

IN THE SUPREME COURT OF OHIO

10-1255

PAUL E. DALRYMPLE

Plaintiff-Appellant

And

SHARON DALRYMPLE

Plaintiff

Vs.

BRETT PURDUM

Defendant-Appellee

On Appeal From The Court Of Appeals

Fourth Appellate District

Ross County

Case No. 09CA3119

Municipal Court Of Chillicothe

Case No. CVE 07 02231

MEMORANDUM IN SUPPORT OF JURISDICTION

Paul E. Dalrymple

407 Barnes Lane

Chillicothe, Ohio 45601

Brett Purdum

8911 U.S. Rt. 50

Bainbridge, Ohio 45612

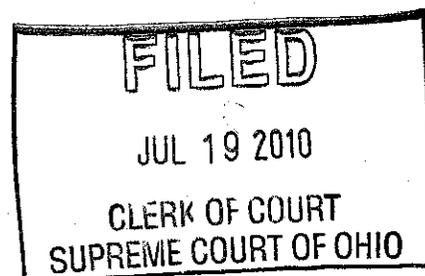
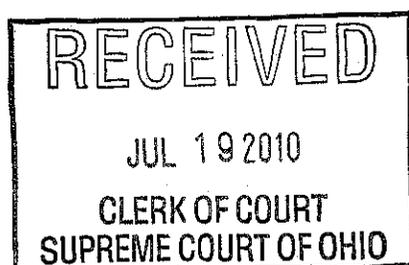


TABLE OF CONTENTS

I believe sections 3.20, 3.23 and 2911.21 (4) (C) of the Ohio Revised Code show where My rights were violated.

Since the Defendant violated 2911.21 (4) (C) of the O. R. C. the Defendant probably violated the Laws that protect Senior Citizens from dishonest contractors.

My lack of education in matters of Law and the Court may not allow me to quote the Laws but I still have a right to the protection set forth by the Law.

HISTORY

Default Judgment for Plaintiff November 21, 2007

Vacated January 23, 2008

Municipal Court of Chillicothe, Ohio May 18, 2009

Judgment Entry June 5, 2009

4th District Court of Appeals June 18, 2009

Decision and Judgment Entry June 11, 2010

ARGUMENT

I believe the Magistrates order to vacate the Judgment dated November 21, 2007 was incorrect.

In the Defendants Answer to Complaint he admits to allegations contained in paragraphs 1,2,3,4,6, and 7 as stated in the Complaint. Paragraph 7 reads : Once the need for the logging road was terminated the agreement obligated Defendant to restore the real property of Plaintiffs to the condition it occupied prior to the construction of the logging road.

In Answer to Complaint paragraph 4 the Defendant claims to have a difficult time defining the word “restored”, but in paragraph 1 of Answer to Complaint the Defendant admits to understanding Paragraph 7 of the Complaint which explains what “restore” means. Paragraph 2 reads the Defendant intended to cut timber owned by the Plaintiff. Mr. Purdum never asked me to sign a Contract so he knew he could not cut my timber. Mr. Purdum knew he would not be cutting my timber before he crossed my land and the Answer to Complaint Paragraph 7 shows he knew what “restore” meant. I believe that puts Mr. Purdum in violation of Ohio Revised Code 2911.21 (4) (C) Authorization Secured by Deception.

There was no just cause to vacate the November 21, 2007 Judgment.

ARGUMENT

MUNICIPAL COURT OF CHILLICOTHE, OHIO May 18,2009 Case No. CVE0702231

I believe it is a sin to swear on the Bible so I don't do it. According to the Ohio Revised Code 3.20 this is acceptable. Since the testimony and evidence from Myself and Mr.

Purdum completely support my Complaint and the Judge ruled against me, I believe the

Judge failed to be Fair and Impartial as required by Ohio Revised Code 3.23. I believe

The Judge ruled against me because, as a Christian I do not swear on the Bible.

