[Cite as *Baird v. Crop Prod. Servs., Inc.*, 2012-Ohio-4022.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

C. WAYNE BAIRD,	:	
Appellant/Cross-Appellee,	:	CASE NOS. CA2011-03-003 CA2011-04-005
	:	
- vs -		O P I N I O N
	:	9/4/2012
CROP PRODUCTION SERVICES, INC.,	:	
Appellee/Cross-Appellant.	:	

CIVIL APPEAL FROM WASHINGTON COURT HOUSE MUNICIPAL COURT
Case No. CVF1000214

John H. Roszmann, 321 East Court Street, P.O. Box 475, Washington Court House, Ohio 43160, for appellant/cross-appellee

J. Trent Snavley, 7543 Baker Road, Sidney, Ohio 45365, for appellee/cross-appellant

PIPER, J.

I. INTRODUCTION

{¶ 1} Plaintiff-appellant/cross-appellee, C. Wayne Baird, appeals a decision of the Washington Court House Municipal Court granting Baird a $1,895.08 judgment in a contract case against defendant-appellee/cross-appellant, Crop Production Services, Inc. ("CPS"). For the reasons stated below, we affirm the decision of the trial court.

II. FACTS AND PROCEDURAL HISTORY

{¶ 2} Baird is a farmer who raises livestock and grows soybeans, hay, and corn. Baird cultivates his crops on his own farmland and on property he leases from two other landowners. One of these leased parcels is referred to as the Kiger farm. In the summer of 2009, Baird arranged for CPS to apply herbicide to the soybean fields located on the Kiger farm as well as another farm Baird was managing. A week after CPS promised to apply the herbicide, Baird noticed that the fields had not been treated. After Baird reminded CPS of its obligation, CPS treated the fields. Subsequently, Baird drove by those fields adjacent to roadways to confirm that the parcels had been treated. He did not, however, check the remaining fields that could not be seen from the roadways.

{¶ 3} One of the parcels that could not be seen from the roadways was a 19.61 acre ("19-acre") field located on the Kiger farm. In the beginning of September, James Kiger, the landowner of the Kiger farm, informed Baird that the 19-acre field contained very tall weeds and foxtail. Baird then personally inspected this field and concluded that herbicide was never applied. Baird contacted CPS, who immediately sprayed herbicide on the field. Shortly thereafter, Baird decided he would not harvest the 19-acre parcel due to the small yield of soybeans it would produce as a result of the weeds and the potential damage the weeds would cause to his combine.

{¶ 4} On April 6, 2010, Baird filed suit against CPS demanding almost $9,000 in lost profits from the soybean crop planted in the 19-acre field. At trial, Baird argued that he entered into a contract with CPS that obligated CPS to spray the 19-acre field. Baird alleged CPS breached this contract and he suffered lost profits as a result of CPS's breach and negligence. CPS denied entering into a contract regarding the 19-acre field and also argued that Baird should not recover damages because he should have harvested the crop in the 19-acre field and any losses he endured would have been avoided by early detection if he

would have performed his duty as a farmer and periodically checked all his fields.

{¶ 5} The trial court announced its findings in open court, with the parties agreeing that the transcript of proceedings would constitute the court's written findings of fact. The court noted that both parties were equally responsible for what had occurred. Neither party requested, nor did the court issue, any additional written findings of fact. Nor did either side ask the court to clarify those findings expressed in open court.

{¶ 6} In an entry dated March 3, 2011, the trial court found that CPS and Baird entered into a contract whereby CPS was to spray Baird's 19-acre field and that CPS breached the contract by failing to do so. The court granted lost profit damages to Baird but not in the amount he sought. The trial court determined Baird's net loss was $3,790.17, which the court then divided in half ($1,895.08) because of Baird's failure to mitigate damages.

{¶ 7} Baird now appeals from the trial court's decision, raising one assignment of error. In addition, CPS cross-appeals from the same decision, raising three assignments of error.

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF-APPELLANT BAIRD IN GRANTING HIM JUDGMENT AGAINST DEFENDANT-APPELLEE CPS IN THE SUM OF ONLY $1,895.08.

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

{¶ 11} THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER THE PLAINTIFF'S DUTY TO MITIGATE DAMAGES.

