[Cite as *Readence v. Am. Asphalt Sealcoating, Inc.*, 2009-Ohio-5206.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

GINGER READENCE,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-002**
- vs -	:	
AMERICAN ASPHALT SEALCOATING, INC.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Mentor Municipal Court, Case No. 07 CVF 2254.

Judgment: Reversed and remanded.

John P. O'Donnell, John P. O'Donnell, L.L.C., 38109 Euclid Avenue, Willoughby, OH 44094 (For Plaintiff-Appellee).

Bret Jordan, Bruner & Jordan, 1800 Illuminating Building, 55 Public Square, Cleveland, OH 44113-1922 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} This is an accelerated calendar case, submitted to this court on the record and the briefs of the parties. Appellant, American Asphalt Sealcoating, Inc. ("American Asphalt"), appeals the judgment entered by the Mentor Municipal Court. The trial court awarded damages of $6,480, plus interest, in favor of appellee, Ginger Readence.

{¶2} This case concerns Readence's claims for breach of contract relating to a driveway that was installed at her residence by American Asphalt.

{¶3} In 2006, Readence entered into a contract with American Asphalt. Pursuant to the contract, American Asphalt was to install an asphalt driveway at Readence's residence. The contract price was approximately $2,200.[1]

{¶4} American Asphalt installed the asphalt driveway. Thereafter, pursuant to instructions provided by American Asphalt, Readence conducted a water test. During the test, water went into her garage.

{¶5} Readence filed a complaint against American Asphalt in the Mentor Municipal Court for breach of contract. American Asphalt answered the complaint. The matter proceeded to an evidentiary hearing before the magistrate.

{¶6} At the hearing, Readence testified on her own behalf. She described several instances of water entering her garage after the installation of the driveway. In addition, during her testimony, Readence introduced a DVD as an exhibit. Readence created the DVD. The DVD shows various instances of water accumulating in Readence's garage after rain events and following a time when her husband washed his car in the driveway. In addition, the DVD showed the condition of the driveway where it met the garage and the concrete apron of the city street, as well as the condition of the sides of the driveway, which appeared to be deteriorating. Specifically, portions of the side of the driveway crumbled as Readence rubbed her foot over the area.

{¶7} Readence testified that she contacted American Asphalt several times to remedy the water situation. She stated American Asphalt provided her with two potential solutions to the situation. The first was to put additional asphalt in front of her garage to divert the water away from her garage. Readence described this remedy as a

1. Since Readence paid in cash, she received a discount and only paid $1,900.

"bump" in front of her garage. This remedy did not occur because Readence told American Asphalt that they could not perform the work until after 3:00 p.m. because she worked. In addition, her testimony suggested that she was not in favor of having such a "bump" in front of her garage. The second proposed solution was to install a drain in front of the garage. However, this proposed remedy never occurred, since American Asphalt learned the drain would have had to be tied into the city's storm sewer, which was going to be too expensive.

{¶8} In addition to her own testimony, Readence called Scott Wilson as an expert witness. Wilson has been in the masonry business for more than 20 years. Part of his business is installing concrete driveways. Wilson testified that the driveway installed by American Asphalt was not pitched correctly, in part because it had a crown in the center of the driveway that caused water to flow toward the garage. Wilson provided exact measurements regarding the slope of the driveway in support of his conclusion that the driveway was incorrectly pitched. To remedy the situation, Wilson testified that the entire driveway needed to be removed, the ground regraded, and a new driveway installed. He identified a proposal he prepared for Readence, which was introduced as an exhibit. This proposal quoted a price of $6,480, which included removal of the asphalt driveway, regrading the ground, compacting the base, and installing a new concrete driveway. He testified the price difference between concrete and asphalt was "slight."

{¶9} At the conclusion of her case-in-chief, Readence moved to have her exhibits admitted. American Asphalt objected to the admission of Wilson's proposal, in

part on the basis that the proposal was for a concrete driveway instead of an asphalt driveway. The trial court admitted all of Readence's exhibits.

{¶10} At this point, American Asphalt moved for a directed verdict, which the trial court denied.

{¶11} Todd Tornstrom, the President of American Asphalt, testified for American Asphalt. Tornstrom testified that the driveway was pitched correctly. He testified that the only problem with the driveway was a small section directly in front of the garage. He stated this problem could be fixed with a "patch," which he described as removing a small section of the driveway and filling it in with new asphalt. He testified that it would cost about $100 to fix the problem and would take about one hour. He stated he could not perform this task after 3:00 p.m. as requested by Readence, because the asphalt plants do not make asphalt that late in the day. As for the drain solution, Tornstrom testified that it was not a feasible solution once he learned the city would require it to be tied in to the storm sewer, which requires a "master plumber."

