IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 10, 2007 Session

ROGER WILKES, ET AL. v. SHAW ENTERPRISES, LLC

Appeal from the Chancery Court for Maury County
No. 03-708 Robert L. Jones, Judge

No. M2006-01014-COA-R3-CV - Filed March 14, 2008

The principal issues presented by this appeal of a residential construction dispute between a contractor and the homeowner are (1) whether the standard of workmanship required of the contractor by the chancellor was correct and (2) whether the proper measure of damages was applied. The chancellor found that some of the house construction was defective, but that the cost of repair of the defects was excessive and disproportionate. The chancellor held that the proper measure of damages was the diminished value of the house and awarded damages on that basis. We affirm in part, reverse in part and remand for proof of the contractual workmanship standard of "good building practices" and for proof of the diminished value of the home.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part and Remanded

E. RILEY ANDERSON, SP. J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., joined. WILLIAM B. CAIN, P.J., M.S., not participating.

Jean Dyer Harrison, Nashville, Tennessee, for the appellants, Roger Wilkes and Vittoria Wilkes.

Barton E. Kelley, Columbia, Tennessee, for the appellee, Shaw Enterprises, LLC.

OPINION

Background

On September 18, 2002, Appellants Roger and Kay Wilkes ("Wilkes") contracted to buy a house under construction in Maury County from Appellee Shaw Enterprises, LLC, ("Shaw") for $259,000. The Wilkes completed the sale in November of 2002 and occupied the house shortly

thereafter.[1] In February 2003, the Wilkes discovered a water leak in the vaulted ceiling of their home and additional water leaking into the basement from the front windows of the house. The Wilkes contacted Randall Shaw, the owner of Shaw Enterprises, LLC, to discuss the leak and its cause. Shaw attempted to repair the leak and other defects but failed to completely stop the leak or to correct other problems. The Wilkes had an inspector, an engineer and an architect inspect the house and determine the extent of construction defects in the house. As a result, the Wilkes discovered that Shaw had not installed flashing and weepholes throughout portions of the house during the original construction as required by the applicable building codes.[2] The Wilkes also learned from his consultants of other defects and omissions that they identified primarily in the roof and the brick veneer.

As a result of the findings, the Wilkes filed a complaint in the Chancery Court for Maury County, alleging fraud, breach of contract, violations of the Tennessee Consumer Protection Act, negligent, intentional and/or fraudulent misrepresentation; and negligence.

Shaw answered denying the allegations, but admitting the leak and alleging that the Wilkes interfered with Shaw's repair efforts.

The case was tried without a jury in Maury County Chancery Court on February 6 and 7, 2006. The Chancellor entered a Judgment, in which he awarded the Wilkes $31,879.15, based on the breach of contract claim.[3] The Wilkes appealed the Judgment on May 15, 2006. Three days later, on May 18, 2006, the Wilkes filed a motion in Chancery Court requesting $30,240.83 in attorneys' fees and $9,073.78 in expert fees. The chancellor awarded $1,500 for expert fees but denied attorney's fees based upon the Wilkes' waiver of the issue and lack of jurisdiction resulting from the filing of the Notice of Appeal prior to filing the motion for attorney fees and costs.

Evidence at Trial

The evidence presented during the bench trial before the Chancellor is summarized as follows:

The construction of the Wilkes' house was explained in great detail by numerous witnesses from both parties. The house at issue is of "brick veneer" construction, meaning that the outside of the house is bricked, but the brick does not bear the significant weight of the roof and the house. Instead the brick is attached to a wooden frame, and provides the finished appearance of a brick home. Under the applicable building code in Maury County at the time the house was built, the 1995

[1] Prior to the Wilkes occupying the house, the Maury County Department of Buildings and Zoning inspected the house to insure compliance with local building code and issued a Certificate of Occupancy.

[2] Flashing is a thin metal sheet integrated into the house to direct water away from the interior of the house to prevent water and moisture infiltration into the house.

[3] The record indicates the fraud, consumer protection, and misrepresentation claims were dismissed on the day of trial.