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

{¶ 13} THE TRIAL COURT'S CALCULATION OF DAMAGES IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 14} Cross-Assignment of Error No. 3:

{¶ 15} THE TRIAL COURT ERRED WHEN IT FOUND THAT THERE WAS A CONTRACT BETWEEN BAIRD AND CPS TO APPLY HERBICIDE TO A 19.1 (SIC) ACRE PARCEL.

III. STANDARD OF REVIEW

{¶ 16} The majority of the assignments of error challenge the trial court's decision on the basis that the judgment award was against the manifest weight of the evidence. The Ohio Supreme Court has recently clarified the manifest weight of the evidence standard in civil cases. *Eastley v. Volkman,* Slip Opinion No. 2012-Ohio-2179. The Supreme Court noted that several appellate districts have merged the concepts of sufficiency of the evidence and manifest weight of the evidence in civil cases. *Id.* at ¶ 14. These districts, including this district, would not reverse a trial court's judgment as being against the manifest weight of the evidence if it is supported by some competent, credible evidence going to all the essential elements of the case. *E.g., Hamilton v. Ebbing,* 12th Dist. No. CA2011-01-001, 2012-Ohio-2250, ¶ 50, citing *C.E. Morris v. Foley Construction*, 54 Ohio St. 2d 279 (1978). Although in *State v. Thompkins,* 78 Ohio St.3d 380 (1997), paragraph two of the syllabus, the Ohio Supreme Court held that a manifest-weight review involves weighing of the credible evidence to determine if the evidence supports one party at trial, appellate courts have interpreted this standard as applying in criminal cases alone. *Eastley* at ¶ 1. In *Eastley,* the Supreme Court explained that *Thompkins* does not apply solely to criminal cases and therefore appellate courts should conduct the same analysis when reviewing a case for manifest weight of the evidence in both criminal and civil cases. *Id.* at ¶ 9-13.

{¶ 17} Therefore, a manifest weight challenge in a civil case concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *Eastley* at ¶ 12, citing *Thompkins* at 387. When reviewing whether a

judgment was against the manifest weight of the evidence in a civil case, this court will review the entire record, weigh the evidence and all reasonable inference, and consider the credibility of the witnesses. *Eastley* at ¶ 20, citing *Tewarson v. Simon,* 141 Ohio App.3d 103 (9th Dist.2001). *See State v. Lester,* 12th Dist. No. CA2003-09-244, 2004-Ohio-2909, ¶ 33. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide since it is in the best position to judge the credibility of the witnesses and the weight to be given to the evidence. Moreover, "every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the findings of facts." *Eastley* at ¶ 21, quoting *Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80 (1984), fn. 3. The question upon review is whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. *Id. See State v. Good,* 12th Dist. No. CA2007-03-082, 2008-Ohio-4502, ¶ 25.

IV. ANALYSIS

A. Contract Existence

{¶ 18} We begin our analysis with CPS's third cross-assignment of error in which CPS argues that the trial court erred when it found a contract existed between the parties to apply herbicide to the 19-acre field.

{¶ 19} "A contract is generally defined as a promise, or a set of promises, actionable upon breach." *Artisan Mechanical, Inc. v. Beiser,* 12th Dist. No. CA2010-02-039, 2010-Ohio-5427, ¶ 26, citing *Kostelnik v. Helper,* 96 Ohio St.3d, 1, 2002-Ohio-2985, ¶ 16. The essential elements of a contract include: "an offer, an acceptance, a meeting of the minds, an exchange of consideration, and certainty as to the essential terms of the contract." *Turner v. Langenbrunner,* 12th Dist. No. CA2003-10-099, 2004-Ohio-2814, ¶ 13. A valid contract must

be specific as to its essential terms, such as the identity of the parties to be bound, the subject matter of the contract, the consideration to be exchanged, and the price to be paid. *Id.* Additionally, an enforceable agreement must be mutual and must bind all parties to the contract. *Id*.

{¶ 20} In the present case, Baird testified about his management of the Kiger farm fields. He explained that he planted soybeans in several of the fields at the Kiger farm, including the 19-acre parcel in question. To prepare the 19-acre field for the 2009 growing season, Baird drove over the field in his tractor multiple times to cut up and mulch the previous year's crops and plant the new soybeans. According to Baird, after this process was complete he hired CPS to apply herbicide to several fields located at the Kiger farm including the 19-acre field. Baird explained that he spoke to an employee of CPS over the phone about the fields to be sprayed. Additionally, he claimed that the CPS employee met him during the 2009 growing season at the Kiger farm to visually identify the fields to be treated. On both of these occasions, Baird stated that he told CPS to apply herbicide to the 19-acre field. He testified that the total number of acres to be treated, including the 19-acre field, was 125 acres. At trial, it was unclear from Baird's testimony which fields were included in the 125 acres. However, Baird did testify that this was not the first time he hired CPS to spray herbicide on his farm. In fact, he also contracted with CPS in 2008 to have his fields sprayed to kills weeds, including the 19-acre field.

