MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Brian M. Pierce
Muncie, Indiana

ATTORNEY FOR APPELLEE

Michael L. Einterz, Jr.
Einterz & Einterz
Zionsville, Indiana

IN THE COURT OF APPEALS OF INDIANA

Zak Hiatt,
Appellant-Defendant,

v.

Jaime Haines and Jeremy Haines,
Appellees-Plaintiffs.

November 12, 2021

Court of Appeals Case No. 21A-SC-527

Appeal from the Hamilton Superior Court

The Honorable Darren J. Murphy, Magistrate

Trial Court Cause No. 29D04-2006-SC-3973

Molter, Judge.

[1] Plaintiffs Jaime and Jeremy Haines contracted with Defendant Zak Hiatt to build a retaining wall on their property. Shortly after Defendant completed his work, the retaining wall began to deteriorate, and Plaintiffs sued Defendant in small claims court. The small claims court, after hearing testimony from both

Plaintiffs and Defendant, ruled in favor of Plaintiffs and ordered Defendant to pay damages in the amount of $5,151.95 (plus interest). Defendant now appeals, arguing that the evidence presented to the small claims court was insufficient to support the judgment. We disagree and affirm the judgment.

Facts and Procedural History

[2] Plaintiffs signed a contract for Defendant to build a retaining wall around their pool. Ex. Vol. at 4–5. The contract was for $3,520.95 excluding tax—$2,320.95 for building materials and $1,200.00 for labor—and Plaintiffs told Defendant they wanted the retaining wall to function as a walkway. *Id.*; Tr. at 42. Defendant completed the retaining wall, but it soon began to fall apart. Plaintiffs notified Defendant about the retaining wall's condition and hired another contractor to assess and fix it. This contractor found that the retaining wall was "falling in," "uneven in many areas," and "settled as much as [three] inches below grade." Ex. Vol. at 12. Further, the contractor determined that the retaining wall had deteriorated because the incorrect building materials were used.

[3] After Plaintiffs sued Defendant in small claims court, the court held a bench trial at which it received testimony and other evidence from the parties. It concluded that Defendant had not installed the retaining wall in a "proper workman-like manner" because the retaining wall had become "so out of alignment that it posed a danger to [Plaintiffs'] family." Appellant's App. Vol. 2 at 9. The small claims court also noted that the evidence presented by

Plaintiffs, including photos of Defendant's work, supported Plaintiffs' claim that some of the building materials used for the project were improper.

[4] The small claims court entered judgment for Plaintiffs. In making its damages determination, the small claims court acknowledged that Plaintiffs were able to repurpose some of the building materials from Defendant, so those materials were excluded from the damages. It awarded Plaintiffs a total of $5,151.95 (plus interest) in damages. *Id.* Specifically, it awarded Plaintiffs damages for the cost of improper building materials that were not repurposed ($2,026.95), Defendant's labor ($1,200.00), and the cost for fixing Defendant's work ($1,800.00). *Id.* Defendant now appeals.

Discussion and Decision

[5] Defendant challenges the judgment of the small claims court on two grounds. First, he argues that the evidence presented to the small claims court did not support its finding that he breached the contract or any duty he owed to Plaintiffs. Second, he contends that even if we affirm as to the alleged breach, the small claims court's damages award was not supported by the evidence and must be reversed.

[6] Small claims judgments are "subject to review as prescribed by relevant Indiana rules and statutes." *Herren v. Dishman*, 1 N.E.3d 697, 702 (Ind. Ct. App. 2013) (citing Ind. Small Claims Rule 11(A)). Under Indiana Trial Rule 52(A), the clearly erroneous standard applies to appellate review of facts determined at a bench trial with due regard to the opportunity of the trial court to assess witness

credibility. This particularly deferential standard of review is important in small claims actions, where "the trial shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law." *Truck City of Gary, Inc. v. Schneider Nat'l Leasing*, 814 N.E.2d 273, 277 (Ind. Ct. App. 2004) (citing Ind. Small Claims Rule 8(A)). In determining whether a judgment is clearly erroneous, we do not reweigh the evidence or determine the credibility of witnesses, and we consider only the evidence and reasonable inferences that support the judgment. *Kalwitz v. Kalwitz*, 934 N.E.2d 741, 748 (Ind. Ct. App. 2010).

[7] Because Defendant had the burden of proof at trial, he appeals from a negative judgment. We will reverse a negative judgment when it is contrary to law. *Mayflower Transit, Inc. v. Davenport*, 714 N.E.2d 794, 798 (Ind. Ct. App. 1999). A judgment is contrary to law when the evidence and reasonable inferences point unerringly to a conclusion different from that reached by the trial court. *Id.*

I. Breach

[8] Defendant first asserts that the evidence presented at trial is insufficient to support a conclusion that he breached the contract or any duty he owed to Plaintiffs. For a contract to be binding, there must be a meeting of the minds on all essential terms, and the objective of contract interpretation is to "give effect to the parties' intent." *Homer v. Burman*, 743 N.E.2d 1144, 1146–47 (Ind.

Ct. App. 2001). In a contract for work, there is an implied duty to perform the work in a skillful, careful, and workmanlike manner. *Id.* at 1147.

