[Cite as *Dalrymple v. Purdum*, 2010-Ohio-2750.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

PAUL E. DALRYMPLE,		
Plaintiff-Appellant,	:	Case No. 09CA3119
and	:	
SHARON DALRYMPLE,	:	DECISION AND JUDGMENT ENTRY
Plaintiff,	:	
vs.	:	
BRETT PURDUM,	:	
Defendant-Appellee.	:	

APPEARANCES:

APPELLANT PRO SE:[1] Paul E. Dalrymple, 407 Barnes Lane, Chillicothe, Ohio 45601

CIVIL APPEAL FROM MUNICIPAL COURT
DATE JOURNALIZED: 6-11-10

ABELE, J.

{¶ 1} This is an appeal from a Chillicothe Municipal Court judgment in favor of Brett Purdum, defendant below and appellee herein, on the action brought by Paul E. Dalrymple, plaintiff below and appellant herein, and Sharon Dalrymple.

{¶ 2} Appellant assigns the following error for review:

> "JUDGE'S DECISION WAS BASED ON AN ASSUMPTION NOT THE EVIDENCE."

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[1] Appellee did not enter an appearance in this appeal.

{¶ 3} Appellant and Bruce Rinehart own contiguous properties. Rinehart hired appellee to do some "logging" on his property and, in March 2007, the two men approached appellant about access across his land to reach timber on a portion of Rinehart's property. Appellant agreed to grant access, but no written contract memorialized the agreement's terms.

{¶ 4} On April 25, 2007, appellant and his wife filed the instant action and alleged that their agreement required that appellee restore the right-of-way to its original condition, that appellee failed to do so and thereby caused $10,000 in damages. Appellee initially failed to answer and a default judgment was taken against him. However, after that judgment was subsequently vacated pursuant to Civ.R. 60(B), the matter came on for a bench trial.

{¶ 5} Initially, we point out that no dispute arose that the right-of-way agreement was an oral, rather than written, contract. Appellant testified that his recollection of terms called for appellee to "fix [his] property," which he defined as putting it back in the condition it was in before logging began. Appellee remembered it differently, however, and testified that all he was obligated to do was smooth over the right-of-way so "mother nature" could take its course and that part of appellant's land would return to a state where it could again be used to grow hay.

{¶ 6} Further, appellee and Rinehart testified that this is precisely what appellee did. Rinehart said that appellee "back-bladed" the property, the end result was that the property was smooth when they finished. Appellee also introduced various

photographs to substantiate that claim. Appellant, however, introduced his own photographs that showed deep ruts caused by logs dragged over the path.

{¶ 7} Finally, the evidence further established that after appellee stopped logging on Rinehart's property, appellant hired a logger to log his own property. Appellee and Rinehart both testified that this logging (by someone named "Baxter") caused the damage to appellant's land.

{¶ 8} After weighing the evidence, the trial court concluded that appellant had not carried his burden of proof. Although the court did not expressly accept appellee's version of the facts and the parties' agreement, it noted that "numerous ruts remain" on the land. Thus, appellee had not "leveled out the road as required by the agreement[.]" However, when the court considered damages, it found that insufficient evidence had been adduced to establish what damages were warranted. Thus, the court entered judgment in appellee's favor and dismissed the case. This appeal followed.

{¶ 9} Appellant's brief largely rehashes the evidence adduced at trial and it is somewhat difficult to discern appellant's precise argument. Indeed, appellant cites no legal authority. However, we generally afford considerable leeway to pro se litigants. See e.g. Besser v. Griffey (1993), 88 Ohio App.3d 379, 382, 623 N.E.2d 1326; State ex rel. Karmasu v. Tate (1992), 83 Ohio App.3d 199, 206, 614 N.E.2d 827. Thus, we reformulate appellant's assignment of error and his argument asserting that the trial court's judgment is against the manifest weight of the evidence.

{¶ 10} Generally, "judgments supported by some competent and credible evidence should not be reversed on appeal as being against the manifest weight of the

evidence." Shemo v. Mayfield Hts. (2000), 88 Ohio St.3d 7, 10, 722 N.E.2d 1018; and C.E. Morris Co. v. Foley Constr. Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, at the syllabus. Further, it is well settled that the trier of fact must resolve questions concerning the weight of the evidence and witness credibility. The underlying rationale for deferring to the trier of fact on these issues is that the trier of fact is best positioned to view witnesses, to observe demeanor, gestures and voice inflections, and to use those observations to weigh witness credibility. Myers v. Garson (1993), 66 Ohio St.3d 610, 615, 614 N.E.2d 742; Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. Thus, a trier of fact (in this case, the trial court) may believe all, part or none of the testimony of any witness who appears before it. Rogers v. Hill (1998), 124 Ohio App.3d 468, 470, 706 N.E.2d 438; Stewart v. B.F. Goodrich Co. (1993), 89 Ohio App.3d 35, 42, 623 N.E.2d 591.

{¶ 11} Appellee and Rinehart both testified that their agreement was simply to smooth the path. Other differences appeared in their testimony, but those discrepancies go to the weight and credibility of the evidence. Most important, the trial court concluded that appellant presented insufficient evidence concerning a proper measure of damages. It is fundamental that damages must be established with reasonable certainty. Bemmes v. Pub. Emp. Retirement Bd. (1995), 102 Ohio App.3d 782, 658 N.E.2d 31; Accurate Die Casting Co. v. Cleveland (1981), 2 Ohio App.3d. 386, 442 N.E.2d 459. Although appellant presented an estimate from a landscape construction firm, the record does not contain specific evidence of damages that relate solely to grading the ruts that remain on the property. Courts are not permitted to simply speculate about an appropriate measure of damages. Here, the estimate

appellant presented contained a single amount for work to be performed, but included measures beyond the scope of the parties' agreement.

{¶ 12} Accordingly, based upon the foregoing reasons we hereby overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Kline, J., concurring.

{¶ 13} I concur in judgment and opinion with the analysis of the damages issue. That is, I agree that the appellant (hereinafter "Dalrymple") did not establish damages with reasonable certainty. However, I write separately because, respectfully, I do not believe that Dalrymple and the appellee (hereinafter "Purdum") entered into a contract. Here, Dalrymple promised that Purdum could use the land. And according to Dalrymple, Purdum promised to "put [the land] back the way it was." Transcript at 7. In contrast, Purdum claims that he promised merely to smooth over the right of way. Regardless, in my view, under either version of the agreement, there could not have been a contract because of a lack of consideration. Neither one of Purdum's alleged promises benefited Dalrymple. As a result, I believe that the agreement between Dalrymple and Purdum involved a conditional gratuitous promise. See, generally, *Carlisle v. T & R Excavating, Inc.* (1997), 123 Ohio App.3d 277, 283-87 (explaining conditional gratuitous promises). With this lone exception, which does not change the result here, I concur in judgment and opinion.

JUDGMENT ENTRY

It is ordered the judgment be affirmed and appellee to recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Chillicothe Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs in Judgment & Opinion
Kline, J.: Concurs in Judgment & Opinion with Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.