{¶ 21} CPS then presented evidence that the contract did not include the 19-acre field. A CPS employee testified that during the initial phone call, Baird requested 120 acres of soybeans to be treated with herbicide which did not include the 19-acre field. The CPS employee acknowledged that he made notations on an aerial map designating which fields Baird requested to be sprayed. This map did not indicate that the 19-acre field was included. The employee explained that if the 19-acre tract would have been included in the contract,

the contract would have been for over 140 acres.[1] Additionally, the CPS employee denied visiting Baird at his farms in 2009.

{¶ 22} After a thorough review of the record, we cannot say that the trial court's finding that a contract existed between the parties to spray the 19-acre field was against the manifest weight of the evidence. Both parties presented conflicting evidence as to the total acreage of the contract and whether the 19-acre field was included in the contract. We find that Baird's testimony established that there was an offer, acceptance, a meeting of the minds, an exchange of consideration, and certainty as to the essential terms of the contract to spray the 19-acre field. In finding that a contract for the 19-acre field existed, the trial court relied on Baird's testimony, reasoning that a person who "has been over the field four times is not going to forget to tell the spray company about it." The court also explained that it believed the contract included the disputed acreage because CPS had sprayed the 19-acre field the previous year. As noted above, the trial court is in the best position to weigh the evidence and the credibility of witnesses. In light of these facts, we find that the inclination of the greater amount of credible evidence establishes that a contract existed to spray the 19-acre field. Therefore, CPS's third cross-assignment of error is overruled.

B. Calculation of Damages

{¶ 23} In its second cross-assignment of error, CPS argues that the trial court's finding that Baird was entitled to $1,895.08 in lost profits is against the manifest weight of the evidence. Specifically, CPS claims the trial court's finding that the 19-acre field would produce 44 bushels of soybeans per acre was not supported by the evidence.

{¶ 24} "[T]he general measure of damage in a contract action is the amount necessary

1. The rationale of CPS's argument is that the fields initially sprayed by CPS contained approximately 120 acres. By including the 19-acre field, the total acreage under the contract would have been approximately 140 acres, not 120.

to place the nonbreaching party in the position he or she would have been in had the breaching party fully performed under the contract." *Hugh v. Wills,* 7th Dist. No. 05 MO 8, 2006-Ohio-1282, ¶ 46, quoting *Allied Erecting & Dismantling Co., Inc. v. Youngstown,* 151 Ohio App.3d 16, 2002-Ohio-5179, ¶ 62 (7th Dist.). Therefore, in recovering lost profits, the nonbreaching party may only be awarded the difference between the price he or she would have received under the contract less the expenses of performance that was saved because of the breach. *Nieman v. Bunnell Hill Development Co. Inc.,* 12th Dist. No. CA2007-07-174, 2008-Ohio-5541, ¶ 23, citing *Kosier v. DeRosa,* 169 Ohio App.3d 150, 2006-Ohio-5114, ¶ 34 (6th Dist.). The nonbreaching party bears the burden of proving these damages. *Kosier* at ¶ 34.

{¶ 25} It is well established that a nonbreaching party may recover lost profits in a breach of contract action. *Domestic Linen Supply & Laundry Co. v. Kenwood Dealer Group, Inc.,* 109 Ohio App. 3d 312, 317 (12th Dist.1996), citing *Charles R. Comb Trucking, Inc. v. Internatl. Harvester Co.,* 12 Ohio St.3d 241 (1984), paragraph two of the syllabus. In order to recover lost profits, the nonbreaching party must prove that "1) the profits were within the contemplation of the parties at the time the contract was made, 2) the loss of profits is the probable result of the breach of contract, and 3) the profits are not remote and speculative and may be shown with reasonable certainty." *Charles R. Comb Trucking* at paragraph two of the syllabus. As to whether profits are "remote" or "speculative," the Ohio Supreme Court has held that "the amount of lost profits, as well as their existence, must be demonstrated with reasonable certainty." *Gahanna v. Eastgate Properties, Inc.,* 36 Ohio St.3d 65 (1988), syllabus.