CABO One and Two Residential Code, contractors are required to install flashing in specific portions of the house in the gap between the brick and the wooden interior structure of the house to prevent water from entering through the brick mortar into the interior of the house. Because the mortar used between the bricks allows moisture to penetrate, holes, known as weepholes, are required by the building code to be placed into the brick veneer to allow moisture to escape. The building code also required additional flashing to be installed in the house at specific points, such as the junction between the roof and a wall.

Randal Shaw admitted that the house he built for the Wilkes did not contain weepholes and flashing. Shaw, however, testified that none of the homes in the Wilkes' neighborhood that were constructed up through 2002 contained flashing and weepholes. He stated that, according to his understanding, the Maury County building officials did not require weepholes and flashing to be installed at that time. With regard to the diminution in value of the home, Shaw testified that the home, without flashing and weepholes, was valued at $259,900, the same price at which the house was sold. He testified that the value of the home was not affected by the lack of flashing and weepholes.

J.P. Hatch, the Director of Building and Zoning for Maury County, had a different view. He testified that "1995 CABO One and Two" was the building code in effect at the time Shaw Enterprises built the Wilkes' house. He said that the building code required flashing to be installed at several locations in the house, such as along windowsills and above the windows.[4] With regard to whether Maury County made a conscious choice to not enforce the weepholes and flashing requirements as found in the applicable building code sections, Hatch stated that "[t]he flashing was always understood that it would be installed." The County, however, did not specifically inspect for flashing because flashing is usually installed at the time the brick is installed, and as a result, a proper inspection for compliance with the flashing requirement would require that the County post a man on site during the bricking of the house, which was impractical. He testified that the County inspected the home five times at specific phases throughout the construction process to ensure compliance with the code. He recognized that his inspectors were not able to inspect everything in the code book during the five planned inspections. He also said that a certificate of occupancy means that to the best of their ability the house meets the code requirements, but the certificate is not a guarantee that everything in the house had met the code. He testified that he assumes all contractors know the code and are going to comply with the code.

When asked about how to fix the problem of the lack of through-wall flashing in a house, Hatch replied, "Well, it depends on what location. Over and under the windows, you could simply remove the brick and add the flashing and replace the brick." He also testified, with regard to flashing the whole house, that it "would be a little more difficult. It may be possible to do it in

[4] In this matter, there are two types of flashing. "Sidewall" or "counterstep" flashing, according to Mr. Hatch, is required at roof-to-wall intersections. "Through-wall" flashing, on the other hand, is required around doors and windows. "Weepholes" are holes in the brick veneer that allow water that has reached in the flashing to escape. The evidence indicates that the house lacked all types of flashing and weepholes.

sections, but it would be very difficult." In addition, Hatch explained that leaving weepholes out is not a serious matter because they can be drilled at a later time. He said that a house without weepholes could still be in compliance with the code. On the other hand, "leaving the flashing out -- that's a serious matter. . . ." according to Hatch.

The Wilkes hired three consultants who conducted inspections, prepared written reports and testified at trial about the defects and omissions in the construction of the house. Harrison McCampbell, a licensed architect who specializes in moisture issues within the building envelope, inspected the Wilkes' house specifically for moisture intrusions. McCampbell testified that he found no flashing in the house and several leaks in various areas of the house. He also testified about moisture being present between the interior walls of the home and the exterior brick veneer.

Walter Jowers, a home inspector, performed an inspection and made various findings regarding defects in the home including a lack of flashing and weepholes in the brick veneer. He briefly testified at trial about his findings and his report. In his report, he noted that the local code inspectors do not enforce the part of the code regarding flashing and weepholes. He also noted that it is possible to retrofit a completed house with flashing and weepholes, but it is tedious and costly.

William Elliston, a structural engineer, viewed the Wilkes' house and prepared an engineering report based on his findings and those of Jowers. Elliston testified at trial that it appeared that weepholes and flashing had been omitted in the brick above the door and window opening and at the bottom of the brick veneer. He further testified that the brick veneer allows water to pass through and without proper flashing the wood in the moist areas will quickly rot. In order to repair the defects, Elliston stated that ideally, all of the brick veneer should be removed and flashing installed and the brick reinstalled. He also said that you can remove only the brick around the windows and the doors, but this replacement method leaves a ring of non-matching brick around the window.

