IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

O'NEAL TURNER and BONITA TURNER		)	
	Plaintiffs Below,	)	
v.	**Appellants,**	)	**C.A. No. 2005-07-103**
PAT COLLINS and JOHN COLLINS,		)	
	Defendants Below, Appellees.	)	

Date Submitted: November 13, 2006
Date Decided: January 3, 2007

O'Neal Turner
Bonita Turner
P.O. Box 248
Hockessin, DE 19707
Pro Se

Pat Collins
John Collins
3830 Katherine Avenue
Wilmington, DE 19808
Pro se

DECISION AFTER TRIAL

Plaintiffs O'Neal and Bonita Turner (hereinafter "Mr. Turner" and "Mrs. Turner" respectively), bring this breach of contract action to recover money damages arising from a contract with Patricia and John Collins (hereinafter "Mrs. Collins" and "Mr. Collins" respectively or "Collins Paving" jointly). Plaintiffs allege that after they contracted with Collins Paving to replace their driveway, the completed driveway immediately began crumbling and breaking apart, and has sunk in numerous areas. In addition, Plaintiffs allege that loose gravel from the crumbling driveway damaged their snow blower. Plaintiffs seek damages for the amount of the original driveway replacement, costs for an

engineer's certified evaluation report of the driveway, costs of repairing the snow blower, and court costs. The Defendants' responsive pleading admits the driveway has "minor cosmetic flaws" which they agreed to repair under the warranty, but allege Plaintiffs have not allowed them to make these repairs. Following trial on November 13, 2006, the Court reserved decision. This is the Court's final decision.

FACTS

Mr. Turner testified that on March 20, 2004 he entered into a contract with Collins Paving to remove his existing driveway and install a new driveway. He identified Plaintiff's Exhibit No. 1 as the March 20, 2004 contract, which specified that the new driveway was to consist of "up to 6 inches " of compacted stone and a minimum covering of "2 ½" of compacted asphalt. Collins Paving was also to install a drain, widen the driveway "approximately one foot on left and four feet at right rear," and lengthen the driveway by "approximately seven feet." Although the original contract indicated the sum of $4,300.00 as the total price for the job, Mr. Turner identified Plaintiff's Exhibit No. 3 as a copy of check dated September 13, 2004—signed by Bonita Turner and made out to Collins Paving—showing that the final cost of the job was discounted to $4,100.00.

Mr. Turner testified that Collins Paving began work on the driveway during the first week of September 2004, and completed installation on September 13, 2004. When Mr. Turner saw the nearly finished driveway on that date, he asked Mr. Collins why the driveway looked so porous. Mr. Collins told him that he had used a silicon mix. Also, a water test of the driveway showed water running off the right edge of the driveway onto the grass, which might have created a mud tunnel. Therefore, Mrs. Collins suggested

heating the remaining asphalt to create a 1 to 2-inch "lip" on the driveway to redirect the water. She described this as a temporary solution, because the lip would not adhere properly to the previously rolled asphalt.

After the driveway was completed, the Turners testified they did not use the driveway or park in the garage for two weeks. Immediately upon using the driveway, they noticed that the surface of the driveway was crumbling, shedding loose stones. Although Mr. Turner initially thought that the loose stones were a temporary by-product of installation, the crumbling problem persisted. He called Mrs. Collins who told him that the problem was normal. During the winter following installation, however, Mr. Collins noticed that both his snowblower and snowshovel were dislodging loose gravel. In the following spring the Turners began to notice tire ruts where the vehicle tires turned on the driveway, and also noticed spotting in six to eight places. Mr. Turner's practice was often to park a vehicle on the asphalt close to the garage entrance. Thereafter, he began to notice sunken tire impressions in this area.

Over time, the Turners' driveway has experienced increasing ruts, impressions, and crumbling. The following winter, Mr. Turner testified he also noticed that water would pool and freeze in an area where the asphalt was approximately one inch higher than the adjoining sidewalk, creating a three to five foot patch of ice.

