IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

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|---|---|---|
| MARTIN A. SCHNEBLE, | : | |
| Plaintiff-Appellee/Cross-Appellant, | : | CASE NOS. CA2011-06-063<br>CA2011-06-064 |
| | : | |
| - vs - | | O P I N I O N |
| | : | 7/9/2012 |
| CELESTE STARK, | : | |
| Defendant-Appellant/Cross-Appellee. | : | |

CIVIL APPEAL FROM LEBANON MUNICIPAL COURT
Case No. CVI1000141

Donald E. Oda, P.O. Box 119, Springboro, Ohio 45066-0119, for plaintiff-appellee/cross-appellant

Gregory J. Demos, 12 West South Street, Lebanon, Ohio 45036, for defendant-appellant/cross-appellee

**POWELL, P.J.**

**{¶ 1}** This cause is an appeal from a decision of the Lebanon Municipal Court awarding damages pursuant to a breach of contract action.

**{¶ 2}** On May 18, 2010, plaintiff-appellee/cross-appellant, Martin Schneble ("Contractor"), submitted a proposal to defendant-appellant/cross-appellee, Celeste Stark ("Owner"), to remodel a portion of Owner's bed and breakfast for $6,550. Owner accepted Contractor's bid and paid an initial deposit of $3,275 upon signing the

agreement. The parties agreed that the balance was due on July 15, 2010, the planned date of completion.

**{¶ 3}** However, on July 15, 2010, a disagreement ensued, when Owner expressed dissatisfaction with Contractor's work. After the argument, Owner refused to allow Contractor to return to complete the project.

**{¶ 4}** Contractor subsequently sought payment in full under the contract. Additionally, Contractor issued a new invoice for $845 in "extra" services that he performed at Owner's request. The invoice, dated July 26, 2010, itemized the additional services as follows:

| | |
|---|---|
| Increase closet size from 24 inches deep to 28 inches deep | $135 |
| Move shower wall after it was framed | $30 |
| Install insulation | $60 |
| Repair extra cracks in entry ceiling | $60 |
| Millwork, made trim for bathrooms and closet | $120 |
| Plumbing access panel | $45 |
| Chair rail | $100 |
| Remove and haul away hearth | $195 |
| Floor joists added where hearth was removed | $100 |
| Total | $845 |

**{¶ 5}** Owner refused to make any additional payments, claiming that Contractor's work was deficient. Owner also claimed that the July 26 invoice double-charged for work contemplated by the original contract, and contained charges for work that Owner did not authorize.

**{¶ 6}** Contractor subsequently filed suit to collect the balance owed. Owner filed a

counterclaim, alleging that Contractor had violated the Ohio Consumer Sales Practices Act ("CSPA").

**{¶ 7}** During trial, Contractor testified that he completed the project in a sufficient and workmanlike manner. In support of his argument, Contractor presented the testimony of Kimberly Zech, interior designer and general contractor for the job. Zech testified that based on her experience, Contractor performed his duties in a workmanlike fashion and was entitled to be paid in full.

**{¶ 8}** Conversely, Owner testified that Contractor's work was substandard for a variety of reasons. Specifically, Owner claimed that Contractor caused scratches and dents in her hardwood floors, built a defective interior door, caused cracks in her ceiling, and did poor trim work.

**{¶ 9}** Owner's expert, Terrence Finegan, testified that in his opinion, Contractor failed to perform various tasks as agreed under the contract. Finegan stated it would cost $3,400 to repair Owner's floors, based on an estimate that Owner received from Hammonds Hardwood Floors Co., Inc. Finegan also "guessed" it would cost an additional $1,500 to fix the cracks in the ceiling and to complete the project.

**{¶ 10}** At the conclusion of trial, the court found that Finegan failed to testify with any certainty as to the quality of Contractor's work or the costs of repair and completion. The court also excluded, as inadmissible hearsay, a written copy of the Hammonds Hardwood Floors estimate proffered by Owner.

**{¶ 11}** The court ultimately concluded that Contractor substantially performed under the contract, and was therefore entitled to the contractual balance of $3,275. However, the court immediately subtracted $500 from this award to reflect Owner's repair costs. As for the claimed "extra" services performed at Owner's request, the court awarded Contractor $600, rather than the requested $845. The court also found that

Owner failed to prove damages under R.C. 1345.09 for the alleged CSPA violations. Thus, the court entered judgment for Contractor in the amount of $3,375.