{¶ 26} In the March 3, 2011 judgment entry, the trial court granted Baird $1,895.08 in lost profit damages. In calculating the damages award, the court found that based upon the evidence presented the 19-acre field would produce an average of 44 bushels of soybeans

per acre, for a total of 862.84 bushels of soybeans. The court then multiplied the total number of bushels of soybeans by the current market price of each soybean bushel, $9.78. The court deducted the expenses Baird saved due to the breach of the contract and those expenditures Baird would have incurred had the contract been fulfilled. Lastly, the court divided the net loss profit award in half because of Baird's failure to mitigate his damages.

{¶ 27} The trial court's finding that the average yield of soybeans at the Kiger farm was 44 bushels an acre is not against the manifest weight of the evidence. At trial, Baird testified that he completed a crop insurance report for each of the four farms he managed in 2009. This report listed the bushels of soybeans produced, the acres farmed, and the average yield of soybeans per acre for each of Baird's four farms. In 2009, the report showed that the Kiger farm produced 5,703 bushels of soybeans over 129.3 acres, for an average yield of 44 bushels of soybeans an acre. Additionally, Baird also stated he completed a farm services agency document that certified that he planted 129.3 acres of soybeans on the Kiger farm in 2009 of which approximately 109 acres were actually harvested by Baird.

{¶ 28} CPS points to other evidence submitted at trial which disputes Baird's claim that he harvested an average of 44 bushels of soybeans an acre on the Kiger farm. CPS cites a sales receipt which shows that Baird would have produced an average of 37.14 bushels of soybeans an acre for all the farms he managed and an even lower 12.38 bushels an acre for the Kiger farm. However, during cross-examination Baird stated that the sales receipt did not show his total production for 2009 and thus this was not an accurate reflection of his damages. CPS also argues that Baird's earlier testimony that he harvested an average of 53.29 bushels of soybeans an acre is inconsistent with the trial court's determination.

{¶ 29} Upon a thorough review of the record, we agree with the trial court's finding that the 19-acre field would produce 44 bushels of soybeans per acre as this was supported by the inclination of the greater amount of credible evidence. We find Baird's testimony

regarding the crop insurance certification credible. Although the trial court was presented with different figures as to the average yield of soybeans per acre, the court chose to believe Baird's testimony regarding the crop insurance certification. While we consider credibility in a manifest weight challenge, credibility is a matter primarily for the trier of fact as it is in the best position to judge the credibility of witnesses and the weight given to evidence. We do not find that the trial court clearly lost its way and created a manifest miscarriage of justice. Accordingly, the trial court's determination that the average yield of 44 bushels of soybeans an acre for purposes of calculating damages is not against the manifest weight.

{¶ 30} CPS's second cross-assignment of error is overruled.

C. Mitigation of Damages

{¶ 31} We next address Baird's sole assignment of error and CPS's first cross-assignment of error together as both take issue with the trial court's decision regarding the mitigation of damages. Specifically, Baird claims: (1) the trial court abused its discretion by finding that he was "equally responsible" for the loss incurred and (2) such finding was against the manifest weight of the evidence. CPS argues the trial court erred by failing to consider Baird's duty to mitigate his damages due to his failure to either discover that the19-acre field had not been sprayed or harvest what little soybean crop remained in the field.

{¶ 32} The trial court announced its findings in open court on February 17, 2011. The court explained how it determined the amount of Baird's damages. It then noted that "each side is equally responsible here," and, without further explanation, awarded Baird damages of only one-half of his total net loss. However, in its subsequent judgment entry, the trial court stated "that both parties had a duty to mitigate damages," set forth its calculations for Baird’s total net loss, and reduced that figure by one-half, awarding Baird $1,895.08.

{¶ 33} Counsel for CPS inquired whether the court was going to prepare findings of facts and conclusions of law. The trial court suggested that it could ask both sides to prepare

findings of fact but then CPS's attorney asked if they could accept the transcript as the court's findings of facts which the court agreed they could.

{¶ 34} Baird asserts that the trial court's decision is against the greater inclination of the credible evidence. His position is that CPS breached the contract by failing to spray the 19-acre field and this was the sole proximate cause of his damages. Baird argues the trial court arbitrarily found that both parties had a duty to mitigate damages because the court failed to explain why he too was at fault and such a finding is not supported by the evidence.

