to place a property in the condition contemplated by the parties at the inception of a construction contract, a court may award damages for remedial expenses that are incurred as a result of defective construction. *Chess*, 1994 Ohio App. LEXIS 5907, at *11-12. The award of these damages was appropriate.

{¶18} Mullen presented the only witness who testified regarding the cost of repairing the defects in the basement. Thus, there was competent, credible evidence before the trial court upon which that portion of the damage award was based. Byers' second assignment of error is without merit.

{¶19} In Byers' third assignment of error, he argues that the trial court improperly shifted the burden of proof to Byers, forcing him to prove that he was not negligent. This assignment of error is based upon a question posed by the court to Byers at the conclusion of his testimony.

{¶20} Pursuant to Evid.R. 614(B), a court may interrogate witnesses in an impartial manner, whether called by itself or by a party. The right to question witnesses pursuant to Evid.R. 614(B) rests within the sound discretion of the trial court. *State v. Prokos* (1993), 91 Ohio App.3d 39, 44. Thus, the standard of review on appeal is whether

the trial court abused its discretion in eliciting responses from a witness. *State v. Davis* (1992), 79 Ohio App.3d 450, 454. In *Mentor v. Brancatelli* (Dec. 5, 1997), Lake App. No. 97-L-011, unreported, 1997 Ohio App. LEXIS 5439, this court stated:

> i. "'Evid.R. 614(B) permits a trial judge to interrogate a witness as long as the questions are relevant and do not suggest a bias for one side or the other.*** Absent a showing of bias, prejudice, or prodding of the witness to elicit partisan testimony, it is presumed that the trial court interrogated the witness in an impartial manner in an attempt to ascertain a material fact or develop the truth.*** A trial court's interrogation of a witness is not deemed partial for purposes of Evid.R. 614(B) merely because the evidence elicited during the questioning is potentially damaging to the defendant.'" (Citations omitted.) *Id.* at *5-6, quoting *State v. Blankenship* (1995), 102 Ohio App.3d 534, 548.

{¶21} The court asked Byers why, upon discovering the watery condition of the soil, he did not discuss the situation with Mullen and alter the building plan accordingly. Byers responded that he did not think that altering the plan was an option and, therefore, did not discuss the problem with Mullen. Byers argues that by asking this question, the court improperly shifted the burden to him to prove he was not negligent. We disagree. The question posed by the court went directly to the duty imposed on a builder to use such care and skill in the choice of materials and work as is necessary to meet the risk of the hazards a structure is exposed to, *including those inherent in the site.* This question was

not improper, nor did it improperly shift the burden a proof. Byers' third assignment of error is without merit.

{¶22} The judgment of the trial court is affirmed.

PRESIDING JUDGE WILLIAM M. O'NEILL

CHRISTLEY, J., concurs,

GRENDELL, J., concurs in judgment only.