

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 21, 2015 Session

BILL STAVELY v. HAROLD OTTO ET AL.

**Appeal from the Circuit Court for Stewart County
No. 4476CV00 George C. Sexton, Judge**

No. M2014-00477-COA-R3-CV – Filed May 14, 2015

This appeal arises from the remodeling of a 1940's era block and frame house. The agreement was based on a written estimate that described the work in very general terms. The issues on appeal are whether the contractor was liable for negligent construction of several areas of the work and, if so, the amount of damages. After a bench trial, the trial court found that there was barely a meeting of the minds, but, to the extent there was a contract, the contractor was to build a bedroom addition, a garage addition, and a sunroom; the contractor was to additionally replace the porches and repair the roof. Placing significant weight on the contractor's testimony, the trial court found that the homeowner failed to carry his burden of proof on all claims but for the negligent construction of the sunroom ceiling and roof for which the trial court awarded \$12,950 in damages. Both parties appeal. The homeowner contends the trial court erred in failing to find the contractor liable for negligent construction of other areas of the work and in failing to award damages commensurate with the cost of repair. The contractor contends the court erred in finding him liable for any negligent construction and in the calculation of damages awarded the homeowner. Finding the evidence does not preponderate against the trial court's finding that the contractor was liable for negligent construction of the sunroom ceiling and roof and the award of damages in the amount of \$12,950, we affirm that award. As for the claim the contractor was negligent in failing to install roof ventilation, the trial court made no findings regarding this claim, and, following a de novo review, we have determined the contractor was negligent and thus liable for failing to install the ventilation, and we award an additional \$2,500 in damages. As for all other claims, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed in Part and Modified in Part**

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and W. NEAL MCBRAYER, JJ., joined.

Roger Alan Maness, Clarksville, Tennessee, for the appellant, Bill Stavely.

James Roberts Potter, Clarksville, Tennessee, for the appellees, Harold Otto, Linda Otto, and Specialized Construction.

MEMORANDUM OPINION¹

The residential structure that is the subject of this dispute was built in the 1940's. It is a one story, block and frame house located at 2395 Leatherwood Road in Stewart County, Tennessee. The property was owned by and had been resided in by the parents of Bill Stavely for years, but by 1998, the structure had deteriorated to the extent that Mr. Stavely's elderly father had to move out.² Wanting to refurbish the home so his father could return, Mr. Stavely engaged Harold Otto, a licensed general contractor and a friend of Mr. Stavely's parents, to make the necessary repairs and several improvements.

The work to be done included building a bedroom addition, a screened-in porch and a garage addition over a well, installing vinyl siding to the exterior of the home, and removing and replacing the entire roof. There were no architectural plans or formal drawings, but Mr. Stavely prepared sketches of the work he wanted done. Based upon the parties' conversations and the sketches provided by Mr. Stavely, Mr. Otto prepared a job estimate that generally described the work and the price. The estimate, dated August 14, 1998, was signed by Mr. Otto but not by Mr. Stavely, and there is no other writing to memorialize their agreement.

Mr. Otto commenced work on the home in September 1998. Over the next five months, Mr. Stavely visited the job site on several occasions, but it is disputed how frequently³; however, Mr. Stavely frequently communicated with Mr. Otto by telephone. Mr. Stavely stated that he visited every few weeks, while Mr. Otto stated that Mr. Stavely visited more often and frequently worked alongside Mr. Otto and his crew. It is undisputed that when Mr. Stavely visited, he would observe the progress and discuss with Mr. Otto certain changes or specifications, and he specifically requested that the

¹ Tenn. Ct. App. R. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

² Mr. Stavely's mother had recently passed away.

³ Mr. Stavely's ability to visit the job site was limited due to the fact that he owned and operated a marble business in Illinois, which required his full attention.

screened-in porch be changed to a sunroom. As the weeks passed, the parties experienced on-going conflicts, including allegations of failure to timely pay and dissatisfaction with the work performed. Although Mr. Stavely made progress payments during the first five months, which totaled approximately \$60,000, the disagreements became so significant that Mr. Otto ceased work in February 1999.

A year and a half later, in October 2000, Mr. Stavely filed this action against Mr. Otto seeking to recover damages for breach of contract and negligent construction.⁴ Mr. Otto filed his answer and counterclaimed for breach of contract alleging failure to pay. In the interim, Mr. Stavely made several repairs to the home, including replacing the foundation, replacing the entire roof, replacing and reinforcing the sunroom ceiling and roof, reinforcing the frame system in the garage, fixing the vinyl siding, replacing the back porch, and installing proper ventilation for the roof.