{¶ 35} CPS argues that Baird had a duty to mitigate his damages under two separate and distinct theories. First, CPS claims that Baird had a duty to mitigate his damages by discovering during the early part of the crop season that the 19-acre field had not been sprayed. If he had done so, Baird would have found that the 19-acre field had not been sprayed and CPS would have sprayed the field with herbicide after being notified by Baird. According to Baird's own testimony, this would have completely avoided any of his alleged damages incurred as a result of CPS's breach. Secondly, CPS asserts that Baird had a duty to mitigate his damages by actually harvesting the small soybean crop left in the 19-acre field which would have reduced his total net loss.

{¶ 36} As noted, the parties agreed to treat the transcript of the February 17, 2011 court session as the trial court's findings of fact. Those findings include the court's determination that each party was equally responsible for what had occurred. Neither party subsequently asked the trial court to clarify its decision or make any additional findings of fact or conclusions of law. Consequently, the parties have waived any claimed error associated with the court's determination that both parties were "equally responsible." *See Bristow v. Bristow*, 12th Dist. No. CA2009-05-139, 2010-Ohio-3469, at ¶ 15, citing *McCarty v. Hayner*, 4th Dist. No. 08CA8, 2009-Ohio-4540, fn. 1.

{¶ 37} CPS first argues that Baird should have discovered that the 19-acre field was

not sprayed either under his duty to inspect his crops or by reviewing the number of acres covered in CPS's June 2009 invoice. While we agree with that the burden is on the breaching party to prove that the injured party did not avoid or minimize the damages experienced, the duty to mitigate arises only where the non-breaching party has knowledge that the he has actually sustained damages. A Maryland court reasoned:

> It is axiomatic that, before the doctrine of mitigation of damages or avoidable consequences will operate to impose a duty upon a plaintiff to minimize a loss that he has incurred by virtue of the defendant's breach of contract, the plaintiff must be aware that he has sustained a loss; to require a plaintiff to mitigate damages that he does not know he has suffered would be patently unreasonable.

Blumenthal Kahn Elec. Ltd. Partnership v. Bethelem Steel Corp., 120 Md.App. 630, 644 (1998).[2]

{¶ 38} In *Blumenthal*, the court went on to reason that because neither party established evidence that the non-breaching party knew of the breach of the contract during the time the non-breaching party was supposed to be mitigating its damages, this doctrine did not apply. Likewise, we find that the trial court could not reduce Baird's damages under the mitigation doctrine for his failure to inspect the fields as Baird had not learned of the breach until it was too late to take corrective measures in order to avoid the loss.[3] The evidence below indicated Baird was not aware that he sustained any damages until late August or early September when Kiger informed him that the 19-acre field was covered in weeds. Since Baird was unaware that he had incurred a loss, he was not required to mitigate damages in the manner asserted by CPS.

{¶ 39} Kiger indicated that a farmer supposedly has a duty to scout his fields. He also

2. *See also*, *Chandler v. General Motors Acceptance Corp.*, 68 Ohio App. 2d 30 (1st Dist.1980).

3. Obviously, the law would not protect Baird had he intentionally not scouted his fields in order to avoid discovering his loss. Had this been the case, the outcome on this issue would have been different.

testified that he inspects his farm on a very frequent basis and that the farmers he represented as an attorney absolutely looked over and scouted their lands "all of the time." However, on cross-examination, Kiger qualified his testimony by stating that each farmer is different in this regard. Finally, Baird also admitted on the record that it was the farmer's responsibility to monitor his crops during a normal growing season.

{¶ 40} Although CPS presented evidence at trial from both Kiger and Baird that farmers have a duty to inspect their fields, CPS did not present sufficient evidence regarding the specific frequency with which custom requires farmers to inspect their crops. Kiger, a farmer for over 40 years, told the trial court that farmers differ in the frequency in which they scout their crops. Nor did Kiger indicate a minimum and maximum range in terms of days, weeks, or months farmers customarily scout their crops. The phrases "look over their fields all of the time" or "regularly inspects them on a very frequent basis" are vague phrases subject to different interpretations and do not establish a daily scouting custom within the farming industry.