The Appeals Court said the Judge could believe all, part or none of the testimony of any

of the witnesses. Such a rule leaves the door wide open for violations to the rules to be

Fair and Impartial because not even a Judge can see into a persons heart to know who is

honest. The Judge also ignored the evidence that shows a road I did not need or want

where I had a hayfield.

Appeals Court Judge J. Kline thinks Purdum promised to put the land back the way it

was (gratuitous promise). Such is not the case, The only way I would let Purdum cross

My land was if he restored my land when he was finished. Mr. Purdum agreed to my

terms but did not restore my land. That means Mr. Purdum is guilty of criminal trespass,

Ohio Revised Code 2911.21 (4) (C) Authorization Secured by Deception.

ARGUMENT

If the Court allows this decision to stand it will have far reaching effects in the future.

Any person that destroys another persons land, need only to say they had a deal and

The Court will accept their word for it.

In the interest of Justice I think the Court needs to remember I did not ask for any compensation to cross my land, I only required that my land be restored. My field was a hayfield, I now have a road that I have no use for. The road was for Purdums use only.

Throughout this entire Court process to this point I have been denied Justice.

I am the landowner I set the terms, The logger is a trespasser unless he fulfills my terms, which he did not, Mr. Purdum even admitted in Court he did not have a deal to cut my timber as he had said before. Mr. Purdum also admitted that I did not ask for a road on my property, Mr. Purdum also testified that Mr. Rinehart had said that I was "maybe" wanting some trees cut, this is proof Mr. Purdum and Mr. Rinehart knew there was no other deal. The Judge also let the Defense spend time on the issue of my logging my property the next winter. What I did on my land the next winter was none of their Business (irrelevant). I signed a contract with another logger to cut my timber, not with Mr. Purdum. The Judge does not have the authority to decide who can cut my timber, I own the land, not the Judge.

For my kindness to my neighbor and his logger the Court has said I must pay for the damage to my land (\$8800) plus my lawyer plus Court costs. This is an absolute injustice.

Paul E. Dalrymple

CERTIFICATE OF SERVICE

Hand delivered to the office of: Edward R Bunstine II

Attorney at Law

32 South Paint St.

Chillicothe, Ohio 45601

(740) 775- 5600

Paul C. Dalrymple

7-15-10

FILED

IN THE CHILLICOTHE MUNICIPAL COURT, CHILLICOTHE OHIO

Paul E. Dalrymple, et al.

2007 NOV 21 PM 3:03

Plaintiffs,

TINA E. LARGE, CLERK
MUNICIPAL COURT
CHILLICOTHE, OHIO

CASE NO. 07-CVE-2231

-vs-

* Judge _____

Brett Purdum, et al.

* ENTRY

Defendants.

*

* * * * *

This cause came on for hearing upon application of the plaintiff for Judgment by Default, defendants, having failed to plead or appear in the action.

It is ordered, adjudged and decreed that the plaintiff shall be awarded judgment in this case as follows: judgment against the defendants for damages of \$10,000.00; to pay interest on any judgment at the statutory rate per annum from March 31, 2007; reasonable attorney fees, costs and expenses associated with the prosecution of this action, and for any further relief that the Court deems appropriate.

Bt 11/21/07

Judge

APPROVED:

STATE OF OHIO:

SS

COUNTY OF ROSS:

Clifford N. Bugg

Clifford N. Bugg 0059462
Phillips & Bugg
Attorneys for Plaintiff

I, Tina E. Large, Clerk of the Chillicothe Municipal Court, within and for said County, hereby certify that the above and foregoing is truly taken and copied from the original

Entry

now on file in my office.

Witness my hand and seal of said Court this

14th day of July A.D. 20 10

Tina E. Large, Clerk

by *Shirley S. Steele*
Deputy Clerk

PHILLIPS & BUGG
Attorneys at Law
37 North Paint Street
Chillicothe, Ohio 45601-3116
(740) 775-3300
FAX (740) 775-4781

8

FILED
IN THE MUNICIPAL COURT, CHILLICOTHE, OHIO

2008 JAN 31 PM 4: 05

Paul E. Dalrymple, et. al.,
Plaintiff,

TINA E. LARSON, CLERK
MUNICIPAL COURT
CHILLICOTHE, OHIO

CASE NO: 07 CVE 2231

vs.

