**[Cite as *Sullivan v. Curry*, 2010-Ohio-5041.]**

**IN THE COURT OF APPEALS OF OHIO**
**SECOND APPELLATE DISTRICT**
**MONTGOMERY COUNTY**

ARTHENIA SULLIVAN

Plaintiff-Appellee

v.

PAUL CURRY

Defendant-Appellant

Appellate Case No. 23293

Trial Court Case No. 08-CV1-5913

(Civil Appeal from Dayton Municipal Court)

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**O P I N I O N**

Rendered on the 15th day of October, 2010.

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ARTHENIA SULLIVAN, 1025 Grand Avenue, Dayton, Ohio 45408
Plaintiff-Appellee, *pro se*

PAUL CURRY, 1632 Courtner, Dayton, Ohio 45427
Defendant-Appellant, *pro se*

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FAIN, J.

**{¶ 1}** Defendant-appellant Paul Curry appeals *pro se* from a judgment rendered in favor of plaintiff-appellee Arthenia Sullivan, following a bench trial in a small claims action. Curry contends that the trial court violated his right to free speech by failing to allow him the right to speak at the trial. Curry also contends that the trial court acted improperly by stating that Curry should have pretended that he was not there and should not have "piped up." In a repetition of the first assignment of error, Curry contends that the case should be dismissed as a matter of law for judicial misconduct, because the court denied his right to be heard.

**{¶ 2}** In an amended brief, Curry contends that the trial court violated the First, Fifth, Seventh, Eighth, Ninth, Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments to the Constitution of the United States. Finally, Curry requests that a stay be "levied" against the trial court, because the judge has ordered garnishment and freezing of Curry's bank account.

**{¶ 3}** We conclude that the trial court did not err in any respect. Curry was given an opportunity to testify and to present testimony from another witness. The trial court did not refuse to allow any witnesses to testify, and the court was permitted to maintain decorum and enforce reasonable rules. Finally, although the magistrate could have been more circumspect when she offered the observation that things might actually have worked out better for Curry if it had not been for his belated indication that he was present in the courtroom, which caused the case to be completely reheard, we find no evidence of bias on the magistrate's part.

**{¶ 4}** We also conclude that none of Curry's constitutional arguments are valid. Curry failed to articulate the basis for his constitutional arguments, and we are not

required to speculate about what the alleged errors might involve. Finally, we conclude that issues pertaining to garnishment are not properly before us, as they involve matters that occurred after Curry filed his notice of appeal. Accordingly, the judgment of the trial court is Affirmed.

I

**{¶ 5}** In July 2008, Arthenia Sullivan filed a small claims complaint in Dayton Municipal Court against Paul Curry. Sullivan alleged that Curry had improperly blacktopped her driveway, and she requested $3,000 in damages.

**{¶ 6}** Trial was scheduled for late August 2008, before a magistrate. The magistrate called the case, and only Sullivan and her witnesses stepped forward. Because Curry failed to appear, the magistrate indicated that a default judgment would be rendered against him. The magistrate then heard testimony from Sullivan regarding the alleged issues with the driveway. After hearing Sullivan testify, the magistrate concluded that the alleged problem with the driveway appeared to affect only about one-quarter or one-fifth of the driveway. The magistrate, therefore, stated that a default judgment in the amount of $375 would be granted against Curry.

**{¶ 7}** At this point, Curry raised his hand to indicate to the court that he was present, and was a bit hard of hearing. When the magistrate asked Curry why he had failed to come forward, Curry indicated that he was not aware he was supposed to come up to the front of the courtroom. The magistrate then re-called the case, administered the oath to the parties and witnesses, and reheard the evidence. Curry was allowed to present testimony from himself and other witnesses. He was also

allowed to present documentary evidence and photographs.

**{¶ 8}** Sullivan explained that she had contacted Curry in September 2007 about blacktopping her driveway. Curry was a friend of Sullivan's brother. Sullivan told Curry that she wanted the back part of the driveway removed and redone. Curry was also supposed to put asphalt down on the remaining part of the driveway. Curry guaranteed that his work would be done properly.

**{¶ 9}** Sullivan testified that before Curry performed work, water had always run down the center of the driveway, to the street. The rear part of the driveway was also even with a patio at the rear of the house. After Curry finished the work, the water ran down the side of the house, went across the front porch, and went into a manhole and water meter. Water pooled up toward the foundation of the house, when it was supposed to be graded away from the house. Sullivan testified that this had caused problems with ice and rain. Sullivan also stated that the driveway in the back is four and a half inches higher than the patio, which will cause water to go up to the back door if there is a bad rain or flood.