{¶12} Pursuant to the magistrate's request, both parties submitted written closing arguments.

{¶13} The magistrate recommended entering judgment in favor of Readence in the amount of $6,480, plus interest. American Asphalt filed objections to the magistrate's decision pursuant to Civ.R. 53(E). One of its objections was that the price of an asphalt driveway is not the same as the price of a concrete driveway. The trial court adopted the magistrate's decision and entered judgment in favor of Readence in the amount of $6,480, plus interest.

{¶14} American Asphalt raises two assignments of error. We address these assigned errors out of numerical order. American Asphalt's second assignment of error is:

{¶15} "The trial court erred to the prejudice of defendant-appellant in overruling its motion for dismissal of plaintiff-appellee's case."

{¶16} American Asphalt argues that the trial court overruled his "motion for dismissal." We note the magistrate considered American Asphalt's motion at the conclusion of Readence's case-in-chief a motion for directed verdict pursuant to Civ.R. 50.

{¶17} "According to Civ.R. 50(A)(4), a motion for directed verdict should be granted when, after construing the evidence most strongly in favor of the party against whom the motion is directed, 'reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party.'" *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, at ¶14.

{¶18} When ruling on a motion for directed verdict, the court must not consider the credibility of the witnesses or the weight of the evidence. *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, at ¶31. (Citations omitted.) Thus, as the determination of a motion for directed verdict only concerns questions of law, reviewing courts apply a de novo standard of review. *Groob v. KeyBank*, 2006-Ohio-1189, at ¶14. (Citation omitted.)

{¶19} In this matter, Readence raised a cause of action for breach of contract for the installation of her driveway. Through the testimony of Wilson, Readence presented evidence that, if believed by the trier-of-fact, demonstrated the driveway was not pitched

correctly and that this defect caused water to enter her garage. Accordingly, there was evidence presented that American Asphalt breached the contract by not installing the driveway in a workmanlike manner.

{¶20} Since Readence presented adequate evidence to support a judgment in her favor, the trial court did not err in denying American Asphalt's motion for directed verdict.

{¶21} American Asphalt's second assignment of error is without merit.

{¶22} American Asphalt's first assignment of error is:

{¶23} "The trial court erred to the prejudice of defendant-appellant when it awarded an excessive amount of damages to plaintiff-appellee."

{¶24} American Asphalt argues that Readence failed to present evidence regarding the diminution in value of her property. American Asphalt cites *S. Shore Cable Constr., Inc. v. Grafton Cable Communications, Inc.*, 9th Dist. No. 03CA008359, 2004-Ohio-6077, at ¶29, which cites, among other cases, *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238 for the legal rule that diminution in value is the proper measure of damages, unless it is demonstrated that restoration costs are less than the diminution in value of the property.

{¶25} First, we note that American Asphalt did not raise this argument in its objections to the magistrate's decision. This court has held "[a] party may not raise a claimed error on appeal unless that party has properly objected to that factual finding or legal conclusion in his or her objections to the magistrate's decision." *Stauffer v. Stauffer*, 11th Dist. No. 2008-G-2860, 2009-Ohio-998, at ¶21, citing Civ.R. 53(D)(3)(b)(iv) and *Loss v. Claxton*, 11th Dist. No. 2003-P-0128, 2005-Ohio-347, at ¶71.

Since American Asphalt failed to raise this issue in its objections to the magistrate's decision, it is precluded from doing so on appeal.

{¶26} Moreover, we note this court has, especially in cases involving residential properties, "moved away from the 'rigid' rule of *Ohio Collieries*, and [has] evolved toward a rule of reasonableness." *Parker v. Hegler*, 11th Dist No. 2006-L-062, 2006-Ohio-6495, at ¶41, citing *Curtis v. Vazquez*, 11th Dist. No. 2003-A-0027, 2003-Ohio-6224.

{¶27} For these reasons, American Asphalt's argument that Readence is precluded from collecting damages as a result of her failure to introduce evidence of diminution of the value of her property lacks merit.

{¶28} American Asphalt cites the following language from *Allied Erecting & Dismantling Co., Inc. v. Youngstown*, 151 Ohio App.3d 16, 2002-Ohio-5179, at ¶62 (citation omitted) for the appropriate amount of damages in a breach of contract case: "the general measure of damages in a contract action is the amount necessary to place the nonbreaching party in the position he or she would have been in had the breaching party fully performed under the contract."

