

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2008-232

NOVEMBER TERM, 2008

Perry Green and Sheila Green	}	APPEALED FROM:
	}	
	}	
v.	}	Bennington Superior Court
	}	
	}	
Brent Peacock and Brent Peacock Construction Company	}	DOCKET NO. 108-3-07 Bncv

Trial Judge: David A. Howard

In the above-entitled cause, the Clerk will enter:

Plaintiff homeowners, Perry and Sheila Green, appeal the superior court's order granting them final judgment in their suit against defendant contractor for alleged faulty work. Homeowners contend that the court's factual findings are not supported by the evidence and that the court's resulting damage award is insufficient. We affirm.

The basic facts are as follows. Homeowners contacted contractor about putting an all-season room and a deck on their house. Homeowners had previously used a different company to put in some foundations and wood framing and wanted contractor to build the room and deck above the existing frame. Following some negotiations, contractor wrote up an estimate for the work. Eventually the parties signed a three-page contract, which specified the list of items contractor agreed to perform. The contract indicated that \$42,614 was the original price and on the final page listed \$48,684 as the final price. At the time construction began, the existing frame was covered by a tarp. Once construction commenced and the tarp was removed, the parties discovered deficiencies in the existing platform and foundation supports. Contractor explained that it would cost \$2,268 to perform remedial work on the foundation, and homeowners approved and paid this amount. During construction, the parties also orally agreed to some substitutions, including less-expensive windows for a savings of \$1,200. As work progressed, contractor issued invoices to homeowners, who, in total, paid \$47,160 to contractor.

Following completion, homeowners discovered deficiencies in contractor's work. The most serious problem was that the all-season room was experiencing differential settling during cold weather, causing doors and windows to be inoperable and cracks to form on the walls. Homeowners also complained of other deficiencies in contractor's work, including: the grout was not all cleaned off the tile floor, proper colored hinges were not installed, some painting was

unfinished, additional gravel was required, trim was dented, and the wires for the security system were not installed properly. Homeowners attempted to contact contractor to return and remedy the deficiencies, but despite their efforts no such meeting occurred. Contractor contended that pursuant to an agreement, he came to fix items on one occasion, but homeowners were not there.

Eventually, homeowners filed suit against the contracting company and its principal personally, alleging unsatisfactory completion of the work and requesting damages for overpayment on the contract price, remedial work and fraud. Contractor filed a counterclaim for unpaid additional costs from approved changes made to the contract. Prior to trial, contractor filed a motion to dismiss him personally from the suit. The court granted this motion, explaining that the contract was between homeowners and the company, and there was no basis to pierce the corporate veil. Homeowners do not appeal that decision. Following discovery, the court held a bench trial on homeowners' claims. At trial, homeowners presented solely the testimony of husband-homeowner, Perry Green. Homeowner is a licensed architect and has been involved in the construction of many buildings. He testified concerning the negotiations leading up to the agreement made with contractor. He also testified concerning the quality of contractor's work and the remediation that would be necessary to fix the problems. He requested \$41,400 in damages, including \$22,000 for remedial work to fix the foundation and settlement problems. Homeowner explained that he had not paid anyone to fix anything yet, but attempted to introduce a letter from a contractor regarding the cost of repair work to the foundation. The court excluded this evidence as hearsay. Contractor's principal testified on behalf of contractor. He explained the provisions of the original contract and the subsequent changes that the parties made to the contract. He agreed that there were some problems and explained that he had offered to fix many of homeowners' complaints. He also denied that he was responsible for the differential settlement problem because he had not constructed the foundation and homeowner had specifically decided not to build a full foundation under the room.

The court issued written findings and conclusions. The court found that some of contractor's work was not performed in a workmanlike manner, but that some of problems were due to the existing foundation, which was beyond the scope of contractor's work. As to damages, the court found that the final contract price was \$48,684. Accounting for agreed extra costs, including the \$2,268 to do additional work on the foundation, and crediting homeowners for some savings, the court found that homeowners would owe \$1,511 if there was no issue with the quality of the work. The court found that there was no credible basis for homeowners' claim that remedial work would cost \$22,000. Although husband-homeowner has some expertise in the area, the court found that his testimony was not sufficient to support this figure as it did not explain "what work would be done to do repairs and why it would be appropriate." The court did not find contractor's estimate of a few hundred dollars credible either. Ultimately, the court awarded homeowners \$2,500 for repairs, including repairing the door and the cracks on the wall, based on the testimony of both parties and the photographic evidence submitted at trial. As to homeowners' fraud claim, the court concluded that there was no basis for punitive damages because homeowners did not demonstrate that contractor intentionally did not fulfill the contract or misrepresented facts.

