[Cite as *Fabrication Group L.L.C. v. Willowick Partners L.L.C.*, 2012-Ohio-4460.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

FABRICATION GROUP LLC,	**:**	**O P I N I O N**
Plaintiff-Appellee,	**:**	
		CASE NO. 2011-L-141
- vs -	**:**	
WILLOWICK PARTNERS LLC, et al.,	**:**	
Defendants-Appellants.	**:**	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 09 CV 002911.

Judgment: Modified and affirmed as modified.

Daniel J. Myers, Myers Law, LLC, 610 Skylight Office Tower, 1660 West Second Street, Cleveland, OH 44113 (For Plaintiff-Appellee).

Patricia M. Ritzert, Climaco, Wilcox, Peca, Tarantino & Garofoli Co., 55 Public Square, Suite 1950, Cleveland, OH 44113 (For Defendants-Appellants).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Willowick Partners LLC (WP) and WAP Construction LLC (WAP), appeal the judgment of the Lake County Court of Common Pleas, following a bench trial, awarding appellee, Fabrication Group LLC (FG), a money judgment on its claim for breach of contract and an award of attorney fees. At issue is whether FG provided materials in conformity with its contracts with WAP and whether WAP waived its right to challenge the enforceability of an attorney-fee provision. For the reasons that follow, we modify the trial court's judgment and affirm as modified.

{¶2} FG is a metal fabrication firm located in Cleveland, Ohio. WP is a real estate developer, which owns a ten-acre parcel in Willowick, Ohio, on which it has built the Larimar Condominium. The building has six floors and 24 units. WAP is WP's general contractor for the condominium project, which, as of the time of trial, had been under construction for about four years. WAP entered into three separate subcontracts with FG pursuant to which FG was to fabricate and install handrails and fencing.

{¶3} The first contract was for the fabrication and installation of balcony railings and pickets for the 16 condominium units that are above the first floor of the condominium. The second subcontract was for the fabrication and installation of fencing around the deck over the condominium's parking garage. The third subcontract was for the fabrication and installation of stair rails and wall-mounted handrails in the condominium's four stairwells that are used as emergency exits.

{¶4} On September 8, 2009, FG filed a complaint against WP and WAP. The amended complaint asserted three causes of action. The first alleges the validity of FG's mechanic's liens. The second sought damages for WAP's alleged breach of contract. The third cause of action alleged that WP was unjustly enriched by FG's performance. FG also sought attorney fees.

{¶5} Appellants filed separate answers denying the material allegations of the amended complaint. Further, WAP filed a counterclaim asserting two claims against FG. The first sought judgment declaring that FG's mechanic's liens were invalid. The second sought damages for breach of contract. WP also filed a counterclaim asserting three claims. The first alleged FG's mechanic's liens were invalid. The second alleged

breach of contract. The third alleged slander of title resulting from FG's mechanic's liens.

{¶6} WP and WAP filed a partial motion for summary judgment regarding the validity of FG's mechanic's liens. The trial court granted the motion, finding the liens to be invalid. FG did not appeal this ruling. FG and WP subsequently settled WP's slander-of-title counterclaim. This resolved FG's first cause of action, WAP's first counterclaim, and WP's first and third counterclaims. The only issues remaining for trial were the parties' contract claims (in FG's second cause of action and WAP and WP's second counterclaims), FG's claim for unjust enrichment against WP (in FG's third cause of action) and FG's request for attorney fees.

{¶7} FG's representative, Henry Kassigkeit, who has been in the metal business for 35 years, testified that between September and October 2008, he negotiated three subcontracts with WAP for work on the Larimar Condominium project. He negotiated with Kirk Betteley, who is the construction superintendent for WAP. Mr. Betteley testified he has been in the construction business for 34 years.

{¶8} According to the subcontracts, all material was to be made of aluminum that would be "powder coated." Powder coating is an alternative method of painting metal. In this process, an electrostatic charge is created in the uncoated metal. A powder of plastic particles is then exposed to the metal, and the powder is attracted to the metal by the charge. The metal and powder are then baked in an oven. The heat causes the plastic particles to melt and to fuse to the metal. Powder coating is required to be performed in large ovens in an industrial plant setting.

{¶9} Mr. Betteley requested a proposal from FG for new powder coated materials. However, after FG provided a quote, Mr. Betteley said WAP wanted a less expensive product. Mr. Kassigkeit then offered Mr. Betteley materials that had previously been powder coated for a project in Florida that had been cancelled. These materials were then being stored in FG's warehouse in Ohio. Mr. Kassigkeit stated that the materials could be remanufactured for this project at a price that would be far less than new product, and Mr. Betteley agreed to this alternative.