**{¶ 12}** Owner appeals, raising five assignments of error for review. Additionally, Contractor raises two cross-assignments of error. We will address each argument in turn.

**{¶ 13}** Assignment of Error No. 1:

**{¶ 14}** THE TRIAL COURT ERRED IN CONCLUDING THAT APPELLEE PERFORMED HIS OBLIGATIONS UNDER THE CONTRACT IN A WORKMANLIKE MANNER.

**{¶ 15}** Owner first claims the trial court's finding that Contractor performed his duties in a workmanlike manner was not supported by the evidence.

**{¶ 16}** "[A]n appellate court should not substitute its judgment for that of the trial court when there exists * * * competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge." *Seasons Coal Co., Inc. v. City of Cleveland*, 10 Ohio St.3d 77, 80 (1984). A careful review of the record reveals that the trial court's findings are corroborated by competent and credible evidence.

**{¶ 17}** It is well-established that "[b]uilders and contractors have a duty to perform work in a workmanlike manner." *Leppert v. Combs*, 12th Dist. No. CA96-10-094, 1997 WL 226208, * 1 (May 5, 1997), citing *Mitchem v. Johnson*, 7 Ohio St.2d 66 (1966). Here, Owner claims that the sole evidence in support of the court's finding was Kimberly Zech's testimony. However, Owner argues Zech was not an expert qualified to testify to the quality of Contractor's services, thus the court's decision was not supported by the evidence.

**{¶ 18}** The rule governing the admission of expert testimony is Evid.R. 702. Pursuant to this rule, a witness may testify as an expert if all of the following apply:

> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information.

**{¶ 19}** "While this rule permits expert testimony, a threshold determination must first be made under Evid.R. 104(A) concerning the qualifications of the witness to testify." *Scott v. Yates*, 71 Ohio St.3d 219, 221 (1994).

**{¶ 20}** The expert witness is not required to be the best witness on the subject, but his or her testimony must assist the trier of fact in the search for the truth. *Alexander v. Mt. Carmel Med. Ctr.*, 56 Ohio St.2d 155, 159 (1978). The expert must demonstrate some knowledge on the particular subject superior to that possessed by an ordinary juror. *Yates* at 221. "A ruling concerning the admission of expert testimony is within the broad discretion of the trial court and will not be disturbed absent an abuse of discretion." *Id.* An abuse of discretion occurs when the trial court's judgment is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

**{¶ 21}** During trial, Zech testified to her experience as an interior designer and general contractor. Zech explained that she had done "some remodeling" in her career, and that as a general contractor, it was her duty to oversee subcontractors during the remodeling process. Zech also testified that she had worked with remodelers roughly a dozen times in her career, and was able to tell "good work" from "bad work * * *." Zech indicated that she had "very high standards" for subcontractors, and continually reviewed their work for flaws. Zech then opined that Contractor performed his duties in a workmanlike manner, based on her observations of "other contractors' 'shoddy'" work.

*See River Oaks Homes, Inc. v. Twin Vinyl, Inc.*, 11th Dist. No. 2007-L-117, 2008-Ohio-4301, ¶ 29 ("'[w]orkmanlike manner' has been defined as the way work is customarily done by other contractors in the community").

**{¶ 22}** We find Zech's credentials were sufficient to qualify her as an expert witness under Evid.R. 702, as she possessed some superior knowledge not possessed by the trier of fact, which was acquired by her experience in the remodeling business. *See State Auto Mut. Ins. Co. v. Chrysler Corp.*, 36 Ohio St.2d 151, 159-160 (1973).

**{¶ 23}** However, even if Zech had not testified as an expert, but rather as a lay witness, Evid.R. 701 permits opinion testimony if it is rationally based on the perception of the witness and helpful to a clear understanding of her testimony or the determination of a fact in issue. *See, e.g., State v. Kehoe*, 133 Ohio App.3d 591, 602 (12th Dist.1999); *Gannett v. Booher*, 12 Ohio App.3d 49, 52 (6th Dist.1983).