Eddie Miles, a general contractor with extensive brick experience, prepared an estimate of the total cost of repair to the Wilkes' home. He testified that the cost to remove and reinstall the brick veneer and carry out the necessary related repairs was $82,187, without profits or overhead. He said that to replace the roof sheathing was $8,320 and to replace the entire roof was an additional $10,125. Miles also enumerated a number of other alleged defects in the house. He estimated that the total cost of repair to the Wilkes' house would be $156,727.32, which included a twenty-four percent profit and overhead fee.

In addition to his own testimony, Shaw called three witnesses for the defense. First, Rex Hadley, an employee at the Maury County Department of Building and Zoning, testified that most of the houses that he inspected in Maury County in 2002 did not contain weepholes. He also said that he did not "turn down" or refuse to grant a Certificate of Occupancy to a house that did not have weepholes. He stated that he could not answer whether he would turn down a house that lacked flashing, but said that the applicable building code required the installation of flashing in specific

points throughout a house. He testified that he was an original inspector of the Wilkes' house during the footer and initial framing inspection, but he did not conduct any further inspections on the house.

Tim Vantrease, the general sales manager for the Columbia, Tennessee store of Alley-Cassetty brick company testified that his company provides seventy percent of the brick to builders in Maury County and supplied the brick for the Wilkes' house. Vantrease said that he personally knew the subcontracting crew that installed the brick veneer on the Wilkes' house and testified that the crew was not installing flashing and weepholes in houses in 2002. He also stated that he had observed an additional ten to twelve brickmasons' work in Maury County in 2002, and none of them installed flashing or weepholes in a brick veneer house. He testified that prior to the enforcement of the flashing and weepholes code provisions, which began approximately two years after the Wilkes house was built according to Mr. Vantrease, he sold no flashing in Maury County.

Neither party introduced any evidence as to whether the alleged defects and omissions violated "good building practices", the standard of workmanship contained in the purchase contract.

Chancellor's Findings of Fact

On April 19, 2006, the Chancellor entered a judgment in favor of the Wilkes for $31,879.15, in which he detailed findings of fact and conclusions of law. In essence he found the house contained defects, which necessitated an award of damages; however, he did not make a specific finding of fact that the defective construction breached the standard of workmanship set out in the contract. In addition, he did not explain the precise legal basis upon which he held Shaw liable. Following are some of the more pertinent findings of fact:

> Shaw admits that his masonry subcontractor failed to properly install roof flashing in that portion [over and to the right of the front door]. . . Shaw attempted to correct that defect by sawing into the brick and installing flashing after the leaks were detected.
>
> It appears that the leak has not been stopped completely and that the brick, at least in that area of the front wall, may have to be removed with appropriate flashing properly installed and the brick relaid.
>
> Eddie Miles, a licensed contractor and custom builder, testified about an exhibited estimate for making various repairs, including the removal of all brick veneer around the house for the purpose of not only fixing the roof leak but for the additional purpose of installing flashing as the base of all brick veneer walls and leaving weep holes immediately above the flashing to permit any water penetrating the brick wall to escape through the weep holes.
>
> Houses built within the municipalities of Columbia, Spring Hill, and Mt. Pleasant are built in accordance with codes adopted by those municipalities and are inspected by

the building officials of those municipalities. Construction within Maury County, but outside the three municipalities, are subject to the CABO Code under the supervision of the county's Office of Building and Zoning, which office conducts inspections at various stages of construction. The portion of the code in the record as Exhibit 15 requires that brick veneer walls have flashing and weep holes. Such flashing and weep holes were not required before the 1995 edition of the code.

Maury County adopted the 1995 edition in or about that year, but it's inspectors did not inspect for or require flashing and weep holes until after the dispute between the parties arose in 2003. Those portions of the code are now enforced in Maury County.

Shaw admits that he did not install such flashing and weepholes before this dispute arose and was unaware of any masonry contractors doing so in the Maury County area before this dispute.

Many less serious defects are complained of by the plaintiffs, and most of these do not constitute code violations. The plaintiffs' roofing expert testified that the roof sheathing, the shingle overhand [sic], the nailing, and the trimming of valley corners are required by roofing manufacturers but do not constitute code violations. The failure of the defendant to properly follow those manufacturer recommendations results in a defect for which the plaintiffs are entitled to damages, but not in an amount sufficient to completely replace the sheathing and shingles. The more appropriate measure of damages is some percentage of the value because the life of the roof may not be as long as it otherwise would have been, and for the purpose of permitting some replacement of shingles in the portion of the roof near the leak in the front of the house.