{¶10} Mr. Kassigkeit, Mr. Betteley, and Ted Sahley, managing member and part owner of both WAP and WP, agreed that FG would use aluminum that had previously been powder coated for the Florida project and that the powder coat would be topcoated with an enamel paint because the powder coat was black and WAP's architect wanted a different color. Mr. Kassigkeit testified that painting powder coated material with an enamel topcoat actually makes the metal more durable than powder coated material that is not topcoated.

{¶11} The three contracts were performed at around the same time beginning in November 2008. Pursuant to the deck subcontract, FG fabricated and installed the fence around the deck over the parking garage. Mr. Kassigkeit testified that the fencing was powder coated. Mr. Betteley testified that FG performed the contract exactly as the parties had agreed. WAP never voiced any dissatisfaction with FG's performance or provided any list of items to be corrected. WAP paid the full amount of this contract.

{¶12} Further, pursuant to the balcony railing subcontract, FG fabricated and installed the balcony railings for the 16 condominium units above the ground level. Mr. Kassigkeit testified this material was powder coated. After this contract was performed,

Mr. Sahley, managing member of both WAP and WP, inspected the balcony railings, found no problems, and sent payment for the balance owed under the balcony railing subcontract in the amount of $6,257.63. Thereafter, without any notice of any problems with the balcony railings, WAP stopped payment on the check due to an alleged problem with the separate handrail contract.

{¶13} At around the same time that work was proceeding on these two subcontracts, FG's employees also fabricated and installed the stair rails and corresponding handrails on the concrete block walls pursuant to the subcontract for stair rails and handrails in the four stairwells. Mr. Kassigkeit testified that the stair rails and handrails that FG fabricated and delivered to the site were powder coated.

{¶14} After the stair rails and handrails were installed, Mr. Kassigkeit saw they were damaged by scratches and other defects apparently caused by other contractors using the stairs to transport their equipment and materials.

{¶15} FG sent a team to the site to perform touch-up painting of the railings, but, due to the cold weather and lack of any heat in the building, FG could not proceed. On November 19, 2008, FG sent a facsimile transmission to WAP saying that FG could not perform the touch-up work that needed to be done until the weather was warmer and that they would return when it was warmer. In this note, FG recommended that WAP hold back as retainage $2,000 as security that the touch-ups would be completed.

{¶16} Although WAP never advised FG of any problems with the paint finish or the installation of the stair rails or handrails in the stairwells, Mr. Kassigkeit was aware that there were issues with the installation of the wall-mounted handrails. As a result, on February 12, 2009, he sent a crew of FG's workers to remove sections of the

handrails to take them back to FG's shop to be re-fabricated. But, on the arrival of FG's employees, WAP called the Willowick Police and reported that FG was stealing its property from the job site. The police arrived at the scene and instructed FG's representative that, per WAP's instructions, FG should leave the handrails at the scene and leave the property. As a result, Mr. Kassigkeit testified WAP prevented FG from making the necessary repairs to the handrails. In an effort to justify its actions, Mr. Betteley, WAP's representative, testified that FG removed and re-installed the railings three times, but never installed them properly. However, Patricia Setlock, FG's president, testified that FG's employees did not previously remove and re-install the railings.

{¶17} Mr. Kassigkeit testified that all the railings used in the performance of these three subcontracts were powder coated as required by the contracts. In contrast, Mr. Betteley testified that in his opinion it did not look like the railings were powder coated.

{¶18} On February 24, 2009, WAP's attorney, John Climaco, sent a letter to FG stating that FG had negligently failed to manufacture, paint, and install the railings in the stairwells. He said that WAP "acknowledges that under the terms of the [stairwell] contract, there is a balance owed." However, he said that until FG properly manufactured and installed the railings, WAP would withhold further payment. In his letter, Mr. Climaco gave FG five days until February 29, 2009, in which to cure these problems. Mr. Climaco's letter did not provide any specifics as to the nature of the problems.

{¶19} Ms. Setlock, FG's president, testified that FG received Mr. Climaco's letter for the first time on March 3, 2009, and on the same date, she forwarded it to FG's attorney, Henry Fischer. On March 4, 2009, Mr. Fischer advised Mr. Climaco of his representation of FG. Mr. Climaco sent an e-mail on March 4, 2009 to Mr. Fischer, saying that once FG properly completed the job, WAP would then pay for it.