Brett Purdum, et.al.,
Defendant.

MAGISTRATE'S DECISION
ON MOTION TO VACATE
JUDGMENT

* * * * *

This matter came on for hearing on January 23, 2008, on the Defendant's Motion to Vacate the Default Judgment Entry of November 21, 2007. Plaintiff was present and represented by Clifford Bugg, Attorney. Defendant was present and represented by Edward Bunstine, Attorney.

After reviewing the case file and considering sworn testimony from the Defendant and argument from counsel for both parties, it is found that the judgment granted November 21, 2007, should be vacated. There does appear to be a genuine issue of material fact concerning the Defendant's liability for money damages. Defendant did contact his attorney who filed an Answer. Defendant was under the mistaken belief that there would be a hearing set to determine the exact amount of damage that Plaintiff claimed was done to his property.

The Defendant's failure to timely answer is found to be based on mistake, inadvertence, and excusable neglect, under Ohio Civil Rule 60(B).

It is further found that Defendant has filed his motion to vacate in a timely manner. For the above reasons, the default judgment should be vacated. The Defendant shall file a timely Answer within 14 days from this decision.

Date: 1-31-08


MAGISTRATE

JUDGMENT ENTRY

The above Magistrate's Decision is hereby adopted.

The Default Judgment granted on November 21, 2007, is hereby vacated. Defendant is granted 14 days in which to file his Answer.

Date: 2/1/08


JUDGE

PROOF OF SERVICE

This Magistrate's Decision and Judgment Entry was served upon all parties or their respective Attorneys on 2-1-08.

DATE: 2-1-08

Shirley J. Wilson
Deputy Clerk

NOTICE

Objections to the Magistrate's Decision must be filed in writing within 14 days. A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FINDING OF FACT OR CONCLUSION OF LAW IN THIS DECISION UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIVIL RULE 53.

STATE OF OHIO:

SS

COUNTY OF ROSS:

I, Tina E. Large, Clerk of the Chillicothe Municipal Court, within and for said County, hereby certify that the above and foregoing is truly taken and copied from the original Magistrate's Decision

now on file in my office.

Witness my hand and seal of said Court this 14th day of July A.D. 20 10

Tina E. Large, Clerk
by Wetchem S. Steele
Deputy Clerk

IN THE MUNICIPAL COURT OF CHILLCOTHE, OHIO

FILED

Paul E. Dalrymple, and
Sharon Dalrymple,
Plaintiffs,

CASE NO. 07 CVE 2231

2009 JUN -5 AM 8: 52

TINA J. HARRIS, CLERK
MUNICIPAL COURT
CHILLCOTHE, OHIO

vs.

JUDGMENT ENTRY

Brett Purdum,
Defendant.

This matter was tried to the court on May 18, 2009. The plaintiffs, Paul and Sharon Dalrymple, were present in the courtroom. They were represented by Attorney Clifford Bugg. The defendant was also present. He was represented by Attorney Edward Bunstine. Paul Dalrymple, Jeremy Forcum, and Jonathan Evans testified on behalf of the plaintiffs. Plaintiffs' exhibits 1 through 6 were offered and admitted without objection. The plaintiffs rested their case. The defendant called two witnesses, himself and Bruce Rinehart, and offered exhibits A through Q. The exhibits were admitted without objection, and the defense rested.

The evidence established that in February or March 2007, Paul Dalrymple, Brett Purdum, and Bruce Rinehart met at Dalrymple's house. They discussed the possibility of using a portion of Dalrymple's land as a means of access to Rinehart's property. Purdum was cutting timber on Rinehart's property, and the easiest means of access was across Dalrymple's property. Dalrymple agreed to let Purdum use his property, but the exact nature of the agreement is in dispute. Dalrymple testified that the agreement allowed Purdum to make a road along the edge of Dalrymple's property as long as he restored the property to as good condition as he found it. The property was being used as a hay field, and the road would skirt the edge of the field. Rinehart and Purdum, on the other

hand, testified that the agreement allowed them not only to use Dalrymple's property to access timber on Rinehart's property but also allowed Dalrymple to use Rinehart's property to remove timber from Dalrymple's property. In addition, they said the agreement only required Purdum to level out the ruts created by the road, not to restore the property to its original condition.

