IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 20, 2015 Session

CHARLES E. WEBSTER, ET UX. V. THE ESTATE OF P.H. DORRIS, ET AL.

Appeal from the Chancery Court for Robertson County
No. CHIICV10208, 74CCI2010CV56 Laurence M. McMillan, Jr., Chancellor

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No. M2014-02230-COA-R3-CV – Filed February 4. 2016

Plaintiffs purchased a home from two of the Defendants; one defendant was the contractor whose construction company built the home and the other was his wife, who had marketed the home for sale. Before and after the closing, Plaintiffs identified several defects which they desired to have corrected; some defects were remedied while others were not. Plaintiffs brought suit and, following trial, the court awarded judgment for $2,000 in favor of Plaintiffs against the construction company for breach of contract and judgment for $40,184 against the estate of the contractor and the construction company for breach of warranty; the court held that the contractor's wife was not liable for either judgment in her individual capacity. Plaintiffs appeal, asserting that contractor's wife was liable as partner or joint venturer with the other Defendants for breach of contract and implied warranty of workmanship and that the court erred in its award of damages and in failing to award prejudgment interest. We modify and affirm the judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Modified and Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

W. Timothy Harvey, Clarksville, Tennessee, for the appellants, Charles E. Webster and Keiko S. Webster.

Joe R. Johnson, Springfield, Tennessee, for the appellees, Nancy M. Dorris, Estate of Phillip Hall Dorris, and P.H. Dorris Construction, LLC.

OPINION

I. FACTUAL & PROCEDURAL HISTORY

Charles and Keiko Webster ("Plaintiffs") entered into an agreement on February 23, 2008, to purchase a home in Springfield, Tennessee, from P.H. and Nancy Dorris. Construction of the home had been completed in July 2007 by P.H. Dorris Construction, LLC, a company owned by P.H. Dorris; the house had been listed for sale by Nancy Dorris, who was a real estate agent. Prior to the closing, Plaintiffs prepared and sent to the Dorrises a "punch list" of items which they desired to be fixed before the closing, which had been set for March 27, 2008.[1] At the closing, the Dorrises gave Plaintiffs a document entitled "One Year Structural Warranty," wherein P.H. Dorris Construction, LLC, warranted to repair or replace certain specific items "when necessary."[2] In addition, P.H. Dorris signed and delivered to Charles Webster a document prepared by the United States Department of Housing and Urban Development entitled "Warranty of Completion of Construction."[3]

After taking possession of the home, Plaintiffs noticed that not all of the items on the punch list had been completed and that a brick retaining wall had cracks in the mortar through which water ran after a heavy rain. They notified P.H. Dorris, who sent workers to make various repairs; the repairs did not resolve all of Plaintiffs' concerns. As a consequence, in February 2009 Plaintiffs retained a home inspector and sent a copy of his report, which identified still-existing defects, to "P.H. Dorris, General Contractor, ATTN: Mr. Phil Dorris." After Mr. Webster met with P.H. Dorris regarding the matters raised in the report, further unsuccessful efforts were made to correct the same.

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[1] The list was addressed and faxed to "Phil & Nancy Dorris" with copies sent to "Phil Dorris Constr" and "Nancy Dorris/realtrac.com."

[2] The warranty specifically excluded, *inter alia*, "any and all cosmetic items."

[3] The HUD warranty included the following provision:

> The undersigned Warrantor [P.H. Dorris] further warrants to the Purchaser(s)/Owner(s) or his/her (their) successors or transferees, the property against defects in equipment, material or workmanship and materials supplied by Warrantor or any subcontractor or supplier at any tier resulting in noncompliance with standards of quality as measured by acceptable trade practices. This warranty shall continue for a period of one year from the date of original conveyance of title to such Purchaser(s) or from the date of full completion of each of any items completed after conveyance of title. The Warrantor shall remedy, at the Warrantor's expense, any defect(s) of equipment, material, or workmanship furnished by the Warrantor. Warrantor shall restore any work damaged in fulfilling the terms and conditions of this warranty.

Plaintiffs filed suit on February 18, 2011, in Robertson County Circuit Court against the Estate of P.H. Dorris,[4] Nancy Dorris, and P.H. Dorris Construction, LLC, for breach of contract, breach of warranty, and violation of the Tennessee Consumer Protection Act;[5] Plaintiffs sought $60,000 "to compensate them for repair costs or replacement and/or breach of contract for the defective and deficient construction of the home." Plaintiffs also filed suit in Robertson County Chancery Court against The Estate of Phillip Hall Dorris, Deceased.[6] On December 18, 2013, the Circuit Court entered an order consolidating the two actions in Chancery Court.