Chancellor's Conclusions of Law

Based upon the Chancellor's findings, he concluded that the defects in the house warranted an award of damages to the Wilkes. Many of his conclusions revolved around the proper measure of damages for a case in which, in his view, the cost to repair the house is grossly disproportionate to the diminished value of the house as the result of the defects and lack of compliance with the applicable building code. The Chancellor concluded that the cost of repair was an excessive amount, which necessitated the use of the diminution in value measure of damages as opposed to the cost of repair. Accordingly, the Chancellor awarded a judgment of $31,879.15 to the Wilkes and concluded as follows:

The burden is on the defendant in this case to show that the cost of repairs is unreasonable when compared to the diminution in value due to the defects and omissions. The only such evidence submitted by the defendant is Mr. Shaw's testimony that at the time of the sale the house was of a value equal to the purchase price of $259,900. While the court feels that evidence is less than fully credible in

light of all of the defects, especially a continuing leak, it does offer some credible proof that the house with defects is close in value to such house without defects.

The plaintiffs' estimate of $156,727 for repairs, including removal of all brick around the entire exterior of the house, is grossly disproportionate to the value of the house. No reasonable person would actually remove and replace all of the brick on the house when untold number of houses have been built before and since 1995 without masonry flashing and weep holes. Certainly, such defect is not so substantial as to justify such a grossly disproportionate amount of damages.

On the other hand, it may be appropriate for some significant brick work to be done in the area above and to the right of the front door. The only legitimate figure the court has for that repair work is the $7,361 estimated by Mr. Miles for the repair of Item 11. As noted in the attached spreadsheet, that number is included again in Miles estimate for Items 15 and 16, which makes the subtotal of his estimates too high and also exaggerates his overhead and profit figure and total.

As noted in the "Court Findings" column of Exhibit A, the court has concluded that complete destruction of the brick veneer and total replacement of the same is unreasonably disproportionate for a technical code violation that did not exist before 1995 and was not being enforced when this dwelling was constructed. Instead the court is approving $10,000 for partial reasonable repairs or to compensate for a decrease in the value of what the house would have been if code compliant.

Likewise, total removal and replacement of roof sheathing and shingles would be disproportionately expensive when such are causing no loss of enjoyment and habitability. The technical violation of specifications by manufacturers of roof sheathing and shingles does not justify a replacement but may affect warranties of roof shingles or the life of the roof and justify a total of $4,000 damages for improper installation.

The other items found by the court to warrant a recovery by the plaintiffs are more in the nature of cost of repairs than diminution in value. Therefore, it is appropriate to approve 15% of the subtotal for a fee for management, overhead, and profit of a licensed contractor. Also, since the amount for brick veneer flashing and weep holes and for loss of roof life could result in repairs, the court is allowing the same 15% fee for all items of damage.

In accordance with the specifics of Exhibit A, it is appropriate for the plaintiffs to recover of the defendant a total judgment in the amount of $31,879.15.

The Chancellor prepared an exhibit, referred to as "Exhibit A." which was attached to the judgment. Exhibit A is a itemized spreadsheet containing a list of the alleged defects, whether that

defect is a code violation, the plaintiffs' and defendant's estimate of cost of repair for each alleged defect, and the corresponding monetary value that the Chancellor awarded to the Wilkes for each specific defect.

As we have observed, the Chancellor did not specifically state the legal basis for his award. It appears his award is based on Shaw Enterprises' breach of contract. The Chancellor did not mention any applicable contractual provision; however, the contract provided that Shaw would erect the house in accordance with "good building practices."

We find the main issues on appeal to be the following: (1) whether state law requires compliance with the building code; (2) what is the proper standard of workmanship by which contractors are to be held; (3) whether the Chancellor erred in basing the award of damages on the diminution of value as opposed to the cost of repair; and (4) whether the Chancellor erred in failing to award attorneys fees to the Wilkes.