Shortly after the meeting, Dalrymple went to Georgia for a visit. When he returned, he found the logging operation underway. He was concerned because Purdum was using more of his property than he had expected. Dalrymple, however, did not question either Purdum or Rinehart about this expanded use of his property. When the logging operation ended, defendant did some work to level out the road, but he did not reseed it or return it to its original condition. Plaintiff was not satisfied with the way the property was left and contacted defendant in June 2007. According to Dalrymple, Purdum said he would restore the property on the following Saturday, but he has not done so.

Several months later, Dalrymple hired another logger to remove timber from Dalrymple's property. That person made use of the same road that Purdum had created. The road has not been restored since the second logger used it.

Several issues are involved in this case. The first issue is, "what was the agreement between the parties?" Was it that defendant would restore the property to as good condition as he found it or was the agreement that Rinehart could use Dalrymple's property and Dalrymple could use Rinehart's property and the road surface would be leveled out but not restored? Another issue is the appropriate measure of damages. Is plaintiff entitled to recover the amount of the cost to repair his property or is he limited by the diminution in fair market value of the property?

The burden of proof is on Dalrymple to prove the facts necessary for his case by a preponderance of the evidence; that is, evidence that outweighs or overbalances the evidence

opposed to it. It is evidence that is more probable, more persuasive, or a greater probative value. He must prove both the nature of the agreement and the amount of damages by a preponderance.

Here, we have competing claims as to the nature of the agreement. The court cannot say plaintiffs have proved, by a preponderance of the evidence, that the agreement was as Dalrymple says it was. He says it called for Purdum to restore the property to as good condition as it was before the work began. Purdum and Rinehart, however, say that the agreement was to use each other's property for logging purposes. The fact that Dalrymple did log his own property a short time after Rinehart logged his supports their claim as to the nature of the agreement. It seems likely that Dalrymple was contemplating logging his own property when the agreement was made. If so, it would be natural to want to be able to use Rinehart's property in exchange for permitting Rinehart to use his property. That scenario is at least as likely as plaintiffs' version of the agreement. Consequently, plaintiffs have not established that defendant is required to restore the land to its original condition.

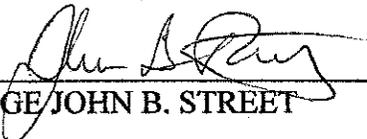
The second question to be addressed is "has defendant leveled out the road as required by the agreement?" Purdum did do some leveling work, but numerous ruts remain. What damages have plaintiffs suffered?

In Ohio, the general rule for damages to real property is set forth in Ohio Jury Instruction 315.35 as follows:

If the damage to the property is temporary and such that the property can be restored to its original condition, then the owner may recover the reasonable cost of these necessary repairs. If, however, these repair costs exceed the difference in the fair market value of the property immediately before and after the damage, then this difference in value is all that the owner may recover.

The court did not hear evidence as to the change in fair market value of the property which

is the limit that the plaintiff may recover. Therefore, the court is unable to determine the amount of damages. For the foregoing reasons, judgment is rendered in favor of the defendant. This case is dismissed with costs to plaintiff.

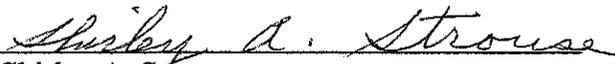


JUDGE JOHN B. STREET

CERTIFICATE OF SERVICE

Copy of the foregoing Judgment Entry mailed to the following by ordinary first class mail postage prepaid on the 5th day of June, 2009:

Clifford Bugg, Newman & Bugg, Attorneys at Law, 41 N. Paint St., Chillicothe, OH 45601
Edward R. Bunstine II, Attorney at Law, 32 S. Paint St., Chillicothe, OH 45601



Shirley A. Strouse
Court Reporter, CMC # 2

STATE OF OHIO:

SS

COUNTY OF ROSS:

I, Tina E. Large, Clerk of the Chillicothe Municipal Court, within and for said County, hereby certify that the above and foregoing is truly taken and copied from the original

Judgment Entry
now on file in my office.