[9] Defendant argues that there is no evidence to support the trial court's findings that (1) at least some of the fill material Defendant used was improper topsoil rather than crushed limestone, and (2) Defendant used the wrong style and size of landscaping blocks. We disagree. Plaintiffs provided the small claims court with eleven photographs of the retaining wall. Tr. at 7–8; Ex. Vol. at 7–10. At least one of these photographs, taken during the project, showed that Defendant used "regular topsoil" when building the retaining wall. Tr. at 7–8; Ex. Vol. at 7–10.

[10] Plaintiffs also provided the court with an assessment from a different landscaping contractor. Tr. at 8–9; Ex. Vol. at 12. This contractor stated that Defendant's use of incorrect landscaping blocks (style or size) and base material ("regular based soil instead of crushed limestone") caused the retaining wall's rapid deterioration. Ex. Vol. at 12. Relatedly, Defendant argues that the parties' contract does not specify which materials were to be used. But Plaintiffs' claim is that Defendant failed to complete the project in a workmanlike manner, and selecting the proper materials is part of that duty, even if not expressly stated in the contract. *See Eichberger v. Folliard*, 523 N.E.2d 389, 392 (Ill. App. Ct. 1988) (In terms of performing in a workmanlike manner, "[w]e do not see any significant difference between a builder who builds a faulty foundation which results in [a] house sinking and a builder . . . who

selects an improper foundation for [a] house, constructs it otherwise in a nondefective fashion, and yet the house still sinks.").

[11] Defendant next argues that the small claims court inappropriately imposed a negligence duty when concluding that the project was unsuitable for the purpose for which Defendant was hired. The small claims court did not commit any legal error here. The law implies a duty in every contract for services that the services will be performed "skillfully, carefully, diligently, and in a workmanlike manner." *Homer*, 743 N.E.2d at 1147 (citation omitted).

[12] Relatedly, Defendant argues that the small claims court's conclusion was not supported by the evidence, but again, it was. Defendant's argument is an invitation to reweigh the evidence, which we are not permitted to do. *Kalwitz*, 934 N.E.2d at 748. As noted above, Plaintiffs provided the court with eleven photographs of the retaining wall and a written statement from a different contractor. The photographs showed the retaining wall falling out of alignment. Ex. Vol. at 7–10. The contractor also assessed the condition of the retaining wall. He described it as "falling in," "uneven in many areas," and "settl[ing] as much as [three] inches below grade." Ex. Vol. at 12.

II. Damages

[13] Defendant challenges the small claims court's damages award as being unsupported by the evidence. The amount of damages to be awarded is a question of fact for the trier of fact. *Jasinski v. Brown*, 3 N.E.3d 976, 978–79 (Ind. Ct. App. 2013). A court is not required to calculate damages with

mathematical certainty, but the calculation must be supported by evidence in the record. *Id*. When injured by a breach of contract, a party's recovery is limited to the actual loss suffered. *Coffman v. Olson & Co., P.C.*, 906 N.E.2d 201, 210 (Ind. Ct. App. 2009), *trans. denied*. The party may not be placed in a better position than they would have enjoyed if the breach had not occurred. *Id.* Accordingly, a damages award must reference some fairly defined standard. *Id.* We will reverse the trial court's award only when it is not within the scope of the evidence on the record. *Id.* at 210–11.

[14] The small claims court's determination of damages was within the scope of the evidence presented. Defendant claims that there was no support for the $2,026.95 award for improper building materials. We disagree. Plaintiffs provided the court with the parties' contract, which showed that these materials cost Plaintiffs $2,320.95. Tr. at 5; Ex. Vol. at 4. Because Plaintiffs repurposed walkway stones from the project, and to avoid placing Plaintiffs in a better position, the small claims court subtracted the stones' cost ($294.00) from the total materials' cost ($2,320.95). Appellant's App. Vol. 2 at 10. Also, Plaintiffs presented the court with photographs of the deteriorating retaining wall and a written statement from another contractor, explaining that the wall's deterioration was due to using improper building materials. Ex. Vol. at 7–10, 12. Therefore, sufficient evidence was presented to support the small claims court's damages award.

[15] Defendant also argues that he was entitled to retain $1,200.00 for his labor under a *quantum meruit* theory. However, Defendant did not offer this

argument in the small claims court, so it cannot be raised for the first time on appeal. *Grace v. State*, 731 N.E.2d 442, 444 (Ind. 2000) ("[A]ny grounds not raised in the trial court are not available on appeal.").[1]

[16] Affirmed.

Vaidik, J., and May, J., concur.

[1] Plaintiffs request an award of appellate attorney fees pursuant to Indiana Appellate Rule 66(E). We have discretion to award attorney fees where a party on appeal has engaged in substantive or procedural bad faith. *See Thacker v. Wentzel*, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003). To prevail on a substantive bad faith claim, the party must show that the appellant's contentions and arguments are utterly devoid of all plausibility. *Id.* Procedural bad faith, on the other hand, occurs when a party flagrantly disregards the form and content requirements of the rules of appellate procedure, omits and misstates relevant facts appearing in the record, and files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. *Id.* at 346–47. Defendant has not made frivolous arguments or flagrantly disregarded applicable rules, so we decline Plaintiffs' request.