[Cite as *Kaine v. Kaine*, 2023-Ohio-4743.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

STACEY KAINE,

Plaintiff-Appellee,

v.

RONALD KAINE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 JE 0008

Civil Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 16 DR 308

BEFORE:
Cheryl L. Waite, David A. D'Apolito, Mark A. Hanni, Judges.

JUDGMENT:
Reversed in part.
Remanded.

Atty. Francesca T. Carinci, 3135 Sunset Boulevard, Steubenville, Ohio 43952, for Plaintiff-Appellee

Atty. Danielle C. Kulik, 5005 Rockside Road, Suite 350, Independence, Ohio 44131, for Defendant-Appellant

Dated: December 21, 2023

WAITE, J.

{¶1} Appellant Ronald Kaine appeals a February 13, 2023 judgment entry of the Jefferson County Court of Common Pleas. The entry found Appellee Stacey Kaine in contempt of a divorce decree and ordered partial damages. Appellant argues that the trial court failed to enforce a term of the parties' separation agreement which required Appellee to maintain Appellant's residence in good repair and not commit waste. Appellant also argues that the court improperly substituted its own judgment in place of testimony and exhibits. Appellee attempted to raise a cross assignment of error, however, she failed to comply with the appellate rules. The record reveals that Appellant's arguments have merit in part. The judgment of the trial court is reversed in part and the damage award is to be modified in Appellant's favor in the amount of $58,202.13. The matter is remanded to the trial court to award these damages and review the issue of an award of attorney fees.

Factual and Procedural History

{¶2} The parties divorced in 2016. As part of the divorce decree, the parties entered into an unusual residential agreement which was drafted by Appellee's counsel. It appears that Appellant was not represented by counsel at this time. A clause within that agreement addressed the parties' four residences: the family home and three rental properties. In the agreement Appellant was ultimately awarded the family home and the three rental properties were awarded to Appellee. However, the agreement also provided that for the limited period of six years, Appellant was to reside in one of the rental properties and Appellee was to reside in the family home. In other words, Appellant

temporarily lived in Appellee's rental house and Appellee temporarily lived in Appellant's permanent residence.

{¶3} While the parties neglected to provide an exact move-out date within the original agreement, Appellee's counsel drafted a separate agreement stating that the parties would exchange residences at midnight on September 30, 2022. Importantly, Appellee's counsel conveyed this deadline to both parties, who agreed to the terms. Thus, both parties clearly understood and intended that the exchange of properties would occur at midnight as the calendar changed from September 29th to September 30th, requiring, essentially, an overnight move.

{¶4} The original agreement mandated reciprocal but differing levels of duties concerning maintenance of the respective properties. For instance, Appellant's obligations required him to be "responsible to maintain [Appellee's rental house] during the time he occupies it. He shall pay utilities and keep the [house] in good repair." (2/13/23 J.E.) As to Appellee, her obligation regarding Appellant's permanent residence stated in pertinent part that "if major repairs are needed, she shall first notify [Appellant] and he shall determine if he is capable of making the repair on his own. If he is not capable of making the repair on his own, then [Appellee] shall employ whomever she see fit at her cost. During the years of exclusive occupancy, [Appellee] shall maintain the resident in good repair and not commit waste upon the property." (2/13/23 J.E.)

{¶5} The parties' post-divorce relationship has not always been smooth. At some point, the parties temporarily renewed their romantic relationship, but it ended again prior to 2020. In recent years, their relationship has been less than amicable. For instance, at one point Appellee sought to prohibit Appellant from entering his property for

any reason during her occupancy. This occurred after Appellant requested Appellee to make a repair to the property. The relationship was so strained at one point that Appellant requested an inspection of his house be made to assess for any possible damage prior to the expiration of the six-year exchange. The magistrate denied the request, and the record reveals that this denial may have contributed to many of the issues in this case.

{¶6} In accordance with the agreement, Appellant arrived at his permanent residence shortly after midnight on September 30th to retake possession, and parked a U-Haul truck in the driveway. One of the parties' daughters was in the process of leaving the house when she noticed the truck and sent a text message to Appellee. Appellee came out of the house and demanded that Appellant leave, saying that she had another twenty-four hours to vacate the premises. Appellee claimed to believe she did not have to vacate the house until midnight of the following day. Appellant informed her that she was incorrect and demanded that she immediately vacate the premises. Ultimately, Appellant called the police, who arrived at the residence and informed Appellee that she had to leave.

{¶7} As Appellant now had legal representation, later that morning and throughout the weekend respective counsel conversed through a series of emails, Appellee's counsel explained that her client had misunderstood the agreement as to the moving deadline. Counsel made it clear that this was her client's fault, and expressed a willingness for Appellee to bear some of the resulting expenses.

{¶8} As evidenced by photographs that were admitted into evidence, Appellee had not completed any significant packing or other preparation for the move. The house was full of furniture, unpacked personal items, and garbage. Apparently, Appellee had

taken a week or ten-day vacation just before the date of the move and had been staying at times with her boyfriend in West Virginia. She conceded that, even with the additional day she believed she was owed, she would not have been able to vacate the property in a timely manner.

{¶9} When Appellant finally entered the premises, he discovered that it was in very poor condition. He had difficulty opening the front door and was forced to kick it open due to swelling near the bottom of the door. Once the door opened, he immediately noticed what he described as an unbearable odor of cat urine and animal feces as he entered. A home inspector who testified at trial, Jordan Perreca, confirmed this testimony.

{¶10} Inside, the carpets were stained and soaked with cat urine. Appellant observed cat and dog feces on the carpet. In addition to the carpet, the following were damaged by cat urine: a fireplace, wooden cabinets, and multiple doors. Additionally, the smell associated with the urine required that the air ducts be cleaned.

{¶11} Mostly due to Appellee's failure to completely move out, the house was otherwise dirty and cluttered with belongings. Appellant incurred several expenses as a result, including: trash removal services, cleaning services, storage fees for his possessions while the house was returned to a habitable state, and a power washing of the white vinyl fence surrounding the property.

