

Case Summary and Issues

James Witt, d/b/a Witt Construction (“Witt”), appeals the small claims court’s judgment in favor of Nancy Thornton for breach of contract. Witt raises three issues for our review, which we restate as whether the small claims court abused its discretion in (1) excluding evidence offered by Witt and (2) failing to instruct Witt he could cross-examine Thornton; and (3) whether the small claims court’s judgment is clearly erroneous. Concluding the small claims court did not abuse its discretion in either excluding evidence offered by Witt or failing to instruct Witt he could cross-examine Thornton, and the small claims court’s judgment is not clearly erroneous, we affirm.

Facts and Procedural History

On June 16, 2008, Thornton, a homeowner, entered into a written contract with Witt for Witt to (1) “[r]epair front oval porch roof using vinyl sophist fascia”; (2) install a rubber roof; (3) paint the columns the same two-tone grey as currently painted; and (4) reuse existing posts but repair one of the post tops. Appellant’s Appendix at 5. The contract specified the price as \$2,430 due upon completion. The contract listed Witt’s telephone number and business address. Thereafter, Witt utilized one or more subcontractors, including Paul McCarty, to perform the contract, and Thornton paid Witt the full contract price.¹ Approximately seven months after the contract was entered into, Thornton submitted a written complaint regarding Witt to the Better Business Bureau. At trial, Thornton presented

¹ In addition, on June 19, 2008, Thornton entered into a written contract with Witt to replace a double door, remove unsupported brick above the door, and “frame in void & cover in metal” at a contract price of \$1215 due upon completion. Appellant’s App. at 6. However, Thornton testified at trial she was only seeking damages under the June 16, 2008 contract, and the trial court’s judgment appears to be predicated only upon

testimony that the work performed on the porch was defective and she contacted Witt regarding the defects, while Witt testified Thornton approved the work when she paid him for it and never contacted him regarding any defects.

On February 13, 2009, Thornton sued Witt in the small claims division of Clark Superior Court, alleging breach of contract and seeking damages of \$2,430. A small claims trial was held on July 21, 2009, at which both Thornton and Witt appeared pro se. The small claims court initially questioned Thornton about the basis for her claim and then allowed Thornton to call and ask questions of two witnesses. Witt was permitted to and did cross-examine both witnesses. The small claims court then questioned Witt regarding the basis of his defense. The small claims court did not advise either Thornton or Witt that they could cross-examine the other, and neither party requested to cross-examine the other.

Among other documentary evidence, the small claims court admitted the written contract and an estimate from Will'z Construction regarding the cost of "replac[ing]" the work Thornton claimed was defectively done. Transcript at 37. However, the small claims court denied Witt's request to admit certain documentary evidence Witt tendered during and at the close of the trial, in the following colloquy:

[Witt]: Uh, I'm sorry your honor but I didn't give you any of my exhibits. Would you care to review those?

...

Court: What are they?

[Witt]: Uh...

Court: I'm not going to take stuff that you've written up about what happened.

breach of the June 16, 2008 contract.

[Witt]: Uh, no your honor not at all. I've got some pictures of the work we did with explanation of the pictures. I have the response from the Better Business Bureau. Um, I think it would demonstrate that I've been trying . . .
Court: I will take your pictures. I'm not interested in the Better Business Bureau response because . . .
[Witt]: Okay.
Court: It's my job to decide what is appropriate.

Id. at 72-73. The small claims court then admitted the photographs as Defendant's Exhibits B and C and took the case under advisement.

On July 31, 2009, the small claims court entered its judgment in favor of Thornton for \$2,430 plus costs of eighty-nine dollars and post-judgment interest. Witt now appeals.²

Discussion and Decision

I. Exclusion of Evidence

The admission or exclusion of evidence rests within the sound discretion of the small claims court, and its decision will be reversed only upon a showing of a manifest abuse of discretion resulting in the denial of a fair trial. Elrod v. Brooks, 910 N.E.2d 231, 233 (Ind. Ct. App. 2009). Witt argues the small claims court abused its discretion by excluding from evidence what Witt described at trial as a "response from the Better Business Bureau," tr. at 73, and which he describes on appeal as "Thornton's handwritten complaint to the Better Business Bureau ("BBB") and a portion of his reply to the BBB complaint." Reply Brief of Appellant at 4. Initially, we note our review of this issue is complicated by the fact that none of these documents are included in the Appendix filed by Witt. See Ind. Appellate Rule 50(A)(2)(g) (appellant's appendix shall include such excerpts from the record as "are

