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**IN THE
COURT OF APPEALS OF INDIANA**

JOE SPIKER EXCAVATING, INC.,)

Appellant-Plaintiff,)

vs.)

No. 67A05-1012-MF-751

MONICA M. RAHILL and)
JO A. MORTON,)

Appellees-Defendants.)

APPEAL FROM THE PUTNAM CIRCUIT COURT
The Honorable David R. Bolk, Special Judge
Cause No. 67C01-0904-MF-197

May 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

An excavating and plumbing company sued a homeowner to foreclose on a mechanic's lien obtained by the company after the homeowner paid only \$2750 of a \$4019.47 bill for work performed on her sewage lines. The homeowner disputed the validity of the lien and also counterclaimed for damages caused to basement carpet as a result of the company's alleged unworkmanlike performance. In its findings of fact and conclusions thereon, the trial court found that an employee of the company quoted the homeowner \$2500 as the total cost of the work to be done at the residence and that the company was contractually bound by that price. Because the homeowner had already paid the company more than the quoted price, the court set aside and released the mechanic's lien. The court went on to conclude that the evidence indicated that the company performed its work in an unworkmanlike manner, and therefore the company was liable to the homeowner for damages.

On appeal, the company argues that the trial court clearly erred in concluding that it was bound by the \$2500 price because the employee that quoted the price did not have authority to quote prices to customers. The company also asserts that the trial court committed reversible error when relied on evidence of subsequent remedial measures performed by the company in support of its finding that the company performed in an unworkmanlike manner. Third, the company asserts that the trial court's damage award is clearly erroneous. Considering the evidence that supports the judgment and the reasonable inferences to be drawn from that evidence, we find no clear error and affirm.

Facts and Procedural History

On March 27, 2008, Monica Rahill contacted Joe Spiker Excavating, Inc. (“Spiker”), regarding a sewage backup in the basement of a rental house owned by Rahill.¹ Spiker sent an employee to the residence, which was located in Greencastle. The employee conducted a video inspection of the sewer line, which revealed tree roots and other blockage in the line. Rahill agreed to have Spiker auger the sewer line in an attempt to clear the line. The Spiker employee performed this service and Rahill paid for the service. The employee advised Rahill that it was not guaranteed that it would cure her sewer problems.

Soon thereafter, Rahill experienced a second sewer backup into the basement. Rahill again contacted Spiker and requested that Spiker “fix” the problem. Tr. at 127. Spiker came to the residence and assessed the situation. Spiker later provided Rahill with a written estimate to replace between thirty and forty feet of sewer line from the residence to the city sewer line connection with new PVC pipe and to install a back-flow preventer. The written estimate for this work was \$1520. Rahill informed Spiker that she would seek estimates from other companies as well. Rahill subsequently authorized Spiker to perform the work.

Upon digging up the sewer pipe, Spiker discovered that the pipe did not have a drop in elevation that was necessary to allow the pipe to drain by gravity into the main sewer line. Spiker employee Brian Jeter contacted the Rahills to discuss what Spiker had discovered.

¹ Monica Rahill’s mother, Jo A. Morton, is listed on the deed to the property and is a named defendant/appellee in this matter. The parties agree that Morton was not involved in the dealings between Monica Rahill and Spiker and did not participate in the proceedings before the trial court. Therefore, for simplicity, we will refer only to Monica Rahill (“Rahill”), or Monica Rahill and her husband Austin (“the Rahills”), when discussing the appellees in this case.

Jeter explained that, in addition to replacing the sewer line, Spiker would need to install a residential lift station to aid the flow of sewage to the main sewer line. Before authorizing this service, the Rahills requested from Jeter the cost of the project. Jeter verbally quoted the Rahills the cost of \$2500. Austin Rahill confirmed with Jeter that \$2500 would be the “bottom-line” or the total cost for the project, and Jeter responded that this would indeed be the total cost. *Id.* at 115. Jeter was the only Spiker employee who discussed the price of the project with the Rahills, and Spiker did not provide a written estimate for the project. After speaking with Jeter, the Rahills consented to the project, and the work to install the new sewer line and residential lift station was begun and completed.

On April 30, 2008, Spiker sent the Rahills a bill for \$4019.47 for installation of the new sewer line and lift station. Monica Rahill immediately complained to Spiker and indicated that Jeter had quoted them the price of \$2500. On May 7, 2008, Rahill paid Spiker \$2500.