{¶12} In addition to the appearance of the house, there was significant damage to the structure and mechanics. For instance, the HVAC unit, which worked when Appellant moved out of the house in 2016, no longer was operable. Appellant located a clogged filter, demonstrating that Appellee did not regularly change or clean the filter as instructed. Appellant's testimony was that two filters were used in rotation; one would be installed in

the unit while the other was cleaned. A home inspection completed on the house and a repair quote confirmed the general neglect in maintaining the residence during Appellee's occupancy. Notably, Appellant sought to have Appellee's counsel join in a walk-through of the property, but she declined.

{¶13} Several water leaks, both old and active, were responsible for damage, mostly in the basement. In addition, improper winterization caused damage to garage pipes which froze and burst. Failure to clean the gutters also resulted in water damage in the basement, including damage to a wall stud. Various leaks also occurred in a toilet, a tub, and a sink.

{¶14} Other items were also damaged, including a broken fan blade, large dents on the garage door, damage to the front door, damage to a basement door, damage to an area of the exterior fence gate, cat scratches to window screens, damage to window blinds, a cracked bathroom sink, paint on the basement floor, and multiple holes in a bi-fold door.

{¶15} While Appellee had scheduled a carpet cleaning for October 1st, she conceded that mere cleaning would not have been possible or effective due to the amount of possessions remaining inside the house and the extent of the soiling and staining the carpets sustained. Appellant testified that he had not initially planned on installing new carpets but he could not leave the existing carpet in place.

{¶16} As a result of these issues, on October 18, 2022, Appellant filed a motion to show cause asserting various claims of contempt against Appellee. Appellant sought damages in the amount of $95,703.39 and his attorney fees. On November 10, 2022, Appellant filed a motion to escrow sale proceeds of at least one of Appellee's rental

properties, which was granted. In response, Appellee asked for a $400 set off for expenses allegedly incurred when Appellant failed to give her a Comcast box she had left at the house, requiring that she pay close to $390 in penalties.

{¶17} On January 31, 2023, the trial court held a hearing on the contempt claims. During the hearing, physical documents were admitted in the form of photographs, emails, quotes and estimates, and a home inspection report. Appellant, his home inspector (Mr. Perreca), and Appellee all testified. The court voiced concern that the total amount of requested damages, $95,703.39, was close to half of the total value for the property as a whole. The court also voiced a belief that some of the requested repairs appeared to the court to be more akin to remodels than repairs, emphasizing that the house was built in 1951. The court repeatedly stated that when viewing Appellant's claims, there was not "a lot that I'm excited about, other than the pet problems." (Hrg., p. 45.)

{¶18} Although Appellant presented testimony and written estimates and quotes, Appellee failed to introduce any competing estimates, either verbal or written, with the exception of the HVAC system for which she had a replacement, but not repair, quote. Overall, the court found Appellee in contempt, but issued only a partial damage award. The court often arrived at damage amounts lower than the estimates provided by Appellant, even though Appellee did not submit competing estimates. In many instances, the court based its awards on its own personal opinion as to what certain parts cost at various stores or its own opinion of the cost of services.

{¶19} In a February 13, 2023 judgment entry, after a setoff of $400 granted to Appellee relating to the Comcast equipment, the court awarded Appellant partial

damages in the amount of $15,820. It is from this entry that Appellant timely appeals. Appellant limits his appeal, however, to only certain aspects of the trial court's award.

{¶20} At the outset, we note that Appellee has attempted to raise her own assignment of error regarding an escrow issue. However, Appellee failed to file a cross notice of appeal as required by App.R. 3(C)(1). While App.R. 3(C)(2) provides that a cross notice of appeal is not required when a party does not seek to change the court's order but only attempts to defend an appeal, this is not Appellee's intention. She seeks to directly attack an aspect of the trial court's order not addressed by Appellant. Thus, Appellee's attempt to overrule the court's order without filing a cross notice of appeal violates the appellate rules, is not properly before us, and will not be considered.

Standard of Review

{¶21} Appellee claims this matter should be reviewed under a manifest weight of the evidence standard. However, a post-divorce decree contempt award is reviewed for an abuse of discretion. *Boyd v. Boyd*, 2022-Ohio-4775, 205 N.E.3d 41 (10th Dist.). The *Boyd* court explained that "[t]he trial court must make its finding of civil contempt upon a showing of clear and convincing evidence. Once the movant has met [his or] her initial burden, the other party must either rebut the initial showing or demonstrate an affirmative defense by a preponderance of the evidence." (Internal citations omitted.) *Id.* at ¶ 10. "We will not reverse a trial court's finding of contempt absent an abuse of discretion." *Id.* citing; *Columbus v. ACM Vision, V, LLC,* 10th Dist. No. 20AP-79, 2021-Ohio-925*,* ¶ 36; *Heinrichs v. 356 Registry, Inc.,* 2016-Ohio-4646, 70 N.E.3d 91, ¶ 51 (10th Dist.,); *Byron v. Byron,* 10th Dist. No. 03AP-819, 2004-Ohio-2143, ¶ 15.

{¶22} As the Ohio Supreme Court has held, if competent, credible evidence exists to support a trial court's decision, there is no abuse of discretion. *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401, 696 N.E.2d 575 (1998). It appears that Appellee's confusion rises from the comingling of terms of art within several appellate opinions. However, the law is clear that we are to review this matter under an abuse of discretion standard.

ASSIGNMENT OF ERROR NO. 1

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO ENFORCE THE ORDER AND SEPARATION AGREEMENT, BUT RATHER MODIFIED THE OBLIGATIONS.

ASSIGNMENT OF ERROR NO. 2

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT SUBSTITUTED ITS OWN JUDGMENT FOR THE MANIFEST WEIGHT OF THE EVIDENCE AS TO THE COSTS AND AMOUNTS OF THE DAMAGES.

{¶23} Appellant argues that the court modified the parties' agreement and lessened Appellee's duty to make repairs to the house. Appellant also argues that the court acted arbitrarily in determining the amount of the award and usurped the role of "home construction/appraiser expert" when it generated its own estimate for repairs, that were contrary to the estimates provided by Appellant. Appellant emphasizes that

Appellee failed to rebut any of his repair estimates with competing estimates or any other evidence to show his quotes were unreasonable or unnecessary.

{¶24} Appellee's brief is nonresponsive for the most part. In it, she addresses damages (i.e. a girder beam) that were not included within the original motion for contempt or the instant appeal. More problematic, Appellee's factual recitation differs in several instances from the facts within the record.