{¶20} On March 6, 2009, Mr. Fischer sent a letter to Mr. Climaco confirming that FG was ready, willing, and able to complete work on the stairwell contract, but that before doing so, it would need: (1) WAP's assurance that FG's workers would be allowed to enter the property to complete the work without threat of arrest and (2) a punch list indicating exactly what was needed to be done.

{¶21} Neither Mr. Climaco nor any other representative of WAP responded to Mr. Fischer's letter. Instead, WAP hired Bill Weber to correct the installation of the handrails in the stairwells. Mr. Weber testified that the continuous interior stair rails were fabricated and installed by FG according to the contract. However, he said that the corresponding wall-mounted handrails were not bent properly and did not follow the angle of the steps. As a result, the height of the handrails, which was supposed to be 36 inches, was uneven. He said that in correcting these problems, he extended, re-bent, and re-installed the wall railings at an even height. He said that in performing this work, he removed the black coating on many sections of the railings so he could weld them. Also, on the sections of the railings he added, he used new material, which was not powder coated. He said he is not an expert in painting or powder coating. He charged WAP a total of $6,651 for the work he did to correct the handrails. He also testified that he would charge $77,700 to remove, re-powder coat, and re-install the

balcony railings, deck fencing, and all stair rails and handrails involved in all three contracts.

{¶22} FG argued in the trial court that it had substantially performed the stairwell contract and was paid all but $4,000 for labor and materials that was withheld as retainage by WAP, and was prevented by WP and WAP from completing performance of the contract and receiving the balance due of $4,000. In contrast, appellants argued that FG failed to provide the materials specified in the stair rail and handrail contract and failed to install the railings in a workmanlike manner. They also argued they were damaged in the amount of $77,700, the amount of Mr. Weber's quote.

{¶23} Following trial on the parties' claims, the trial court held a hearing on FG's request for attorney fees. FG's attorney, Mr. Fisher, testified his hourly rate of $175 was customary for trial counsel in Lake County, and said that his services, as reflected in his itemized statement admitted in evidence, were reasonable and necessary. FG claimed it was entitled to recover the full amount of fees charged by its counsel in the amount of $29,630.50.

{¶24} Following three days of trial, the trial court entered judgment in a highly-detailed, five-page Opinion and Judgment Entry. With respect to the contract for balcony railings and pickets, the court found that WAP *failed to prove* that (1) these materials were not powder coated as required by the contract and that (2) FG did not install them in a good and workmanlike manner. The court found that WAP inspected FG's performance under this contract before it made final payment in the amount of $6,257.63, and that it unjustifiably stopped payment on that check. The court also found this contract provided for payment of attorney fees in the event it was necessary

to collect the proceeds due thereunder. The court found that FG incurred reasonable attorney fees of $3,055.90 for collection of the amount due under the balcony railing contract. The court rendered judgment in favor of FG and against WAP (breach of contract) and WP (unjust enrichment) on FG's second and third causes of action regarding the contract for balcony railings in the amount of $6,257.63. With respect to the balcony railing contract, the court also entered judgment in favor of FG and against WAP in the amount of $3,055.90 for attorney fees.

{¶25} With respect to the contract for fencing around the deck over the parking garage, the court found that WAP had *failed to prove* that (1) the materials provided were not powder coated and that (2) FG did not install them in a good and workmanlike manner.

{¶26} Finally, with respect to the contract to provide and install stair railings and handrails in the stairwells, the trial court found that WAP failed to prove the stair railings and handrails were not powder coated. However, the court found that WAP had proved that FG failed to install them in a good and workmanlike manner, thus breaching that contract. The court found that WAP had paid $6,651 to repair this work, and that this amount represented the damages sustained by WAP from this contract breach. The court found that WAP withheld $2,000 as retainage on the stair rail and handrail contract, and this amount should be applied as a credit against the $6,651 in damages owed by FG. Thus, the court found that FG owes WAP $4,651 as damages for the breach of the contract for stair railings and handrails. The court thus entered judgment against FG and in favor of WAP in the amount of $4,651 on this contract on FG's second cause of action.

{¶27} The court rendered judgment in favor of FG on WP's and WAP's second counterclaims for breach of contract.

{¶28} Appellants appeal the trial court's judgment asserting four assignments of error. FG also raises one cross-assignment of error. For their first assigned error, appellants allege:

{¶29} "The trial court erred in allowing a judgment for attorney fees."

{¶30} WAP argues that the trial court erred in awarding attorney fees to FG because in its view the provision in the balcony-railings contract providing for attorney fees was unenforceable. However, we note that at no time prior to, during, or after the hearing held by the court on the issue of attorney fees did WAP ever object on the grounds that the contract provision for attorney fees was unenforceable. Moreover, in WAP's post-trial brief, WAP did not challenge the enforceability of the attorney-fee provision. Thus, WAP raises this issue for the first time on appeal.

