[Cite as *Nemeckay v. Upp*, 2010-Ohio-1966.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

PHILIP NEMECKAY	C.A. No. 24874
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MARTY UPP	AKRON MUNICIPAL COURT COUNTY OF SUMMIT, OHIO
Appellant	CASE No. 08CV14221

DECISION AND JOURNAL ENTRY

Dated: May 5, 2010

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant Marty Upp appeals from the decision of the Akron Municipal Court finding him negligent and awarding Plaintiff-Appellee Philip Nemeckay $1,577. For reasons set forth below, we affirm.

BACKGROUND

{¶2} Nemeckay hired Upp to do some excavation work at his home. On June 21, 2008, while Upp was pulling into Nemeckay's driveway with his truck and trailer to begin work for the day, Nemeckay saw Upp hit the power line with the backhoe which was on Upp's trailer. A power surge resulted, damaging items in Nemeckay's home.

{¶3} Nemeckay sued Upp in Akron Municipal Court to recover the amount not covered by insurance, namely his deductible. The case was tried to the court and the court found Upp negligent and awarded Nemeckay $1,577.

{¶4} Upp, has appealed raising one assignment of error for our review.

MANIFEST WEIGHT

{¶5} In Upp's sole assignment of error, Upp contends that the trial court's ruling in favor of Nemeckay was against the manifest weight of the evidence. We disagree.

{¶6} Under the civil manifest weight of the evidence standard "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

> "The Ohio Supreme Court has clarified that[] when reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. This presumption arises because the trial judge had the opportunity to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." (Internal citations and quotations omitted.) *Westphal v. Cracker Barrel Old Country Store, Inc.*, 9th Dist. No. 09CA009602, 2010-Ohio-190, at ¶14, quoting *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶24.

{¶7} "To prevail in a negligence action, the plaintiff must show (1) the existence of a duty, (2) a breach of that duty, and (3) an injury proximately resulting from the breach." *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, at ¶21. The trial court in its judgment entry concluded that:

> "[Upp] failed to exercise reasonable care on June 21, 2008. Consequent thereto, the Court finds that [Upp] breached his duty of care.
>
> "The Court finds that [Upp's] breach of his duty of care caused a break in the neutral line portion of the power line that runs across [Nemeckay's] driveway and attaches to [Nemeckay's] house. As a proximate cause thereof, the neutral break then sent a power surge throughout [Nemeckay's] home, and damaged electronic devices therein.

> "The Court finds that [Nemeckay] has proven by a preponderance of evidence that [Upp] was negligent in breaking the neutral portion of the power line on June 21, 2008."

{¶8} Upp's sole contention on appeal is that Nemeckay did not prove by a preponderance of the evidence that Upp caused the damage. Thus, we will focus our analysis on this point.

{¶9} Upp testified that Nemeckay hired him to do excavation work for the garage Nemeckay was building. He testified that he told Nemeckay that the lines were too low prior to starting work on the job. Upp stated that on June 21, 2008, he pulled in with his truck and the trailer containing the backhoe, checked for clearance, and parked where he always had parked. Upp began unloading the backhoe which takes approximately twenty to thirty minutes. He testified that the backhoe is twenty feet long and the trailer is twenty-three feet long. After he finished unloading it, Nemeckay came outside and told Upp that Upp had hit the power lines and Nemeckay's ex-girlfriend indicated that the TV was not working. Upp saw no damage to the lines and denied hitting them. Upp averred that he loaded the backhoe on to the trailer the same way each time. He stated that the only way that the arm of the backhoe could be higher than it was during his prior successful clearances of the lines is if it was loaded on to the trailer improperly. Upp denied loading the backhoe improperly.

{¶10} Upp testified that Nemeckay told him that two to three days prior to June 21st, the stone delivery contractor ripped the wires down with its truck and the electric company had to come out to fix it. Upp indicated that the electric company also came out on June 21, 2008 while he was there in order to raise the lines which Nemeckay told him were hung too low when the electric company came out to fix the damage caused by the stone delivery contractor.

{¶11} Nemeckay had Upp finish the job and paid Upp the agreed price upon completion. Upp testified that a week to a week and one-half after June 21st, he received a phone call from a detective who said that Nemeckay alleged that Upp hit the wires causing a power surge.

{¶12} Benjamin Peffer who worked with Upp on the project also testified. He testified that on June 14, 2008 and June 15, 2008 he followed behind Upp and the truck and trailer. He noted that Upp did not hit the lines either coming to Nemeckay's residence on the 14th or leaving the residence on the 15th. Peffer estimated that there was approximately two feet of clearance between the lines and the backhoe. Peffer, however, did not go to Nemeckay's residence on June 21, 2008 and so did not observe the incident at issue.

{¶13} Nemeckay testified that Upp started the excavation work on June 14, 2008. He stated on June 21, 2008, around 7 a.m., Upp pulled into the driveway. Nemeckay testified that he "saw the knuckle of the backhoe was up on the trailer." Upp drove in and hit the line. Nemeckay told Upp to stop but he already hit the line. Then Nemeckay's ex-girlfriend came running out of the house yelling that she smelled smoke and that the TV was making noises. Nemeckay confirmed that he did in fact see Upp hit the line. When Nemeckay went in the house he also smelled smoke. The electric company was called and came out to fix the line. Nemeckay denied that the electric company was at his home prior to June 21, 2008 and denied that Upp ever told him the wires were too low.

{¶14} Nemeckay also testified concerning an exhibit which was paperwork from his insurance company and detailed the damages and the $1,577 deductible for which Nemeckay was responsible.

{¶15} Nemeckay's ex-girlfriend, a retired volunteer firefighter, also testified. At the time of the incident, she was dating Nemeckay and was living in his home. She testified that on

the morning of June 21, 2008, she was in the house when Upp arrived with the truck and trailer. She yelled out to Nemeckay that Upp was there as she heard him pulling in. She then heard a "big boom." Nemeckay's ex-girlfriend thought that Upp had hit the house.

{¶16} She ran outside and asked what happened. Nemeckay said, "The phone line came down again." She then saw that part of the electric line was hanging. She surmised that the arm of the backhoe hit the phone and electric lines. Nemeckay's ex-girlfriend ran back inside and observed the lights flickering and then began to smell "burning electric." She then began unplugging electrical appliances. Nemeckay came in, smelled the smoke and then proceeded to go shut off the main box. Nemeckay's ex-girlfriend then contacted the electric company. When the person from the electric company arrived she also had the person come check inside the residence.

{¶17} After a review of the record we conclude that there was competent, credible evidence presented to support the trial court's conclusion that Upp caused the damage to the lines at Nemeckay's house on June 21, 2008. While it is true that there were conflicting stories presented to the trier of fact, the trier of fact had the opportunity to evaluate the credibility of the witnesses. See *Westphal* at ¶14, quoting *Wilson* at ¶24. Here, it is apparent that the trial court found Nemeckay's and his ex-girlfriend's testimony more credible than Upp's, thus warranting a judgment in favor of Nemeckay. "A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court." Id. Therefore, Upp's assignment of error is overruled.

CONCLUSION

{¶18} In light of the foregoing, we affirm the judgment of the Akron Municipal Court.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Akron Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

GREGORY L. HAIL, Attorney at Law, for Appellant.

PHILIP NEMECKAY, pro se, Appellee.