² After Thornton filed her appellee's brief, Witt filed a motion to strike two sentences of Thornton's brief. Because Witt has failed to explain why these sentences are "redundant, immaterial, impertinent,

important to a consideration of the issues raised on appeal”). Although the absence of these documents from the appendix does not amount to a waiver of Witt’s argument, see App.R. 49(B), our review is made even more difficult by the fact that neither at trial nor in his amended appellant’s brief has Witt described the contents of these documents with particularity.

Witt contends his reply to the Better Business Bureau complaint “would have shown his desire to cure any claimed defect,” “that he did not ignore Thornton, and that Thornton was contacting McCarty.” Reply Br. of Appellant at 10. However, because Witt has provided us with no means of ascertaining the actual content of these documents, we are unable to conclude they are relevant and admissible, much less that their exclusion affected the trial’s result or otherwise prejudiced Witt’s substantial rights. See App.R. 66(A) (error is not grounds for reversal on appeal “where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties”). In support of his argument the small claims court abused its discretion, Witt directs us to Elrod, where this court reversed and remanded for a new trial after the small claims court denied the plaintiff the opportunity to present any evidence refuting the defendant’s counterclaim. 910 N.E.2d at 234. Here, by contrast, Witt was permitted to testify in his defense, and the small claims court merely excluded some of his proffered exhibits (the documents regarding the Better Business Bureau complaint) while admitting others (his photographs). Additionally, Witt contends the small claims court abused its discretion by “refus[ing] to even look at the documents” to determine their probative value. Amended Brief of Appellant at 14.

scandalous” or otherwise “inappropriate,” see Ind. Appellate Rule 42, we hereby deny Witt’s motion.

Although the small claims court's explanation for excluding the documents is indeed cursory, the record is not clear that the small claims court refused to examine them altogether. In sum, we conclude the small claims court did not abuse its discretion.

II. Cross-Examination

Witt argues the small claims court should have advised Witt that he could cross-examine Thornton and its failure to do so was “a manifest abuse of . . . discretion that resulted in the denial of a fair trial to Witt.” Id. at 15. Matters that relate to the orderly conduct of a trial, not regulated by precise statute or rule, rest within the sound discretion of the trial court and are reviewed only for an abuse of that discretion. Rhines v. Norlarco Credit Union, 847 N.E.2d 233, 240 (Ind. Ct. App. 2006), trans. denied. In addition, Indiana Small Claims Rule 8(A) states: “The [small claims] trial shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law, and shall not be bound by the statutory provisions or rules of practice, procedure, pleadings or evidence”; see also Bowman v. Kitchel, 644 N.E.2d 878, 879 (Ind. 1995) (noting this rule embodies the policy that “formality is not the order of the day” in small claims trials).

Here, the small claims court questioned Thornton about the basis of her claim and questioned Witt about the basis of his defense. Neither Thornton nor Witt requested to cross-examine the other, and the small claims court did not advise either party that he or she could cross-examine the other. Thus, the small claims court treated the parties equally and may

well have determined that, given its own questioning of both parties, cross-examination was not necessary for either party's credibility to be adequately tested.

Witt relies on Armes v. Pierce Governor Co., 121 Ind. App. 566, 101 N.E.2d 199, 203-04 (1951), which states the right to cross-examine adverse witnesses is fundamental to due process and cannot be denied by any tribunal unless waived. In Armes, an administrative board considered evidence in the form of a written report without affording prior notice to the claimant or his attorney; as a result, the claimant was unable to request to cross-examine the report's author. Id. at 203. Here, by contrast, Witt was present at the small claims trial and could have, but did not, request to cross-examine Thornton. For these reasons, we conclude the small claims court did not abuse its discretion and it afforded Witt a fair trial.