Standard of Review

The standard of review of a trial court's findings of fact is *de novo* and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The 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 findings of fact, there is no presumption of correctness and we "must conduct our own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). We also give great weight to a trial court's determinations of credibility of witnesses. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). Issues of law are reviewed *de novo* with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999). Mixed questions of law and fact are subject to a different standard of review. *Bubis v. Blackman*, 435 S.W.2d 492, 498 (Tenn. Ct. App. 1968).

Analysis

Compliance with the Building Code

The Wilkes contend that state law requires compliance with the building code. We agree. Tenn. Code Ann. § 5-20-102 provides that the governing body of any county may adopt by reference a specific building code, which serves as the enforceable building code in the county. Tenn. Code Ann. § 5-20-102; *see also* Tenn. Code Ann. §§ 5-20-101-106. At trial, J.P. Hatch, the Director of the Maury County Codes Department, testified and the trial court found that the adopted code in effect in Maury County at the time the house was built was the "1995 CABO One and Two Family

Residential Code." Mr. Hatch's office was charged with ensuring the houses were constructed in accordance with the 1995 CABO Code.

Under the statutory framework, the county attorney or any other official vested with enforcement powers, such as the Maury County Office of Building and Zoning, may institute an injunction to prevent the violation of the code. Tenn. Code Ann. § 5-20-104. Further, any person who violates the adopted code provisions commits a "Class C Misdemeanor." Tenn. Code Ann. § 5-20-105. Therefore, according to the applicable statutes, state law in this situation requires compliance with the adopted 1995 CABO One and Two Family Residential Code.

Standard of Workmanship

The applicable building code statute, Tenn. Code Ann. § 5-20-105, however, does not create a private right of civil action or provide requirements as to the standard of workmanship to which a contractor or builder must be held. *See* Tenn. Code Ann. §§ 5-20-101, et. seq.[5] In an earlier case, however, this Court stated, "in the absence of express plans and specifications, the standard of workmanship prevailing in the area coupled with conformity to the applicable codes . . . is the standard by which the appellee's performance is to be tested." *Carter v. Krueger*, 916 S.W.2d 932, 935 (Tenn. Ct. App. 1995). In the present case, however, the contract between the parties contained a specific standard with which the construction was to comply. The contract contained a "Limitation" clause, which stated:

> Seller agrees to erect the house in substantial accordance with the plans and specifications selected *and in accordance with good building practices*. (emphasis added).

It is undisputed that this house was a "spec" house, meaning that the great majority of the house was not built according to plans or specifications previously requested by the Wilkes.[6] However, the language of the contract provides that "Seller agrees to erect the house in substantial accordance with the plans and specifications selected ***and*** in accordance with good building practices." (emphasis added). Thus, the erection of the house in accordance with good building practices is *not* dependent on there being previously agreed upon plans and specifications. Accordingly, the standard set out in *Carter v. Krueger*, *supra* at 935, does not apply because the parties contracted for a specific standard.

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[5] Unlike Tennessee, the Kentucky legislature has provided a private cause of action to any person damaged as a result of a violation of the building code. *See* KRS 198B.130. Regarding the proper award of damages under the statute, the Supreme Court of Kentucky has stated, "if a statutory violation has occurred, KRS 198B.130 requires payment of either the cost of repair to bring the property up to code compliance or payment of the diminution in fair market value of the property because of code infractions, whichever is less." *Real Estate Marketing, Inc. v. Franz*, 885 S.W.2d 921, 927 (Ky. 1994).

[6] An addendum to the contract provides for some minor specifications with regard things, such as the color of the carpet to be installed and the concrete in the driveway.

In this case, there was no written warranty by the builder in the record nor did the contract provide for a warranty. When a contract for the sale of a dwelling is silent about the terms of a warranty, there exists an implied warranty that the construction "is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction. . . ." *Dixon v. Mountain City Const. Co*., 632 S.W.2d 538, 541 (Tenn. 1982) (citations omitted).

Ordinarily, the implied warranty standard set out in *Dixon* would apply where there is no warranty. However, the Supreme Court has provided that "[t]his warranty is implied only when the written contract is silent." *Id*. at 541-42. In line with the Supreme Court's reasoning, the specific standard provided for in the contract prevails over the implied standard of workmanship because the contract is not silent on the issue of the standard to which the contractor will be held.