{¶31} We note that prior to the court conducting this hearing after trial, WAP objected on the ground that the hearing should have been held during FG's case-in-chief. This was the sole ground offered by WAP in support of its objection to attorney fees. Moreover, in its post-trial brief, the only argument asserted by WAP against attorney fees was that FG had not presented any evidence of the fees charged by FG's counsel that pertain specifically to his collection efforts.

{¶32} WAP argues that the objection it made regarding the timing of the hearing was sufficiently broad to include an objection to the enforceability of the attorney-fee clause. However, because the objection was limited to the timing of the hearing, it was not general in nature. In any event, even if a general objection was made, that would

not have been sufficient to preserve the issue. *B-Right Trucking Co. v. Interstate Plaza Consulting*, 154 Ohio App.3d 545, 2003-Ohio-5156, ¶58 (7th Dist.). In *B-Right Trucking*, the Seventh District held that a party objecting to the enforceability of a contract provision for attorney fees must raise that specific objection in the trial court prior to the court's ruling on the adverse party's claim for attorney fees. *Id.* Otherwise, the issue is waived on appeal. *Id.* Because WAP never challenged the enforceability of the attorney fee provision in the trial court, we hold the issue is waived on appeal.

{¶33} In any event, even if the issue was not waived on appeal, it would lack merit. WAP argues that the only authority supporting a request for attorney fees was R.C. 1301.21, recently re-designated as R.C. 1319.02. WAP claims this statute bars FG from recovering its attorney fees because the statute provides that a commitment to pay attorney fees is enforceable only if the total amount owed on the contract at the time the contract was entered into exceeds $100,000. WAP argues that because the contracts at issue, either separately or combined, do not total more than $100,000, the attorney-fee provision at issue was unenforceable.

{¶34} However, R.C. 1319.02 applies only to a "contract of indebtedness." This statute defines a "contract of indebtedness" as "a note, bond, mortgage, conditional sale contract, retail installment contract, lease, security agreement, or other *written evidence of indebtedness*, other than indebtedness incurred for purposes that are primarily personal, family, or household." (Emphasis added.) It has been held that a contract to deliver goods in exchange for payment is not a contract of indebtedness subject to R.C. 1319.02. *Roth Produce Co. v. Scartz*, 10th Dist. No. 01AP-480, 2001 Ohio App. LEXIS 5907, *11, fn. 2 (Dec. 27, 2001). Moreover, it has been held that R.C. 1319.02 applies

only to commercial *lending transactions*. *In re Tudor*, 342 B.R. 540, 544 (Bankr. S.D. Ohio 2005). The balcony contract at issue here was a construction contract, not a lending transaction. Thus, WAP's assertion that R.C. 1319.02 precludes an award of attorney fees is incorrect.

{¶35} Having established that R.C 1319.02 does not apply to a construction contract, we note that Ohio has adopted the "American Rule" regarding attorney fees under which each party to a lawsuit must pay his or her own attorney fees. *See Sorin v. Warrensville Hts. School Dist. Bd. of Edn.*, 46 Ohio St.2d 177, 179 (1976). Exceptions to the rule allow fee-shifting: (1) if there has been a finding of bad faith; (2) if a statute expressly provides that the prevailing party may recover attorney fees; or (3) if the parties' contract provides for fee-shifting. *See Nottingdale Homeowners' Assn., Inc. v. Darby*, 33 Ohio St.3d 32, 33-34 (1987).

{¶36} Further, the interpretation of a written contract is a question of law. *See Long Beach Assn., Inc. v. Jones*, 82 Ohio St.3d 574, 576 (1998). Therefore, the trial court's interpretation of the contract is subject to de novo review. *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 64 Ohio St.3d 145, 147 (1992). Absent ambiguity in the language of the contract, the parties' intent must be determined from the plain language of the document. *See Hybud Equip. Co. v. Sphere Drake*, 64 Ohio St.3d 657, 665 (1992).

{¶37} Thus, we review the trial court's interpretation of the attorney-fee provision in the balcony railing contract de novo. That provision states: "In the event that it is necessary to collect the proceeds due, or any portion thereof through the efforts of an attorney and or court action the undersigned agrees to pay reasonable attorney fees, cost of collection and or cost of litigation." The trial court interpreted this provision to

mean that FG was entitled to recover its attorney fees for services incurred in the collection of the amount owed under the balcony railing contract. We find no error in this interpretation.