HVAC

{¶25} We again note that the parties had different obligations concerning maintenance of the respective houses. As previously stated, the parties' agreement required Appellant to be "responsible to maintain [Appellee's rental house] during the time he occupies it. He shall pay utilities and keep the [rental property] in good repair." Thus, his sole requirement was to keep the rental property in good repair. The agreement fails to address which party bore the burden to pay for any repairs.

{¶26} However, Appellee's obligations were differently stated: "if major repairs are needed, she shall first notify [Appellant] and he shall determine if he is capable of making the repair on his own. If he is not capable of making the repair on his own, then [Appellee] shall employ whomever she see fit at her cost. During the years of exclusive occupancy, [Appellee] shall maintain the residence in good repair and not commit waste upon the property." Appellee was specifically required to make a necessary repair *at her own cost* if Appellant could not, in his opinion, do the work. No reciprocal burden was placed on Appellant. Further, Appellee was required not only to keep in the property in good repair, but also had a burden not to commit waste on the property. Unlike Appellant, Appellee was clearly to pay the cost of any repairs Appellant could not make.

{¶27} With this in mind as we review the trial court's entry, the court determined that Appellant was primarily responsible for repairs to both homes. Only if he was unable to make a repair on the home Appellee was living in would she be responsible to pay. The record reveals that the parties' agreement required only the bare minimum of maintenance on Appellee's rental home, and is silent as to which party bore the costs. Further, it is clear that no "major repairs" were intended to be undertaken on the rental property. Again, we note that Appellee's counsel drafted the language in the agreement.

{¶28} It is also abundantly clear that the trial court improperly characterized Appellant's actions when moving back into his own home at the end of the parties' six-year agreement as an "illegal" and "forceful" "eviction." Appellee clearly admitted she was mistaken as to her move-out date and that Appellant was correct. Despite this admission, the trial court stated in its entry "[t]he Court is not so sure." This was error, as the record shows Appellee's lawyer chose both the date and time of exchange of properties and wrote the agreement, and Appellee conceded her error. Further, the trial court did recognize that Appellee would not have met the deadline regardless. In fact, she had made virtually no preparation to move out of Appellant's house. The trial court's mistaken belief that she was somehow evicted appears to color its view of all of the evidence in this matter.

{¶29} The trial court also mischaracterized Appellant's original damage request. While Appellant submitted the full inspection report into evidence, Appellant agreed that many issues highlighted in the report were not the responsibility of Appellee, and that the report was being submitted only to support those requests enumerated in his motion. The

court, however, ignored Appellant's limiting language and chastised Appellant for some sort of "overreach" not supported by this record.

{¶30} This record shows that while Appellant fully complied with his duties under the agreement, Appellee fell woefully short. Regarding the HVAC unit at Appellant's house, the record contains evidence that Appellee's neglect caused the unit to malfunction. Specifically, there is testimony from Appellant and evidence in the form of notes written on the professional estimate reflecting that failure to maintain the unit caused the malfunction.

{¶31} Appellant's expert testified that the unit would not operate and recommended repairs. (Tr. p. 25.) Appellee testified that his daughter had previously emailed him about the unit's issues and he sent an estimate for repairs, but Appellee refused to pay the cost of those repairs. Appellant testified that when he finally took possession of the house, he found a clogged air filter nearby and "[m]ore than likely, the cause of the failure of the air conditioner was failure to maintain the air filter." (Hrg., p. 55.) Two filters were to be used in rotation and when one of them was dirty, a hose was used to clean the filter while the other was installed. (Hrg., p. 56.) He testified that a repair could be accomplished for an estimated expense of $4,250 for materials.

{¶32} While Appellant did indicate at the hearing that "I'm not going to work on it for free," he is required to provide the labor pursuant to the agreement that he is seeking to enforce in this matter. (Hrg., p. 56.) He cannot receive damages for labor that he admits he is capable of performing, and as Appellant is an HVAC technician, there is no question he is capable of providing this labor. In addition, because Appellant testified that repairs would be possible, if this is no longer the case, he is responsible for the additional

costs of replacing the unit. The trial court, merely citing "the conduct of the parties" and ignoring the evidence of record, failed to award Appellant any sum for Appellee's failure. As the burden to pay for the repair was Appellee's, Appellant should have been awarded the repair costs of $4,250.

Basement Water Damage

{¶33} The home inspector testified that the gutters were clogged which caused water to enter the basement. Appellant obtained an estimate for repairs. The company who provided the estimate informed Appellant that the water damage, which is at the base of the wall, had caused at least one stud to break loose. The repair mechanism involves tearing out a forty-eight square foot portion of the wall, removing the insulation, and replacing the affected studs and drywall. (Hrg., p. 73.) The repairs were quoted at $6,200. Appellee presented no evidence through testimony or documents that a cheaper alternative existed or that damage was less severe than Appellant claimed. Again, Appellee was required to pay for any major repairs and was required to "maintain the residence in good repair and not commit waste upon the property."

{¶34} In determining the damage award associated with the contempt finding, the trial court stated that "Exhibit 11 shows a basement wall that appears discolored by water in the corner. [Appellant] claims the entire stud wall must be removed at a cost of $6,200.00. This is gross overkill. The Court sees no problem that some drywall patch and a coat of paint won't fix. [Appellant] is awarded <u>$45.00 for some drywall patch and a gallon of paint.</u>" (J.E., p. 7.)

{¶35} Exhibit 11 is a photograph that shows water damage to the area where the floor meets the wall. The floor area and part of the lower wall have obvious signs of

significant water damage. The white baseboard has substantial damage and is mostly stained with black along an at least two to three foot stretch. Although it is difficult to tell from the picture, it appears that the baseboard may have separated from the wall in several areas of the approximately six to eight foot strip.

{¶36} It is clear that the court found Appellee in contempt as to this issue. In accordance with the agreement, the court was required to determine from Appellant whether he was capable of making the repair himself. There is no evidence within the record that he could do so. Hence, the parties' agreement leaves Appellee responsible for the total repair costs.