**{¶ 24}** Evid.R. 701 grants the trial court wide latitude in allowing or controlling lay witness opinion testimony. *Kehoe* at 603. An appellate court reviews the decisions of the trial court concerning lay witness testimony for an abuse of discretion. *Id.* Furthermore, the party challenging the testimony must demonstrate that, if the trial court did abuse its discretion, such abuse "materially prejudiced the objecting party." *Id.*

**{¶ 25}** Upon review, it appears that Zech's opinion was rationally based on her personal observations of Contractor's work in Owner's home, and that her testimony was helpful in determining a fact in issue, namely, the quality of that work. *See* Evid.R. 704; *Ohio State Racing Comm. v. Monk*, 12th Dist. No. CA87-02-020, 1987 WL 19746, * 1 (Nov. 9, 1987).

**{¶ 26}** Under these circumstances, we find the trial court did not abuse its discretion by relying on Zech's testimony to support its conclusion that Contractor performed his duties in a workmanlike manner. *See State v. McKee*, 91 Ohio St.3d 292,

296-297 (2001). Because the trial court's decision is supported by competent and credible evidence, we overrule Owner's first assignment of error.

**{¶ 27}** Assignment of Error No. 2:

**{¶ 28}** THE TRIAL COURT ERRED IN EXCLUDING APPELLANT'S WRITTEN ESTIMATE TO REPAIR HARDWOOD FLOORS MARKED AS DEFENDANT'S EXHIBIT "H".

**{¶ 29}** In her second assignment of error, Owner argues the trial court erroneously sustained Contractor's objection to the written quote from Hammonds Hardwood Floors Co., Inc., for $3,400 in repair work. According to Owner, the written quote was admissible as additional evidence of the cost to repair her floors, where Finegan had already testified to the cost without any objection from Contractor.

**{¶ 30}** It is well-established that the admission of evidence "lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that created material prejudice." *State v. Morris*, __ Ohio St.3d __, 2012-Ohio-2407, ¶ 14. As previously discussed, an abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore*, 5 Ohio St.3d at 219.

**{¶ 31}** In support of the admissibility of the written estimate, Owner cites *Fleischer v. George*, 9th Dist. No. 09CA0057-M, 2010-Ohio-3941. In *George*, the Ninth District Court of Appeals upheld the trial court's decision to admit a written estimate over contractor's objection, where contractor did not previously object to testimony about the same cost. The court found there was no prejudice to contractor in admitting the written quote, where it was duplicative of the testimony already before the trial court.

**{¶ 32}** Owner relies on *George* for the apparent proposition that because Contractor did not object to Finegan's testimony regarding the Hammonds estimate, the

written copy was automatically admissible. It seems that Owner confuses admissibility with a lack of prejudice. In *George*, the Ninth District found only that the contractor suffered *no prejudice* from the admission of the written quote, but specifically declined to decide whether the quote was, in itself, admissible.

**{¶ 33}** Here, even if we were to assume, without deciding, that the written estimate was admissible, we find that Owner was not prejudiced by the trial court's decision to exclude it, given the evidence already before the court. Specifically, on at least two occasions, Finegan testified to the specific dollar amount in the Hammonds estimate. Thus, we fail to see how Owner was materially prejudiced by the court's decision to exclude the written form of the same expense. *Morris*, 2012-Ohio-2407 at ¶ 14. Accordingly, we cannot say the trial court abused its discretion in excluding the written Hammonds estimate.

**{¶ 34}** Owner's second assignment of error is overruled.

**{¶ 35}** Assignment of Error No. 3:

**{¶ 36}** THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT APPELLANT'S EXPERT DID NOT SUFFICIENTLY EXPRESS HIS OPINION WITH REGARD TO THE COST OF REPAIR AND COMPLETION.

**{¶ 37}** In her third assignment of error, Owner argues the trial court erroneously rejected Finegan's expert opinion regarding the costs to repair her home and to complete the project.

**{¶ 38}** First, contrary to Owner's assertion, the trial court did not "reject" Finegan's opinion as to costs. Instead, the court found that because Finegan failed to testify with the certainty required of an expert witness, his testimony should be given little or no weight. We tend to agree with the trial court.

