[Cite as *B & W Welding v. Grater*, 2011-Ohio-6498.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

B&W Welding

Appellee

v.

Charles Grater

Appellant

Court of Appeals No. S-10-054

Trial Court No. 10 CVF 54

DECISION AND JUDGMENT

Decided: December 16, 2011

* * * * *

Charles L. Grater, pro se.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Fremont Municipal Court, following a trial to the court, in which the trial court denied a claim by appellee, B&W Welding, Inc. ("B&W") against appellant, Charles Grater, for $3,269.18 in repairs made to a pickup truck purchased from appellant, allowed a claim by B&W against appellant for $2,571 in fees for hauling and installation of three diesel fuel storage tanks, and

awarded appellant $2,000 on his cross-claim for damage done to one of the storage tanks during delivery. On appeal appellant, acting pro se, sets forth the following arguments, which this court will treat as assignments of error:

{¶ 2} "A. Direct Errors – Law Not Fully Applied

{¶ 3} "1) Provisions fell short of a cure for damages due to confusion etc.

{¶ 4} "2) Defense argued Implied Warranty of Fitness but not applied

{¶ 5} "3) Right to deduct damages overrides commercially reasonable [sic]

{¶ 6} "B. Indirect Errors – Misapplication of Law due to Error of Basis

{¶ 7} "1) Conclusion: Defendant inspected tanks, disputed/shown irrelevant

{¶ 8} "2) Conclusion: Tanks sold as-is, disputed/shown irrelevant by record

{¶ 9} "3) Confusion [sic]: Subject of witness [sic] testimony/$3,000 estimate shown errant

{¶ 10} "4) Conclusion: Defendant conceded owing Plaintiff, disputed by record

{¶ 11} "5) Conclusion: Plaintiff only quoted an hourly rate, disputed by record[.]"

{¶ 12} On January 28, 2008, the parties entered into a written agreement whereby David Michael, on behalf of B&W, agreed to deliver, and appellant agreed to purchase, two 10,000 gallon fiberglass storage tanks and one 9 x 13 steel storage tank. The purchase price for the three tanks was $4,500. In addition, appellant agreed to purchase diesel fuel from B&W for $1.90 per gallon. To offset the cost of the fuel, appellant agreed to sell a 2005 Silverado pickup truck to Michael for $11,000. Before purchasing

the tanks, appellant went to B&W's location and saw them. However, appellant did not look inside the tanks or otherwise inspect them for damage.

{¶ 13} After signing the contract, appellant paid B&W for the tanks, and Michael took possession of the pickup truck. On January 30, 2008, B&W transported the tanks to appellant's place of business on flatbed trucks. One of the fiberglass tanks struck the outrigger of a crane as it was being lifted off the truck. Later, after filling that tank with diesel fuel, appellant noticed a leak at approximately the same location where the tank struck the crane. Appellant contacted Michael, who denied responsibility for damage to the fiberglass tank. Eight months later, Michael contacted appellant to complain that the pickup truck had a damaged drive shaft that required extensive repairs costing $3,269.18.

{¶ 14} B&W filed a complaint against appellant in Fremont Municipal Court on September 10, 2008, seeking reimbursement for repairs to the pickup truck. On January 9, 2009, that complaint was dismissed, and subsequently was refiled on January 21, 2010. In the refiled complaint, B&W sought payment of $2,571 in delivery charges, along with damages in the amount of $5,840.18 for repairing the truck, which B&W alleged was broken at the time it was purchased from appellant. On March 9, 2010, appellant filed an answer, in which he denied owing B&W $2,571 and also stated that the pickup truck was not defective when he sold it to B&W. Appellant also filed a cross-complaint, in which he sought $8,000 in damages to repair the leaking fiberglass storage tank.

{¶ 15} A trial to the court was held on September 3, 2011. Testimony was presented by appellant, Michael, B&W employee Scott Wagner, and environmental Remediation Services employee Jaime Mancha.

{¶ 16} Appellant testified at trial that he paid a total of $4,500 for all three tanks, and that $2,000 of the purchase price was allocated to the leaking fiberglass tank. Appellant stated that he received an estimate of $8,000 to clean the tank and fix the leak. Appellant further testified that he sold the Silverado pickup truck to B&W as partial payment for the diesel fuel. Appellant stated that the leaking tank hit the outrigger of B&W's crane during delivery, resulting in a visible "scratch." Later, when the tank was filled with 10,000 gallons of diesel fuel, appellant observed a leak at the site of the "scratch." Appellant also stated that the leak could not be mended with silicone caulking, as Michael suggested because, by that time, the tank was full of fuel. Appellant further stated that he paid B&W for the fuel, but refused to pay the delivery charges for the tank and fuel because the bill was much higher than he expected.