{¶37} The sole evidence before the court was Appellant's estimate that the repairs would cost $6,200. Appellee did not provide an estimate in rebuttal nor did she address the issue when she testified. Instead of granting Appellant damages in the amount of the quote, which was the sole evidence presented on the issue, the court arrived at its own damage award by choosing an arbitrary figure based on the court's opinion as to the extent and cost of repair and substituted that amount. There is no support for the court's award on this issue in the record.

{¶38} We note that the trial court relied on a photograph admitted into evidence which does not show the loose stud, but depicted the extensive water stains on the wall, baseboard, and floor area. The court did not address the problem with the studs, which clearly required more than drywall patch and paint. Appellant testified, and his estimate reflects, that only a relatively small section, a square footage of forty-eight square feet of the area, needed to be replaced. (See Hrg., p. 73; Exh. 11a.)

{¶39} Because the court found Appellee in contempt and the sole evidence of record as to cost is the estimate provided by Appellant, Appellant should have been entitled to damages in that amount, $6,200. We note that the estimate specifically states that it does not include the costs of painting the wall, which Appellant will be responsible for once the work is completed.

Garage Door

{¶40} Appellant claims that the garage has several large dents and a crease that occurred after he moved out of the residence. Apparently, Appellee previously admitted that their daughter hit the garage door with her car. The dents are visible in the photograph. Appellant contends that “the seals don’t match up” which can cause air and water leakage, (Hrg., p. 145) and the panels no longer fit together squarely.

{¶41} Appellee admitted that the damage occurred during the period she was subject to the agreement. There is no evidence that Appellant is capable of performing the necessary repairs to the garage doors. The court dismissed the damage as cosmetic, but this view is contrary to the testimony concerning the failure of the panels to seal and the potential for leakage. Again, the agreement provides that Appellee is responsible to maintain the property in good repair and not cause waste. Appellant provided an estimate for repairs and Appellee failed to rebut or attack this evidence. As such, Appellant should be awarded the full requested damages of $4,250.

Carpet

{¶42} The uncontroverted evidence shows that the carpet was destroyed by staining and odor, and that pet urine saturated the carpet throughout the house. Both parties agree that the carpet needed to be replaced and could not merely be cleaned.

{¶43} The court determined that Appellee was in contempt and that the carpets were destroyed by cat urine and needed to be fully replaced. However, the court arbitrarily reduced the $8,291.60 estimate for replacement and granted Appellant $7,870.00. The court stated in its entry that: "[t]he sealing of the floors is definitely [Appellee's] problem, as is the replacement of the carpet. The problem with the carpet is that it was old carpet. [Appellant] should be taking over the house with old but not smelly carpet. The replacement of the carpet actually makes the house better than it was and better than [Appellant] was entitled to receive necessitating some discount for betterment. New carpet costs $8,291.60. Old carpets were already 12 or 13 years old having been installed in 2009 or 2010 and then used by kids, three cats and two old dogs prior to the termination of the marriage. [Appellee] is found in contempt for her treatment of the carpet and [Appellant] is awarded $7,870.00 in damages." (J.E., pp. 4-6.)

{¶44} Again, the court specifically found Appellee in contempt. There is no evidence that Appellant is capable of performing the replacement. Appellant provided an estimate for replacement and Appellee failed to introduce any rebuttal evidence. The court unilaterally decreased the award based on what it described as a "betterment discount." Testimony revealed the carpet was installed six years before Appellant moved out and was approximately twelve years old at the time of hearing. Appellant testified that he did not plan to replace it until he saw its current condition. Regardless, it was Appellee who allowed the carpet to be destroyed beyond repair and must now bear the burden of the repair in full. There was no testimony from any witness to support the trial court's decision to reduce the award. This is not an instance of normal wear and tear.

This is an instance of Appellee's complete disregard and negligence. Her actions caused damage to the carpet past a point of salvation and necessitating complete replacement.

{¶45} There was unrebutted evidence that there was urine damage in some areas of the house, and that the heavy amount of urine caused it to leak through the floorboard and into the basement ceiling tiles. Appellee's sole rebuttal is that a small amount of paint on the carpet preexisted Appellant's move to her rental property. There is no question that Appellee caused the severe condition of the carpet, and she conceded as much. Thus, Appellant was entitled to the full estimated amount of replacement: $8,291.60.

Toilet

{¶46} There were several problems with the home's toilets discussed at trial, however, Appellant challenges only the damage award regarding a second floor toilet. At trial, the home inspector and trial court entered into the following discussion.

{¶47} [Home Inspector]: And on Page 39, that's where I noted in the summary that that second floor toilet did not fill up when I turned on the supply valve, and the internal components would need replaced.

The Court: So just replace the guts?

[Home Inspector]: Yes.

(Hrg., pp. 32-33.)

{¶48} Appellant then testified: "[t]he upstairs toilet was nonoperable. It was leaking through the fill valve, so they just shut the toilet off. When they shut the toilet off, the water supply, the trap went dry, so we had sewer gas in the upstairs of the house. And the toilet is stained, can't be cleaned, couldn't be cleaned. So I requested that we

replace the toilet." (Hrg., p. 97.) Appellant testified that the toilet worked when he left and was "a new toilet," although he could not remember the exact date it was purchased. (Hrg., p. 98.) Appellee testified she shut off the toilet because she felt that the children were not keeping the bathroom clean and did not want them to use it. (Hrg., p. 174.) It remained shut off at the time she moved, thus she could not provide any testimony as to its operability. (Hrg., p. 174.) She could not recall if it was stained.

{¶49} The court determined there was contempt, but attributed it to "[o]ne toilet that does not fill up and that the guts need to be replaced. New guts are about $25.00 at Lowe's and require about 45 minutes to install. [Appellee] should have fixed the toilet as a matter of maintenance and is found in contempt. [Appellant] is awarded $25.00 for parts but should perform the labor as per the Separation Agreement." (J.E., p. 5.)

{¶50} Again, while it is clear the court found Appellee in contempt, it appears the trial court arbitrarily substituted its judgment for the evidence in the record. Appellant had a duty to maintain the house. Unrebutted evidence shows the toilet was permanently stained due to her failure to properly maintain.

{¶51} Appellant introduced a quote from Buckeye Mechanical estimating the replacement at $1,300. While Appellant works for Buckeye Mechanical, he is an HVAC technician and the quote is from a plumber within the company. In reducing the contempt award on this issue, the court relied on "evidence" not within the record and ignored the sole evidence of record. As such, Appellant was entitled to the estimated amount of $1,300.