Although this action was commenced in 2000, it did not go to trial until thirteen years later. The case was tried without a jury over two days, on September 20, 2013, and January 21, 2014. The witnesses included Mr. Stavely, Mr. Otto and Mitchell Barnett, an architect and former builder retained by Mr. Stavely as an expert witness. Mr. Barnett acknowledged that his inspection of the home occurred two years after Mr. Otto ceased work; nevertheless, Mr. Barnett testified that he personally inspected the home and relied on photographs taken by Mr. Stavely that documented Mr. Otto's work. Mr. Barnett prepared a report on June 27, 2001, which was entered into evidence.

Mr. Barnett described in detail the problems he observed with the home; in particular, he observed that the garage was built below grade and the contractor failed to take into account exterior drainage control which allowed water to seep into the garage and render the well that was located under the garage inoperable. In addition, Mr. Barnett noted that the garage and sunroom were improperly framed, that the bedroom addition was built lower than the original house with several holes in the room's foundation wall, that the cellar was being flooded, and that the roof and vinyl siding on the exterior were not correctly installed. Overall, Mr. Barnett noted that "the work performed by the contractor is generally sub-standard and poor quality. In many instances, it appears that the contractor . . . lacked proper experience or supervision in performing specific tasks or simply chose to disregard general standards of quality, good workmanship or manufacturer recommendations."

Mr. Stavely's testimony largely corroborated Mr. Barnett's report. Mr. Stavely additionally testified that he incurred labor and material costs totaling \$55,463 to repair Mr. Otto's work. Mr. Stavely introduced into evidence a handwritten note that he

⁴ Mr. Otto's wife, Linda Otto, was also sued, but the trial court dismissed all claims against Mrs. Otto. Mr. Stavely does not appeal her dismissal.

prepared which detailed the material and labor costs. Mr. Stavely did much of the work himself and estimated the value of his own labor to be \$20,000.

Mr. Otto testified that he was not hired to do any grade work, that none of his work was below grade, that his work was not negligent, and that he performed the work as Mr. Stavely requested. Mr. Otto also testified that some of the work remained unfinished because of conflicts with Mr. Stavely and because Mr. Stavely breached their agreement by failing to pay as and when required.

In its Memorandum Opinion and Order entered February 7, 2014, the trial court found that “there was barely a meeting of the minds necessary to form a contract between plaintiff and defendant.” The court found that, to the extent there was a contract, it was for Mr. Otto “to build a bedroom addition, a garage addition, a screened in porch (later sunroom), replace or refurbish porches and repair the roof.” The trial court also found that the work contracted for was substantially but not completely finished, and that Mr. Stavely paid for most but not all of the material and labor furnished by Mr. Otto. As a result, the court found that both parties materially breached the contract and neither party could recover under breach of contract; neither party appeals this decision.

As for the claims regarding negligent construction, the trial court found that many of the claims arose as a result of water seepage; moreover, the court found that, while there was conflicting testimony as to the source of the water, Mr. Otto was “emphatic and consistent” in his testimony on two things: that he was not hired to do any grade work and that none of his work was below grade. Based on these findings and the fact the court found Mr. Otto’s testimony more persuasive on these two issues, the court ruled that Mr. Otto was not responsible for grading; therefore, he could not be held liable for damages caused by water, including water entering the garage, well, and basement.

However, the trial court found that Mr. Otto negligently constructed the sunroom ceiling and roof, and awarded damages in the amount of \$12,950.

For the remainder of the claims, the trial court placed “significant weight” on Mr. Otto’s testimony as an experienced builder with over twenty-five years of experience, and found that Mr. Stavely failed to carry his burden of proof on these claims.

Both parties appeal various components of the trial court’s rulings regarding the negligent construction claims; however, Mr. Stavely does not appeal the trial court’s rulings regarding his claims relating to grade work, masonry work, water intrusion, or the installation of vinyl siding on appeal.

STANDARD OF REVIEW

The standard of review of a trial court's findings of fact is de novo, and we presume that the findings are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *see Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *See Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Where the trial court does not make specific findings of fact, there is no presumption of correctness, and the appellate court must conduct an independent review of the record to determine where the preponderance of the evidence lies. *Nashville Ford Tractor, Inc. v. Great American Ins. Co.*, 194 S.W.3d 415, 424 (Tenn. Ct. App. 2005); *see also Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). The trial court's determinations regarding witness credibility are entitled to great weight on appeal and shall not be disturbed absent clear and convincing evidence to the contrary. *See Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002).

ANALYSIS

The issues on appeal pertain to certain aspects of Mr. Otto's work, whether Mr. Otto was negligent in the performance of that work, and, if so, the appropriate measure of damages. Specifically, Mr. Stavely contends that the trial court erred in failing to award damages commensurate with the cost of repair by failing to consider the largely uncontroverted report of his expert, Mr. Barnett. Conversely, Mr. Otto insists his construction was not negligent, and, therefore, repairs were not necessary. He also insists that Mr. Stavely's proof of damages is insufficient; therefore, the trial court erred in awarding any damages.

The trial court found in favor of Mr. Otto on all claims of negligent construction but for the construction of the ceiling and roof in the sunroom, for which the court awarded damages of \$12,950. As for the remaining claims, the trial court stated that "[a]s an experienced builder with over twenty-five years experience, this court places significant weight on [Mr. Otto's] testimony," and ruled that Mr. Stavely failed to carry his burden of proof.

Having reviewed the record, we find that the evidence concerning the negligent construction claims were disputed; therefore, we respectfully disagree with Mr. Stavely's contention that Mr. Barnett's report was largely undisputed. The numerous conflicts in the evidence required the trial judge to evaluate the evidence and determine what was more probative and more persuasive, and following its assessment of the evidence, the court resolved the majority of the disputed claims in favor of Mr. Otto. Considering the significant weight the trial court placed upon Mr. Otto's testimony in resolving the disputed facts, we have concluded that the evidence does not preponderate against the

trial court's ruling with one exception: Mr. Stavely's claim for replacing soffit and fascia due to Mr. Otto's failure to install proper roof ventilation. We have concluded that the evidence preponderates in favor of awarding Mr. Stavely an additional \$2,500 for the cost of replacing the soffit and fascia.

As for the award to Mr. Stavely of \$12,950 for damages related to the sunroom ceiling and roof, which both parties contend was error, the evidence does not preponderate against the trial court's finding that Mr. Otto was negligent in the construction of the sunroom ceiling and roof. Specifically, Mr. Barnett stated in his report that the sunroom had an open, vaulted ceiling where the rafters were sloped and came to a ridge point, but the rafters were improperly connected at the top and were undersized for the span, and Mr. Otto did not dispute this testimony.

As for the amount of damages related to the sunroom ceiling and roof, Mr. Stavely contends it was inadequate, and Mr. Otto contends it was excessive. As the plaintiff seeking damages for defects in the performance of a construction contract, Mr. Stavely had the burden to demonstrate the reasonable cost of the required repairs. *GSB Contractors v. Hess*, 179 S.W.3d 535, 543 (Tenn. Ct. App. 2005). At trial, Mr. Stavely introduced into evidence a handwritten note he had prepared that identified the cost of materials and labor for the repairs he deemed were necessary. Mr. Otto challenges the evidence on appeal contending it was too uncertain and speculative to support an award of damages; however, Mr. Otto provided no evidence to challenge the cost of the repairs, but instead insisted that the work was not negligently performed and did not require repair.

The amount of damages awarded by a trial court is a question of fact. *Moody v. Lea*, 83 S.W.3d 745, 751 (Tenn. Ct. App. 2001) (citing *Beaty v. McGraw*, 15 S.W.3d 819, 829 (Tenn. Ct. App. 1998)). If the case is tried without a jury, "we review the amount of damages awarded by the trial court with the presumption that it is correct, and we will alter the amount of damages only when the trial court has adopted the wrong measure of damages or when the evidence preponderates against the amount of damages awarded." *Id.* We have concluded that the trial court applied the correct measure of damages and that the evidence regarding this issue does not preponderate against the trial court's amount of the award. Accordingly, we affirm the award of \$12,950 in damages for the negligent construction of the sunroom ceiling and roof.

For the reasons stated above, we affirm the trial court in all respects with the exception of modifying the amount of the judgment by awarding Mr. Stavely an additional \$2,500 for damages incurred to replace soffits and fascia.

IN CONCLUSION

The judgment of the trial court is affirmed in part and modified in part, and this matter is remanded for entry of judgment awarding Mr. Stavely a total of \$15,450 in damages and for such other proceedings as are necessary. Costs of appeal are assessed equally against the parties.

FRANK G. CLEMENT, JR., JUDGE