III. Judgment

A. Standard of Review

Judgments in small claims actions are “subject to review as prescribed by relevant Indiana rules and statutes.” S.C. R. 11(A). On appeal following a bench trial, this court shall not set aside the judgment unless it is clearly erroneous. Ind. Trial Rule 52(A). In determining whether a judgment is clearly erroneous, we do not reweigh the evidence or rejudge the credibility of witnesses but consider only the evidence supporting the judgment and the reasonable inferences to be drawn therefrom. Counciller v. Ecenbarger, Inc., 834 N.E.2d 1018, 1021 (Ind. Ct. App. 2005). “This deferential standard of review is particularly important in small claims actions, where trials are informal, with the sole objective of

dispensing speedy justice between the parties according to the rules of substantive law.” Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1067-68 (Ind. 2006) (quotations omitted).

The small claims court entered a general judgment without specific findings of fact or conclusions thereon. We will affirm a general judgment on any legal theory consistent with the evidence. Perkins v. Brown, 901 N.E.2d 63, 65 (Ind. Ct. App. 2009). A judgment in favor of a party having the burden of proof, i.e., Thornton, will be affirmed if the evidence was such that a reasonable trier of fact could conclude the elements of the party’s claim were established by a preponderance of the evidence. Counciller, 834 N.E.2d at 1021.

B. Breach of Contract

To recover for a breach of contract, a plaintiff must prove (1) a contract existed, (2) the defendant breached the contract, and (3) the plaintiff suffered damage as a result of the defendant’s breach. Collins v. McKinney, 871 N.E.2d 363, 370 (Ind. Ct. App. 2007). In a home improvement contract, as in any contract for work, there is an implied duty to perform the work skillfully, carefully, and in a workmanlike manner. Benge v. Miller, 855 N.E.2d 716, 719 (Ind. Ct. App. 2006). “Negligent failure to do so is a breach of contract as well as a tort.” Id. Thornton’s claim is essentially that Witt breached his duty to properly perform the home repairs described in their written contract. Witt does not dispute the parties had a contract. Rather, Witt argues he did not breach the contract because, he contends, Thornton approved the work, did not mitigate damages by contacting Witt regarding any defects, and the defects she sued Witt over regarded a separate agreement she entered with the subcontractor McCarty.

The record, however, does not clearly establish Witt's contentions on these points. The Thornton-Witt contract called for Witt to repair the front porch roof using vinyl facia, repair one of the existing post tops, and repaint the columns. Thornton testified the vinyl facia, once installed, "started buckling" and "coming loose" and "had been collecting water." Tr. at 9-10. After Thornton pointed out the defect, the worker "took it all back down" and "attempted to rebuild it back like it was," but the rebuilding was "not even." Id. at 10. Further, Thornton testified the repair to the front porch was defective because the worker "covered over the rotten wood that he was supposed to take down in the first place" and never completed the replacement of the rotten wood and the repainting. Id. at 10-11. In addition, Thornton testified the painting of the columns was defective because the worker used only one coat of paint and "you can still see through it." Id. at 14. Based on this testimony, the small claims court reasonably could have concluded Witt breached his duty to properly perform the repairs he contracted to complete.

Further, the evidence does not clearly establish that Thornton failed to contact Witt about the defects or that the defective work she testified to regarded a separate agreement entered into with McCarty. Following Witt's testimony that he never received any calls from Thornton, the trial court asked Thornton if she ever called "him," referring to Witt. Id. at 68. Thornton answered affirmatively: "probably three or four times myself, my husbands [sic] called him probably about the same number of times." Id. Thornton also testified she did not enter into a separate agreement with the man who performed the work on Witt's behalf:

Court: Did you pay that gentleman any additional money?
[Thornton]: No.

Court: He didn't say I'm working as a separate contractor?
[Thornton]: No, no.
Court: I'll charge you to do the work right or anything like that?
[Thornton]: No, he said he wanted to make it right

Id. at 68-69. Ultimately, the small claims court was faced with a credibility determination, and its decision to credit Thornton's testimony over Witt's is not one we may disturb on appeal. See Counciller, 834 N.E.2d at 1021. Further, the small claims court's award of damages was supported by evidence, in the form of the estimate introduced by Thornton, that she received no value for the defectively done repairs because the cost of correcting the defects exceeded the original contract price. For these reasons, we conclude the small claims court's judgment is not clearly erroneous.

Conclusion

The small claims court did not abuse its discretion in excluding evidence offered by Witt or in not advising Witt that he could cross-examine Thornton. Further, the small claims court's judgment is not clearly erroneous.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.