**{¶ 39}** In prior civil cases, this court has found that "an expert opinion * * * is

admissible only if it is expressed in terms of probability * * *." *Lee v. Barber*, 12th Dist. No. CA2000-02-014, 2001 WL 733449, * 2 (July 2, 2001). We further held that "[e]xpert opinions expressed with a lesser degree of certainty must be excluded as speculative." *Id. See also Stinson v. England*, 69 Ohio St.3d 451 (1994).[1]

**{¶ 40}** During trial, Finegan opined as to the possible, rather than probable, costs of repair and completion. Regarding the cost to repair Owner's floors, Finegan explained that he could only provide a price "range," because he was not actively involved in the project. Finegan stated that Owner had shared with him an estimate for $3,400 to resurface the floors, but Finegan never confirmed this cost based on his own expertise. As for the additional costs to complete the project, Finegan stated, "I assumed I guessed or I estimated that it might be about another $1500 * * * I mean, that's a[n] estimate it's not hard cold exact." When asked to clarify his $1,500 calculation, Finegan emphasized that it was merely a "guestimate * * *."

**{¶ 41}** Under these circumstances, we find that the trial court did not err in its treatment of Finegan's testimony, given its highly speculative nature. *Stinson*, 69 Ohio St.3d at paragraph one of the syllabus; *Barber*, 2001 WL 733449 at fn. 2. *See also In re G.K.*, 9th Dist. Nos. 24276, 24278, 2008-Ohio-5442, ¶ 12 (trier of fact may "assess the expert's credibility and to assign weight to the expert's testimony and opinions").

**{¶ 42}** Owner's third assignment of error is overruled.

**{¶ 43}** Assignment of Error No. 4:

**{¶ 44}** THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT APPELLANT

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1. In a case preceding *Stinson*, the Ohio Supreme Court appears to have lessened the standard for criminal cases to allow experts to testify in terms of "possibility," rather than "probability." *State v. D'Ambrosio*, 67 Ohio St.3d 185, 191 (1993) ("we believe that the better practice, especially in criminal cases, is to let experts testify in terms of possibility"). However, because the Supreme Court has not explicitly extended *D'Ambrosio* to civil cases, we adhere to our holding in *Barber* that "at least in the context of civil cases * * * the admissibility of expert testimony * * * is contingent upon the expression of the opinion in terms probability or reasonable scientific certainty." *Barber*, 2001 WL 733449 at fn. 2.

FAILED TO MEET HER BURDEN OF PROOF OF SHOWING DAMAGES UNDER THE OHIO CONSUMER SALES PRACTICES ACT.

**{¶ 45}** In her fourth assignment of error, Owner challenges the trial court's finding that she failed to prove damages under the CSPA.

**{¶ 46}** At the outset, we note that the CSPA is remedial legislation and is to be construed liberally. *Motzer Dodge Jeep Eagle, Inc. v. Ohio Atty. Gen.*, 95 Ohio App.3d 183, 189-90 (12th Dist.1994). Pursuant to the CSPA, no supplier shall commit an unfair, deceptive, or unconscionable act or practice in connection with a consumer transaction. *See* R.C. 1345.02; 1345.03.

**{¶ 47}** R.C. 1345.02 prohibits suppliers from committing an unfair or deceptive act or practice in connection with a consumer transaction. R.C. 1345.02(B) contains a list of practices that are unfair or deceptive.

**{¶ 48}** R.C. 1345.03 prohibits suppliers from committing an unconscionable act or practice in connection with a consumer transaction. R.C. 1345.03(B) lists factors to consider in determining whether an act or practice is unconscionable.

**{¶ 49}** Pursuant to R.C. 1345.05(B)(2), the Attorney General is authorized to adopt substantive rules defining additional acts or practices that violate R.C. 1345.02 and R.C. 1345.03. These rules are found in the Ohio Administrative Code. *See* Ohio Adm.Code 109:4-3-01 et seq. *See also Culbreath v. Golding Ents., L.L.C.*, 114 Ohio St.3d 357, 2007-Ohio-4278, ¶ 29. *See also Baker v. Tri-County Harley Davidson, Inc.*, 12th Dist. No. CA98-12-250, 1999 WL 1037262, * 1 (Nov. 15, 1999) (Ohio courts may also define specific acts or practices as unfair, deceptive, or unconscionable).