**{¶ 10}** Curry's work was finished in October 2007, and Sullivan expressed her dissatisfaction with the work. Curry told her that he was going to put a bumper on the driveway. Subsequently, Curry put coal asphalt onto the driveway. When Sullivan again complained, Curry stated that he had done all he could. Sullivan last talked to Curry in December 2007, after a bad rain had occurred the day before. When Sullivan came outside, there was a wide sheet of ice on the driveway. Curry told Sullivan that he would come back in the spring to pull out the asphalt, but he never returned. Pictures of the driveway also show grass growing up through the blacktop.

**{¶ 11}** Sullivan obtained estimates from other contractors about what would fix the problems. One contractor refused to give an estimate because the driveway was such a mess. Two other contractors also stated that the driveway was a mess, and both indicated the driveway would have to be completely torn out and redone. One estimate, from Air City Asphalt, was for $4,140. The other estimate, from Houser, Inc., was for $2,145.

**{¶ 12}** Curry presented his own testimony and that of an individual who works with him doing blacktop work. Both men indicated that Sullivan's back porch was below the house and was not even with the driveway when the work began. Curry testified that he cut out the old asphalt near the patio, and extended the driveway so that Sullivan could park her car behind the house. Curry stated that he put an inch and a half of asphalt down, and that it is normal for grass to grow through asphalt in less than a year, particularly when there is a lot of rain. After Sullivan complained to her brother about the job, Curry came back and put in a little lip to keep water from going onto the patio. Curry indicated that he resealed the driveway at no charge, and Sullivan liked it. Curry also stated that when they used a hose to test the water flow, the water went right out the driveway to a water meter. Finally, Curry gave the magistrate a letter from a relative who stated that he had inspected the driveway and had found nothing wrong with the workmanship.

**{¶ 13}** After hearing the evidence, the magistrate made the following remarks:

**{¶ 14}** "Alright, you should have pretended you weren't here because it's costing you way more than I was going to give her before I knew you came here. There is an estimate from three different companies that said the job you did was a complete mess

and has to be completely torn out. Nothing is salvageable. You get me an estimate from a friend of yours. That's not, the court isn't even going to entertain that. You need to have gotten some experts that are unrelated to you, like she did, to give me estimates on their opinion or their opinion on this job. So I'm going to go with Miss Sullivan's unbias [sic] information. And every single one of them says the driveway has to be removed to get the proper grading for this water to run off in the way it should go. So, I was only going to give her three hundred and seventy five-dollars before you piped up in the back. I'm giving her eighteen hundred and fifty dollars. I do not believe that this job was done in a workmanlike manner and although it looks nice, the water is not graded properly and the entire driveway has to come out and be redone properly. So, judgment to plaintiff so [sic] eighteen fifty.

**{¶ 15}** "* * *

**{¶ 16}** "You should have just stayed quiet." T. 65.

**{¶ 17}** After making these comments, the magistrate recommended that judgment be awarded in favor of Sullivan for $1,850 plus 8% interest and costs. Curry objected to the decision, contending that the evidence was false and slanderous, and that the magistrate's ruling was unjust and biased. After reviewing the transcript of the evidence, the trial court overruled the objections in December 2008. The court noted that the magistrate had found Sullivan's evidence more objective and credible. In addition, the court noted that Sullivan's evidence indicated that the driveway was not properly graded and would have to be removed and redone.

**{¶ 18}** Curry appeals from the judgment against him.

II

**{¶ 19}** Curry's First Assignment of Error is as follows:

**{¶ 20}** "THE COURT VIOLATED THE DEFENDANTS' FREE SPEECH BY DEPRIVING THEM THE RIGHT TO SPEAK AT A HEARING WHERE THEY HAVE BEEN CHARGED WITH FAILING TO COMPLETE WORK IN A PROPER MANNER."[1]

**{¶ 21}** Under this assignment of error, Curry contends that the trial court violated his and his wife's free speech rights by depriving them of the right to speak. Curry fails to provide citations of authority for his argument in either his brief or amended brief. The appellee, Sullivan, did not file a brief.

**{¶ 22}** The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." This guarantee applies to the states, pursuant to the Fourteenth Amendment. *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶10.