Mr. Turner introduced Plaintiff's Exhibit No. 4 photographs he took between December 2004 and February 2005. They showed loose gravel coming off of the driveway, and rough patches of driveway where car tires had accelerated the crumbling. Mr. Turner introduced Plaintiff's Exhibit No. 5 photographs he took between April and May 2005. They showed areas near the garage where the driveway had sunk, and also

showed cracked and crumbling areas. Mr. Turner introduced Plaintiff's Exhibit Nos. 6 and 7, photographs he took between June 26, 2006 and July 15, 2006. Exhibit 6 showed increased crumbling in some areas of the driveway, and also some increased sinkage near the garage. Exhibit 7 showed the height of the asphalt to be relatively higher than the adjoining sidewalk, and also showed crumbling and indentations.

Mr. Turner also identified Plaintiff's Exhibit No. 8 as a video he made of the driveway on various dates. Due to defendants' objections, regarding certain measuring implements featured in the video, it was admitted for the limited purpose of showing the condition of the driveway, but not for the purpose of showing the driveway's purported elevation. The first part of the video showed the driveway during February 2005, the next part during June 2005, the next part on June 26, 2006, and the last part between July 15-21, 2006. The video showed the same deterioration depicted in Plaintiff's photo Exhibits 4 through 7. Mr. Turner testified the driveway had sunk and there were crumbling areas—on both the left and right sides—running the length of the driveway from the entrance up to the garage.

On cross examination Mr. Turner denied that Mrs. Collins had told him that turning his car wheels on the driveway with a stationary vehicle would pull up gravel. He admitted that Mrs. Collins had told him that repeatedly parking in the same spot would cause some settling of the asphalt. He admitted that when out of town he would occasionally leave his vehicle parked in the same spot, but only for a couple of days. Mr. Turner said that his previous driveway had some soft and settling spots, which was the reason why they chose to have it replaced. Mr. Turner testified that except for some

cracking and crumbling around two "soft spot" areas, the integrity of the previous driveway was fairly consistent.

Mr. Turner admitted that he had not performed any maintenance to the new driveway since its installation, choosing to leave it as installed by Collins Paving. Although Collins Paving offered to repair the surface of the new driveway, Mr. Turner refused to consent to these repairs, having some concerns about the driveway's underlying integrity. In reference to the height of the new driveway relative to the sidewalk, Mr. Turner admitted that Collins Paving had removed and reinstalled a block of sidewalk abutting the driveway, but said that this was only done to facilitate removal of the previous driveway rather than to correct any height discrepancy.

Patrick Walsh (hereinafter "Walsh") was called as an expert in civil engineering and construction, and testified at trial for the Turners. In the past twenty years he had supervised and/or participated in numerous development projects, including residential driveways. Walsh inspected the driveway on July 11, 2005. He testified his inspection revealed that the surface of the driveway was loose and pock-marked in areas, and there were approximately twelve areas where it showed signs of wear from tire marks. Walsh attributed these problems to a lack of cohesion or compaction. His conclusions, however, were based upon his visual observations rather than a compaction test. He hypothesized that the asphalt might have been too cold when installed, which would prevent it from compacting properly under a roller. Alternatively, the compaction problems may have been caused by a roller which was not large enough in relation to the thickness of the asphalt. He explained that a lack of compaction would lead to continued flaking

problems as moisture seeped into the asphalt and chipped off stones during freezing and thawing.

Walsh testified that the sinkhole near the front left side of the garage was probably due to settlement of the sub-base material under the asphalt rather than from shifting in the asphalt itself, since the asphalt wasn't showing any signs of cracking or marring. He also testified the relative height of the driveway to the adjoining sidewalk would trap water and form ice in the winter. Walsh testified that, in the back-up part of the driveway, there was a saddle or bowl shape in the asphalt near the edge of the driveway. This might have been caused by the roller operator slowing the roller in anticipation of the edge of the driveway. The slower speed could cause the roller to push some asphalt forward rather than simply flatten it out. He said that the distorted shape could have been corrected by rolling over the area from various directions, which Collins Paving might not have done. He also testified that the asphalt at the end of the driveway was lower than the curb line. The discrepancy might have been caused by the contractor running low on asphalt or by the difficulty of placing asphalt in such areas by hand rather than with a paver.

Walsh testified that the lack of asphalt cohesion was either attributed to improper materials or contaminated asphalt, but that when asphalt comes out of a certified plant this rarely ever happens. The other two explanations for flaking—cold asphalt or insufficient compaction—were interrelated since cold asphalt resisted proper compaction. He testified asphalt coming out of a plant is usually as hot as 260 to 280 degrees Fahrenheit, although it could be hotter depending on the material. Such material should be approximately 220 degrees when it arrives at the job site. The temperature of the

asphalt when it arrives at the job site depends on other factors like ambient temperature, weather, and whether the truck is heated.