A bench trial was held on May 21, 2014. J.W. Goad, who was qualified as an expert in construction defects, and Chris Averitt, qualified as an expert in construction, testified on behalf of Plaintiffs, along with Charles Webster. William Lamb, qualified as an expert in structural engineering, and John Keightley, qualified as an expert in construction, testified on behalf of Defendants, along with Nancy Dorris.

The court entered a Memorandum Opinion and Order on September 12, making factual findings and awarding Plaintiffs a judgment for $2,000 against P.H. Dorris Construction, LLC, for breach of contract, and a judgment for $40,184 against the Estate of P.H. Dorris and P.H. Dorris Construction, LLC, for breach of warranty; the court ruled that Nancy Dorris was not liable for either judgment in her individual capacity.

Plaintiffs thereafter filed a motion to alter or amend the judgment, which was denied. Plaintiffs appeal, articulating the following issues for our review:

> 1. Did the trial court err when it held that Defendant/Appellee Nancy Dorris, a co-owner/seller and joint venturer or partner of the defectively-built residence, was not jointly liable with Defendants/Appellees P.H. Dorris and P.H. Dorris Construction, LLC, for breach of contract and warranty?

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[4] P. H. Dorris died in December 2010.

[5] As to the Tennessee Consumer Protection Act claim, Plaintiffs alleged in the complaint that "the home and realty so conveyed was represented to be of a particular standard, quality, or grade and the same was conveyed with construction defects and deficiencies which were not cured" and that the Defendants "conceal[ed] substantial defects in the home at the time it was conveyed by warranty deed." Defendants denied the allegations, and the Court held that "Plaintiffs have failed to carry their burden of proof to establish that they suffered damages as a result of an unfair or deceptive act or practice attributable to any Defendant in this case." The court's holding relating to the Tennessee Consumer Protection Act claim is not at issue in this appeal.

[6] The complaint filed in Chancery Court is not part of the record on appeal. At oral argument, counsel for Plaintiffs advised that the complaint was filed in Chancery Court in order to be treated as a claim against the estate of P.H. Dorris.

2. Did the trial court err in awarding compensatory damages based on the Defendant/Appellees' expert proof, despite the experts' failure to opine whether the construction of the residence met the applicable standards?

3. Did the trial court err in failing to award the Plaintiffs'/Appellants prejudgment interest, contrary to the principles of equity?

II. ANALYSIS

A. Standard of Review

"Because this case was tried by the court, sitting without a jury, this Court conducts a *de novo* review of the trial court's decision with a presumption of correctness as to the trial court's findings of fact, unless the evidence preponderates against those findings." *Nw. Tennessee Motorsports Park, LLC v. Tennessee Asphalt Co.*, 410 S.W.3d 810, 816 (Tenn. Ct. App. 2011) (citing *Wood v. Starko*, 197 S.W.3d 255, 257 (Tenn. Ct. App. 2006)). To preponderate against the court's factual findings, the evidence "must support another finding of fact with greater convincing effect." *Id.* (citing *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)). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

B. The Liability of Nancy Dorris

There was no written partnership or joint venture agreement or testimony to establish an express partnership or joint venture introduced at trial; consequently, we review the record to discern evidence of an implied partnership or implied joint venture. Plaintiffs assert that Nancy Dorris is liable for the construction defects in the home because:

> Nancy Dorris acted together with P.H. Dorris and P.H. Dorris Construction, LLC to purchase land, finance the building of a residence, and then market and sell the residence to the Appellants. Each Appellee was an integral part of the business scheme and profited from the sale of the residence at issue. Therefore, the Appellees should be held accountable as an indivisible group, regardless of whether it is labeled a partnership or joint venture.