Witness my hand and seal of said Court this
14th day of July A.D. 20 10

Tina E. Large, Clerk
by Gretchen S. Steele
Deputy Clerk

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

2010 JUN 11 PM 12:49

FILED
ROSS COUNTY COMMON PLEAS
CLERK OF COURTS
TY D. HINTON

PAUL E. DALRYMPLE,	:	
Plaintiff-Appellant,	:	Case No. 09CA3119
and	:	
SHARON DALRYMPLE,	:	DECISION AND JUDGMENT ENTRY
Plaintiff,	:	
vs.	:	
BRETT PURDUM,	:	
Defendant-Appellee.	:	

APPEARANCES:

APPELLANT PRO SE:¹ Paul E. Dalrymple, 407 Barnes Lane,
Chillicothe, Ohio 45601

CIVIL APPEAL FROM MUNICIPAL COURT
DATE JOURNALIZED:

ABELE, J.

This is an appeal from a Chillicothe Municipal Court judgment in favor of Brett Purdum, defendant below and appellee herein, on the action brought by Paul E. Dalrymple, plaintiff below and appellant herein, and Sharon Dalrymple.

Appellant assigns the following error for review:

"JUDGE'S DECISION WAS BASED ON AN ASSUMPTION NOT THE EVIDENCE."

¹Appellee did not enter an appearance in this appeal.

Appellant and Bruce Rinehart own contiguous properties. Rinehart hired appellee to do some "logging" on his property and, in March 2007, the two men approached appellant about access across his land to reach timber on a portion of Rinehart's property. Appellant agreed to grant access, but no written contract memorialized the agreement's terms.

On April 25, 2007, appellant and his wife filed the instant action and alleged that their agreement required that appellee restore the right-of-way to its original condition, that appellee failed to do so and thereby caused \$10,000 in damages. Appellee initially failed to answer and a default judgment was taken against him. However, after that judgment was subsequently vacated pursuant to Civ.R. 60(B), the matter came on for a bench trial.

Initially, we point out that no dispute arose that the right-of-way agreement was an oral, rather than written, contract. Appellant testified that his recollection of terms called for appellee to "fix [his] property," which he defined as putting it back in the condition it was in before logging began. Appellee remembered it differently, however, and testified that all he was obligated to do was smooth over the right-of-way so "mother nature" could take its course and that part of appellant's land would return to a state where it could again be used to grow hay. Further, appellee and Rinehart testified that

this is precisely what appellee did. Rinehart said that appellee "back-bladed" the property, the end result was that the property was smooth when they finished. Appellee also introduced various photographs to substantiate that claim. Appellant, however, introduced his own photographs that showed deep ruts caused by logs dragged over the path.

Finally, the evidence further established that after appellee stopped logging on Rinehart's property, appellant hired a logger to log his own property. Appellee and Rinehart both testified that this logging (by someone named "Baxter") caused the damage to appellant's land.

After weighing the evidence, the trial court concluded that appellant had not carried his burden of proof. Although the court did not expressly accept appellee's version of the facts and the parties' agreement, it noted that "numerous ruts remain" on the land. Thus, appellee had not "leveled out the road as required by the agreement[.]" However, when the court considered damages, it found that insufficient evidence had been adduced to establish what damages were warranted. Thus, the court entered judgment in appellee's favor and dismissed the case. This appeal followed.

Appellant's brief largely rehashes the evidence adduced at trial and it is somewhat difficult to discern appellant's precise argument. Indeed, appellant cites no legal authority. However,

we generally afford considerable leeway to pro se litigants. See e.g. Besser v. Griffey (1993), 88 Ohio App.3d 379, 382, 623 N.E.2d 1326; State ex rel. Karmasu v. Tate (1992), 83 Ohio App.3d 199, 206, 614 N.E.2d 827. Thus, we reformulate appellant's assignment of error and his argument asserting that the trial court's judgment is against the manifest weight of the evidence.