Walsh went on to testify as follows: The hairline cracks in the asphalt are typically caused by the sub-grade material under the asphalt. They could also be caused by frost-heave action whereby frozen moisture in the sub-base material heaves during a freeze but then settles during a thaw. Once this movement has occurred the asphalt may crack under the weight of a vehicle. Although asphalt is generally considered impermeable, every mixture of asphalt has a certain porosity which might allow seepage. Compaction is therefore necessary for proper cohesion that pushes the air out of the asphalt, although overcompaction which pushes too much air out of the asphalt can also weaken it. Normally asphalt cannot be tested for compaction until after it has cooled. On the other hand, sub-base material can be tested for compaction once it has been laid down. Subgrade material—the ground underlying the driveway—should be rolled prior to installation. The crushed stone on top of the subgrade would have to be similarly compacted, as would the asphalt on top. Walsh concluded that since any of these three layers could contribute to the failure of a pavement section, a paving company would need to devote similar care to compacting each layer.

Based on his initial observations and the video images in Plaintiff's Exhibit No. 8, Walsh opined that the depressions near the garage were getting larger and that the area was experiencing continued settling. Based upon the video's depiction of the gravel produced by sweeping the surface of the asphalt, Walsh also opined that the stones on the surface of the asphalt were flaking or coming loose. Walsh concluded also that the flaking indicated that the asphalt was too cool when it was rolled, so that the tar in the

asphalt was already too hard to properly bond the stones together. When asked about the size of the asphalt gravel used in the Turner driveway, Walsh said that it looked like common driveway stone. He said that since the driveway was composed with the right kind of material, the driveway would have been "fine" if it had been properly compacted at the right temperature.

Walsh made several recommendations for repairing the driveway. The simplest solution would be to remove the asphalt, rework the subgrade, and apply a new layer of asphalt. A second solution would be to cut out and patch the sinkhole areas at the front of the driveway, fill in the low spots at the turnaround area, either mill down or remove-and-patch the high spot near the sidewalk, and then seal coat the driveway. This seal coat would need to be reapplied every two to three years, and would cost $500-$800 per application. Walsh recommended raising the sidewalk and curb as another option to correct the water pooling between the driveway and the sidewalk. In its current condition Walsh expected the driveway to continue to flake as freezing water and vehicle use would break off more stones.

On cross examination, Walsh testified that he personally performed only a visual inspection of the driveway. He discussed coring the driveway with the Turners, and also recommended that they get someone else to do a compaction test since Walsh did not have the equipment to do so. These tests would have provided additional data.

Walsh confirmed that asphalt softens in higher temperatures. He said that even in hot temperatures, a very heavy flowerpot sitting continuously on asphalt would not cause a depression greater than an eighth of an inch. He pointed out that cars, much heavier

than flowerpots, sit on driveways without making ruts. He said that he only saw tire ruts on poorly constructed driveways.

In summary, Walsh listed five specific problems with the driveway: 1) The stones flaking off the surface, 2) the sinkhole near the left side of the garage, approximately 1' wide, 2' long, and 1.5" deep, 3) the relative height of the driveway above the adjoining sidewalk, 4) saddling in the turnaround area, approximately 4' wide and 16' long, and 5) the relative lowness of the driveway below the adjoining curb line. Walsh estimated the size of the entire driveway was approximately 240 square feet.

Walsh's personal observation was that driveways were usually not seal coated until the asphalt was aged, perhaps five or six years after installation.

Walsh admitted on cross-examination, that water comes up through asphalt, but said that asphalt is not designed for this. He said that asphalt can be reheated, but that this is difficult to do. He said that he had used infrared patching to reheat and then repair areas of asphalt. He said that this technique could probably be used in certain areas of the Turners' driveway. Walsh said that although aged asphalt would need to be resealed, brand-new asphalt should not need resealing for two or three years. Once one begins resealing it must continue on a regular basis. He said that the amount of wear produced by a sitting vehicle turning its tires would depend on the weight of the vehicle and the quality of the installation.