The court made the following findings with respect to its holding that Ms. Dorris was not liable in her individual capacity:

> Defendant, NANCY DORRIS, testified that the home was constructed by P.H. DORRIS CONSTRUCTION, LLC. Ms. Dorris did not have input into any material aspect of the construction of the residence, other than minor consultation involving brick color, paint colors and counter-top colors. She testified that she had no knowledge of residential construction principles, nor did she have any engineering or construction expertise. She did not direct the sub-contractors, nor did she design the plans for the house. The Court finds Ms. Dorris' testimony in this regard to be credible.[7]

With respect to the nature of the business relationship between the Defendants, the following testimony of Nancy Dorris supports the trial court's findings:

> Q. Did . . . Phil Dorris consult with you about the running of his business?
> A. No.
> Q. Do you have any expertise as it relates to the building of houses?
> A. No.
> Q. Do you assist with bidding projects?
> A. No.
> ***
> Q. All right. Now, in this instance, did you in fact, you and Phil, Philip Hall Dorris, in fact own the land and own the house that was sold to Mr. Webster?
> A. Yes. We bought the lot.
> Q. All right. And did you have any input as to the design of that house?
> A. Yes.
> Q. Okay. What input did you have?
> A. I would have started probably picking out a roof color and a brick color; with his approval, of course.
> Q. But as far as building the structure of the house --
> A. Oh, no.
> Q. -- would you have had any input into that?
> A. No.
> ***
> Q. Money-wise, what was your – what money would you gain from the sale of this house?

[7] We afford trial courts "considerable deference when reviewing issues that hinge on the witnesses' credibility because trial courts are 'uniquely positioned to observe the demeanor and conduct of witnesses,'" and we "'will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary.'" *Kelly v. Kelly*, 445 S.W.3d 685, 692 (Tenn. 2014) (quoting *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000); *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999); and citing *Hughes v. Metro. Gov't of Nashville & Davidson Cnty.*, 340 S.W.3d 352, 360 (Tenn. 2011)).

A. If I listed it, the commission.
Q. Okay. And would that be deposited into a joint account or an account in your name or how would that work?
A. In an account in my name only.
Q. All right. Did Phil Dorris have any access to your account?
A. No.
Q. Did you have access to the LLC account?
A. No.
Q. Did you have the authority to sign checks?
A. I did not.
Q. The money from the sale of the house, where would that go?
A. Into his business account.
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Q. Specifically with regards to the house purchased by the Websters, did you select the plan for that house?
A. No.
Q. Did you assist in determining how much would be spent in the construction of that house?
A. No.
***
Q. Would he come to you and ask you for input in how the house was going to be built?
A. Oh, not the actual floor plan or the construction of it, just the decorating.
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Q. . . . What was your commission from the sale of this house?
A. I believe it was 3 percent. [8]

Plaintiffs contend that other testimony of Nancy Dorris and Mr. Webster establishes the existence of an implied partnership.

[8] The following testimony from Mr. Webster relative to Nancy Dorris' input into the appearance of the home was consistent with hers:

> Q. (BY MR. JOHNSON) Well, you knew at the time you purchased this home that Nancy Dorris wasn't the builder of the home, didn't you?
> A. I knew that Nancy -- Nancy -- when we closed -- or the day we met Nancy -- Phil and I, the first time I met Phil in the front of the house there, she told me I chose what the paint job was in this house, I determined what the light fixtures were in the house, I determined what the color schemes and different things of this -- the whole decor of the house. Now that's – to that extent I understand -- understood she was involved.

1. Implied Partnership

A partnership is "an association of two (2) or more persons to carry on as co-owners of a business or other undertaking for profit." Tenn. Code Ann. §§ 61-1-101(7), 61-1-202(a); *see also Bass v. Bass*, 814 S.W.2d 38, 41 (Tenn. 1991). "[T]he existence of a partnership may be implied from the circumstances where it appears that the individuals involved have entered into a business relationship for profit, combining their property, labor, skill, experience, or money." *Montgomery v. Montgomery*, 181 S.W.3d 720, 727 (Tenn. Ct. App. 2005) (quoting *Bass*, 814 S.W.2d at 41). To determine if a partnership exists, "all of the relevant facts, actions, and conduct of the parties must be considered" and "[n]o one fact or circumstance is conclusive." *Martin v. Coleman*, 19 S.W.3d 757, 761 (Tenn. 2000) (citing *Bass*, 814 S.W.2d at 41). "Generally, what will constitute a partnership is a matter of law, but whether a partnership exists under conflicting evidence is one of fact." *Montgomery*, 181 S.W.3d at 726 (quoting *Messer Griesheim Indus., Inc. v. Cryotech of Kingsport, Inc.*, 45 S.W.3d 588, 605 (Tenn. Ct. App. 2001)).

