

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

James McAdams,	:	
Plaintiff-Appellee,	:	No. 12AP-1088
v.	:	(C.P.C. No. 10CVH-09-13186)
B&D Concrete Footers, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

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D E C I S I O N

Rendered on June 13, 2013

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*Eugene R. Butler Co., LPA, and Eugene R. Butler, for appellee.*

*Duncan Simonette, Inc., and Brian K. Duncan, for appellants.*

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶ 1} B&D Concrete Footers, Inc., and B&D Concrete, LLC (collectively referred to as "B&D"), defendants-appellants, appeal the judgment of the Franklin County Court of Common Pleas, in which the court denied the motion of B&D for judgment notwithstanding the verdict or, in the alternative, motion for new trial.

{¶ 2} B&D has not filed any transcripts from the jury trial below, so our recitation of the facts is based mainly upon the trial court's December 28, 2012 decision and entry denying B&D's motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial. In August 2009, James McAdams, plaintiff-appellee, and Keith Kirkwood, who does business as Woody's Quality Improvements, contracted to have

Kirkwood build a room addition onto appellee's home. The work required a concrete footer and foundation walls for what was to be the basement of the addition. Kirkwood then contracted with B&D to pour the concrete footer and foundation walls, which it completed on November 30 and December 1, 2009. According to the trial court's December 28, 2012 decision and entry, there was evidence presented at trial that the concrete for the footer contained too much water, should have been covered while curing in the low temperatures, did not meet code specifications, and would have to be replaced along with the foundation walls. Appellee disagreed with B&D's suggested method of replacing/repairing the footer.

{¶ 3} On September 8, 2010, appellee filed a complaint against B&D Concrete Footers, Inc., and Kirkwood, doing business as Woody's Quality Improvements. Apparently appellee and Kirkwood entered into a settlement, appellee dismissed Kirkwood, and Kirkwood assigned its rights under the contract with B&D Concrete Footers, Inc., to appellee. On September 13, 2011, appellee filed an amended complaint naming B&D Concrete Footers, Inc., as the only defendant. On February 13, 2012, appellee filed a second amended complaint, adding B&D Concrete, LLC, as a defendant, asserting that B&D Concrete Footers, Inc., had transferred all of its assets to B&D Concrete, LLC, one month after appellee filed the present action.

{¶ 4} A jury trial commenced and, on August 31, 2012, the jury returned a general verdict in favor of appellee and against both appellants, jointly and severally, in the amount of \$17,500. The trial court entered judgment against B&D on September 12, 2012. On September 26, 2012, B&D filed a motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial. The trial court denied the motion on December 28, 2012. B&D appeals the judgment of the trial court, asserting the following assignments of error:

1. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE MOTION FOR A NEW TRIAL ON NOVEMBER 29, 2012, AS PLAINTIFF FAILED TO MITIGATE HIS DAMAGES.

2. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE MOTION FOR A NEW TRIAL ON NOVEMBER 29, 2012, AS THE JURY AWARD OF \$17,500.00 WAS EXCESSIVE AND DID NOT COMPORT WITH THE EVIDENCE PRESENTED AT TRIAL.

3. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE MOTION FOR A NEW TRIAL ON NOVEMBER 29, 2012, AS THE CONTRACT BETWEEN JAMES MCADAMS AND KEITH KIRKWOOD FAILED TO MEET THE REQUIREMENTS OF THE BEST EVIDENCE RULE, OHIO R. EVID. 1002.

4. THE TRIAL COURT ERRED WHEN IT DENIED BY ERRONEOUSLY PERMITTING THE TESTIMONY OF TWO WITNESSES AT TRIAL NOT PREVIOUSLY DISCLOSED WITHIN THE DEADLINES PREVIOUSLY SET BY THE COURT.

5. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE MOTION FOR A NEW TRIAL AS THE ASSIGNMENT OF KEITH KIRKWOOD'S RIGHTS TO JAMES MCADAMS WAS INVALID.

6. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE MOTION FOR A NEW TRIAL AS EVIDENCE OF SUCCESSOR LIABILITY FROM B&D CONCRETE FOOTERS, INC. TO B&D CONCRETE FOOTERS, LLC, WAS INSUFFICIENT TO IMPOSE LIABILITY ON B&D CONCRETE FOOTERS, LLC, FOR THE CONDUCT OF B&D CONCRETE FOOTERS, LLC.

7. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

{¶ 5} Before addressing B&D's assignments of error, we must address B&D's failure to file a transcript of the trial court proceedings. The duty to provide a transcript for appellate review is on the appellant, who has the burden of showing error by

referencing matters in the record. *Whiteside v. Madison Corr. Inst.*, 10th Dist. No. 04AP-401, 2005-Ohio-1844, ¶ 11, citing *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199 (1980). Without a complete transcript, we have no way to determine what evidence and testimony is or is not included in the record. *Id.* When portions of the transcript necessary for the resolution of assigned errors are omitted from the record, an appellate court has nothing to pass upon, and, consequently, as to those assigned errors, the reviewing court must presume the validity of the trial court proceedings and affirm. *Knapp* at 199. See also *Beer v. Beer*, 10th Dist. No. 04AP-93, 2004-Ohio-4559, ¶ 8 (where portions of the transcript necessary for the resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and must presume the validity of the trial court's proceedings and affirm its decision, because the appellate court is unable to evaluate the merits of the assignments of error); and *Simmerman v. McCallister*, 10th Dist. No. 02AP-62, 2002-Ohio-6735, ¶ 23, citing *Columbus v. Hodge*, 37 Ohio App.3d 68, 68-69 (10th Dist.1987) (finding in the absence of all the relevant evidence, a reviewing court must indulge the presumption of regularity of the proceedings and the validity of the judgment in the trial court. It is the appellant's responsibility to include all the evidence in the appellate record so that the claimed error is demonstrated to the reviewing court).

{¶ 6} In the present case, all of B&D's assignments of error argue that the trial court erred when it denied its motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial. When a party files a motion for new trial on the ground that the judgment is not sustained by the sufficiency or weight of the evidence, the trial court has a duty to review the evidence presented at trial and weigh the sufficiency of the evidence and the credibility of the witnesses. *Rohde v. Farmer*, 23 Ohio St.2d 82, 92 (1970). Similarly, when a party files a motion for judgment notwithstanding the verdict, the trial court must consider the legal sufficiency of the evidence. *McLeod v. Mt. Sinai Med. Ctr.*, 166 Ohio App.3d 647, 2006-Ohio-2206 (8th Dist.). Although a motion for judgment notwithstanding the verdict does not present factual issues but a question of law, "in deciding such a motion, it is necessary to review and consider the evidence." *O'Day v. Webb*, 29 Ohio St.2d 215 (1972), paragraph three of the syllabus.

{¶ 7} In the present case, B&D paraphrases, portrays, summarizes, and relies upon evidence and testimony presented at trial to support all of its arguments. However, without a valid transcript, we are unable to determine what testimony was presented at trial and cannot address the merits of B&D's arguments. For this reason, we must presume regularity in the proceedings and overrule B&D's assignments of error.

{¶ 8} Accordingly, B&D's seven assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

DORRIAN and O'GRADY, JJ., concur.

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