{¶ 17} As to B&W's claim for damages to replace the transmission of the pickup truck, appellant stated that he sold the truck "as is," that the vehicle was running when Michael took possession, and Michael did not inform him of any problems with the truck until long after the sale. On cross-examination, appellant stated that he did not look inside the tanks before purchasing them because he did not have a ladder and also because they were covered with bolted-on lids. Consequently, he did not know that the

steel tank was partly full of an unknown substance that could be hazardous. Appellant admitted that he did not receive a written warranty for the tanks.

{¶ 18} Michael testified at trial that he did not believe the leak in the fiberglass tank was caused before or during delivery; however, he admitted there was a "scratch" on the tank after the tank hit the crane's outrigger. Michael further testified that appellant looked into both of the fiberglass tanks before purchasing them; however, the steel tank could not be inspected because the lid was bolted down.

{¶ 19} As to the delivery charges, Michael testified that he gave appellant a "special rate" of $95 per hour for the crane, and $75 per hour for the transport trucks. Michael stated that it took two trucks to haul the three tanks and the fuel, and he did not explain to appellant that the job could take more than one day to complete.

{¶ 20} Mancha testified at trial that, although he cleans tanks, he does not repair them. Mancha estimated that it would cost $3,000 to clean the leaking fiberglass tank because such cleaning required special equipment and expertise. Mancha stated that he could not tell how long the tank had been leaking. He further stated that the tank would have to be emptied, cleaned, repaired and repainted before it could safely be used. On cross-examination, Mancha stated that he did not know what substance was in the steel tank, and he was not hired by appellant to perform work on any of the tanks.

{¶ 21} Wagner testified at trial that he loaded the tanks onto trucks for transport, and that one of the fiberglass tanks swung into an outrigger on the crane as it was lifted

off the truck during delivery. Wagner stated that, although the tank had a scratch on it, in his opinion, the collision with the outrigger would not have caused the tank to leak.

{¶ 22} On October 7, 2010, the trial court issued a judgment entry in which it found that: 1) B&W sold three tanks to appellant "as is, where is," 2) appellant did not carefully inspect the tanks before the purchase, nor did he require a warranty as part of the sales contract, and 3) there was "sufficient direct and circumstantial evidence" presented at trial to show that damage to one of the fiberglass tanks during installation caused it to leak. The trial court also found that appellant sold the truck to Michael, on behalf of B&W, "as is" with no warranties, and that Michael had an opportunity to inspect the truck before purchasing it. Based on these findings, the trial court denied B&W's claim for repairs to the pickup truck and awarded appellant $2,000 in damages for the damaged fiberglass tank. The trial court also found that B&W's claim for delivery charges in the amount of $2,571 was well-taken; however, the court offset that amount with the $2,000 awarded to appellant, for a final award to B&W of $571. Appellant filed a timely notice of appeal on November 15, 2010.

{¶ 23} On appeal, appellant first asserts that the trial court erred by ignoring his defense of implied warranties of fitness and merchantability. Second, appellant asserts that the trial court reached erroneous conclusions because it misinterpreted the evidence presented at trial. In support, appellant argues that the trial court mistakenly concluded that Mancha's $3,000 estimate for tank cleaning applied to the steel tank, and not the leaking fiberglass tank. Appellant also argues that the trial court was prejudiced against

appellant due to: 1) the negative claims made in B&W's complaint regarding the pickup truck, and 2) Michael's testimony that appellant actually did inspect at least two of the tanks before signing the purchase agreement. Ultimately, appellant argues that the trial court erred by awarding appellant only $2,000 in damages for the fiberglass tank, offsetting that amount against B&W's claim for $2,561, and ordering appellant to pay $561 to B&W.

{¶ 24} In civil cases, "[a] trial court's findings of fact will not be reversed on appeal * * * if they are supported by some competent and credible evidence." *M.D. (fka) M.C. v. C.W.*, 6th Dist. No. WD-09-023, ¶ 18, citing *C.E. Morris Co. v. Foley Constr.* (1978), 54 Ohio St.2d 279, syllabus. In cases where such findings rest on the credibility of witnesses, a reviewing court must defer to the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus; *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81. "This presumption arises because the trial judge 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.'" *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 24, citing *Seasons Coal*, supra, at 80. "If evidence is susceptible to more than one construction, reviewing courts must give it the interpretation that is consistent with the verdict and judgment." *State v. Gordon*, 10th Dist. No. 10AP-1174, 2011-Ohio-4208, ¶ 13, citing *White v. Euclid Square Mall* (1995), 107 Ohio App.3d 536, 539. "Mere disagreement over the credibility of witnesses is not sufficient reason to reverse a judgment." *State v. Wilson*, supra.