In the testimony cited by Plaintiffs, Nancy Dorris testified that her husband had formed his construction business "long before [she] came along"; that "he built a few spec homes along the way when he had time"; that he did not consult with her "about the runnings of his business"; that she had no expertise in building houses and did not assist with bidding projects; that her husband was not involved in running her real estate business; that she had no input into building the structure of the house at issue, though she did have input into some design elements of the house such as "a roof color and a brick color[,] with [P.H. Dorris'] approval, of course"; that she and her husband together owned the lot on which the house at issue was built; that they financed the construction with a loan from F&M Bank, a loan for which she personally signed, as did her husband; that she earned three percent commission from the sale of the home; and that the proceeds from the sale of the property paid off the indebtedness on the land.

Mr. Webster testified that the punch list was sent to Nancy Dorris, as well as to P.H. Dorris; that he called on Mr. and Mrs. Dorris about the problems he had with the house; that he told "Mr. and Mrs. Dorris that [he] had some construction defects"; that he inspected the driveway with Mr. Dorris and told him about the retaining wall; that "everything really that I had raised an issue of wanting them to take and fix, I had verbally asked Mr. Dorris several times to do so"; that he hand-delivered the home inspector's report "to Mr. Dorris . . . in order to ensure it got in his hands before the end of the 12 months and to give him time in order to repair them"; and that during a visit to the home to inspect the retaining wall, it was P.H. Dorris who did all the talking while Nancy Dorris "sort of monitored and looked around at things there."

This testimony does not preponderate against the factual finding of the trial court; neither does it establish an implied partnership. It is not evidence that Nancy Dorris and

P.H. Dorris acted as co-owners of the business or that she had the requisite authority to control any aspect of the conduct of the LLC's business or access to the LLC's accounts. The evidence is clear that her role during the building of the home was to choose certain cosmetic features of the home, such as the color of the brick and roof, and her choices were only implemented if P.H. Dorris approved them; she had no authority to select subcontractors, materials, or the workers who built the house.

Plaintiffs also contend that an implied partnership exists because Plaintiffs addressed their concerns about defects to both Nancy and P.H. Dorris prior to the sale and that "Nancy Dorris also attended to the resolution of these defects." Taken in context, however, the efforts Ms. Dorris expended do not show the level of control over the undertaking necessary to establish an implied partnership with the other Defendants.

As noted earlier, Mr. Webster testified that he directed his phone calls and in-person conversations about the defects to P.H. Dorris; we note also that the report of the home inspection was addressed to "P.H. Dorris General Contractor, ATTN: Mr. Phil Dorris." At the time the efforts to have the defects corrected were transpiring, P.H. Dorris was undergoing treatment for cancer, the condition which led to his death in December 2010; the record shows Nancy Dorris began to communicate with Mr. Webster after P.H. Dorris' treatments began. Her testimony as well as that of Mr. Webster was that she spoke with him on three occasions specifically relating to the retaining wall issue; the first conversation was to acknowledge a message he had left, the second to inform him that an engineer was being sent to the home to assess the retaining wall, and the third to request a visit to the home where she and P.H. Dorris could look at the retaining wall. Both testified further that, during that visit, P.H. Dorris did all the talking, and proposed a solution, which Mr. Webster rejected, and that she was nearby but not a participant in the conversation.

Lastly, Plaintiffs contend that "[a] portion of the proceeds from the sale also paid for the financing that Nancy Dorris and P.H. Dorris obtained to purchase the lot and to build the residence"; they ask us to conclude that this financial benefit should result in a finding of an implied partnership.

Nancy Dorris testified as follows about the proceeds of sale of the house:

> Q. The money from the sale of the house, where would that go?
> A. Into his business account.
> Q. Was that money – let's talk about this specific transaction with the Websters. I'm assuming there was a settlement statement?
> A. Yes.
> Q. All right. And would that settlement statement have reflected your commission?

A. Yes.
Q. There would be a check from that made out to you; is that correct?
A. No. It would have been sent by the closing agent to the company that I worked for.
Q. Okay. I didn't ask you that. Who was that?
A. Reliant Realty.
Q. And then would Reliant Realty then cut you a check?
A. Yes.
Q. What about the seller's proceeds from this transaction; where were they deposited?
A. They would have been deposited in his account. And the -- there would have been a construction loan against that house. It wouldn't have been reflected on that closing statement. It would have appeared that he made a great deal of money. But actually then he paid, out of his business, off the construction loan. It was a line of credit.

As reflected in Paragraph 14 of the order,[9] the court considered this testimony in its ruling.