The Wilkes did not specifically allege that Shaw's construction of their house was not "in accordance with good building practices." Instead, under the breach of contract heading, they allege, "Defendant did not construct the home in a good and workmanlike manner nor did Defendant construct the home in accordance with accepted building standards, but carelessly and negligently and in an unworkmanlike manner constructed the home in contravention of the contract requirements and the building code." In essence, it appears the Wilkes based their breach of contract claim on both the express language of the contract and the implied warranty, which they assumed accompanied their house.

The Chancellor did not make a specific finding as to whether Shaw Enterprises breached the contractual standard of care. In regard to the applicable standard, the Chancellor did, however, quote language from *Dixon*, 632 S.W.2d at 541, which stated:

> [T]he home-buying public has a legitimate expectation that the workmanship and materials used by the builder-vendor in the construction of a dwelling will meet the standard of the trade for homes on comparable locations and price range and as such a warranty is implicit in the contract and survives the passing of title to the real estate and the taking of the possession, as an exception to the doctrine of *caveat emptor*.

Id. As a result of this language being included in the Chancellor's findings coupled with no mention of the contract standard, "good building practices," we have concluded that the Chancellor applied a standard of care based upon the implicit workmanlike manner in the prevailing area standard. However, we have determined, in accordance with *Dixon* and *Carter*, that the implied standard of workmanship did not accompany the construction of the house at issue because the explicit language of the contract provided a different standard. *See Carter*, 916 S.W.2d at 935; *Dixon*, 632 S.W.2d at 541-42.

The result of the Chancellor's application of the incorrect standard requires proof as to whether the defective construction breached the contractual standard of care – good building practices.

In the present case, a determination cannot be made that the defects in the house constitute a breach of the contract resulting from construction that fell below the standard of "good building practices" because the record is silent regarding "good building practices." Furthermore, the findings of the inspectors and the expert witnesses are "immaterial unless it is shown that the conditions found to be defective by them fell below the applicable standard." *Carter v.* 916 S.W.2d at 935. As a result, we are required to remand the issue for a seemingly obvious determination by an expert that the construction of the Wilkes' house did not comply with "good building practices."[7]

Damages

The Wilkes contend that the Chancellor erred by applying the diminution in value measure of damages rather than the cost of repair.

A determination regarding the proper amount of damages awarded by the trial court is a question of fact. *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 541 (Tenn. Ct. App. 2005) (citing *Sholodge Franchise Sys, Inc. v. McKibbon Bros., Inc.*, 919S.W.2d 36, 42 (Tenn. Ct. App. 1995)). The determination of which particular measure of damages is appropriate for any given case, however, is a question of law. *Beaty v. McGraw*, 15 S.W.3d 819, 829 (Tenn. Ct. App. 1998). Thus, we review the question of whether the trial court utilized the proper measure of damages under a *de novo* standard. *Id*. In essence, if a trial court hears a case without a jury, as was the case here, we presume that the amount of damages awarded by the trial court 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*. at 829.

Generally, courts have assessed two types of damages for breach of a construction contract – "cost of repair" or "diminution in value," also referred to as "difference-in-value." In *Edenfield v. Woodlawn Manor, Inc*., 462 S.W.2d 237, 241 (Tenn. Ct. App. 1970), the Court explained the relationship between the two measures of damages:

> As a general rule, the measure of damages is the cost of correcting the defects or completing the omissions, rather than the difference in value between what ought to have been done in the performance of the contract and what has been done, where the correction or completion would not involve unreasonable destruction of the work done by the contractor and the cost thereof would not be grossly disproportionate to the results to be obtained. On the other hand, the courts generally adhere to the view that if a builder or contractor has not fully performed the terms of the construction agreement, but to repair the defects or omissions would require a substantial tearing down and rebuilding of the structure, the measure of damages is the difference in value between the work if it had been performed in accordance with the contract and that which was actually done, or (as it sometimes said) the difference between the value of the defective structure and that of the structure if properly completed.

[7] The Wilkes also contend that the Chancellor made clear errors of fact with regard to whether certain defects were violations of the building code. In light of the contractual standard, we find this issue is irrelevant.