{¶29} American Asphalt, citing to Tornstrom's testimony, argues the appropriate measure of damages in this case is $100, the cost to remove the defective portion of the driveway and replace it with a "patch." However, we note there was conflicting testimony presented at the magistrate's hearing regarding the necessary actions to repair the driveway. While Tornstrom testified the driveway could be repaired with a simple "patch," Wilson testified that the entire driveway was incorrectly pitched and the entire driveway needed to be replaced to correct the problem.

{¶30} "The weight to be given to the evidence and the credibility of witnesses are primarily matters for the trier of fact to decide." *Lamont v. Lamont*, 11th Dist. No. 2004-G-2580, 2005-Ohio-2256, at ¶14, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. In this matter, the magistrate specifically found Wilson's testimony to be "unbiased and very credible." In contrast, the magistrate found Tornstrom's testimony "to be evasive and self-serving."

{¶31} Accordingly, we conclude the trial court did not err in finding the appropriate measure of damages was to remove the existing driveway, regrade the soil, compact the base, and install a new driveway.

{¶32} American Asphalt argues that Readence did not present any evidence regarding the "cost of repair of the asphalt driveway." We agree. While we do not disturb the trial court's finding that the correct measure of damages in this case is removing the old driveway and replacing it with a new driveway, we hold that the correct measure of damages is for the installation of an asphalt driveway, not a concrete driveway.

{¶33} On cross-examination, Wilson testified:

{¶34} "Q. Is concrete driveway more expensive than asphalt driveway?

{¶35} "A. Right. Slightly, not much, if it's done properly."

{¶36} There was no additional evidence presented as to how much the costs differed for a concrete driveway versus an asphalt driveway. In addition, the proposal admitted by the magistrate contained one lump sum for the removal of the old driveway and the installation of a new concrete driveway. It did not itemize these costs.

{¶37} Readence contracted for the installation of an *asphalt* driveway. The trial court found American Asphalt breached the contract by not installing the driveway in a workmanlike manner. Further, the magistrate found that removal of the old driveway and the installation of a replacement driveway was necessary to place Readence in the position she would have been in if there had been no breach. See *Allied Erecting & Dismantling Co., Inc. v. Youngstown*, 2002-Ohio-5179, at ¶62. (Citation omitted.) Thus, Readence is entitled to damages to remove the asphalt driveway installed by American Asphalt, regrade the ground, compact the base, and install a new *asphalt* driveway. The price of a *concrete* driveway is not relevant. See Evid.R. 401. As this evidence was not relevant, the magistrate abused its discretion by admitting it.

{¶38} Since the trial court committed an evidentiary error, we remand this matter for a new trial solely on the issue of damages. See, e.g., *Perry v. Univ. Hosps. of Cleveland*, 8th Dist. No. 83034, 2004-Ohio-4098, at ¶71-74. This is because, had the trial court not admitted the evidence regarding the concrete driveway, Readence would have had the opportunity to present evidence regarding the cost to replace the existing driveway with a new asphalt driveway.

{¶39} American Asphalt's first assignment of error has merit to the extent indicated.

{¶40} The judgment of the Mentor Municipal Court is reversed. This matter is remanded for further proceedings consistent with this opinion. Specifically, the trial court shall conduct a new hearing solely concerning the damages relating to the removal of the existing driveway and the installation of a new asphalt driveway. At this

hearing, both parties shall have the opportunity to present evidence as to the appropriate level of damages for this remedy.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part, with Concurring/ Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part, with Concurring/ Dissenting Opinion.

{¶41} I concur with the balance of the majority's well-reasoned opinion. I diverge from its conclusion that this case should be remanded for a new trial, on damages only. Evidentiary rulings are peculiarly within the discretion of the trial court, and may only be reversed when that discretion is abused. *State v. Smith*, 11th Dist. No. 2008-T-0023, 2008-Ohio-6998, at ¶34. A trial court abuses its discretion when its judgment comports neither with reason, nor the record. *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. In this case, the trial court had before it Mr. Wilson's testimony that the difference in price between a new concrete driveway, and a new asphalt driveway, was nominal. As defendant failed to introduce any countervailing evidence that the price of a concrete driveway would significantly exceed that of one made from asphalt, I believe the trial court's judgment to base damages upon Mr. Wilson's figures comports both with reason, and the record, and is no abuse.

{¶42} I respectfully concur in part, and dissent in part.