We agree with the trial court that the use of the proceeds from the sale of the house to satisfy the indebtedness, under the facts of this case, does not establish an implied partnership.[10] Plaintiffs do not cite any proof in the record to show that

[9] Paragraph 14 of the order read as follows:

> NANCY DORRIS testified that the home at issue was constructed with funds borrowed from a financial institution, and that her personal residence was pledged as security for the loan. She testified that she and P.H. DORRIS were required by the bank to personally guarantee the obligations of the LLC.

[10] Pertinent to our consideration of this issue is Tenn. Code Ann. § 61-1-202, which states in pertinent part:

> (c) In determining whether a partnership is formed, the following rules apply:
> (1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.
> (2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.
> (3) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment:
> (A) Of a debt by installments or otherwise;
> (B) For services as an independent contractor or of wages or other compensation to an employee;
> (C) Of rent;

Defendants shared the profits; to the contrary, Nancy Dorris testified that she received — via the real estate company she worked for — a commission check and that the sellers' proceeds were deposited into P.H. Dorris' account.[11] There is no testimony or other evidence that any profit was shared in such a manner as to support a determination that an implied partnership existed.

2. Implied Joint Venture

The elements required to establish a joint venture are: (1) a common purpose, (2) some manner of agreement among the parties, and (3) the equal right of each "to control the venture as a whole and any relevant instrumentality." *King v. Flowmaster, Inc.*, No. W2010-00526-COA-R3CV, 2011 WL 4446992, at *2 (Tenn. Ct. App. Sept. 27, 2011) (citing *Cecil v. Hardin,* 575 S.W.2d 268, 271 (Tenn. 1978), *superseded by statute on other grounds).* In *Via v. Oehlert,* this court held:

> A joint venture is similar, but not identical, to a partnership, and has been described by our Supreme Court as "something like a partnership, for a more limited period of time, and a more limited purpose." More specifically,
>
> > A joint venture is an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill, and knowledge, but without creating a partnership in the legal or technical sense of the term....
>
> Joint ventures are governed by the same rules of law as those governing partnerships.

347 S.W.3d 224, 230 (Tenn. Ct. App. 2010) (internal citations and quotations omitted). "[T]he burden is on [Plaintiffs] to prove the existence of an implied joint venture by clear and convincing evidence." *Id.; see also Montgomery,* 181 S.W.3d at 726.

> (D) Of an annuity or other retirement or health benefit to a beneficiary, representative, or designee of a deceased or retired partner;
> (E) Of interest or other charge on a loan, even if the amount of payment varies with the profits of the business including a direct or indirect present or future ownership of the income, or rights to income, proceeds, or increase in value derived from the collateral; or
> (F) For the sale of the goodwill of a business or other property by installments or otherwise.

[11] Given the context of this testimony it is clear that Ms. Dorris was referring to the account of the construction company.

For the same reasons that we have concluded that the evidence does not support the determination that an implied partnership existed, we conclude that an implied joint venture has not been shown by clear and convincing evidence. The parties do not dispute that Nancy Dorris did not participate in the actual building of the home, and, while her testimony quoted previously herein was to the effect that she had some input into the cosmetic appearance of the home, her selections were subject to her husband's approval. There is no proof of any agreement between Defendants relative to a division of proceeds of the sale or of the allocation of the proceeds other than the real estate commission paid to Reliant Realty and payment of the construction loan.

The Tennessee Supreme Court examined the meaning of the "clear and convincing" standard in *In re Estate of Walton v. Young*; the Court wrote:

> The "clear and convincing" standard falls somewhere between the "preponderance of the evidence" in civil cases and the "beyond a reasonable doubt" in criminal proceedings. To be "clear and convincing," the evidence must "produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established."

In re Estate of Walton v. Young, 950 S.W.2d 956, 960 ((Tenn. 1997) (quoting *Fruge v. Doe*, 952 S.W.2d 408, 412 n.2 (Tenn. 1997)). Measured against this standard, the evidence, taken as a whole, does not establish the degree of control or other attributes necessary to hold that an implied joint venture existed between Nancy Dorris and the other Defendants.

3. Implied Warranty

We next address Plaintiffs' contention that Nancy Dorris is individually liable for breach of contract and the implied warranty established by the following language in *Dixon v. Mountain City Construction Co.*:

> [I]n every contract for the sale of a recently completed dwelling . . . the vendor, *if he be in the business of building such dwellings*, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, 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; and that this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee.