Edenfield v. Woodlawn Manor, Inc., 462 S.W.2d 237, 241 (Tenn. Ct. App. 1970) (citing 13 AM. JUR. 2nd, pp. 79, 80, 81 Section 79). The Court in *GSB Contractors, Inc.*, clarified the proper place for the "cost of repair" measure and the "diminution in value" measure by stating, "*Generally*, the measure of damages will be the cost or [sic] repair *unless* the repairs are not feasible or the cost is disproportionate to the dimunition [sic] in value." *GSB Contractors, Inc.*, 179 S.W.3d at 543 (citations omitted). In a case where the cost of repairs is "disproportionate when compared with the difference in value of the structure actually constructed and the one contracted for, the diminution value may be used instead as the measure of damages." *Id*. at 543 (quoting *Redbud Cooperative Corporation v. Clayton,* 700 S.W.2d 551 (Tenn.App.1985)).

It is well settled, however, that prior to a court's consideration of awarding damages based on diminution in value, as opposed to the cost of repair, proof must be offered on both the cost of repair and the diminution in value. *GSB Contractors, Inc.*, 179 S.W.3d at 543; *Nutzell v. Godwin,* No. 33, 1989 WL 76306, at *2 (Tenn. Ct. App. July 13, 1989). Otherwise, a court is left with no legal basis upon which to grant an award of the diminution in value. Further, the burden is on the defendant to show that the "cost of repair is unreasonable when compared to the diminution in value due to the defects and omissions." *GSB Contractors, Inc.*, 179 S.W.3d at 543. If the defendant fails to meet this burden, the court cannot simply not award diminution in value as the measure of damages. *See id*.

In this case, the Wilkes introduced evidence of the cost of repair, which totaled $156,727.32. The Chancellor stated that their cost of repair estimate was excessive and disproportionate to the value of the house.

In our view, Shaw failed to introduce adequate evidence of the diminution in value of the home resulting from the defects. The only evidence in the record with regard to proof of diminution in value is Randall Shaw's own testimony, in which he stated the house, with the present defects, was worth $259,900, the amount the Wilkes paid for the house. Thus, according to Randall Shaw, there was zero diminution in value to the house.

The Chancellor stated, with regard to Shaw's testimony regarding the diminution in value, "[w]hile the court feels that evidence is less than fully credible in light of all the defects, especially a continuing leak, it does offer some credible proof that the house with defects is close in value to such house without defects." Clearly, the Chancellor did not find Shaw's testimony on the issue to be fully credible. Shaw had a strong personal interest in claiming the house had not diminished in value despite the clear finding of ongoing leaks in the house and the failure of the house to comply with the code.

Based on the record before us, we find no credible evidence of the diminished value of the home. Accordingly, we must remand for the parties to present evidence as to the diminished value of the home. Thereafter, the Chancellor will make a determination of whether the cost of repair is unreasonable and disproportionate when compared to the diminished value of the house.

Award of Fees

Three days after filing a notice of appeal to this court on May 15, 2006, the Wilkes filed a Motion for Costs, which included a request for expert fees and attorney's fees. On July 14, 2006, the Chancellor awarded the Wilkes $1,500 in expert fees, but denied their request for attorney's fees because he found the claim was waived.[8] The Chancellor's explained that the trial court did not have jurisdiction because the Wilkes allegedly failed to present evidence of the attorney's fees, and the filing of the notice of appeal vested jurisdiction with the Court of Appeals.

The Wilkes, however, contend that they did not waive the issue of attorney's fees at the trial, and as a result, they are entitled to receive attorney's fees. The chancellor made an alternative award of attorney's fees in the event this court holds that there was no waiver and there was jurisdiction.

It is undisputed that the Wilkes requested attorney's fees in their complaint. Further, the record indicates that on two occasions during the trial, counsel for the Wilkes, reiterated her client's desire to obtain fees and costs associated with the litigation. The record contains testimonial evidence, in which the Wilkes estimated that he had spent between $10,000 and $20,000 on such fees. This fee amount is not as large as the total amount of $30,240.83 requested in the post-judgment motion; however, it does provide some evidence of fees, which the trial court could take into account when ruling on the issue.