On appeal, homeowners allege that many of the court's factual findings are erroneous and therefore that the damage award is insufficient. We will not set aside findings of fact unless they are clearly erroneous. V.R.C.P. 52(a)(2). We view the court's findings "in the light most

favorable to the prevailing party below, disregarding the effect of modifying evidence.” Naylor v. Cusson, 2007 VT 108, ¶ 7 (mem.). Homeowners’ first allegation of error concerns the actual contract price. Homeowners assert that the contract price was \$42,614 and consequently they should be reimbursed for \$2,278 for overpayment on the contract. Homeowners allege that the court erred in finding that: (1) contractor gave them an original price of \$42,614 on a business card, (2) homeowners hoped for a lower figure, and (3) \$48,614 was the agreed price. Although homeowners’ version of the events contradicts these statements, the court’s findings are supported by the contract itself and contractor’s testimony at trial. Under homeowners’ version of events, contractor originally estimated \$38,500 for the work and then following further negotiations returned with a final estimate of \$42,614. The contract, however, signed by homeowners and contractor, lists \$42,614 as the original price and on the last page gives the final contract price as \$48,684. Moreover, contractor testified that he gave homeowners the original \$42,614 quote on a business card,<sup>1</sup> and that the final price was based on changes suggested by homeowner. Contractor also testified that he personally read through the estimate with homeowners and they agreed to this price. Based on this evidence, the court found that \$48,614 represented the final contract price. While homeowners may disagree, the finding is supported by the evidence, and there are no grounds to reverse it.

In a related claim, homeowners argue that the court erred in finding that it was not contractor’s responsibility to provide proper wiring to hook up their security system in the new room. The court’s finding that the security system was beyond the scope of the contract is supported by evidence. The contract does not mention the security system, and contractor testified that it was never a part of the parties’ agreement.

Homeowners next contend that the court’s findings pertaining to the foundation are erroneous. Homeowners argue that the court erred in finding that: (1) the \$2,268 was in addition to the contracted price, and (2) the problems resulting from differential shifting in the foundation were not contractor’s responsibility. Again, although homeowners dispute contractor’s version of events, contractor’s testimony supports the court’s findings, and we therefore affirm. Contractor testified that after the tarp on the foundation was removed, additional problems with the platform and foundational supports were discovered. He opined that he explained the problem with the existing foundation and homeowner chose to replace some of the footings at a cost of \$2,268 above the contract price. Contractor explained that he offered to do a more complete replacement, but homeowner did not want to incur the expense of constructing a new, full foundation. The court accepted contractor’s version of events and found that the \$2,268 was in addition to the contract price, and that some of the problems caused by shortcomings in the foundation were not contractor’s responsibility. See Naylor, 2007 VT 108, ¶ 9 (where parties negotiated specifics of their agreement, contractor not responsible for items beyond terms of agreement). The court found that contractor was responsible for repairing the cracks and fixing the door, but concluded that contractor’s breach did not require the extensive work asserted by homeowner. The court’s findings were within its discretion to assess the evidence and determine the credibility of witnesses. Id. ¶ 12.

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<sup>1</sup> The court found that contractor had given homeowners a business card with this price on it. Homeowners disputed contractor’s testimony, and testified that they received no business card with a quote on it. The court’s resolution of the conflict was within its discretion.

Homeowners argue that the court’s award is insufficient to do the necessary remedial work on the foundation to fix the differential settlement problem. Homeowners assert that the court erred in excluding the letter from a structural engineer contractor regarding the cost of repairs necessary to fix this problem. The court excluded this letter as hearsay. Hearsay is a statement made by someone not testifying at trial “offered in evidence to prove the truth of the matter asserted.” V.R.E. 801. Hearsay is not admissible unless provided so by statute or rule. V.R.E. 802. The trial court has discretion in determining the admissibility of documentary evidence. Kinney v. Johnson, 142 Vt. 299, 302 (1982). In this case, the trial court properly excluded the letter given that the author did not testify at trial, the letter was being introduced to prove the truth of homeowners’ claim for damages, and homeowners did not demonstrate that any exception to the hearsay rule applied. See Towle v. St. Albans Publ’g Co., 122 Vt. 134, 139 (1960) (error to admit letter where author not a witness and contents used to support damage award). Consequently, the only evidence of the cost of repairing the cracks from the differential settlement was the testimony of husband-homeowner and contractor. The court found that neither party’s estimate was entirely credible and set its damage award in between the two. As the finder of fact, the court had discretion to set a damage award within these limits. Meadowbrook Condo. Ass’n v. S. Burlington Realty Corp., 152 Vt. 16, 27 (1989) (affirming trial court’s finding of cost of repair where in between two extremes presented by parties’ witnesses).

Finally, homeowners argue that the court erred in denying their claim for punitive damages because they allege contractor acted fraudulently in purposefully misleading them concerning the contract price and in failing to respond to their requests for remediation. We conclude that the court properly denied homeowners’ request for punitive damages. Punitive damages are generally not available in cases involving breach of contract. Murphy v. Stowe Club Highlands, 171 Vt. 144, 154 (2000). In extraordinary cases, punitive damages may be awarded upon a showing of “actual malice,” that is, “conduct manifesting personal ill will, evidencing insult or oppression, or showing a reckless or wanton disregard of plaintiff’s rights.” Id. at 155 (quotations omitted). Homeowners presented no evidence that contractor acted with malice. Even crediting homeowners’ testimony that contractor did not reply to their attempts to contact him, this nonresponsive behavior does not have the character of tortious conduct necessary to support a punitive damage award. See id. at 156-57 (delays not malicious or of tortious nature where done for reasonable reasons).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice