

IN THE COURT OF APPEALS  
AT KNOXVILLE

**FILED**

**August 19, 1998**

**Cecil Crowson, Jr.**  
**Appellate Court Clerk**

STEVE W. KILLIAN,	)	KNOX CHANCERY
	)	C. A. NO. 03A01-9803-CH-00106
Plaintiff-Appellee	)	
	)	
	)	
	)	
	)	
	)	
vs.	)	HON. SHARON BELL
	)	CHANCELLOR
	)	
	)	
	)	
	)	
	)	
TABOR CONSTRUCTION, INC.,	)	MODIFIED, AFFIRMED AS
	)	MODIFIED AND REMANDED
Defendant-Appellant	)	

THOMAS R. HENLEY, Lufkin, Henley & Conner, Knoxville, for Appellant.

C. PAUL HARRISON, Long Ragsdale & Waters, Knoxville, for Appellee.

O P I N I O N

McMurray, J.

This is an action for breach of contract. The plaintiff alleged in his complaint that he had contracted with the defendant whereby the defendant was to construct a house for him. During the course of the construction, he removed the defendant from the job, allegedly for breach of contract, and hired a substitute to complete the project. The defendant denied that it had breached the contract, but on the contrary, filed a counterclaim seeking damages from the plaintiff alleging that the plaintiff was the party guilty of breaching the contract. After a bench trial, the court took the matter under advisement and subsequently issued a memorandum opinion wherein the original complaint was dismissed. The plaintiff was found to have breached the contract with the defendant, however, the court found that no damages had been proved and gave no judgment for damages on the counterclaim. The defendant appealed. We modify the judgment of the trial court and affirm as modified.

The appellant presents the following issues for our consideration:

1. The trial court erred by ruling that plaintiff breached the contract and then not awarding damages for defendant-appellant.
2. The trial court erred in not awarding attorney fees to defendant according to the provisions of the contract.

The appellee also asks us to find that this is a frivolous appeal and to assess damages pursuant to T.C.A. § 27-1-122.

Our standard of review is de novo upon the record, with a presumption of correctness of the findings of fact by the trial court. Unless the evidence otherwise preponderates against the findings, we must affirm, absent an error of law. See Rule 13(d), Tennessee Rules of Appellate Procedure. If the plaintiff is entitled to a judgment, appellate courts have a duty to render judgments which the lower court should have rendered. See e.g., Toomey v. Atyoe, et al, 32 S.W. 254 (Tenn. 1895), and Perry v. Carter, 219 S.W.2d 905 (Tenn. 1949). See also Rule 36(a), Tennessee Rules of Appellate Procedure.

We should point out that no transcript of the evidence or statement of the evidence has been prepared and filed as required by Rule 24, Tennessee Rules of Appellate Procedure.<sup>1</sup>

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<sup>1</sup>We further note that there are no authorities whatever cited in the appellant's brief in support of any argument advanced by the appellant. We call counsel's attention to Rule 27(a)(7), Tennessee Rules of Appellate Procedure.

Where the issues raised go to the evidence, there must be a transcript. In the absence of a transcript of the evidence, there is a conclusive presumption that there was sufficient evidence before the trial court to support its judgment, and this Court must therefore affirm the judgment.

Coakley v. Daniels, 840 S.W.2d 367, 370 (Tenn. App. 1992). See also Word v. Word, 937 S.W.2d 931, 932 (Tenn. App. 1996); Sherrod v. Wix, 849 S.W.2d 780, 783 (Tenn. App. 1992); Irvin v. City of Clarksville, 767 S.W.2d 649, 653 (Tenn. App. 1988).

In the opinion issued by the trial court it is stated:

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Defendant claims entitlement to one-half equity in the house, apparently under a theory that he would not have reduced his price and held his profit to a minimum had he known plaintiff would breach the contract and deprive defendant of future profits.

That, however, was not the agreement of the parties, and is not a measure of damage known to the court.

Last, defendant demands punitive damages, but there is no showing of the requisite degree of malice to sustain such an award.

FINDINGS:

From the above, it is respectfully found that neither party is entitled to a judgment. Costs are taxed one-half to each party, with each to bear their own discretionary costs.