Prior to the Wilkes' motion requesting attorney's fees, the Chancellor failed to address the issue, and thus, the Wilkes' right to attorney's fees remained unadjudicated. Therefore, under Rule 3(a) of the Tennessee Rules of Appellate Procedure, the April 19, 2006 Order, which appeared to be the final judgment, was in fact not the final judgment and not yet appealable. Tenn. R. App. P. 3(a); *See Thompson v. Logan*, No. M2005-02379-COA-R3-CV, 2007 WL 2405130, at *11 (Tenn. Ct. App. Aug. 23, 2007). The Wilkes' Notice of Appeal was "premature." *See Thompson*, 2007 WL 2405130, at *11. Because the Chancellor's April 19, 2006 Order was not actually an appealable final judgment until resolution of all the claims, rights and liabilities of the parties, "the trial court had jurisdiction to resolve the unadjudicated claim. . . ." *Thompson*, 2007 WL 2405130, at *11. As such, the Wilkes Notice of Appeal filed on May 15, 2006, did not divest the trial court of jurisdiction.

Because the trial court had jurisdiction to hear the issue of attorney's fees, we will determine whether the Chancellor's alternative award of attorney's fees is proper. The Chancellor, in the event this Court ruled the trial court did have jurisdiction, alternatively awarded $7,560.21 in attorney's fees to the Wilkes. The trial court found that the requested attorney's fees were excessive and incurred on theories pursued by the Wilkes, which were not sustained by the proof at trial. The determination of reasonable attorney's fees and costs is a "discretionary inquiry by the trial court, to which the appellate courts will defer, absent an abuse of discretion." *Keith v. Howerton*, 165 S.W.3d 248, 250-251 (Tenn. Ct. App. 2004) (citing *Killingsworth v. Ted Russell Ford,* 104 S.W.3d

[8] The Wilkes filed an additional notice of appeal on August 14, 2006, in which they appealed the July 14, 2006 Order. The appeals have been consolidated.

530, 534 (Tenn. Ct. App. 2002)). We conclude that the Chancellor did not abuse his discretion in awarding attorney's fees.

The Wilkes also contend the trial court erred in reducing the expert fees in proportion to the trial court's reduction in damages. It is true that in the Chancellor's Order regarding attorney's fees and discretionary costs he found the "damages sought by Plaintiffs and the repair costs associated thereto were excessive in relation to the diminished value of this particular home." However, we find no basis for the contention that the Chancellor's reduction of expert fees was based in any way upon the diminution in value of the house. The Chancellor stated that the fees were excessive and incurred on theories that were not sustained by the proof at trial. Accordingly, we conclude the Chancellor did not abuse his discretion with regard to his award of discretionary costs associated with expert fees. *See Sanders v. Gray*, 989 S.W.2d 343, 345 (Tenn. Ct. App. 1998); Tenn. R. Civ. P. 54.04. The Chancellor has also reserved the ultimate award of discretionary costs for expert fees until the Court of Appeals makes the final determination.

In addition to the Wilkes's entitlement to reasonable attorney's fees at the trial, their contract provides that the prevailing party shall be entitled to recover all costs, including reasonable attorney fees. Therefore, the Wilkes are entitled to attorney's fees on appeal. Accordingly, we remand this case for a determination of proper attorney's fees and costs incurred on appeal.

Management Fee, Overhead Cost and Profit

Miles, testifying on behalf of the Wilkes, stated that the management fees and overhead cost should be calculated at twenty-four percent (24%) of the cost of repair. Shaw, testifying on behalf of Shaw Enterprises testified that a ten percent (10%) fee is reasonable when completing a "cost-plus" job. Shaw admitted to not having any personal involvement in a fee of this type, but testified that it is the industry standard.

The Chancellor awarded a fee of fifteen percent (15%) to the Wilkes. The Wilkes contend that the chancellor based the award on his personal knowledge rather than the proof admitted at the trial. The record does not support this contention. The chancellor's award is affirmed.

In Conclusion

The judgment of the trial court is affirmed in part and reversed in part and this case is remanded for additional proof on the issue of whether the house was built in accord with "good building practices" as required by the contract and for proof of the diminished value of the house, i.e. the difference in value between what ought to have been done in the performance of the contract

and what has been done. If a diminished value is proven the chancellor will determine whether the cost of repair is disproportionate to the diminished value. The costs of appeal are assessed equally between the parties.

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E. RILEY ANDERSON, SPECIAL JUDGE