Then, on June 3 and 4, 2008, the Rahills experienced subsequent sewer backups in their basement. The Rahills contacted Spiker, whose owner, Joe Spiker, personally came to the residence. Joe Spiker inspected the lift station and surrounding water pit that his company had installed and later said that “if I was doing it myself I wouldn’t have done it like that. So I done [sic] a little bit of work on it.” *Id.* at 56. Joe Spiker made several changes to the lift station to better direct the flow of water in the pit. Since Joe Spiker made those changes, the Rahills have experienced no further sewer backups.

On June 9, 2008, Rahill sent an email to Spiker disputing the large bill that Spiker had sent and also questioning the quality of work originally performed by Spiker. She informed Spiker that her basement carpet was ruined and had to be removed as a result of the sewer backups that occurred after Spiker had worked at the property. Thereafter, Spiker's attorney sent a collection notice to the Rahills indicating that legal action would be taken if the balance of the bill was not paid within thirty days. Fearing that Spiker would file a mechanic's lien against the property or bring other legal action, Rahill emailed Spiker and agreed to make bi-weekly payments of \$250 toward the balance. The Rahills made one payment of \$250 and then stopped making such payments.

Spiker filed a mechanic's lien against the Rahills' residence on July 29, 2008. Spiker then filed a complaint to foreclose on the mechanic's lien on September 4, 2008. The Rahills filed an answer disputing the validity of the lien and also counterclaimed for damages caused to their basement carpet as a result of what the Rahills alleged to be unworkmanlike performance on the part of Spiker. A bench trial was held on September 17, 2010. On November 12, 2010, the trial court issued its findings of fact, conclusions thereon, and judgment which provides in relevant part:

24. The evidence however shows that Spiker's Mechanic[']s lien should be set aside and released. The evidence is clear that the only people that discussed the price regarding this project were the Rahills and Jeter. No other employee of Spiker engaged into a discussion with Rahill regarding this matter. Additionally, there was no written contract or estimate regarding the additional work to be performed. The agreed upon price of the work was \$2,500.00 Rahill has paid this amount in full, plus an additional \$250.00. Therefore, there was no additional money due and owing to Spiker that would support a Mechanic's Lein being filed in this matter.

25. The law implies a duty in every contract for work or services that the work or services will be performed skillfully, carefully, diligently, and in a workmanlike [manner]. *DataProcessing Services, Inc. v. L.H. Smith Oil Corp.*, 492 N.E.2d 314, 319 (Ind. Ct. App. 1986), reh'g denied. Failure to perform in a workmanlike manner may constitute a breach of contract. *Wilson v. Palmer*, 452 N.E.2d 426, 429 (Ind. Ct. App. 1983). In this case, Spiker came to Rahill's home on three separate occasions due to a sewer back up into Rahill's basement. Two of the back-ups were after Spiker engaged in work on Rahill's sewer lines. Rahill testified that she hired Spiker to "fix the problem" and was relying on them to do so. Joe Spiker, the president and Owner of Spiker testified himself that he came to the residence and inspected the project after one of the back-ups. Joe Spiker testified that there was work done "not like he would have done it" and Joe Spiker fixed the problem. Rahill testified that there were no further back-ups in the sewer after Joe Spiker personally came to the residence and fixed the problem.
26. The evidence demonstrates that Spiker did not engage in work in a workmanlike manner prior to Joe Spiker coming to the residence. However, the Rahills sewer had backed-up into the basement after Spiker was working at the residence and before Joe Spiker came to the residence and made the changes.
27. Rahill has been damaged due [to] Spiker failing to engage in work in a workmanlike manner. Rahill is required to replace the ruined carpet. The value of the damaged carpet is \$1,198.00,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED
as follows:

28. The Mechanic's Lien filed by Spiker against Rahill's property is hereby **RELEASED** and shall be shown as such by the Putnam County Recorder's Office.
29. Spiker is found to have breached the contract it entered into with Rahill as a result of the unworkmanlike manner of work. Rahill is entitled to damages in the amount of \$1,198.00.
30. Rahill overpaid on the contract price by \$250.00 due to Spiker's threatened litigation, to which she is entitled to reimbursement.

31. Rahill shall have a judgment against Spiker in the total amount of \$1,448.00.
32. Each party shall be responsible for its own attorney costs.

Appellant's App. at 11-12. This appeal ensued.

Discussion and Decision

At Spiker's request, the trial court issued findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52. Our standard of review is well settled.

Typically, when reviewing a judgment based on such findings, we must first determine whether the evidence supports the findings and then determine whether the findings support the judgment. We will set aside the trial court's findings of fact and judgment only if they are clearly erroneous. Findings of fact are clearly erroneous when the record lacks any reasonable inference from the evidence to support them and the judgment is clearly erroneous if it is unsupported by the findings and conclusions thereon. In assessing whether findings are clearly erroneous, we will not reweigh the evidence nor judge the credibility of the witnesses. Rather, we consider the evidence that supports the judgment and the reasonable inferences to be drawn therefrom. A finding or conclusion is clearly erroneous when our review of the evidence leaves us with the firm conviction that a mistake has been made. While we defer to the trial court's findings of fact, we do not defer to its conclusions of law.

Atterholt v. Robinson, 872 N.E.2d 633, 638-39 (Ind. Ct. App. 2007) (citations omitted).

I. Authority of Agent

Spiker first argues that the trial court committed reversible error when it concluded that Spiker was bound by the \$2500 total project price quoted to the Rahills by Spiker employee Brian Jeter. Specifically, Spiker contends that it should not be bound by the price quote as there was no evidence to suggest that Jeter had authority to quote prices to customers. We disagree.

It is well settled that a principal will be bound by a contract entered into by the principal's agent on his behalf only if the agent had authority to bind him. *Heritage Dev. of Ind., Inc. v. Opportunity Options, Inc.*, 773 N.E.2d 881, 888 (Ind. Ct. App. 2002). An agent's authority to enter into a contract on his principal's behalf will typically be actual, apparent, or inherent. *Gallant Ins. Co. v. Isaac*, 751 N.E.2d 672, 675 (Ind. 2001). Generally, the question of whether an agency relationship exists and the agent's authority is a question of fact. *Heritage Dev.*, 773 N.E.2d at 888.

Rahill concedes that Jeter had neither actual nor apparent authority² to bind Spiker. Instead, Rahill focuses on evidence in the record that supports a conclusion that Jeter had inherent authority to quote prices to customers.³ The doctrine of inherent agency provides that an agent may derive his power to bind the principal wholly from his relation with the principal and exists for the protection of persons harmed by or dealing with a servant or other agent. *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1211 (Ind. 2000). The doctrine requires that: (1) the agent acted within the usual and ordinary scope of his authority; (2) the other party reasonably believed that the agent was authorized to act for the principal; and (3)

² Actual authority is created "by written or spoken words or conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." *Gallant Ins. Co.*, 751 N.E.2d at 675 (citations and quotation marks omitted). Apparent authority refers to a third party's reasonable belief that the principal has authorized the acts of its agent; it arises from the principal's indirect or direct manifestations to a third party and not from the representations or acts of the agent. *Id.*

³ Spiker points out that the Rahills did not assert the doctrine of inherent authority at trial and the trial court did not specifically espouse that legal theory in its findings and conclusions. Nevertheless, we may affirm the trial court's judgment on any legal theory supported by the findings so long as we are confident that such affirmance is consistent with all of the trial court's findings of fact and the inferences reasonable drawn from the findings. *Mitchell v. Mitchell*, 695 N.E.2d 920, 923-24 (Ind. 1998).

the other party had no notice that the agent was not authorized to act for the principal. *Id.* at 1212-13. It is a status-based form of vicarious liability which rests upon certain important social and commercial policies, primarily that a business enterprise should bear the burden of the losses created by the mistakes or overzealousness of its agents because such liability stimulates the watchfulness of the employer in selecting and supervising the agents. *Id.* at 1210.

In support of a conclusion that Jeter had inherent authority to bind Spiker, the trial court specifically found as follows:

5. An employee of Spiker, Brian Jeter (hereinafter referred to as “Jeter”), spoke with Rahill and her husband, Austin Rahill, regarding the issue of there not being a drop in the sewer line. When speaking with the Rahills, Jeter explained that there would need to be a lift station put into place to aide [sic] the flow of the sewer to the main city sewer line in addition to replacement of the sewer line.
6. When discussing the installation of the lift station and the replacement of the sewer line the Rahills requested from Jeter the cost of the project. Jeter verbally quoted the Rahills the cost for the lift station and the replacement of the sewer line at \$2,500.00. Austin Rahill confirmed with Jeter that this would be the total cost for the project. Jeter confirmed with Austin Rahill that this was indeed the total cost. Rahill consented for the work to be completed for \$2,500.00. Rahill spoke with no other employees of Spiker regarding the cost of this project.
7. Spiker failed to put into the writing the cost of the installation of the lift station or exactly what work would be done to complete the installation of the lift station and the sewer line replacement. Jill Spiker, the office manager of Spiker, testified that it takes approximately 15 minutes for her to put together an estimate.

Appellant’s App. at 9. Because “the only people who discussed the price regarding this project were the Rahills and Jeter,” and “there was no written contract or estimate regarding

the additional work to be performed,” the trial court concluded that the “agreed upon price of the work was \$2,500.00.” *Id.* at 11.

From the evidence in the record, it may reasonably be inferred that quoting prices was within the usual and ordinary scope of Jeter’s authority. He was the employee Spiker sent to diagnose and remedy the Rahills’ problems. It is common in the home-repair business that the agent/employee on site is the one to determine and quote the cost of repair when asked by a homeowner. Indeed, no other employee of Spiker intervened at any time to discuss the price of this project prior to the work actually being performed. Given the fact that Jeter was the employee sent and authorized to evaluate the situation, recommend a solution, and remedy the problem, we conclude that his acts of determining and quoting the price were acts that “usually accompany or are incidental to transactions which [he was] authorized to conduct.” *Menard, Inc.*, 726 N.E.2d at 1214.

Similarly, the record supports a conclusion that the Rahills reasonably believed that Jeter was authorized to quote the price for the installation of the lift station and related work. Again, it is common in the home repair business for the employee on site to evaluate and determine the necessary repair and the resulting cost before a homeowner will consent to the repair. Indeed, it never occurred to Austin Rahill to question Jeter’s authority, as Jeter was clearly the “head honcho on the job site.” Tr. at 113. We agree with the trial court that it was entirely reasonable that the Rahills believed that Jeter had the authority to quote the total price of the project.

Finally, there is no evidence in the record to suggest that the Rahills had notice that Jeter was not authorized to quote a price for installation of the residential lift station and related work. Jeter was the only Spiker employee whom the Rahills had dealt with regarding the installation of the lift station, and Jeter gave the Rahills no indication that he was overstepping his authority when giving them a total project price quote. Moreover, at no time before the installation was completed did Spiker provide a different price quote for the project or inform the Rahills that Jeter's authority was limited in any way. Although we recognize that it is Jeter who may have been negligent in his price assessment and/or failed to follow company protocol when quoting the price, when "one of two innocent parties must suffer due to the betrayal of trust—either the principal or the third party—the loss should fall on the party who is most at fault. Because the principal puts the agent in a position of trust, the principal should bear the loss." *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299, 1304 (Ind. 1998). We agree with the trial court that Spiker is bound by Jeter's \$2500 price quote. The trial court's findings of fact in this regard are supported by the evidence, and our review of the record does not leave us with a firm conviction that a mistake has been made.

II. Remedial Measures

After Spiker completed work on the residential lift station and the sewer lines, the Rahills experienced additional sewage backups in their basement. Joe Spiker testified that he personally went to the Rahill residence after one of the backups and that he "noticed a couple of things" about the work previously performed by his company and decided that he would perform some remedial work on the lift station and surrounding pit. Tr. at 56-57. Monica

Rahill testified that they experienced no additional sewer backups after Joe Spiker personally fixed the problems. The trial court considered this evidence to support its conclusion that the original work was not performed in a workmanlike manner. Spiker contends that evidence of subsequent remedial measures performed by Joe Spiker was inadmissible pursuant to Indiana Evidence Rule 407.⁴