**{¶ 50}** R.C. 1305.09 governs penalties for CSPA violations, and states, in pertinent part:

> (A) Where the violation was an act prohibited by section

> 1345.02, 1345.03, or 1345.031 of the Revised Code, the consumer may, in an individual action, rescind the transaction or recover the consumer's actual economic damages plus an amount not exceeding five thousand dollars in noneconomic damages.
>
> (B) Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02, 1345.03, or 1345.031 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover, but not in a class action, three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater, plus an amount not exceeding five thousand dollars in noneconomic damages or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.

**{¶ 51}** We observe that "statutory damages in the amount of $200 are an alternative to actual damages, and, thus, $200 is the minimum award for a CSPA violation under R.C. 1345.09(B)." *Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St.3d 177, 2006-Ohio-5481, ¶ 17. "In other words, if actual damages are not proven or if three times the consumer's damages is less than $200, then $200 will be awarded." *Id.*; *Nelson v. Pieratt*, 12th Dist. No. CA2011-02-011, 2012-Ohio-2568, ¶ 19.

**{¶ 52}** Here, the trial court found that Owner failed to prove any damages under the CSPA. The court explained that "Contractor's inability to satisfy the Owner [did] not reach the standard of an 'unfair, deceptive, or unconscionable sales act or practice.'"

**{¶ 53}** Owner currently claims she provided evidence that Contractor committed nine separate CSPA violations, and is therefore entitled to statutory damages of $200 for each violation, pursuant to R.C. 1345.09(B). Specifically, Owner argues that Contractor committed deceptive acts and practices: (1) by failing to provide information and disclosures required by Ohio Adm.Code 109:4-3-05(A), and (2) by demanding payment

for unauthorized and/or unfinished work.

**{¶ 54}** Owner first claims that Contractor failed to give her written notice of her right to receive an estimate for the "extra" services before beginning the work, in violation of Ohio Adm.Code 109:4-3-05(A)(1). Owner argues that the July 26, 2010 invoice that Contractor submitted after the work was finished did not satisfy the CSPA requirements.

**{¶ 55}** Ohio Adm.Code 109:4-3-05(A)(1) reads:

> (A) It shall be a deceptive act or practice in connection with a consumer transaction involving the performance of either repairs or any service where the anticipated cost exceeds twenty-five dollars and there has been face to face contact between the consumer or the consumer's representative and the supplier or the supplier's representative, prior to the commencement of the repair or service for a supplier to:
>
> (1) Fail, at the time of the initial face to face contact and prior to the commencement of any repair or service, to provide the consumer with a form which indicates the date, the identity of the supplier, the consumer's name and telephone number, the reasonably anticipated completion date and, if requested by the consumer, the anticipated cost of the repair or service. The form shall also clearly and conspicuously contain the following disclosures in substantially the following language:
>
> Estimate
>
> You have the right to an estimate if the expected cost of repairs or services will be more than twenty-five dollars. Initial your choice:
>
> _____ written estimate
>
> _____ oral estimate
>
> _____ no estimate * * *.

**{¶ 56}** We agree with Owner that the evidence demonstrates that Contractor violated this administrative code section. As a result, Owner was entitled to $200 in statutory damages. *See Gilham v. Stasiulewicz*, 7th Dist. No. 09 JE 25, 2010-Ohio-6407.

**{¶ 57}** In a somewhat related argument, Owner next claims she should receive an

additional $200 in damages, where Contractor deceptively charged her for the work in the July 26 invoice. Owner claims that she did not authorize the specific charges for each service, therefore Contractor acted deceptively by charging the rates as listed in the invoice. *See* Ohio Adm.Code 109:4-3-05(D)(6). We find this claim to be disingenuous, where Owner testified that she discussed the services with Contractor, and never expected Contractor to perform the work for free. Accordingly, we reject this argument.

**{¶ 58}** Lastly, Owner argues that Contractor acted deceptively by billing her for trim work, even though he failed to complete the trim in her bathroom, bedroom, and closet, in violation of Ohio Adm.Code 109:4-3-05(D)(9), which states that it is a deceptive act or practice to "[r]epresent that repairs have been made or services have been performed when such is not the fact * * *."

**{¶ 59}** During trial, Contractor admitted that he billed Owner for trim work he did not complete. Thus, we find the trial court erred by failing to award Owner the statutory minimum damages of $200 for this CSPA violation.