{¶ 41} CPS also argued that Baird should have discovered that the 19-acre field had not been sprayed at least within a week or so after the chemical was applied. According to the record, the effects of the herbicide would have been visually noticeable within seven to ten days after application. However, we note that Baird did in fact inspect his crops shortly after CPS sprayed them by driving down the road next to the fields. He noticed that they had been sprayed by CPS and assumed CPS also sprayed the 19-acre field he was not able to see from the road. This assumption may have been reasonable based upon the fact that CPS sprayed this same field the year before along with the fact that there was no evidence that Baird had problems with CPS not spraying the correct fields in the past.

{¶ 42} Because CPS failed to establish the frequency with which a farmer must scout or inspect his crops under this farming industry custom and the amount of damages Baird

could have avoided if he had complied with the industry custom, we find that CPS did not meet its burden in establishing Baird breached such a duty. CPS also argues that Baird should have realized that the 19-acre field was not included in the agreement when he received his invoice in June 2009 indicating only 125 acres were sprayed. CPS asserts that had this field been included in the contract the total acreage sprayed would have been in excess of 140 acres. CPS claims that had Baird added up the acreage of each field he expected to have sprayed, he would have known early on in the growing season that the 19-acre field had not been included in the contract price. Upon making this discovery, Baird could have mitigated his damages by informing CPS that the 19-acre field should have been included in the contract and should have been sprayed.

{¶ 43} The second theory argued by CPS is that Baird failed to mitigate his damages when he elected not to harvest the soybeans left in the field. The failure to mitigate is an affirmative defense and, as such, the burden of proof lies with the party asserting the defense. *Pinnacle Management v. Smith*, 12th Dist. No. CA2003-12-327, 2004-Ohio-6928, ¶ 12, citing *Young v. Frank's Nursery & Crafts, Inc.*, 58 Ohio St.3d 242, 244 (1991).

{¶ 44} As a general rule, "an injured party has a duty to mitigate and may not recover for damages that could reasonably have been avoided." *Chicago Title Ins. Co. v. Huntington Natl. Bank*, 87 Ohio St.3d 270, 276, 1999-Ohio-62, citing *S & D Mechanical Constrs. Inc. v. Enting Water Conditioning Syst. Inc.*, 71 Ohio App.3d 228 (2nd Dist.1991). However, the obligation to mitigate is not unlimited; the party is not expected to incur extraordinary expenses or to do what is unreasonable or impracticable. *Id.; Lucky Discount Lumber Co., v. Machine Tools of Am.*, 181 Ohio App.3d 64, 2009-Ohio-543, ¶ 12 (2nd Dist.). In mitigating damages, an injured party must use only ordinary and reasonable effort to avoid or lesson the damages. *Abroms v. Synergy Bldg. Sys.*, 2nd Dist. No. 23944, 2011-Ohio-2180, ¶ 58. A defendant will not be held responsible for those damages that plaintiff could have avoided

with "reasonable effort" and "without undue risk or expense." *Hartz Plaza Partners v. N.R. Dayton Mall, Inc.*, 12th Dist. No. CA89-11-066, 1990 WL 98223, * 3 (July 16, 1990).

{¶ 45} The evidence is uncontroverted that, at the time it was discovered that the 19-acre field had not been sprayed, there were soybeans growing among the weeds that potentially could have been harvested. The issue becomes whether Baird could have done so with "reasonable effort" and "without undue risk or expense."

{¶ 46} Kiger testified that when he discovered the unsprayed field he informed Baird that there were either no beans in it or there were very few beans and it was the worst weed field he had seen in 40 years on his farm. He did not believe the crop had a value and that the "weeds were actually taller than where the judge was sitting." Kiger also stated he could hardly get his "gator" through the field, and he concluded he would not use his own combine to harvest the soybean crop because the tall weeds would put stress on the machinery. He advised Baird he would not put an expensive piece of machinery in that field. Baird also testified he did not combine the crop because of the damage it would cause to his equipment. CPS did not provide any rebuttable testimony on this issue.

{¶ 47} We agree with Baird that he did not have a duty to mitigate his damages by harvesting the small soybean crop that was mixed with overgrown weeds in the field. Requiring Baird to place his expensive combine in a weed-infested field in an attempt to mitigate his damages would place him in a position to incur undue risk and expense. However, the trial court evidently believed that Baird shared in the responsibility for the end result. The dissent fails to distinguish a duty to mitigate damages (which exists in every case) from the duties or responsibilities imposed by the everyday operation of the farming industry.