{¶38} Mr. Fischer testified that the rate he charged, i.e., $175/hour, is reasonable in the community and that the time spent was necessary. He testified that, based on the itemized statements presented in evidence, the total amount of attorney fees incurred by FG in this matter was $29,630.50. The trial court's attorney-fee award of $3,055.90 for counsel's collection efforts is supported by Mr. Fischer's statement. We note that WAP presented no evidence challenging Mr. Fischer's testimony or his itemized statement. In light of the foregoing, even if WAP had not waived the issue, we hold the trial court did not err in its award of attorney fees.

{¶39} WAP's first assignment of error is overruled.

{¶40} For its second assigned error, WAP alleges:

{¶41} "The trial court erred by allowing a setoff against damages awarded to counterclaimant, for retainage from contract price for work that was never performed."

{¶42} WAP argues the trial court's judgment finding that FG was entitled to an offset and credit for the retainage WAP withheld from the amount it owed FG under the stair and handrail contract was against the manifest weight of the evidence.

{¶43} In a civil case, an appellate court will not reverse a judgment as being contrary to the weight of the evidence as long as there is some competent, credible evidence supporting the judgment. *C.E. Morris Co. v. Foley Construction Co.*, 54 Ohio St.2d 279, syllabus (1978); *Vogel v. Wells*, 57 Ohio St.3d 91, 96 (1991). Even if we do not agree with the trial court or might have found differently, we cannot substitute our

judgment for that of the trial court. We must give deference to the trier of fact because it is best able to observe the witnesses and their demeanor and to determine their credibility. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Witness credibility rests solely with the finder of fact. *State v. Awan*, 22 Ohio St.3d 120, 123 (1986). If the evidence is susceptible of more than one construction, it must be given that interpretation which is consistent with the judgment and most favorable to sustaining the trial court's judgment. *Seasons Coal Co.*, *supra.*

{¶44} Retainage for which a contract provides may be treated as a penalty or as liquidated damages. *Jones v. Stevens*, 112 Ohio St. 43 (1925). Under either alternative, a [property owner] who would deny payment of the amount it retained must show some breach by the [contractor] of a promise to which the retainage applies. Absent such a showing, the [property owner] is bound by its agreement to pay the retainage to the [contractor]. *Stone Excavating, Inc. v. Newmark Homes, Inc.*, 2d Dist. No. 20307, 2004-Ohio-4119, ¶17.

{¶45} A party to a contract that prevents performance on the part of the adverse party cannot rely on that non-performance to claim a breach. *Suter v. Farmers' Fertilizer Co.*, 100 Ohio St. 403 (1919). It is undisputed that when FG's employees came to the site on February 12, 2009 to remove the railings to re-fabricate them at their shop, WAP called the police on them and refused to allow them access to the site or to the handrails. Appellants argue FG failed to cure the stair rail and handrail issues within the time limit they imposed on FG. Appellants are referring to a letter, dated February 24, 2009, in which their attorney, Mr. Climaco, gave FG five days to cure these issues.

However, Mr. Climaco never responded to FG's request for a punch list of items to be corrected and assurance that its employees would not be arrested. In finding that FG was entitled to a credit for the retainage, the trial court obviously found that WAP unjustifiably prevented FG from returning to the site to correct the problems with the initial installation. Therefore, WAP cannot rely on FG's failure to perform the work. Lacking that showing, WAP is not relieved of its duty to pay the retainage for the work FG performed.

{¶46} Being estopped from arguing nonperformance on FG's part, WAP cannot demonstrate a breach or other event that would allow WAP to avoid paying the retainage owed to FG. The fact that Mr. Weber performed the corrective work after WAP unjustifiably refused to allow FG to do it does not detract from the fact that FG performed the work to which the retainage amount applies.

{¶47} We therefore hold that the trial court's judgment finding the retainage withheld by WAP to be a credit and offset to FG was supported by competent, credible evidence and was not against the manifest weight of the evidence. As a result, we cannot substitute our judgment for that of the trial court, and we must defer to the trial court's finding in this regard.

{¶48} Further addressing FG's entitlement to credit for the retainage withheld by WAP, we note that, while the trial court found that the amount of the retainage was $2,000, the trial testimony and the documentary evidence confirmed that the amount withheld by WAP was $4,000, not $2,000.