Generally, "judgments supported by some competent and credible evidence should not be reversed on appeal as being against the manifest weight of the evidence." Shemo v. Mayfield Hts. (2000), 88 Ohio St.3d 7, 10, 722 N.E.2d 1018; and C.E. Morris Co. v. Foley Constr. Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, at the syllabus. Further, it is well settled that the trier of fact must resolve questions concerning the weight of the evidence and witness credibility. The underlying rationale for deferring to the trier of fact on these issues is that the trier of fact is best positioned to view witnesses, to observe demeanor, gestures and voice inflections, and to use those observations to weigh witness credibility. Myers v. Garson (1993), 66 Ohio St.3d 610, 615, 614 N.E.2d 742; Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. Thus, a trier of fact (in this case, the trial court) may believe all, part or none of the testimony of any witness who appears before it. Rogers v. Hill (1998), 124 Ohio App.3d 468, 470, 706 N.E.2d 438; Stewart v. B.F. Goodrich Co. (1993), 89 Ohio App.3d

35, 42, 623 N.E.2d 591.

Appellee and Rinehart both testified that their agreement was simply to smooth the path. Other differences appeared in their testimony, but those discrepancies go to the weight and credibility of the evidence. Most important, the trial court concluded that appellant presented insufficient evidence concerning a proper measure of damages. It is fundamental that damages must be established with reasonable certainty. Bemmes v. Pub. Emp. Retirement Bd. (1995), 102 Ohio App.3d 782, 658 N.E.2d 31; Accurate Die Casting Co. v. Cleveland (1981), 2 Ohio App.3d 386, 442 N.E.2d 459. Although appellant presented an estimate from a landscape construction firm, the record does not contain specific evidence of damages that relate solely to grading the ruts that remain on the property. Courts are not permitted to simply speculate about an appropriate measure of damages. Here, the estimate appellant presented contained a single amount for work to be performed, but included measures beyond the scope of the parties' agreement.

Accordingly, based upon the foregoing reasons we hereby overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Kline, J., concurring.

I concur in judgment and opinion with the analysis of the damages issue. That is, I agree that the appellant (hereinafter "Dalrymple") did not establish damages with reasonable certainty. However, I write separately because, respectfully, I do not believe that Dalrymple and the appellee (hereinafter "Purdum") entered into a contract. Here, Dalrymple promised that Purdum could use the land. And according to Dalrymple, Purdum promised to "put [the land] back the way it was." Transcript at 7. In contrast, Purdum claims that he promised merely to smooth over the right of way. Regardless, in my view, under either version of the agreement, there could not have been a contract because of a lack of consideration. Neither one of Purdum's alleged promises benefited Dalrymple. As a result, I believe that the agreement between Dalrymple and Purdum involved a conditional gratuitous promise. See, generally, *Carlisle v. T & R Excavating, Inc.* (1997), 123 Ohio App.3d 277, 283-87 (explaining conditional gratuitous promises). With this lone exception, which does not change the result here, I concur in judgment and opinion.

JUDGMENT ENTRY

It is ordered the judgment be affirmed and appellee to recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Chillicothe Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs in Judgment & Opinion

Kline, J.: Concurs in Judgment & Opinion with Opinion

For the Court

Peter B. Abele

By: Peter B. Abele
Peter B. Abele, Judge

THE STATE OF OHIO	TY D. HINTON, CLERK OF
ROSS County, ss	THE COURT OF COMMON PLEAS
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL <i>Decision and Judgment</i>	
NOW ON FILE IN MY OFFICE. WITNESS MY HAND AND SEAL OF SAID COURT THIS <u>19</u> DAY OF <u>July</u> 20 <u>10</u>	
BY <i>[Signature]</i>	TY D. HINTON DEPUTY

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.