**{¶ 60}** In sum, we find that Owner is entitled to statutory damages totaling $400 for two separate CSPA violations committed by Contractor. *See Pieratt*, 2012-Ohio-2568 at ¶ 19.

**{¶ 61}** Accordingly, Owner's fourth assignment of error is sustained in part and overruled in part.

**{¶ 62}** Assignment of Error No. 5:

**{¶ 63}** THE TRIAL COURT'S DECISION IN FAVOR OF APPELLEE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

**{¶ 64}** In her final assignment of error, Owner argues the trial court's judgment in favor of Contractor is against the manifest weight of the evidence.

**{¶ 65}** The Supreme Court of Ohio has recently confirmed that when reviewing the

manifest weight of the evidence, an appellate court conducts the same analysis in both criminal and civil cases. *Eastley v. Volkman*, __ Ohio St.3d __, 2012-Ohio-2179, ¶ 12.

**{¶ 66}** In *Volkman*, the court reiterated that:

> [The] weight of the evidence concerns "the inclination of the *greater amount of credible evidence,* offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*."

(Emphasis sic.) *Id.*, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

**{¶ 67}** In a manifest weight analysis, the reviewing court weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Thompkins* at 387. Moreover, "every reasonable presumption must be made in favor of the judgment and the finding of facts." *Volkman*, 2012-Ohio-2179 at ¶ 21. "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment." *Id.*

**{¶ 68}** Owner first argues the weight of the evidence showed that Contractor failed to perform his duties in a workmanlike manner. Owner argues that Kimberly Zech's testimony as to the quality of Contractor's work carried little weight, while Owner's witness, Finegan, provided credible evidence that Contractor's work was substandard.

**{¶ 69}** While we do not deny that the parties presented convergent views of Contractor's work, the trial court apparently found Contractor's evidence to be more credible. After a careful review of the record, we are not persuaded by Owner's

contention that the trial court's judgment is against the manifest weight of the evidence. The trial court was in the best position to observe the witnesses and make credibility determinations. *See G.K.*, 2008-Ohio-5442 at ¶ 12; *Myers v. Garson*, 66 Ohio St.3d 610, 615 (1993). We cannot say that the court clearly lost its way and created a manifest miscarriage of justice in making such credibility determinations.

**{¶ 70}** Owner also argues the trial court erred when it concluded that her expert, Finegan, provided insufficient evidence of the cost to repair the damage to her home. However, we have already rejected this argument, and found that Finegan's testimony carried little to no weight, where he spoke primarily in terms of possibilities, rather than probabilities. *See Barber*, 2001 WL 733449 at * 2; *Stinson*, 69 Ohio St.3d at paragraph one of the syllabus.

**{¶ 71}** Lastly, Owner argues that the trial court's decision was against the manifest weight of the evidence because the court failed to separately address each of her CSPA claims in the judgment entry. First, we note that Owner did not request separate findings of fact and conclusions of law pursuant to Civ.R. 52. Moreover, we fail to see how the omission in the judgment entry is prejudicial to Owner. We have already found that the decision is not against the manifest weight of the evidence. Thus, the record, as a whole, provides an adequate basis to reject Owner's failed CSPA claims. *See, e.g., Finn v. Krumroy Constr. Co.*, 68 Ohio App.3d 480, 487 (9th Dist.1990); *Weaver v. Armando's, Inc.*, 7th Dist. No. 02 CA 153, 2003-Ohio-4737.

**{¶ 72}** Owner's fifth and final assignment of error is overruled.

**{¶ 73}** Having upheld the trial court's decision as to Contractor's substantial performance and entitlement to damages, we now address Contractor's challenges to the damages amount.

**{¶ 74}** Cross-Assignment of Error No. 1:

**{¶ 75}** THE TRIAL COURT ERRED IN ARBITRARILY REDUCING THE AMOUNT OF DAMAGES SHOWN BY APPELLEE[.]

**{¶ 76}** In his first cross-assignment of error, Contractor argues the trial court arbitrarily reduced his claim for additional damages from $845 to $600. We agree.

**{¶ 77}** Generally, a reviewing court will not reverse a trial court's determination of damages absent an abuse of discretion. *Henry v. Richardson*, 193 Ohio App.3d 375, 2011-Ohio-2098, ¶ 8 (12th Dist.); *Blakemore*, 5 Ohio St.3d at 219. The party seeking damages on a breach of contract claim bears the burden of proving that claim by a preponderance of the evidence. *See Jones v. Honchell*, 14 Ohio App.3d 120, 123 (12th Dist.1984).