Garage Pipes

{¶52} The court awarded Appellant $280.78 for repair of the garage pipes, which froze over the winter, burst, and caused water damage. Without proper support in the record, the court stated in its entry that "[t]hese pipes were installed in 2007 and probably would have survived the winter had they been drained properly. [Appellant] testified that repair was $1,128.78, which seems a bit high for a pipe that is exposed and easily worked on. [Appellant's] estimate (Exhibit 7A) shows materials at $280.78. [Appellant] is awarded $280.78 for materials and can do the labor himself as per the Separation Agreement." (J.E., p. 6.)

{¶53} Again, it is clear the trial court found Appellee to be in contempt on this issue. Despite the court's personal opinion on the matter, there is no evidence that Appellant is capable of making the repairs. Appellant provided no testimony to indicate he could perform the work and was never asked if he was capable of making these repairs. While Appellant's company completed the repair work, repairs were made by a "Commercial Pipefitter Foreman." (Exh. 7A.) Appellant is an HVAC technician.

{¶54} There is no evidence supporting the court's conclusion that the mere fact that the pipe is exposed has any bearing on the difficulty of the repairs. Even so, Appellee presented no arguments or evidence challenging the reasonableness of the repair or costs. The court relied on its own opinion as to how much the repairs should cost without any evidence whatsoever. This record reflects that Appellant was entitled to receive the full $1,128.78 cost of repair.

Fireplace

{¶55} Appellant argued that cat urine on the fireplace caused irreparable damage and necessitated a replacement, as the smell and staining cannot be removed. Appellee conceded that she knew the cat had urinated on the fireplace but claimed that she did not know when this occurred, insinuating it may have been during the parties' marriage. (Hrg., p. 170.) Appellee's main defense was one she used throughout the hearing: that it was possible the damage occurred during the parties' marriage but impossible for her to determine with certainty because no inspection was ordered on the house prior to the exchange. (Hrg., pp. 170, 184.)

{¶56} The court determined that "[e]xhibit 12 shows a fireplace that [Appellant] claims has been corroded by cat urine. He wants it replaced at a cost of $799.00 even though the problem, if any, was so slight that the inspector failed to notice it. The minimal rusting there, if any, does not warrant the entire replacement." (J.E., p. 7.)

{¶57} We again begin with the duties imposed on Appellee by agreement. She was to, at all times, maintain the house in good repair and not commit waste. Appellee conceded that, when she moved out, she "noticed that the cat had peed on [the fireplace]." (Hrg., p. 170.) Appellee again contends it is impossible to know if the damage had occurred during the marriage. She did not testify that she knew when her cats caused this damage with any certainty.

{¶58} While the trial court found contempt, the court did not believe that the damage depicted in Exhibit 12 rose to the level that repairs were required. Appellee, however, admitted there was damage. The sole evidence of cost of repair was submitted

by Appellant, who introduced an estimate in the amount of $779. Appellant should have been awarded that amount, as his evidence was unrebutted.

Wooden Cabinets

{¶59} Appellant argued that the cats urinated on wooden cabinets, ruining them both in appearance and because of the odor. Appellant explained that the cabinets were chosen for their wood grain and painting them would destroy this purpose.

{¶60} The court found that "[e]xhibit 9 shows wooden cabinets that [Appellant] claims were damaged by cat urine. [Appellant] claims that the cabinets cannot be sealed with paint because they are wood grain designed to be pretty. [Appellant] wants $10,500.00 to replace these two cabinets. First, the Court does not see the damage in the photo. Second, even if the wood grain should not be painted it can still be sealed with polyurethane, varnish or any other clear wood finish. [Appellant] is awarded $30.00 for clear and other materials and can do the labor himself as per the Separation Agreement." (J.E., pp. 6-7.)

{¶61} Exhibit 9 shows dark staining at the base of the cabinets. Butting against the cabinets is a carpet tack strip which is stained black from what testimony shows is cat urine. Some black staining is also observable on the cabinets themselves. Problematically, the amount of urine near the base of the cabinets suggests that the urine has soaked into the wood and some mold can be seen on the tack strip abutting the cabinet base. According to unrebutted testimony, there was extensive urine soaking into those cabinets.

{¶62} The court found Appellee in contempt in this regard. Appellant's evidence was that the affected cabinets needed replacement. Appellee again presented no rebuttal

evidence, in terms of the amount of damage or alternative repairs or estimates. With no support in the record, the court determined that a coat of sealer would suffice to cure the problem. It is obvious from this record that Appellant should have been awarded the full $10,500 of his estimate.

Trash Cleanup

{¶63} Appellant sought $1,400 for trash removal. Although the court refused to award damages for trash removal, during questioning by her own counsel, Appellee agreed that she should pay for the trash removal.

> Q There was also a receipt for trash removal from the home.
>
> A (Witness nodding affirmatively.) Yeah, that's legit. I didn't get all my stuff out. I tried.
>
> Q You would agree that it's probably fair that you should be able to pay --
>
> A Yes.
>
> Q You should pay somebody to do that?
>
> A Yes.

(Hrg., pp. 175-176.)

{¶64} Despite this testimony the court failed to award damages stating: "had [Appellant] been just a little bit reasonable and avoided the illegal eviction that likely would have been handled by [Appellee.]" (J.E., p. 7.)

{¶65} The court's decision in the regard is troubling for two reasons. As we previously discussed, there was no "eviction" here, legal or otherwise. The parties voluntarily entered into a contractual agreement drafted by Appellee's counsel, where the parties agreed to move out and exchange properties on a specific date and at a specific time. The uncontested facts establish that Appellee not only was mistaken about her move-out date but she admits that she would not have been able to timely vacate the property even if she were correct in her belief she had another day. Further, Appellee conceded that she is responsible for the costs of trash removal. Appellee was in contempt in this regard, and she admitted as much. The trial court's decision in this regard is an abuse of discretion.

{¶66} Appellant introduced an estimate of $1,400 for trash removal. Appellee did not rebut the need for trash removal, her responsibility for the costs, or the amount of the estimate. Thus, Appellant should be awarded the full $1,400 requested.