{¶ 48} While Baird may not have had a duty to mitigate predicated upon a duty to inspect his fields or, once discovered, harvest a weed-infested crop, Baird is nevertheless

bound by the trial court's finding that he was equally responsible for what had occurred, a finding supported by Baird's own admission that he was obligated to monitor his crops. Although damages should be awarded to place an injured party in as good a position as he would have been absent a breach of contract, damages that could have been avoided by reasonable affirmative action by the injured party should not be included in an award. *See Homes by Caulkins, Inc. v. Fisher*, 92 Ohio App.3d 262 (12th Dist.1993).

{¶ 49} Once a right to damages has been established, the right will not be denied simply because the damages are inconceivable of being calculated with mathematical certainty. *Pennant Moldings, Inc. v. C & J Trucking Co.*, 11 Ohio App.3d 248, 252 (12th Dist.1983). In splitting the damages, the trial court was simply allocating the parties' responsibility, holding both accountable for their respective actions, and excluding from the damages an amount the court attributed to Baird's failure to take action that would have lessened his loss. We again emphasize that the trial court has heard the evidence first hand and, due to the murky factual issues involved, we cannot say the trial court clearly lost its way and created a manifest miscarriage of its judgment.

{¶ 50} As the trial court's award is not against the manifest weight of the evidence, Baird's sole assignment of error and CPS's first cross-assignment of error are not well-taken and overruled.

V. CONCLUSION

{¶ 51} Finding no merit to any of the assignments of error presented in the appeal and cross-appeal, the trial court's judgment is hereby affirmed.

POWELL, P.J., concurs.

HENDRICKSON, J., concurs in part and dissents in part.

HENDRICKSON, J., concurring in part and dissenting in part.

{¶ 52} I concur with the majority's decision that a contract existed between the parties to have CPS apply herbicide to the 19-acre field. I respectfully dissent from the majority's decision to affirm the trial court's damage award because I believe it is inappropriate to apply equitable principles to limit Baird's damages after concluding that Baird had not committed a wrong and did not have a duty to mitigate his damages. I find the trial court's decision that Baird failed to mitigate his damages, and was therefore equally responsible for such damages, is against the manifest weight of the evidence. Because CPS's breach of contract was the sole proximate cause of Baird's damages, I would reverse the trial court's decision and award Baird his entire net loss of $3,790.17.

{¶ 53} The majority has properly stated the law regarding mitigation of damages. Once the trial court determined that a contract existed and CPS had breached the contract, the burden was on CPS to establish that Baird failed to mitigate his damages. As discussed by the majority, CPS attempted but ultimately failed to meet this burden. Because the evidence presented at trial did not establish that (1) Baird had a duty to discover that the 19-acre field had been sprayed, either by inspecting the field directly or by reviewing CPS's June 2009 invoice that detailed the total number of acres sprayed, or (2) Baird had a duty to mitigate his damages by harvesting the small soybean crop that was mixed with overgrown weeds in the 19-acre field, I would reverse the trial court's decision dividing the damage award in half.

{¶ 54} The majority, although finding that Baird did not have duty to mitigate, affirms the trial court's decision that the parties were "equally responsible" by relying on the parties' failure to request additional findings of fact or conclusions of law. The majority then cites to *Homes by Calkins, Inc. v. Fisher*, 92 Ohio App.3d 262 (12th Dist.1993), for the proposition that damages that could have been avoided by reasonable affirmative action by the injured

party should not be included in the award. The "reasonable affirmative action" referenced in *Homes by Calkins* refers to the duty to mitigate damages whenever possible. *Id.* at 270. The majority has already concluded Baird did not have the duty to mitigate in the present case. Because the record does not demonstrate, nor has the majority identified, what "reasonable affirmative action" Baird should have taken to lessen his damages, I find the trial court's decision to divide Baird's damage award in half to be in err.

{¶ 55} As this court has recognized on numerous occasions, "a trial court speaks only through properly journalized entries, not through the judge's * * * comments." *Bokeno v. Bokeno*, 12th Dist. No. CA2001-07-170, 2002-Ohio-3979, ¶ 7. From its March 3, 2011 entry, it is clear that the trial court relied on Baird's alleged "duty to mitigate damages" as the basis for reducing his damages award. The trial court's finding that "both parties have a duty to mitigate damages" was not supported by the facts adduced at trial or by the evidence presented at trial. Because Baird did not have a duty to mitigate his damages, the trial court erred in reducing his damage award. As I indicated above, I would therefore reverse the trial court's decision and award Baird his entire net loss of $3,790.17.