In reference to his recommendations for the Turner driveway, Walsh said that if the asphalt were replaced, the subgrade would need to be readjusted but the new asphalt would not need to be sealed. On the other hand, if only sections of the asphalt were

removed and replaced, then the surface would need to be sealed. However, he said that sealing by itself would not solve the current major problems with the driveway.

Walsh's report of the Turner's driveway was admitted into evidence as Plaintiff's Exhibit No. 9.

Patricia Collins testified as follows: When she initially met with the Turners to discuss their driveway, she suggested either replacing the driveway entirely or removing only part of it and replacing it with an overlay. She said that removing the entire driveway doesn't always produce a better end result because the process may disturb the underlying ground, whereas an overlay does not affect the underlying ground and thereby alleviates settling problems. She said because the Turner driveway is located in a cul-de-sac at the bottom of a hill, a substantial amount of water flows onto the Turner property, including the yard and driveway. The Turners wanted the new driveway to have the same configuration as the old one, except with the turnaround area extended.

Mrs. Collins further testified the Turners' sidewalk had sunk prior to repaving, so that the area adjoining the driveway was very low. This, in combination with an edging from a nearby flowerbed, trapped water prior to repaving. She indicated as an unpaid favor to the Turners, Collins Paving removed the edging and raised the sidewalk slab to at least partially alleviate the water problem. Also, the sidewalk was low in relation to the driveway, and that lowering the driveway to the level of the sunken sidewalk would bring the driveway too low relative to other adjoining areas.

Mrs. Collins admitted that there were some loose gravel areas directly in front of the right garage door. She explained that as Collins Paving was laying the asphalt Mr. Turner suggested that the asphalt should be higher in that area to prevent water from

flowing onto the garage concrete. Mrs. Collins complied with Mr. Turner's wishes but told him that the added asphalt would not have as smooth an appearance as the rest of the driveway. She testified that Mr. Turner was "very agreeable to that." She testified Collins Paving did everything they could to give Mr. Tuner a good driveway, including "letting the base settle." Under the best conditions the driveway could have been done in three days, but because of the water problems and ground issues the job took longer. Mr. Turner would leave daily notes on the garage door about issues or questions he had, and Collins Paving tried in every instance to meet his requirements.

Collins Paving testified that it put down at least six inches of stone, then a layer of base blacktop, and then the final layer of asphalt. She guessed that the top layer was approximately 3" to 3 ½" thick.

After installation, when Mr. Turner had concerns about the driveway, Mrs. Collins met with him and discussed her own observations and proposals to correct the problems. She offered to correct the problems at no additional cost to Mr. Turner. Mr. Turner told her that Collins Paving would not be allowed on the property, and she didn't hear anything further from him until he brought suit in the Justice of the Peace Court.

In response to Mr. Turner's concerns about structural problems, Mrs. Collins wanted to core the driveway to determine each layer's thickness and degree of compaction. Mr. Tuner repeatedly refused to allow the driveway to be cored.

In reference to Plaintiff's Exhibit No. 1, Mrs. Collins pointed out that the contract between the Turners and Collins Paving provided a one-year guarantee against cracking or sinking of the asphalt, but gave no guarantee about water drainage issues. She said

that under the contract Collins Paving would have attempted to fix the problems with the driveway, but the Turners did not allow them to do so.

On cross examination Mrs. Collins confirmed that she had initially told Mr. Turner that the new driveway would have up to 6" of stone base and a minimum 2" of asphalt. Collins Paving did remove all materials from the previous driveway and started from scratch. Although Collins Paving compacted the subgrade material, they do not have any instruments to measure the degree of compaction. Mrs. Collins said that in her experience most contractors did not have instruments to measure compaction. Instead, Collins Paving gauged compaction based on observation and experience. In light of the excessive water flowing onto the Turners' property and the consequent possibility of wet or less stable ground, Mrs. Collins said that they used more base stone than usual and made sure it was compacted. They also made the layers of asphalt thicker than normal.

Although Mrs. Collins told Mr. Turner she wanted to have the driveway cored, she did not make this request in writing, but Mr. Turner did not ask her to put such a request in writing. To her, Mr. Turner seemed opposed to coring in general, not wanting to damage the driveway.