632 S.W.2d 538, 541 (Tenn. 1982) (emphasis added). This warranty "is implied only when the written contract is silent. Builder-vendors and purchasers are free to contract in writing for a warranty upon different terms and conditions or to expressly disclaim any warranty." *Id.* at 542.

Plaintiffs' argument in this regard is predicated upon their contention that Nancy Dorris is liable as vendor of the home. This is without merit. Nancy Dorris was not in the business of building houses and we have determined that the evidence does not support a finding of a joint venture or partnership between her and the other defendants. There is no basis upon which to impose liability on her for the breach of the implied warranty set forth in *Dixon*.[12]

C. The Award of Damages

Plaintiffs contend that the court erred in awarding $40,184, asserting that they were entitled to $79,800 on the basis of their expert's estimate of the cost to repair the construction defects.

Pertinent to Plaintiffs' contentions are the following holdings of the trial court:

> 27. The court finds that the Plaintiffs are entitled to a judgment for breach of contract in the amount of $2,000.00 against the builder of the home, P.H. DORRIS CONSTRUCTION, LLC, for the costs of correcting the small items listed on the "punch list" which were not corrected by the builder prior to closing.[13]
>
> 28. The court further finds that the Plaintiffs are entitled to a judgment for breach of warranty in the amount of $40,184.00 against P.H. DORRIS CONSTRUCTION, LLC for breach of the builders warranty entered as trial Exhibit 11, and against the Estate of P.H. Dorris for breach of the individual warranty entered as trial Exhibit 14. This amount is calculated by using the estimate entered into evidence as Exhibit 17, but reducing

[12] As noted earlier in this opinion, P.H. Dorris Construction, LLC, gave Plaintiffs a "One Year Structural Warranty" and P.H. Dorris gave Plaintiffs the "Warranty of Completion of Construction" issued by HUD at the closing. Neither warranty clearly or unambiguously disclaimed the implied warranty of "workmanlike quality then prevailing at the time and place of construction," *Dixon*, 632 S.W.2d at 541, and thus, an implied warranty was given by P.H. Dorris and P.H. Dorris Construction, LLC, as those Defendants were in the business of building such dwellings. *See Dewberry v. Maddox*, 755 S.W.2d 50, 55 (Tenn. Ct. App. 1988).

[13] Neither party raises an issue with respect to the court's award of damages in the amount of $2,000 for the breach of contract.

> therefrom the cost of replacing the concrete which the court finds to be unnecessary based upon the testimony of William Lamb, P.E.

In a bench trial such as this "we review the amount of damages awarded by the trial court as a question of fact with a presumption of correctness, and only alter or amend the amount if the trial court utilized the wrong measure of damages or the evidence preponderates against the amount awarded." *Nw. Tennessee Motorsports Park, LLC*, 410 S.W.3d at 816 (quoting *Smith v. Williams*, No. E1999-01346-COA-R3-CV, 2000 WL 277059, at *4 (Tenn. Ct. App. March 15, 2000)); *see also* Tenn. R. App. P. 13(d); *Beaty v. McGraw*, 15 S.W.3d 819, 829 (Tenn. Ct. App. 1998). The measure of damages is a question of law which we review *de novo* with no presumption of correctness. *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 541 (Tenn. Ct. App. 2000).

Before the amount of damages can be determined, the trial court must consider the measure of damages to apply. In the context of home construction, this court has observed as follows:

> *Generally,* the measure of damages will be the cost or repair *unless* the repairs are not feasible or the cost is disproportionate to the dimunition [sic] in value." *Radant v. Earwood,* No. 02A01-9802-CV-00029, 1999 WL 418339, at *8, . . . (Tenn. Ct. App. June 22, 1999) (emphasis added); *see also Estate of Jessee v. White*, 633 S.W.2d 767, 769 (Tenn. Ct. App. 1982). When selecting the appropriate measure of damages applicable in this case, we are mindful of the following:
>
> > As a general rule, the measure of damages for defects and omissions in the performance of a construction contract is the reasonable cost of the required repairs. *Estate of Jessee v. White,* 633 S.W.2d 767 (Tenn. App. 1982). This is especially true when the structure involved is the owner's home. *Edenfield v. Woodlawn Manor, Inc.*, 62 Tenn. App. 280, 462 S.W.2d 237 (1970). However, in the event that 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. *Redbud Cooperative Corporation v. Clayton*, 700 S.W.2d 551 (Tenn. Ct. App. 1985). However, *this rule is applicable only when proof has been offered on both factors.* . . . We hold that the plaintiffs do not have the burden of offering alternative measures of damages. *The burden is on the defendant to show that the cost of repairs is unreasonable when compared to the diminution in value due to the defects and omissions. ...*

GSB Contractors, Inc. v. Hess, 179 S.W.3d 535, 543 (Tenn. Ct. App. 2005) (emphasis in original) (quoting *Nutzell v. Godwin*, No. 33, 1989 WL 76306, at *2, (Tenn. Ct. App. July 13, 1989)).

The parties do not dispute that liability was adequately established by the evidence presented by Plaintiffs. The order does not specify the measure of damages the trial court used, although all references in the order to the experts' proof contains reference to "the cost of repair" or similar language. The parties do not contest the cost of repair as the proper measure of damages, nor do they contest the qualification of Messrs. Goad, Averitt, Lamb, or Keightley as experts. The weight to be given their testimony was a matter assigned to the court as factfinder. We therefore proceed to determine whether the evidence preponderates against the amount of damages awarded. *See Nw. Tennessee Motorsports Park, LLC*, 410 S.W.3d at 816.[14]

Plaintiffs' first expert was J.W. Goad, a home inspector who was qualified as an expert in construction defects and housing. He testified that he inspected the home in May 2012, and prepared a report, which was entered as Exhibit 1 and identified many repairs that were warranted. Plaintiffs' second expert, Todd Averitt, a licensed general contractor in the area, testified that he would bid the cost of the repairs identified by Mr. Goad at $79,800.

Defendants' first expert was William Lamb, a civil engineer who was qualified as an expert in structural engineering. He testified that he visited the home in April 2014, and determined "the retaining wall was in need of replacement" as "[i]t was not built correctly" and that in "one portion of the house[,] . . . some additional framing should be installed in the first floor system to support a load-bearing wall." As to the cracks in the basement tiles, Mr. Lamb testified that "[s]tructurally, there is no need for remediation" but that "the cracks in the floor tile could be addressed by replacing the floor tile." Concerning the cracks in the concrete that composed the patio and driveway, Mr. Lamb testified that replacement was not necessary, but a sealant could be used to maintain the surface of the concrete. Mr. Lamb compiled a report from his inspection which was entered into trial as Exhibit 15.

[14] Citing *Carter v. Krueger* and *Nw. Tennessee Motorsports*, Plaintiffs assert that Defendants' experts had to opine that the construction did not meet the standard of construction before expressing opinions as to the cost of repair. There is no language or holding in either of these cases to lead to such a conclusion. Rather, the language cited by Plaintiffs states only that "in order to prove a breach of contract based on a failure to perform in a workmanlike manner according to standard industry practices, the plaintiff must prove that 'conditions found to be defective by [the plaintiff] fell below the applicable standard.'" *Carter*, 916 S.W.2d 932, 935 (Tenn. Ct. App. 1995). There is no impediment to Defendants' experts opining as to the cost of repair.

Defendant's second expert, Mr. John Keightley, a licensed general contractor who was qualified as an expect as such, testified that he prepared an estimate of all the items on Mr. Averitt's bid which came to a total of $57,640; that estimate was introduced into evidence as Exhibit 17. He testified further that he did not think it was necessary to replace the concrete patio and driveway as it had "normal shrinkage, cracking, and is installed correctly." He also testified that he "agreed with the [Plaintiffs' expert] Goad report . . . that a manufacturer's approved repair person should repair [the tub]," not replace it.

The court based the award of damages on Mr. Keightly's opinion, reduced by costs which the court determined to be unnecessary based upon the testimony of Mr. Lamb. The "amount of damages awarded by the Trial Court falls within the span of the disparate amounts presented at trial by Plaintiffs and Defendants." *Wright v. Stevens*, No. 03A01-9903-CH-00064, 1999 WL 1212166, at *4 (Tenn. Ct. App. Dec. 17, 1999). The amount of the award is supported by the foregoing testimony, and the evidence does not preponderate against the amount; we affirm the award of damages.

The trial court did not specify whether the $40,184.00 judgment is to be joint and severable. Pursuant to our authority under Tenn. R. App. P. 36(a) we modify the $40,184.00 judgment against P.H. Dorris Construction, LLC, and against the Estate of P.H. Dorris to be joint and severable.