**{¶ 23}** Section 11, Article I of the Ohio Constitution also provides that "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." However, the First Amendment guarantee " 'has never conferred an absolute right to engage in express conduct whenever, wherever or in whatever manner a speaker may choose.' " *State v. Wellman,* 173 Ohio App.3d

[1]The First Assignment of Error contains an additional sentence, but it is unintelligible.

494, 2007-Ohio-2953, ¶ 31 (citation omitted). Thus, the conduct of court proceedings may be restricted without violating the First Amendment. For example, prior restraint of media coverage of court activities is permitted if appropriate criteria are satisfied. *State ex rel. Toledo Blade Co. v. Henry Cty. Court of Common Pleas,* 125 Ohio St.3d 149, 2010-Ohio-1533, ¶ 24. Furthermore, the Supreme Court of Ohio has stressed that:

**{¶ 24}** "A judge is at all times during the sessions of the court empowered to maintain decorum and enforce reasonable rules to insure the orderly and judicious disposition of the court's business. An order made directly to one in attendance of a judicial proceeding, that certain conduct would not be permitted while the court was in session, need not be journalized to give such order legal effect, particularly with regard to those who are so directed and act with full knowledge and in defiance of the order.

**{¶ 25}** " 'The judge in enforcing orders directing proper and necessary decorum in the courtroom, while the court is in session, must see to it that the rules enforced are reasonable and necessary for that purpose.' " *State v. Clifford* (1954), 162 Ohio St. 370, 372 (citation omitted).

**{¶ 26}** After reviewing the record, we see no evidence that the magistrate improperly restricted Curry's freedom to speak. Curry was given an opportunity to testify, and to call witnesses. When Curry finished his presentation, the magistrate asked if he had any other witnesses, and Curry said no. Trial Transcript, p. 61. After Sullivan provided rebuttal evidence, the magistrate asked Curry if he had anything he wanted to tell her. Curry then made additional statements. Id. at 62-64.

**{¶ 27}** Before Curry made his additional statements, an unidentified female in the courtroom attempted to ask a question. The magistrate explained that questions were

not permitted. The magistrate indicated that if this person had relevant testimony, she should stand up, be sworn, and give testimony. Because the unidentified woman indicated that she did not have facts to add to the case, the magistrate ended that discussion and went on to allow Curry to make an additional statement. Id. at 62.

**{¶ 28}** The magistrate was entitled to follow courtroom procedures that would permit an orderly trial. Rather than inhibiting Curry's speech, the magistrate made every effort to ensure that Curry and his witnesses had an opportunity to present his side of the story.

**{¶ 29}** Curry's First Assignment of Error is overruled.

III

**{¶ 30}** Curry's Second Assignment of Error is as follows:

**{¶ 31}** "THE COURT CLEARLY ABRIDGED THE LAW OF THE LAND WERE [SIC] IT AFFIRMED THAT THE DEFENDANTS SHOULD HAVE PRETENDED THEY WERE NOT HERE AND THAT YOU SHOULD NOT HAVE PIPED UP AND THAT YOU SHOULD HAVE JUST STAYED QUIET."

**{¶ 32}** Under this assignment of error, Curry complains about the magistrate's comments that he should have pretended he was not there, should not have "piped up," and should have stayed quiet. Curry does not present any citations that support his contention that the magistrate erred in making these remarks.

**{¶ 33}** The procedural posture of the case is somewhat unusual, because the magistrate originally intended to award judgment to Sullivan when no defendant came forward at the beginning of the trial. After the magistrate listened to Sullivan's initial testimony, which was not well-articulated, the magistrate decided to award Sullivan

$375. At that time, however, Curry made his presence known, and the magistrate then re-heard Sullivan's testimony. The magistrate also allowed Curry to present his side of the controversy. The magistrate did state, at the conclusion of the trial, that Curry would have been better off if he had not presented evidence. A fair reading of the magistrate's remarks is that Curry's testimony actually aided Sullivan in her proof, and that the magistrate found Sullivan and her witnesses more credible.

**{¶ 34}** Under the Ohio Code of Judicial Conduct in effect at the time, judges were required to be " 'patient, dignified, and courteous' when speaking with litigants, lawyers, and others in an official capacity * * * ." *In re Disqualification of Corrigan*, 105 Ohio St.3d 1243, 2004-Ohio-7354, ¶ 10, citing Canon 3(B)(4) of the Code of Judicial Conduct. In *Corrigan*, the Supreme Court of Ohio held that a trial judge used unfortunate language in describing dilatory attorneys as "jackasses." However, the court did not find evidence indicating that the judge was either partial or biased. Id. at ¶ 11.