Cleaning of the Home

{¶67} Appellant argues that Appellee left the house in an unclean state. Photographs admitted into evidence support this contention. Appellant requested $13,357 in damages for a cleaning service. The court determined "[t]here is no telling how much of that occurred prior to the dissolution. Much of it is petty and unreasonable but some is not. [Appellant] is awarded $5,000 for clean-up." (J.E., p. 7.)

{¶68} There are a several problems with the court's finding in this regard. First, Appellee claimed that she regularly cleaned the home. This testimony may well be credible, however, the evidence reflects that at the time Appellant sought to obtain possession of the property it was littered with dirt and debris. Pet hair, urine and feces

was prevalent. It is apparent from both testimony and from the photos submitted that, at the time she left the property, it was in a disreputable state of cleanliness, much different from the state it had been in six years previously. Some ordinary dust and dirt would undoubtedly not rise to the level of contempt. The trial court did find Appellee was in contempt.

{¶69} The photographs admitted into evidence more than support the necessity of hiring professional cleaning services. Much like other damage throughout the house, Appellee failed to provide any real rebuttal evidence or contest the estimate admitted by Appellant. Thus, Appellant should be awarded the full $13,357 in accordance with his estimate.

Front Door

{¶70} Appellant sought damages resulting from cat urine on the front door and the threshold strip. Photographs admitted into evidence show damage to both areas, damage on the bottom of the door and a partially lifted and rusted threshold. (See Exh. 15.) Appellant offered to admit into evidence a section of the door that was cut off to show the extent of the damage, but the court declined.

{¶71} While the court found the damage was to the exterior side of the door, a review of the photographs show there is damage on the interior side of the door. The side with the damage depicted faces interior tile flooring and baseboards, whereas the other side faces concrete and grass. Thus, evidence submitted does not support the court's finding.

{¶72} The photographs demonstrate that the threshold strip is damaged and lifted on the left side with some rusting evident. The bottom of the door shows what appears to be scratch marks which led to large chipping on the door and large black spots.

{¶73} As the evidence establishes Appellee's contempt and Appellee failed to provide any rebuttal evidence, Appellant should be awarded $15,872 for the front door and threshold.

Basement Door

{¶74} Appellant requested damages caused by cat urine on the basement door. The door is depicted in exhibit 4. Extensive damage, consistent with cat urine, is evident by viewing the photograph. The bottom of the door appears warped and the white paint is bubbled. Appellee and her counsel actually addressed the door in her testimony.

> Q Okay. Were you aware of - - that there was any problem with the basement interior door?
>
> A No, not until we were moving out.
>
> Q And then what did you see?
>
> A I saw that the cat had peed on the door.
>
> Q So that is true?
>
> A It is true.
>
> Q Okay. Now, what about - - well, I mean, what was the condition of the door?

A It had cat urine on it.

Q Was it damaged?

A Yes.

Q Okay. Tell me what the extent of the damage was.

A The door needed replaced.

Q Okay. So you would agree that that door needed replaced?

A Yes, However, I don't know when it happened.

(Hrg., p. 169.)

{¶75} The trial court failed to address this damage in any way. Appellee conceded that the door was damaged by cat urine. Her only defense was that it is unclear when the damage occurred and that possibly it occurred prior to their separation. However, Appellee's testimony in this regard is speculative. Appellee introduced no evidence to rebut the repair method or cost. Thus, Appellant was entitled to the full $1,280 as in his estimate for Appellee's contempt.

Exterior Vinyl Fence

{¶76} There are two areas of concern with the exterior fences: a vinyl fence and a fence post. As to the vinyl fence, Appellant sought $500 for the cost of pressure washing the fence, which appears to surround the property. The court stated that Appellant "claims he spent $500 to have it powerwashed. The condition of the fence was gross. [Appellee] didn't need to keep it perfect but should not have let it get gross. She

had a pressure washer on site and should have used it. The photos show that it definitely needed powerwashed. $500 would have purchased two electric powerwashers. [Appellant] is awarded $200.00 for powerwashing the fence." (J.E., p. 8.)

{¶77} The trial court found Appellee in contempt for failure to maintain the fence. However, once again, the trial court arrived at an arbitrary figure not supported by evidence but based on the court's own personal belief as to the costs of repair. Here, the facts are uncontested. Appellant paid for and produced an invoice for power washing services in the amount of $500. Appellee presented no evidence other than her admission that she had a pressure washer, did not use it, and apparently did not leave it at the house when she left. This record supports a damage award to Appellant for the full $500 he paid for the services.

{¶78} As to the fence post, Appellant explained that he sought an estimate for repair, not replacement. The court found, without any support in the record, that "[h]ad the fencepost been installed and cemented properly, it never would have moved in the first place. This is an upgrade for something that was never right in the first place." (J.E., p. 8.)

{¶79} As Appellee conceded the post had been damaged through the carelessness of the children opening and closing the gate and she knew it, she is responsible for its repair. For her contempt, Appellant was entitled to receive $880 for its repair.

Storage

{¶80} Because Appellant could not move into the house until it had been cleared out, cleaned, and repaired, he was forced to store his belongings. The court stated that

"[Appellant] wants $400.00 for thirty (30) days rental of a storage unit to hold his belongings while he made the home habitable. Part of that he caused himself by having [Appellee] forcefully removed from the home but even if she has the additional hours, this storage would likely have been caused by the condition of the floors and carpet which needed dealt with. However, he has it over-priced. $200.00 would have done it at Space Place in Steubenville. [Appellant] is awarded $200.00 for storage." (J.E., p. 8.)

{¶81} The trial court again found Appellee in contempt but arrived at an arbitrary damage award that has no support in the record. The court rejected the sole evidence of record and substituted its own personal opinion. Additionally, we are again troubled by the court's reference that Appellee was "forcefully removed" from the home, which is also belied by this record. Appellee once again introduced no competing estimates or other evidence. Appellant should be awarded the full $400 requested.

Window Screens

{¶82} Appellant sought replacement of sixteen window screens at thirty dollars apiece for a total of $510. Appellant testified that the screens were in acceptable condition when he moved out. However, when he returned, the screens had been extensively damaged by the cats. Appellee did not address this issue in any way during her testimony.

