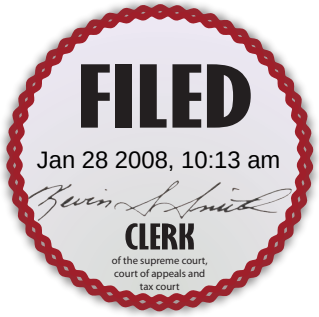
ATTORNEYS FOR APPELLANT:

JEFFREY D. STANTON
Logansport, Indiana



IN THE
COURT OF APPEALS OF INDIANA

JACK MILLER and PAM MILLER,	)	
	)	
Appellants,	)	
	)	
vs.	)	No. 09A02-0701-CV-107
	)	
EUGENE WEDEKIND,	)	
	)	
Appellee.	)	

APPEAL FROM THE CASS CIRCUIT COURT COURT
The Honorable Julian L. Ridlen, Judge
Cause No. 09C01-0505-PL-00008

January 28, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The Cass Circuit Court entered judgment in favor of Eugene Wedekind d/b/a Associated Builders ("Wedekind") in a breach of contract action brought against him by Jack Miller ("Jack") and Pam Miller ("Pam") (collectively "the Millers"). The Millers appeal and claim that the trial court's judgment erroneous. Specifically, the Millers argue that the evidence supports their claim that Wedekind failed to construct a pole building in a workmanlike manner.

We reverse and remand for proceedings consistent with this opinion.

Facts and Procedural History

The Millers wanted to construct a pole building on their property to house semi-tractor trailers owned by Jack. On April 10, 2004, Wedekind submitted a bid to build the pole building for $15,800, and the Millers accepted the bid that day. Throughout the construction of the building, Jack complained about numerous problems he perceived with the construction of the building, and generally did not defer to Wedekind's judgment. Among the bigger disagreements between the parties was a problem with the pouring of the initial quarter of the concrete floor.[1] Specifically, Jack complained that the floor had an uneven surface, was too thin in certain spots, was not finished around the edges, and was not properly reinforced.

Wedekind admitted that there were some problems with the floor and offered to either fix the problems in the concrete or give the Millers a $2,000 credit on the contract price and let the Millers find another contractor of his choosing to pour the floor. Jack

[1] The other major problem alleged in the complaint regarded alleged problems with the siding and roof of the building. However, the Millers's argument upon appeal focuses solely upon the problems with the concrete floor.

rejected this offer, but ultimately had another contractor complete the concrete work on the building. By that time, the Millers had already paid Wedekind $10,534 of the contract price, leaving a balance of $5,266. Wedekind was not paid the balance of the contract price, and he did not complete the contracted work on the building.

On May 23, 2005, the Millers filed a complaint alleging that Wedekind had breached the contract between the parties by, among other things, failing to pour concrete and alleging that the work performed was generally of poor quality. A bench trial was held on June 19 and June 30, 2006. Because Wedekind had requested that the trial court issue specific findings and conclusions, the parties submitted proposed findings and conclusions to the trial court on September 13, 2006. On December 26, 2006, the trial court issued specific findings and conclusions, concluding that the amount of money Wedekind had been paid under the contract was a reasonable payment for the work he had already completed and that, ultimately, the Millers should take nothing by way of their complaint. The Millers now appeal.

Discussion and Decision

The Millers challenge the trial court's conclusion that they should recover nothing for the repair they had performed on the portion of the concrete floor Wedekind poured. In reviewing this claim, we first note that where the trial court enters specific findings of fact and conclusions of law, we apply a two-tiered standard of review: we consider whether the evidence supports the findings, and whether the findings support the judgment. Fowler v. Perry, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). The trial court's findings will be set aside only if they are clearly erroneous, i.e. when the record contains

no facts or inferences supporting them. Id. Further, when reviewing findings of fact, we neither reweigh the evidence nor assess the credibility of witnesses, but instead consider only the evidence most favorable to the judgment. Id.

Where the appellants bore the burden of proof at trial, as the Millers did here, they appeal from a negative judgment and will prevail only if they establish that the trial court's judgment is contrary to law, i.e., that the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to only one conclusion, but the trial court reached a different conclusion. Fowler, 830 N.E.2d at 102. Somewhat lessening the Miller's burden, however, is the fact that Wedekind did not file an appellee's brief. In such a case, we need not undertake the burden of developing an argument for the appellee. Id. Instead, we apply a less-stringent standard of review, and we may reverse the trial court if the appellant is able to establish prima facie error. Id. In this context, prima facie is defined as at first sight, on first appearance, or on the face of it. Id.

The Millers contend that the trial court should have concluded that Wedekind's installation of the first quarter of the concrete floor of the pole building was not properly poured. The Millers contend that the evidence was essentially uncontradicted that the concrete poured by Wedekind was faulty. While the evidence regarding the concrete floor was not entirely supportive of the Miller's claims, Wedekind did admit that there were certain problems with the concrete floor. Indeed, there was testimony that Wedekind offered the Millers a $2,000 reduction of the contract price so that the Millers could have another contractor repair the concrete. Although Jack initially rejected such

an offer, wanting Wedekind to perform the contract, he eventually did hire another contractor to repair the concrete.

Wedekind thus tacitly admitted that his work on the concrete was faulty, at least to the extent of $2,000 worth of repair costs. Yet the trial court's judgment, although acknowledging the offer of $2,000, did not explicitly take into account this amount in determining not to award damages to the Millers. Under these facts and circumstances, we conclude that the Millers have established prima facie error with regard to the $2,000 worth of damages tacitly admitted by Wedekind. We therefore reverse the judgment of the trial court and remand with instructions to award $2,000 to the Millers.[2]

Reversed and remanded.

BRADFORD, J., concurs.

NAJAM, J., dissents with separate opinion

[2] The remainder of the Millers's appellate arguments are essentially requests that we reweigh evidence and consider evidence not favoring the trial court's judgment, which we will not do. See Fowler, 830 N.E.2d at 102.

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	)	
EUGENE WEDEKIND,	)	
	)	
Appellee-Defendant.	)	

NAJAM, Judge, dissenting.

I respectfully dissent. The trial court's findings and conclusions reflect a very thoughtful and sound consideration of the evidence in this case. While I might have awarded damages if I were the trier of fact, I cannot say that the trial court's findings and conclusions are clearly erroneous. In essence, the trial court concluded that Jack Miller's entanglement in the construction project significantly impaired Wedekind's ability to complete the work as promised. And the evidence supports that conclusion and the trial court's denial of damages.

Further, I must disagree with the majority's reliance on Wedekind's $2000 settlement offer as evidence of the Millers' damages. As a general rule, of course, evidence of a settlement offer is inadmissible to prove liability or amount of damages. Ind. Evid. Rule 408. Here, the parties agreed to let that evidence in. But it was for the trial court to weigh whether the settlement offer had any probative value. As I see it, the

$2000 settlement offer was just that, an offer to pay money in exchange for release from the contract, and it was not intended as a measure of actual damages. Indeed, as the trial court explains, there was conflicting evidence regarding the actual amount of the Millers' damages.

We review findings of fact for clear error. LinkAmerica Corp. v. Albert, 857 N.E.2d 961, 965 (Ind. 2006). Because the trial court's findings and conclusions are not clearly erroneous, see Ind. Trial Rule 52(A), I must dissent.