{¶ 25} As set forth above, appellant stated that he did not inspect the tanks prior to purchase. However, testimony was presented by Michael that appellant had an opportunity to inspect the three tanks before purchasing them, and that appellant agreed to purchase the tanks "as is." In addition, Michael testified in support of the $2,571 invoice for delivering the tanks and fuel which was, to some extent, refuted by appellant. As to the condition of the pickup truck, it was undisputed that the truck was working when Michael took possession even though appellant had installed a modified drive shaft, and appellant was not told of any problems with the truck until eight months later. Both parties testified that one of the fiberglass tanks struck a crane during delivery, and it is undisputed that that same tank began leaking after it was filled with diesel fuel. No testimony was presented that appellant inspected the inside of the tanks prior to filling them with diesel fuel. Mancha testified that it would cost $3,000 to clean the leaking tank prior to its repair. Testimony was presented that the leak could not be fixed while the tank was full of fuel, and that properly sealing the leak would cost $2,000.

{¶ 26} Based on this evidence, the trial court found that the leaking tank was damaged during delivery. The trial court further found that appellant did not inspect the tanks prior to purchase. Although the trial court mentioned that the steel tank would "require clean up," the trial court did not, as appellant claims, make an explicit finding that Mancha's $3,000 estimate was for cleaning the steel tank instead of the leaking fiberglass tank. Accordingly, the trial court awarded appellant $2,000 in damages, and also found that Michael's $2,571 delivery bill was reasonable. Accordingly, the amount

of B&W's delivery bill was offset against appellant's $2,000 award, resulting in a judgment for B&W in the amount of $571. The trial court denied B&W's claim for $3,269.18 to repair the pickup truck.

{¶ 27} On consideration of the foregoing, we find that sufficient competent, credible evidence was presented at trial to support the trial court's findings of fact. Taking all of those findings of fact as true, we will now examine appellant's remaining arguments.

{¶ 28} Appellant asserts on appeal that, in addition to the $2,000 awarded by the trial court, he should have been awarded the $3,000 cost to have the fiberglass tank cleaned, an additional $4,500 in punitive damages, and another $4,500 award to be given to "the appropriate Prosecutor according to the Court's choice." In support, appellant argues that the additional awards are justified because B&W breached implied warranties of fitness for a particular purpose and merchantability by delivering a defective tank.

{¶ 29} Generally, in cases where a product is defective or is broken, "the proper remedy is through the contract and the relevant UCC provisions, * * * [which] control the parties' rights." *Sun Refining and Marketing Co. v. Crosby Valve and Gage Co.* (1994), 68 Ohio St.3d 397, 399. It is undisputed that the contract between the parties contained no provisions for damages in the event of a breach. As for the appellant's claim that he is entitled to damages pursuant to Ohio's version of the Uniform Commercial Code, R.C. 1302.28, which sets forth Ohio's implied warranty of fitness for a particular purpose, states:

{¶ 30} "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under section 1302.29 of the Revised Code an implied warranty that the goods shall be fit for such purpose."

{¶ 31} R.C. 1302.27, which sets forth the implied warranty of merchantability, states:

{¶ 32} "(A) Unless excluded or modified as provided in section 1302.29 of the Revised Code, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. * * *

{¶ 33} "(B) Goods to be merchantable must be at least such as:

{¶ 34} "* * *

{¶ 35} "(3) are fit for the ordinary purposes for which such goods are used * * *."

{¶ 36} R.C. 1302.29(C) provides exclusions to implied warranties if the language "as is," or similar language, is employed to warn the buyer that there is no implied warranty, or if the buyer has a chance to examine the goods before purchase. *Mayer v. Frame* (Dec. 6, 2000), 9th Dist. No. 3053-M.

{¶ 37} As set forth above, the trial court found that appellant purchased the three tanks "as is." In addition it is undisputed that, whether or not appellant chose to inspect the tanks before purchasing them, he was not prevented from doing so. In addition, although the record shows that both parties knew the fiberglass tank struck the crane's

outrigger during delivery, no evidence was presented at trial that appellant inspected the inside of the tank for leaks before filling it with diesel fuel, and neither appellant nor Mancha testified as to whether cleaning would have been necessary if appellant had not filled the tank with diesel fuel before he discovered the leak. Accordingly, the implied warranties of fitness and merchantability do not apply in this case, and the trial court did not err by refusing to award appellant an additional $3,000 to clean the damaged fuel tank.

{¶ 38} As for appellant's request for punitive damages, it is well-established that, while punitive damages are recoverable in a tort action, generally, they are not awarded in a contract action. *H&M Landscaping Co., Inc. v. Abraxus Salt, L.L.C.*, 8th Dist. No. 94268, 2010-Ohio-4138, ¶ 24, citing *Ketcham v. Miller* (1922), 104 Ohio St. 372, paragraph two of the syllabus. Finally, appellant has set forth no legal basis for an award of $4,500 to "the appropriate Prosecutor," or in support of his assertion that the $2,571 award to B&W should be vacated.

{¶ 39} On consideration of the foregoing, we find that the trial court did not err by refusing to award appellant more than $2,000 in damages. Appellant's assignments of error are not well-taken.

{¶ 40} The judgment of the Fremont Municipal Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.