**{¶ 78}** Here, Contractor presented the July 26, 2010 invoice as evidence of his additional damages, totaling $845. In calculating Contractor's damages, the trial court simply stated, "[a]rguably, a few of the items requested are contemplated by the original contract and therefore the Court reduces the Contractor's request from $845 to $600."

**{¶ 79}** Without guessing, we cannot determine how the trial court arrived at this amount. While the most obvious offset would include the $45 charge for the plumbing access panel, Owner admitted during trial that this was one of the few services not double-charged. Thus, we find the trial court's damages award constitutes an abuse of discretion and must be vacated. *See Mills v. Perry*, 4th Dist. No. 01CA22, 2002-Ohio-6154, ¶ 30 (court cannot arbitrarily select damages).

**{¶ 80}** Although the specific award is set aside, we do not overturn the trial court's decision to offset Contractor's award by the amount he double-billed Owner. However, as discussed, the record does not support the current $245 offset. The parties presented conflicting testimony as to whether various services listed in the July 26 invoice were contemplated by the original contract, or whether they were legitimate add-ons, and upon

remand, we would expect the trial court to examine the legitimacy of each charge. Accordingly, we find that a remand is necessary for the trial court to specify the basis for its damages award to Contractor. Moreover, if the court finds its basis was inaccurate, then it must modify Contractor's damages award to satisfy its new, specific reasoning.[2] *Schneider v. Gunnerman*, 12th Dist. Nos. CA97-07-017, CA97-12-034, 1998 WL 526541, * 12 (Aug. 24, 1998).

**{¶ 81}** Contractor's first cross-assignment of error is sustained.

**{¶ 82}** Cross-Assignment of Error No. 2:

**{¶ 83}** THE TRIAL COURT ERRED IN FAILING TO ASSESS ATTORNEY FEES AGAINST APPELLANT.

**{¶ 84}** In his second cross-assignment of error, Contractor argues the trial court erred in denying his request for attorney fees against Owner for filing a meritless CSPA claim. We disagree.

**{¶ 85}** R.C. 1345.09 provides for the award of attorney fees to the prevailing party in an action brought under the CSPA. R.C. 1345.09(F) states:

> The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply:
>
> (1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith;
>
> (2) The supplier has knowingly committed an act or practice that violates this chapter.

**{¶ 86}** R.C. 1345.09(F) allows the trial court, in its discretion, to award reasonable attorney fees for either of the aforementioned reasons. *Einhorn v. Ford Motor Co.*, 48

2. We note that neither party challenges the $500 setoff in Contractor's damages for Owner's repair expenses, thus we decline to address this issue on appeal.

Ohio St.3d 27, 29 (1990). Absent an abuse of that discretion, the trial court's determination of attorney fees will not be disturbed on appeal. *See Moore v. Vandemark Co., Inc.*, 12th Dist. No. CA2003-07-063, 2004-Ohio-4313, ¶ 26; *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 146 (1991).

**{¶ 87}** First, we note that R.C. 1345.09(F) is permissive, rather than mandatory. Thus, the trial court was not, at any time, required to award attorney fees to Contractor. Moreover, even if the court agreed that Owner filed a groundless claim, Contractor failed to provide any evidence whatsoever in support of reasonable attorney fees, such as his attorney's billable hours or the requested hourly rate. *See Mike Castrucci Ford Sales, Inc. v. Hoover*, 12th Dist. No. CA2009-03-016, 2009-Ohio-4823, ¶ 14; Prof.Cond.R. 1.5. We therefore find that the trial court did not abuse its discretion in rejecting Contractor's request for attorney fees.

**{¶ 88}** Contractor's second cross-assignment of error is overruled.

**{¶ 89}** In sum, we remand this case for the trial court to specify which items from the July 26, 2010 invoice were contemplated by the original contract and must therefore be excluded from the damages awarded to Contractor, and whether Owner is entitled to recover attorney fees or other costs in addition to the $400 award for Contractor's CSPA violations.

**{¶ 90}** Judgment affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

RINGLAND and PIPER, JJ., concur.