{¶49} App.R. 12 defines the parameters of the court of appeals' exercise of its reviewing power. App. R. 12(A)(2) provides that an appellate court "may disregard"

errors which are not supported by reference to the record or separately argued. Because this language is discretionary, the Supreme Court of Ohio in *C. Miller Chevrolet v. Willoughby Hills*, 38 Ohio St.2d 298 (1974), held that "nothing prevents a court of appeals from passing upon error which was neither briefed nor pointed out by a party." *Id.* at 301.

{¶50} Further, App.R. 12(B) provides that in cases where the trial court's judgment is neither affirmed nor reversed, "*where the court of appeals determines that the judgment * * * should be modified as a matter of law it shall enter its judgment accordingly*." (Emphasis added.)

{¶51} In *Hungler v. Cincinnati*, 25 Ohio St.3d 338 (1986), the Supreme Court of Ohio held that, while "a court of appeals may recognize error not assigned by the parties, there must be sufficient basis *in the record* before it upon which the court can *decide* that error." (Emphasis sic.) *Id.* at 342.

{¶52} In *State v. Peagler*, 76 Ohio St.3d 496 (1996), the Supreme Court of Ohio held: "* * * [App.R. 12(A)(2)] allows a court of appeals discretion in deciding to address an issue not briefed * * *." *Id.* at 499. However, the appellate court must base any factual conclusions reached on evidence in the trial court record. *Id.* Thus, there must be a sufficient evidentiary basis in the record below on which the court of appeals can decide a particular legal issue. *Id.* Fairness requires that the parties be allowed the opportunity to present evidence in the trial court that would support or refute the issue addressed by the court of appeals. *Id.* Further, if an appellate court chooses to consider an issue not raised by the parties on appeal, but implicated by evidence in the

record, the appellate court should give the parties an opportunity to brief the issue. *Id.* at fn. 2.

{¶53} This court has repeatedly followed the Supreme Court's holding in *Peagler* in both criminal and civil cases. In *State v. Blackburn*, 11th Dist. No. 2001-T-0052, 2003-Ohio-605, this court held:

> **{¶54}** Although this issue [whether the trial court erred in its evidentiary rulings] was not specifically briefed by the parties, App.R. 12(A)(2) allows an appellate court to consider issues not briefed by the parties. Generally, when a court of appeals chooses to consider an issue not briefed by the parties, the court should * * * give [the parties] an opportunity to brief the issue. However, due to the similarity of the issues of the evidentiary rulings * * * to the briefed issue in appellant's fifth assignment of error, we will address this issue on the record and the briefs previously filed with this court. (Internal citations omitted.) *Id.* at ¶45.

{¶55} In *Studer v. VFW Post 3767*, 185 Ohio App.3d 691, 2009-Ohio-7002 (11th Dist.), the decedent's administrator appealed the trial court's judgment finding that Ohio's dram shop act was constitutional. This court affirmed that finding. While the administrator did not assign as error the trial court's entry of summary judgment against him on his dram shop act claim, in reviewing the record, this court found there was evidence to withstand summary judgment. Citing *Peagler*, *supra*, and this court's precedent in *Blackburn*, *supra*, this court held that a court of appeals may in its discretion address an issue that was not briefed. *Studer*, *supra*, at ¶38. Because the

issue raised by this court in *Studer* had not been briefed by the parties, this court allowed them to brief the issue. Thereafter, this court held that, based on the record, genuine issues of material fact existed on the administrator's dram shop act claim and that the court thus erred in granting summary judgment to VFW on this claim. *Id.* at ¶39.

{¶56} In the instant case, FG in its complaint alleged that WAP withheld $4,000 as retainage and that it was entitled to recover this amount as part of its damages. The parties' representatives testified and presented documentary evidence at trial that $4,000 was the amount of the retainage. Further, this issue has already been briefed by the parties. FG raised it in its cross-assignment of error and appellants addressed it in their reply brief. We will therefore address this issue based on the record and the briefs previously filed with the court.

{¶57} Mr. Sahley, WP and WAP's managing member, testified that he paid the amount owed under the railing contract to FG less $4,000 for the touch-up painting work on the stair rails and handrails that could not be done in the cold weather. Further, in a letter from Mr. Fischer, FG's counsel, to WAP, dated March 6, 2009, Mr. Fischer confirmed that WAP was holding a retainage of $4,000 that was "owing by WAP to [FG]." WAP never objected to this statement. Further, Ms. Setlock, FG's president, testified that $4,000 is still owed on the stair rail and handrail contract. Finally, Ms. Setlock testified that the amount held back by WAP was $4,000. We note that, after FG raised the issue of the amount of the retainage in its brief, appellants, in their reply brief, did not reference any evidence in the record that WAP withheld $2,000 as retainage, as opposed to $4,000.