{¶83} The court stated: "[a]ssuming those screens are as old as the windows, there is no telling when before or after the divorce the cats did that damage if indeed it was the cats." (J.E., p. 9.)

{¶84} As with the other instances where the trial court substituted its personal opinion for the evidence of record which was unrebutted by Appellee, Appellant should have been awarded damages in the amount of $510.

Bathroom Sink

{¶85} Appellant challenges the failure of the court to award damages for the replacement of a bathroom sink. The court stated that "[o]ne faucet was leaking from where the spout touched the wall and simply needed tightening. The leak was into the tub and did not cause any damage." (J.E., p. 5.)

{¶86} However, the court was mistakenly referring to testimony gleaned from the home inspection report regarding a leaky tub faucet. (Hrg., p. 33.) This is not the damage raised by Appellant at hearing. Instead, Appellant testified that a leak in a bathroom sink caused cracks and missing enamel in the sink. Appellee did not contest this damage or the costs of replacement of the bathroom sink, and Appellant should be awarded the full $830 in his estimate.

Duct Cleaning

{¶87} Appellant requested $1,384.75 for air duct cleaning. Appellant testified that the air vents were clogged with cat and dog hair from Appellee's four cats and two dogs. The ducts required cleaning "to get the smell out with that [hair] all laying in the ductwork." (Hrg., p. 96.) Testimony revealed that the smell within the ductwork and circulating through the house could only be removed through cleaning the ducts. Appellant presented evidence that the odor from the cat urine had been absorbed into animal fur caught within the ducts. Appellee's sole argument in response was that the ducts had never been cleaned before. As to her neglect to maintain the house, the problem was

caused by her pets, and she presented no evidence to rebut Appellant's damage estimate, he should be awarded $1,384.75.

{¶88} In contrast to the above, the trial court did have evidence in the record on which to deny some of the damages Appellant requested. While much of Appellee's testimony involved her speculative contention that it was possible some of the damage occurred during the parties' marriage, there were instances where Appellee testified with certainty. Assuming the trial court found this testimony credible, this testimony can be seen to support denial of certain damage requests.

Basement Floor

{¶89} Appellee concedes that she and their adult children, whom she described as artists, did not protect the basement floor while painting and crafting. She concedes that a significant amount of paint is splattered across the tiled floor. It appears that the paint cannot be cleaned and all parties agree that the flooring needs to be replaced.

{¶90} Appellant testified that the current flooring was "eight inch asbestos tile" requiring encapsulation before a new floor can be installed. However, Appellee produced unrebutted testimony that several boxes of flooring were already purchased, stacked in the basement, and needed only to be installed.

{¶91} The trial court agreed with Appellant that the floor should be replaced, and found Appellee in contempt in this regard. However, Appellant conceded that he had previously purchased flooring for the basement which was still in the basement. Although he purchased the flooring with the intent to complete the work himself, he now seeks to hire a company to do the work. However, Appellant specifically agreed to complete any repairs he is capable of doing. With no evidence that further costs are necessary, the

court's failure to award Appellant costs associated with the basement floor is supported by the record.

Ceiling Fan

{¶92} The home inspector's report contains a note that the ceiling fan blade appeared to be loose. However, Appellant testified that taking the fan down to tighten the blade revealed that the arm was actually broken in half. (Hrg., p. 59.)

{¶93} The court stated that Appellant "claims that a broken fan blade in a ceiling fan cost [sic] $143.97 to replace. [The home inspector's] report however, said that it should be repaired, not replaced. It is likely that the screws holding the blade arms to the motor vibrated loose. It's hard to imagine how a ceiling fan arm could actually be broken. [The home inspector] didn't think so and neither does the Court." (J.E., p. 6.) No damages were awarded.

{¶94} It appears the trial court relied on the inspector's report and may not have found Appellant's testimony in this regard to be credible. Based on the record and the evidence, we cannot find that the court abused its discretion, here. Thus, Appellant's claims regarding the ceiling fan have no merit.

Window Blinds

{¶95} Appellant testified that "[t]he blinds were fine when I moved out. There were no missing panels or damage to those at all." (Hrg., p. 105.) According to Appellant, "[t]hey were peed on, and two of them were broken and missing." (Hrg., p. 104.) Appellee contested this testimony and countered "[t]hose blinds broke years ago. We were actually going to take them down, but we just never got to that point. We never used them because there were slats, like little slats at the top, like, because they hook in these little

hooks. A couple of the slats were broke, but he knew that. We never used those blinds. He wanted to take them out. They were old." (Hrg., pp. 177-178.)

{¶96} The court found "[e]xhibit 26 purportedly shows broken blind slats that were replaced by [Appellant] at a cost of $261.24. There is no telling when those blinds were broken and $261.24 for a single slat seems high." (J.E., p. 8.) However, the court appeared to believe Appellee's testimony that this damage occurred during the marriage. Because there was evidence on which to support the trial court's denial of an award on this issue if Appellee's testimony was found to be credible, there was no abuse of discretion in denying this award.

Bi-Fold Door

{¶97} Appellant presented photographs of an upstairs bi-fold door which show two holes in the door. One hole is due to removal of a doorknob and the other is damage due to another door hitting it. Appellant testified that these holes were not present when he moved out, but Appellee did directly dispute this contention and testified that the damage had occurred before Appellant moved out and had remained unchanged over the period she had control of the residence.

{¶98} The court found Appellee "testified that the bi-fold door damage, front door lock damage, bedroom door dog damage and blind damage were all done during the marriage. [Appellee's] obligation was to maintain, not remodel." (J.E., p. 9.)

{¶99} Because there was rebuttal evidence in the form of Appellee's direct testimony here, we cannot say the trial court abused its discretion in finding this testimony credible. Unlike other instances, Appellee testified with certainty the damage pre-dated her sole occupancy and her testimony in this regard was not merely speculative.

Set-off

{¶100} Appellee claimed that she was forced to spend approximately $390 after Appellant failed to give her a Comcast box that she had left at the house. Appellant testified that he tried to make arrangements for an exchange of items Appellee left at the residence for his property that she allegedly held. While Appellee claimed that Appellant attempted to make her pay for any items she had left at the house, Appellant disputes this. It is clear that both parties held property of the other.

{¶101} The court found that "[d]ue to the illegal eviction in the middle of the night [Appellee] lost a lot of property that was left there. Included in that property was the Comcast cable equipment for which she had to pay $400.000 for failing to return it. Husband now has that equipment. That <u>$400.00</u> caused by the unlawful ejection is a <u>set-off</u>." (J.E., p. 9.)

{¶102} Preliminarily, we note that Appellee did not raise the issue of the Comcast box in any complaint, answer, or pre-trial motion. Appellant objected to Appellee's testimony, but the trial court allowed it and awarded Appellee damages despite the lack of real evidence on the issue other than Appellee's speculative and incomplete testimony. She introduced no physical evidence in support of her claim, and was uncertain of the exact costs of her alleged damage.

{¶103} More problematic, the court's finding was clearly based on its erroneous belief that Appellant's "eviction" of Appellee was unlawful. Appellee was not evicted. Appellee was contractually obligated to exchange residences with Appellant and had utterly failed to prepare.

{¶104} Appellee testified as to the following:

Q And the Comcast, you did have to pay for that?

A I did, almost $400. About $390 to Comcast.

(Hrg., p. 162.)

{¶105} Appellee failed to specify the exact amount owed to Comcast. She presented no evidence in the form of a receipt or other extrinsic evidence that the fee was, in fact, paid, or how much was specifically paid. Her testimony indicates that she paid "about" $390. Because the award is not fully supported in the record and is based on the erroneous conclusion that Appellee was evicted, Appellee is not entitled to this set off.

Attorney's Fees

{¶106} "In divorce proceedings, the court may award reasonable attorney's fees to either party at any stage of the proceedings, including post-decree motions, if the court determines that the other party has the ability to pay the attorney's fees that the court awards. R.C. 3105.21(H). An award of attorney's fees in a domestic relations matter is committed to the sound discretion of the trial court. As such, the court's decision to grant attorney's fees will not be reversed absent an abuse of discretion." *Marx v. Marx*, 8th Dist. Cuyahoga No. 82021, 2003-Ohio-3536, ¶ 30, citing *Dunbar v. Dunbar*, 68 Ohio St.3d 369, 371, 627 N.E.2d 532 (1994); *Rand v. Rand*, 18 Ohio St.3d 356, 359, 481 N.E.2d 609 (1985).

{¶107} The court stated that it "does not see a lot of complexity. It was [Appellant] who took all the pictures and obtained all the estimates. Counsel assembled the photos into an exhibit book, drafted the pleadings and attended the hearing. * * * In any event,

much of what [Appellant] complains about is not contempt and much was caused by his illegal, forcible eviction of [Appellee] from the premises. Still the motion was necessary and four hours was spent in court alone. [Appellant] is awarded $2,500.00 in Attorney Fees." (J.E., p. 9.)

{¶108} Problematic with the court's reasoning is that it failed to correctly address many of Appellant's requests for damage and failed to award damages for many instances of clear contempt. The court also mistakenly held claims where Appellant did not seek repairs against him. Several more issues of disrepair were contained in the inspection report than were raised in Appellant's contempt action. Counsel pointed out that while these necessary repairs were mentioned in the inspection report, they were not included within his motion. Despite this, the court used them to berate Appellant's requests as overreach on his part. Of the claims where Appellant did seek damages, the court found Appellee in contempt for almost all of the claimed damage. And we are again compelled to note that the court also relied on its belief that Appellee was evicted from the house "illegally" and "forcibly," which is erroneous.

{¶109} We remand this mater so that the trial court can correctly award damages pursuant to this Opinion. In light of our determination that the trial court abused its discretion on many of the damage awards, and based its decision on attorney fees, in part, on its erroneous conclusion that Appellee was somehow illegally evicted from Appellant's house, we must also remand this issue for a hearing on whether Appellant may be entitled to an additional award of attorney fees.

Award Summary

{¶110} For ease of understanding, a summary of the damages the record shows should be awarded to Appellant are as follows:

HVAC repair adjusted from no award to $4,250.

Basement door repair adjusted from $0 to $1,180.

Basement wall repair adjusted from $45 to $6,200.

Garage door repair adjusted from no award to $1,290.

Carpet replacement adjusted from $7,870 to $8,291.60.

Toilet replacement adjusted from $25 to $1,300.

Garage pipe repair adjusted from $280.78 to $1,128.78.

Fireplace replacement adjusted from no award to $779.

Wooden cabinets replacement adjusted from $30 to $10,500.

Trash cleanup adjusted from no award to $1,400.

Cleaning services adjusted from $5,000 to $8,000.

Front door replacement adjusted from no award to $9,378.

Vinyl fence cleaning adjusted from $200 to $500.

Fence post repair adjusted from no award to $880.

Storage costs adjusted from $200 to $400.

Window screen replacement adjusted from no award to $510.

Bathroom sink replacement adjusted from no award to $830.

Duct cleaning adjusted from no award to $1,384.75.

Comcast set off removed.

{¶111} The total adjusted damage award amounts to $58,202.13. The record supports an award in damages of this amount on remand to the trial court. While the $2,500 award for attorney fees may be reasonable, the matter is also remanded for a determination as to whether Appellant is entitled to a higher attorney fee award in light of our Opinion.

Conclusion

{¶112} Appellant argues that the trial court failed to enforce a term of the parties' separation agreement which required Appellee to maintain Appellant's residence in good repair and to not commit waste. Appellant also argues that the court improperly substituted its judgment in place of testimony and exhibits and played the role of home construction and appraisal expert. Many of Appellant's arguments have merit and the judgment of the trial court is reversed in part. The matter is remanded for the trial court to enter a damage award in Appellant's favor in the amount of $58,202.13. Further, while

an attorney fee award is justified by the record, the matter is remanded for consideration as to whether the award should be increased based on our decision on damages.

D'Apolito, P.J. concurs.

Hanni, J. concurs.

For the reasons stated in the Opinion rendered herein, Appellant's assignments of error are sustained. Because Appellee failed to file a cross notice of appeal as required by App.R. 3(C)(1), her cross-assignment of error cannot be considered. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Jefferson County, Ohio, is reversed. We hereby remand this matter to the trial court for an award of damages in Appellant's favor in the amount $58,202.13 and for consideration as to whether Appellant is entitled to more than $2,500.00 as attorney fees according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.