We note that evidence of subsequent remedial measures performed by Spiker was actually introduced by Spiker during the direct examination of Joe Spiker. Spiker then did not object to additional testimony regarding subsequent remedial measures elicited upon cross-examination. A party must object to evidence at the time it is offered into the record. *Everage v. NIPSCO*, 825 N.E.2d 941, 948 (Ind. Ct. App. 2005). A party that fails to make a timely objection or fails to file a timely motion to strike waives the right to have the evidence excluded at trial and the right on appeal to assert the admission of evidence as erroneous. *Id.* “In failing to make a timely objection or motion, the party is, in effect, acquiescing to the admission of the evidence.” *Id.*

Although Spiker addressed Indiana Evidence Rule 407 in its proposed findings of fact and conclusions thereon submitted to the trial court after the bench trial, it is well settled that to preserve a claimed error in the admission of evidence, a party must make a specific,

⁴ Indiana Evidence Rule 407 provides:

When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. The rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

contemporaneous objection at the time the evidence is offered. *Raess v. Doescher*, 883 N.E.2d 790, 796-97 (Ind. 2008). Spiker's failure to make a contemporaneous objection during trial has resulted in the waiver of any claim of error pursuant to Indiana Evidence Rule 407.

Spiker maintains that, despite the evidence of subsequent remedial measures, there is other evidence that suggests that any damages suffered by the Rahills was due to torrential rains that occurred in Greencastle or the Rahills' own negligence rather than any unworkmanlike performance of Spiker. Spiker's arguments are simply an invitation for us to reweigh the evidence and reassess witness credibility, which we may not do.

III. Personal Property Damages

We last address Spiker's assertion that the trial court committed reversible error when it awarded the Rahills \$1198 for the value of the ruined basement carpet. Our supreme court has noted that the fundamental measure of damages when an item of personal property is damaged, but not destroyed, is the reduction in fair market value caused by the negligence of the tortfeasor. *Dunn v. Meridian Mut. Ins. Co.*, 836 N.E.2d 249, 253 (Ind. 2005) (citing *Wiese-GMC, Inc. v. Wells*, 626 N.E.2d 595, 599 (Ind. Ct. App. 1993), *trans.denied*). Indeed, the Restatement (Second) of Torts provides:

When one is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for:

(a) the difference between the value of the chattel before the harm and the value after the harm or, at his election in an appropriate case, the reasonable cost of repair or restoration, with due allowance for any difference between the original value and the value after repairs, and

(b) the loss of use.

RESTATEMENT (SECOND) OF TORTS, § 928 (1977).

Accordingly, the plaintiff has the option of proving damages either by directly proving the diminution in fair market value, or by submitting evidence of costs of repairs. *Dado v. Jeeninga*, 743 N.E.2d 291, 295 (Ind. Ct. App. 2001). When a plaintiff presents evidence of the cost to repair damaged personal property, the plaintiff makes a prima facie case of her right to recover those costs, and the burden then shifts to the defendant to show that recovery of the repair costs will produce an over-recovery. *Id.* at 296. This is consistent with the general rule that “all doubts and uncertainties as to the proof of the exact measure of damages must be resolved against the defendant because the most elementary conception of justice and public policy requires that the wrongdoer bear the risk of uncertainty which his own wrong has created.” *Id.* (quoting *Boone County REMC v. Layton*, 664 N.E.2d 735, 741 (Ind. Ct. App. 1996), *trans. denied*).

Spiker asserts that the Rahills failed to meet their burden to prove damages because the only evidence submitted was the replacement cost of the basement carpet rather than the reduction in fair market value of the carpet. Here, Rahill testified that the basement carpet was ruined. Because the carpet could not be repaired, but had to be replaced, she testified that she obtained an estimate of \$1898 to replace the carpet. Tr. at 135. Spiker points out that the carpet was old and argues that valuing damages at the replacement cost would provide an over-recovery to the Rahills. However, Spiker presented no evidence to suggest that the carpet did not need to be replaced or that the replacement estimate obtained by the

Rahills was unreasonable. Moreover, in an obvious attempt to prevent an over-recovery on the part of the Rahills, the trial court discounted the replacement value provided by the Rahills by \$700 and awarded damages in the amount of \$1198. Absent any evidence to the contrary, we find the valuation by the trial court entirely reasonable. As stated above, any uncertainty as to the exact measure of damages must be resolved against the tortfeasor. *See Dado*, 743 N.E.2d at 296. Spiker has not shown that the trial court clearly erred.

Affirmed.

NAJAM, J., and ROBB, C.J., concur.