{¶58} Because there is no competent, credible evidence in the record supporting the trial court's finding that appellants withheld $2,000, we are not bound by the trial court's finding to this effect. Further, because there is no dispute in the trial court record that WAP withheld $4,000, the trial court's judgment should be modified as a matter of law. We therefore modify the judgment to indicate that the amount appellants withheld as retainage was $4,000, not $2,000. We further modify the trial court's judgment to indicate that judgment is entered against FG and in favor of WAP in the amount of $2,651, not $4,651.

{¶59} Appellants' second assignment of error is overruled.

{¶60} For their third assigned error, appellants allege:

{¶61} "The trial court erred in failing to grant judgment against Fabrication Group, LLC for its failure to provide work in a good and workmanlike manner and for supplying materials not in compliance with three contracts."

{¶62} The sole argument asserted by appellants under this assignment of error is that FG failed to provide material that was powder coated as required by each of the contracts.

{¶63} Again, the pertinent standard of review is whether competent, credible evidence supported the trial court's finding. *C.E. Morris Co.*, *supra*.

{¶64} While appellants' representatives testified that, in their opinion, the material provided was not powder coated, Mr. Kassigkeit clearly testified that all materials provided to the site for all three jobs were powder coated. Moreover, Mr. Weber testified that the stair rails and handrails were covered with a black coating, which was the powder coating.

{¶65} The record is equally clear that after the railings were installed, many scrapes, scratches, and dings were present on the railings. Mr. Kassigkeit testified that other contractors used the stairwells for ingress and egress; that they also used them to transport materials and equipment; that the damage to the railings was caused by this construction traffic; that the stairwells were left open to the public during the day; and that WAP had experienced problems with vandalism at the site at that time. Moreover, Mr. Weber testified that the sections of railing he incorporated into the project were not painted and that he removed the finish on all areas that he welded. However, this evidence does not detract from Mr. Kassigkeit's testimony that all materials delivered to the site were powder coated.

{¶66} While Mr. Kassigkeit testified that the connections had to be sanded to bare metal before they could be welded, he said this applied to a very small part of the material and was necessary to install it. We agree with the trial court's implicit finding that this testimony does not detract from Mr. Kassigkeit's testimony that the materials FG provided were powder coated.

{¶67} We note there was no testimony provided by appellants that such installation practices resulted in a product that was not powder coated.

{¶68} We therefore hold that the trial court's finding that substantially all materials provided by FG were powder coated was supported by competent, credible evidence and was not against the manifest weight of the evidence. Consequently, we cannot substitute our judgment for that of the trial court.

{¶69} Appellant's third assignment of error is overruled.

{¶70} For appellants' fourth and final assigned error, they allege:

{¶71} "The trial court erred in granting a judgment against WP on a theory of unjust enrichment."

{¶72} A judgment finding a defendant to be liable for unjust enrichment is reviewed under the manifest weight of the evidence standard of appellate review. *Warnecke v. Chaney*, 194 Ohio App.3d 459, 2011-Ohio-3007, ¶13-14 (3d Dist.).

{¶73} In order to prevail on a claim for unjust enrichment, a plaintiff must show (1) that he conferred a benefit on the defendant; (2) that the defendant knew of the benefit; (3) and that the defendant retained the benefit given under circumstances where it would be unjust for him to retain it without payment. *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183 (1984).

{¶74} The trial court found that because WAP stopped payment on its check for $6,257.63 for the balcony railing work, FG was entitled to judgment against WAP for its breach of contract and against WP for unjust enrichment. As a result, the court's finding of unjust enrichment was based solely on work performed by HG pursuant to the subcontract for railings on the balconies of the individual condominium units.

{¶75} WP argues it is not liable for unjust enrichment because it did not receive any benefit since it was forced to hire Mr. Weber and pay him $6,651 to perform corrections on the stairwell contract. However, the argument is flawed because it assumes the court awarded unjust enrichment on the stairwell contract when in fact unjust enrichment was awarded on the separate balcony contract.

{¶76} The record demonstrates that FG fully performed the balcony contract. After Ted Sahley, managing member of WP, made a final inspection of the balcony work performed by FG, WAP issued payment for the final amount due under this

contract. Then, after WAP allegedly became unhappy with work done on the separate stairwell contract, WAP stopped payment without any notice it was doing so to FG.