D. Prejudgment Interest

Plaintiffs next challenge the trial court's denial of prejudgment interest. Tenn. Code Ann. § 47-14-123 allows the trial court to award prejudgment interest as an element of damages "in accordance with the principles of equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum." An award of prejudgment interest is within the trial court's sound discretion, and we will not disturb such an award absent an abuse of discretion. *Scholz v. S.B. Int'l, Inc.*, 40 S.W.3d 78, 81 (Tenn. Ct. App. 2000). A court "abuses its discretion only when it 'applie[s] an incorrect legal standard, or reach[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.' The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (internal quotations omitted).

"The purpose of pre-judgment interest is to fully compensate a party for the loss of the use of funds, to which he or she is legally entitled." *Myint v. Allstate,* 970 S.W.2d 920 at 927 (Tenn. 1998). In *Myint,* our Supreme Court set forth the following principles to guide the decision of whether to award pre-judgment interest:

> Several principles guide trial courts in exercising their discretion to award or deny prejudgment interest. Foremost are the principles of equity. Tenn. Code Ann. § 47-14-123. Simply stated, the court must decide whether the award of prejudgment interest is fair, given the particular circumstances of the case. In reaching an equitable decision, a court must keep in mind that the purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he or she was legally entitled, not to penalize a defendant for wrongdoing. *Mitchell v. Mitchell,* 876 S.W.2d 830, 832 (Tenn. 1994); *Otis,* 850 S.W.2d at 446.
>
> In addition to the principles of equity, two other criteria have emerged from Tennessee common law. The first criterion provides that prejudgment interest is allowed when the amount of the obligation is certain, or can be ascertained by a proper accounting, and the amount is not disputed on reasonable grounds. *Mitchell,* 876 S.W.2d at 832. The second provides that interest is allowed when the existence of the obligation itself is not disputed on reasonable grounds. *Id.* (citing *Textile Workers Union v. Brookside Mills, Inc.*, 205 Tenn. 394, 402, 326 S.W.2d 671, 675 (1959)). . . .
>
> The uncertainty of either the existence or amount of an obligation does not *mandate* a denial of prejudgment interest, and a trial court's grant of such interest is not automatically an abuse of discretion, provided the decision was otherwise equitable. The certainty of the plaintiff's claim is but one of many nondispositive facts to consider when deciding whether prejudgment interest is, as a matter of law, equitable under the circumstances.

Myint, 970 S.W.2d at 927, 928 (emphasis in original). Tennessee courts "favor awarding pre-judgment interest whenever doing so will more fully compensate plaintiffs who have lost the use of their funds." *Scholz,* 40 S.W.3d at 83. However, the *Scholz* court continued:

> That is not to say that trial courts must grant prejudgment interest in absolutely every case. Prejudgment interest may at times be inappropriate such as (1) when the party seeking prejudgment interest has been so inexcusably dilatory in pursuing a claim that consideration of a claim based on loss of use of the money would have little weight; (2) when the party seeking prejudgment interest has unreasonably delayed the proceedings after suit was filed; or (3) when the party seeking prejudgment interest has already been otherwise compensated for the lost time value of its money.

Scholz., 40 S.W.3d at 83 (Tenn. Ct. App. 2000) (internal citations omitted).

Plaintiffs do not contend that the court applied an incorrect legal standard, but rather that the court's decision was against logic and caused an injustice; they assert that they were "unjustly denied funds for repairs, to which they were legally entitled." We disagree. This $40,184.00 was awarded as the cost of repair which, as we have noted, is the proper measure of damages in an action of this type. In addition, Plaintiffs were awarded $2,000 for the cost of repairing items on the punch list. The only evidence of any monetary loss or expenditure they incurred as a result of the construction problems was the testimony of Mr. Webster that he had $400 worth of sand which he intended to use for landscaping purposes which was used by P.H. Dorris' crew in an attempt to repair the wall; that he spent $125 at Lowe's for plumbing supplies; and that he had a $452 plumbing bill.

As we consider this issue, we are mindful of this court's instruction in *Scholz*, that prejudgment interest may be inappropriate when the party seeking it has been otherwise compensated for the lost time value of its money. To the extent Plaintiffs lost the value of their funds, the $2,000 award, measured against the $977 in out of pocket expenditures, militates against a determination that the denial of prejudgment interest was unjust or an abuse of the court's discretion.

IV. CONCLUSION

For the foregoing reasons, we modify and affirm the judgment.

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RICHARD H. DINKINS, JUDGE