**{¶ 35}** The magistrate in the case before us expressed some frustration at the waste of time caused by Curry's failure to properly identify himself. Nonetheless, the magistrate did allow both sides to fully present testimony, and showed no evidence of bias. Our review of the record indicates that Sullivan was not very articulate when initially questioned, but did a much better and more thorough job during the second phase of the hearing. Curry's testimony did not aid his case, and is, in fact, confusing. Thus, while the magistrate could have chosen her words more circumspectly, we see no evidence of bias or partiality.

**{¶ 36}** Curry's Second Assignment of Error is overruled.

IV

**{¶ 37}** Curry's Third Assignment of Error is as follows:

**{¶ 38}** "THE PLAINTIFF [SIC] CASE SHOULD BE DISMISSED AS A MATTER OF LAW AND THE CAUSE TERMINATED ON THE RECORD FOR JUDICIAL MISCONDUCT THAT DENIED THE DEFENDANTS' RIGHT TO BE HEARD IN A COURT OF LAW AND THE PLAINTIFF FAILING [SIC] TO PROVE THAT THE DRIVEWAY WAS NOT IN WORKING ORDER AT THE COMPLETION AND PAYMENT FOR THE WORK PERFORMED."

**{¶ 39}** Under this assignment of error, Curry fails to make specific points, and does not cite supporting authority. To the extent the assignment of error itself raises the magistrate's alleged bias and interference with Curry's right to be heard, we have already rejected those arguments.

**{¶ 40}** Considering Curry's Brief and Amended Brief in their entirety, we conclude that Curry is also raising a manifest weight challenge. Curry points to various trial testimony, and argues that Sullivan failed to prove her case.

**{¶ 41}** The Supreme Court of Ohio has described the manifest weight standard as follows:

**{¶ 42}** "[T]he civil manifest-weight-of-the-evidence standard was explained in *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus ('Judgments 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'). We have also recognized 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 [or finder-of-fact] had an 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.' " *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 24 (parenthetical material added; citations omitted).

**{¶ 43}** The claim against Curry was based on Curry's alleged failure to properly blacktop Sullivan's driveway. " 'The essential elements of a cause of action for breach of contract are the existence of a contract, performance by the plaintiff, breach by the defendant, and resulting damage to the plaintiff.' " *Winner Brothers, L.L.C. v. Seitz Elec., Inc.*, 182 Ohio App.3d 388, 2009-Ohio-2316, ¶ 31 (citation omitted). The common law also imposes a duty upon builders and contractors to perform their duties in a workmanlike manner. *Hanna v. Groom*, Franklin App. No. 07AP-502, 2008-Ohio-765, ¶ 19. This implied duty requires construction professionals " 'to act reasonably and to exercise the degree of care which a member of the construction trade in good standing in that community would exercise under the same or similar circumstances.' " *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, ¶ 19, quoting from *Seff v. Davis*, Franklin App. No. 03AP-159, 2003-Ohio-7029, ¶ 19. The proper measure of damages for breach of this implied duty is the cost of repair.

*Jarupan*, 2007-Ohio-5081, ¶ 19.

**{¶ 44}** Our review of the transcript and evidence indicates that the judgment of the trial court is supported by competent, credible evidence. As was noted, Curry's testimony was confusing and did not aid his case. The trial court was the trier of fact, and found Sullivan's testimony and witnesses more credible. Giving weight to the trial court's findings as we must, we conclude that the judgment in favor of Sullivan is not against the manifest weight of the evidence.

**{¶ 45}** Curry's Third Assignment of Error is overruled.

V

**{¶ 46}** Curry's Amended Brief raises two more assignments of error. Curry's next assignment of error, which we will designate as the Fourth Assignment of Error, alleges that the trial court violated various parts of the "Bill of Rights," including: (1) the guarantee of freedom of speech; (2) the prohibition against taking of property without just compensation; (3) the right to trial by jury in civil cases; (4) the prohibition against cruel and unusual punishment; (5) the construction of the Constitution; (6) abolition of slavery; (7) guarantee of citizenship rights; (8) guarantee of the right to vote; and (9) the guarantee of voting rights to women.[2]