{¶77} The record demonstrates that WP had knowledge that FG had performed the balcony work because Mr. Sahley testified he inspected it, issued the final check for this work in the amount of $6,257, and then stopped payment on this check. Further, WP has retained the benefit provided by the balcony railings under circumstances where it was unjust for it to do so without payment. Without the balcony railings being installed, the condominium units would not have been habitable and WP would not have been able to sell them. We note that WP failed to present any evidence that the work provided was defective or that it violated any code or would result in a denial of an occupancy permit. In fact, the record is clear that several individuals have already taken possession of the condominium units.

{¶78} Contrary to appellants' argument, since WP did not pay any third party for any materials or labor for the balcony work, WP has sustained a benefit for which it has not paid.

{¶79} We therefore hold the trial court's finding that WP is liable for unjust enrichment on the balcony contract was supported by competent, credible evidence and was not against the manifest weight of the evidence. As a result, we defer to the trial court's finding and cannot substitute our judgment for that of the trial court.

{¶80} Appellants' fourth assignment of error is overruled.

{¶81} Next, FG states for its sole cross-assignment of error, as follows:

{¶82} "The trial court's decision only set-off [sic] half of the retainage held by appellants; Which [sic] gave appellants more than their benefit of the bargain."

{¶83} FG argues that the trial court made a clerical error in calculating the amount of damages it owed to WAP on the stair rail and handrail contract. However, this issue has been rendered moot by our analysis under appellants' second assignment of error.

{¶84} FG's cross-assignment of error is overruled as moot.

{¶85} For the reasons stated in this opinion, it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is hereby modified and affirmed as modified.

MARY JANE TRAPP, J., concurs,

TIMOTHY P. CANNON, P.J., concurs in part and dissents in part with Concurring/Dissenting Opinion.

TIMOTHY P. CANNON, P.J., concurring in part and dissenting in part.

{¶86} I respectfully concur in part and dissent in part with the majority decision. I do not concur that we have the ability to modify the trial court judgment by correcting what the majority concludes is a calculation error by the trial court.

{¶87} R.C. 2505.22 governs the presentation of an assignment of error by an appellee who does not appeal. It states, in pertinent part:

> **{¶88}** In connection with an appeal of a final order, judgment, or decree of a court, assignments of error may be filed by an appellee who does not appeal, which assignments shall be passed upon by a

> reviewing court before the final order, judgment, or decree is reversed in whole or in part.

{¶89} In this case, appellee, at footnote 6 of its brief, acknowledges it has not appealed the trial court's ruling, but presents the cross-assignment of error to support the trial court's ruling. A cross-assignment of error should be addressed only for the purpose of preventing reversal of the trial court judgment. *See Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, ¶30-32, quoting *Parton v. Weilnau*, 169 Ohio St. 145, 170-171 (1959) ("assignments of error of an appellee who has not appealed from a judgment may be considered by a reviewing court only to prevent 'a reversal of the judgment under review'").

{¶90} In this case, the majority is using the cross-assignment of error to actually reverse the trial court judgment. If reversal of the trial court was the outcome appellee desired, it should have filed a notice of cross appeal, as required by App.R. 3(C)(1), which provides:

> **{¶91}** Cross appeal *required*. A person who intends to defend a judgment or order against an appeal taken by an appellant *and who also seeks to change the judgment or order* * * * *shall* file a notice of cross appeal within the time allowed by App.R. 4[(B)(1)]. (Emphasis added.)

{¶92} As explained by the Ohio Supreme Court, "[a]n appellee who does not cross-appeal generally cannot oppose the final judgment on appeal, or attack it to enlarge his own rights or lessen the rights of his adversary." *Kaplysh v. Takieddine*, 35 Ohio St.3d 170, 175 (1988). This court has also previously recognized that a cross

appeal is *required* when an appellee is seeking to change the judgment; thus, when an "attempted cross-appeal is not properly before this court, we will not address it." *State v. Pattinson*, 11th Dist. No. 2010-T-0003, 2010-Ohio-5664, ¶10. *See also Third Wing, Inc. v. Columbia Cas. Co.*, 8th Dist. No. 97622, 2012-Ohio-2393, ¶1 (cross-assignment of error not considered because cross appeal was correct procedural avenue to modify trial court judgment); *Scipio v. Used Car Connection, Inc.*, 7th Dist. No. 10-MA-186, 2012-Ohio-891, ¶40 (appellee not permitted to make arguments in appeal that would modify or change trial court's judgment because no notice of cross appeal filed).

{¶93} In this case, if the trial court has made a calculation error, the other remedy available to appellee is a Civ.R. 60(B) correction. In any event, reversing or modifying the trial court judgment based on appellee's cross-assignment of error is allowing appellee the benefit of a cross appeal even though a cross appeal was never filed by appellee.