Mrs. Collins said that the rutting issues in the driveway were caused by repeated vehicle use over the same pathways. She said that asphalt is a soft material that would shift in response to repeated wear.

DISCUSSION

Plaintiff seeks recovery on the basis of breach of contract of $4,100.00 to replace the driveway, damages for the repair of their snowblower, and $780.00 for cost of retaining an expert for trial.

To recover for a breach of contract, plaintiff must first establish the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, that plaintiff sustained damages as a result of the breach by defendants. *ULIW Technology, LLC v. Hewlett-Packard Company, et al.*, Del. Supr., 840 A.2d 606 (2003); *Wilkinson Construction v. Brice Builders*, 2005 WL 958131 (Del. Com. Pl.), Beauregard, J. The measure of damages to which a recovering party is entitled is that which flow from the breach based upon the reasonable expectations of the parties.

The video and photographs admitted into evidence show that while major parts of the driveway are in good condition, there are substantial flaking, sinking, and height discrepancy problems in a number of discrete areas. The testimony of the expert witness indicates that the driveway installation was faulty for a number of reasons and would continue deterioration. The evidence in the record shows that some portions of the driveway were installed in an unworkmanlike manner, and plaintiffs have proven by a preponderance of the evidence that the asphalt installation for part of the driveway was of poor quality. *Compare Shaughnessy and Shaughnessy v.* McMahan, 1998 WL 1557481 (Del. Com. Pl.). Thus, I conclude that plaintiffs have proven that there was a breach of the obligation to install a driveway for which they contracted.

While the plaintiffs argue that the entire driveway requires replacement, the evidence fails to support a conclusion that necessitates removal and replacement of the

entire driveway. Although Plaintiffs' expert recommended complete replacement as the simplest, most preferable option for repair, he also recommended item-by-item repairs as the "next best solution." Since much of the driveway is useable, plaintiffs are not entitled to the amounts for a total replacement; especially, since they failed to permit defendants on the property to conduct repairs. There is a duty under common law contract that the measure of damages has always been tempered by the rule requiring the injured party to minimize his losses, although the party causing the breach, would pay for the cost of minimizing the injury. *Katz v. Exclusive Auto Leasing, Inc.*, Del. Super., 282 A.2d 866 (1971).

Plaintiff's expert, Walsh Engineering, Inc., testified and its report admitted as Plaintiff's Exhibit No. 9, indicates that the second less costly method to correct the driveway problem is to cut out and patch the sink holes. The cost of this repair is approximately $2,000.00. Additionally, this would require the driveway be sealed at the cost between $500.00 and $600.00 per application. Based upon the evidence in the record, I find these amounts supported and reasonable.

Plaintiffs did not submit any evidence regarding damage to their snowblower, so they have failed to meet their burden on this issue.

Plaintiffs introduced evidence that Walsh charged them $300.00 for his inspection of, and report on, their driveway. Given the driveway's flaking and sinking problems, Plaintiff's resort to an expert opinion was both foreseeable and reasonable as an attempt to assess and mitigate further deterioration. Therefore, Plaintiffs are entitled to $300.00 for the report.

Generally, the prevailing party in a civil lawsuit "shall recover, against the adverse party, costs of suit." 10 *Del. C.* § 5101; *see also* Court of Common Pleas Civil Rule 54(d). The award of costs is a matter of judicial discretion. *Donovan v. Delaware Water & Air Res. Comm'n*, 358 A.2d 717, 722-3 (Del. 1976). Expert witness testimony is a compensable expense. *Nygaard v. Lucchesi*, 654 A.2d 410 (Del. Super. 1994). Reimbursement for expert witnesses is limited "to time necessarily spent in attendance at court for the purpose of testifying." *State ex rel. Prince v. 0.0673 Acres of Land*, 224 A.2d 598, 602 (Del. 1966). Plaintiffs retained their expert witness Walsh for four hours at a rate of $120 per hour. Therefore, Plaintiffs are awarded $480.00 for their expert witness fees.

Accordingly, judgment is hereby entered for Plaintiff in the amount of $2,500.00 for repairs of the driveway, $780.00 for expert witness fees and costs for a total amount of $3,405.00 with post-judgment interest until paid.

IT IS SO ORDERED this 3rd day of January 2007.

_____

Alex J. Smalls
Chief Judge

Turner-OP Jan 07