**{¶ 47}** We have already discussed freedom of speech and will not consider it

[2]The first ten amendments to the United States Constitution are commonly known as the Bill of Rights. See, *e.g.*, *Pacific Mut. Life Ins. Co. v. Haslip* (1991), 499 U.S. 1, 34, 111 S.Ct. 1032, 113 L.Ed.2d 1. Some of the "rights" mentioned by Curry, like the prohibition of involuntary servitude and women's suffrage, occurred after the Bill of Rights was adopted.

further. The provisions in Section 19, Article I, Ohio Constitution, and the Fifth Amendment to the United States Constitution forbid the taking of private property. These provisions do not apply, however, because they relate to the taking of private property for public use. *Englewood v. Turner,* 178 Ohio App.3d 179, 2008-Ohio-4637, ¶ 25. The case before us involves private parties, not a public entity.

**{¶ 48}** Curry's right to a jury trial was also not violated. Section 5, Article I of the Ohio Constitution provides that "[t]he right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." This right is not absolute, however, and the legislature may act within its constitutional boundaries. *Stetter v. R.J. Corman Derailment Servs., L.L.C.,* 125 Ohio St.3d 280, 2010-Ohio-1029, ¶ 63-64.

**{¶ 49}** The legislature has acted in the area of small claims cases, by providing that cases entered on the small claims docket may be transferred to the regular docket of the municipal court, upon the filing of a motion that complies with R.C. 1925.10(B). A party who fails to file a motion waives any right to trial by jury. Id. Curry failed to file a motion to transfer the case, and, therefore, waived any right to trial by jury.

**{¶ 50}** The Eighth Amendment to the Constitution of the United States provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Section 9, Article I of the Ohio Constitution contains identical language. "Historically, the Eighth Amendment has been invoked in extremely rare cases, where it has been necessary to protect individuals from inhumane punishment such as torture or other barbarous acts." *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 370. Furthermore, the Eighth Amendment prohibition against

excessive fines does not generally apply to civil orders. *Ohio Elections Comm. v. Ohio Chamber of Commerce & Citizens for a Strong Ohio*, 158 Ohio App.3d 557, 2004-Ohio-5253, ¶ 33-34. Curry does not suggest how the Eighth Amendment might apply, and we find no potential application to the case before us.

**{¶ 51}** Likewise, there is no possible application of the Thirteenth Amendment's prohibition against involuntary servitude. See, *e.g., Marinelli v. Prete*, Erie App. No. E-09-022, 2010-Ohio-2257, ¶ 49 (rejecting appellant's claim that a restrictive covenant requiring her to use a certain builder to construct her house constituted involuntary servitude). Curry has not specified what his claim of involuntary servitude is. We assume it may be that he is being subjected to involuntary servitude, because he has to return the money that he earned blacktopping the driveway. The trial court concluded that the work was substandard and has to be redone. As we noted, there is competent, credible evidence to support the trial court's judgment.

**{¶ 52}** Finally, we see no possible application of the remaining amendments that Curry mentions (the Ninth, Fourteenth, Fifteenth, and Nineteenth Amendments to the Constitution). Curry does not suggest how they might apply, and we are not required to speculate about what error is being raised. *Enyart v. Columbus Metro. Area Community Action Org*. (1996), 115 Ohio App.3d 348, 357.

**{¶ 53}** Curry's Fourth Assignment of Error is overruled

VI

**{¶ 54}** Curry's Fifth Assignment of Error is couched in terms of a request that we stay trial court orders that allegedly garnished or froze Curry's bank accounts. Under

this assignment of error, Curry contends that the lower court erred in restraining his checking and savings accounts in May 2010. The trial court filed a supplement to the record in August 2010, and included various documents that pertain to garnishment proceedings taking place in the trial court. We cannot review these matters. An appellate court is "without jurisdiction to review any judgment or order that is not listed in the notice of appeal." *Thomas v. Price* (1999), 133 Ohio App.3d 585, 588. Curry's notice of appeal was filed on January 29, 2009, and we cannot consider matters in the record that occurred after that date. Id. at 589.

**{¶ 55}** Curry's Fifth Assignment of Error is overruled.

VII

**{¶ 56}** All of Curry's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and FROELICH, J., concur.

Copies mailed to:

Arthenia Sullivan
Paul Curry
Hon. John S. Pickrel, Presiding Judge
Hon. Dennis J. Greaney's docket