Judgment was duly entered on January 27, 1998.<sup>2</sup> Obviously, all issues raised by the appellant including compensatory damages for breach of contract and the propriety and amount of an award of attorney's fees, require evidence for resolution. (See Custom Built Homes v. G. S. Hinson, Co., 1998 Tenn. App. LEXIS 89 for an excellent discussion, with authorities, of damages as they relate to breach of contract. See also United Medical Corp. v. Hohenwald Bank, 703 S.W.2d 133 (Tenn. 1986) and Conners v. Conners, 594 S.W.2d 672 (Tenn. 1980) for a discussion relating to attorney's fees.) This court has held time and time again that "[i]n the absence of a transcript or statement of the evidence, we must conclusively presume that every fact admissible under the pleadings was found or should have been found favorably to the appellee." Leek v. Powell, 884 S.W.2d 118, 121 (Tenn. App. 1994); Lyon v. Lyon, 765 S.W.2d 759, 763 (Tenn. App. 1988); and a multitude of other authorities. Applying this rule, we must resolve all issues relative to compensatory damages and attorney's fees adverse to the appellant.

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<sup>2</sup>A "Motion to Re-Consider Judgment and Damages" was filed by the defendant on January 7, 1998. The motion also asks that the court award attorney fees. There is no order specifically addressing the motion. Accordingly, in the absence of a record to the contrary, we will presume that the court's final judgment entered on January 27, 1998, was also intended to dispose of this motion.

In both the motion to reconsider and in the brief filed in this court, the appellant asserts that damages were stipulated. The record does not support this contention.

While the issue of nominal damages is not specifically mentioned either in the trial court or in this court, we are of the opinion that the appellant's issue relating to damages is sufficiently broad to encompass nominal damages.

Where there is a breach of contract, but no actual damages have been proven, the plaintiff is entitled to nominal damages. See Bradford & Carson v. Montgomery Furniture Co., 115 Tenn. 610, 92 S.W. 1104 (1906); Morristown Lincoln-Mercury, Inc. v. Roy N. Lotspeich Publishing Co., 42 Tenn. App. 92, 298 S.W.2d 788 (1956). The purpose of nominal damages is to recognize a legal right. See Womack v. Ward, 186 S.W.2d 619 (Tenn. Ct. App. 1944). Thus, in Seat & Robinson v. Moreland, 26 Tenn. (7 Hum.) 575 (1847), the Tennessee Supreme Court struck down the lower court's charge to the jury to enter a verdict for the defendant if the plaintiff suffered no damages. In reversing and remanding for a new trial, the court stated, "Where no actual loss has been sustained by the violation of a contract, the damages are nominal, but this entitles the plaintiff to a judgment for his costs." Id. at 576.

Stewart v. Peterson, 1998 Tenn. App. LEXIS 784 (Tenn. App. 1988). (No application for permission to appeal to the Supreme Court was made.)

Where the plaintiff recovers only nominal damages for the violation of a contract, he is entitled to a judgment for costs. Seat v. Moreland, 26 Tenn. 574 (1847); Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 8 S.W. 574, 6 Am. St. R. 864 (1888). See Gist v. Webb, 41 Tenn. 518 (1860).

Under the above authorities, we are of the opinion that the appellant is entitled to a judgment for nominal damages and costs. We modify the judgment, pursuant to Rule 36, Tennessee Rules of Civil Procedure, and award judgment to the appellant for nominal damages in the amount of \$100.00 and costs in the trial court.

In view of our disposition of the damage issue, this is not an appropriate case for the assessment of damages for a frivolous appeal.

We affirm the judgment of the trial court as modified. Costs in both the trial court and this court are assessed to the appellee and this case is remanded to the trial court for entry of a judgment consistent with this opinion.

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Don T. McMurray, Judge

CONCUR:

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Houston M. Goddard, Presiding Judge

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Herschel P. Franks, Judge

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TABOR CONSTRUCTION, INC.,	)	MODIFIED, AFFIRMED AS
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Defendant-Appellant	)	

**JUDGMENT**

This appeal came on to be heard upon the record from the Chancery Court of Knox County, briefs and argument of counsel. Upon consideration thereof, this Court is of opinion that there was error in the trial court.

We modify the judgment of the trial court and award judgment to the appellant for nominal damages in the amount of \$100.00. We affirm the judgment of the trial court as modified. Costs in both the trial court and this court are assessed to the appellee and this

case is remanded to the trial court for entry of a judgment consistent with this opinion.

PER CURIAM