IN THE COURT OF APPEALS

WILLIAM R. DAUGHERTY and wife BARBARA DAUGHERTY,	)	KNOX CHANCERY
	)	C. A. NO. 03A01-9512-CH-00429
Plaintiffs-Appellants	)	
vs.	)	HON. FREDERICK D. McDONALD CHANCELLOR
SANDOR L. BRAUN and DON ANDERSON, Individually, and SANDOR L. BRAUN and DON ANDERSON as Co-Partners associated and in business as BRAUN-ANDERSON PARTNERSHIP and BRAUN CONSTRUCTION CORPORATION,	)	AFFIRMED AND REMANDED
Defendants-Appellees	)	

C. MARK TROUTMAN, McCord & Troutman, Knoxville, for Appellants.

BEECHER A. BARTLETT, JR., and ADRIENNE L. ANDERSON, Kramer, Rayson, Leake, Rodgers & Morgan, Knoxville, for appellees.

OPINION

McMurray, J.

This case originated as an action seeking damages for breach of a construction contract. After a lengthy bench trial, the court found in favor of the plaintiffs against the defendant, Braun Construction Company only and dismissed the action as to the remaining defendants. He likewise dismissed a counterclaim filed by Braun Construction Company. Judgment was duly entered in favor of the plaintiffs in the amount of eighteen thousand, three hundred eighteen dollars and three cents ($18,318.03). The plaintiffs appealed.[1]

ISSUES

The issues presented for our review are as follows:

1. The trial court erred in dismissing the plaintiffs' action against Anderson and Braun individually.

   A. The trial court erred in failing to hold Anderson liable as a partner with Braun Construction.

   B. Anderson and Braun are liable for the damages resulting from the breach of the implied warranty of workmanship.

2. The trial court erred in its award of damages to the plaintiffs.

   A. The trial court erred in failing to award Plaintiffs damages for defendants' failure to construct a pond.

[1]At a later hearing, the court awarded the plaintiffs attorney's fees in the amount of $9,000.00 and discretionary costs in the amount of $926.50.

B. The trial court erred in failing to award plaintiffs' damages for the sewer repairs.

STANDARD OF REVIEW

Under our standard of review we are required to presume the correctness of the judgment on a de novo review unless the preponderance of the evidence is otherwise. Rule 13(d), T.R.A.P.; State Farm v. Jenkins, 764 S.W.2d 547 (Tenn. App. 1980). Inherent in this standard is the significant element of witness credibility, a determination of which by the Chancellor is well-nigh conclusive. Wells v. Magnolia Truck Lines, 622 S.W.2d 526 (Tenn. 1981); Jones v. Jones, 784 S.W.2d 349 (Tenn. App. 1989); Bowman v. Bowman, 836 S.W.2d 563 (Tenn. App. 1991). This presumption does not attach to conclusions of law of the trial court. Presley v. Bennett, 860 S.W.2d 857, 859 (Tenn. 1993); Hill v. Tennessee Rural Health Improvement Ass'n, 882 S.W.2d 801 (Tenn. App. 1994).

BACKGROUND

The defendant, Sandor Braun, was in the construction business in Florida. He came to Tennessee to build a home for his brother-in-law and sister-in-law. While here, he found a lot in Channel Point subdivision on which he wanted to build a house for speculation purposes. When he applied to the bank for a construction loan, the bank refused the loan because he had been in Tennessee

such a short time. The bank informed Mr. Braun that he needed a local co-signer to obtain the financing.

The defendant, Mr. Anderson, was the listing agent for Channel Point subdivision which was being developed by Dr. Ronald L. Kilgore, who is not a party to this action. Mr. Braun approached Mr. Anderson regarding a possible partnership between them for construction financing. He and Mr. Braun ultimately entered into an agreement whereby Mr. Anderson would be the selling agent for the house and would receive a 6 percent commission; Mr. Anderson and his wife would be obligated on a of the interest on the construction loan until the house sold; Mr. Braun would receive a weekly salary of $500.00; and Mr. Anderson would receive a of the profits from the sale of the house after all expenses were deducted.

The lot was purchased and a warranty deed was prepared, executed and delivered whereby Dr. Kilgore and his wife transferred title to Mr. Braun and his wife, and Mr. Anderson and his wife. Thereafter, construction was begun on the house. While construction was in progress, the plaintiffs, Mr. and Mrs. Daugherty became interested in purchasing the property. The plaintiffs entered into a contract with Braun Construction Company whereby Braun Construction Company agreed to sell the lot and existing structure to the plaintiffs, however since the construction was not completed,

changes and upgrades were made at the request of the plaintiffs. Braun Construction Company agreed to complete the structure in accordance with the contract.[2] The contract was executed between the plaintiffs and Braun Construction Company by Sandor L. Braun, President. None of the other defendants were signatory to the contract. In due course, a warranty deed was prepared, executed and delivered whereby the individual plaintiffs, Mr. Braun and his wife, and Mr. Anderson and his wife conveyed title to the property to the plaintiffs. The plaintiffs took possession of and occupied the premises prior to full completion of the house. After taking possession of the premises and occupying them, the plaintiffs instituted this action to recover damages for breach of contract.

DISCUSSION

Liability Issues

The plaintiffs asserted that the defendants had breached their contract because of defective workmanship and breach of warranties. The plaintiffs, in their complaint, asserted that although the contract was executed by Sandor Braun in his capacity of president of Braun Construction Company, the actual seller of the property was Braun-Anderson Partnership.

[2]We deem it unnecessary to set out the terms of the contract.

Extensive evidence was presented before the trial court. At the conclusion of the trial, the court rendered its opinion from the bench, stating his findings of fact and conclusions of law. The opinion was subsequently transcribed and incorporated into the final judgment by reference. The court found that the plaintiffs had failed to prove by a preponderance of the evidence that there was a contractual arrangement between the plaintiffs and Mr. Anderson whereby Mr. Anderson was under any obligation regarding the construction of the house. Specifically, the court stated:

> ... The burden is upon the plaintiffs to establish, by a preponderance of the evidence, that there was a contractual arrangement between them and Mr. Anderson, obligating Mr. Anderson with respect to the construction. In this case, as will be hereinafter noted, much of the right of one claimant or the other depends upon meeting the burden of proof. Already having the affirmative in a case to prove something must prove so by a preponderance of the evidence, and if the evidence does not preponderate, or even equally balance, then that party already fails to prove the case that that party is obligated to prove in order to prevail.
>
> I think, weighing the evidence, that the plaintiffs Daugherty have failed to prove that there was an obligation of the partnership to carry out the contractual obligations of the Braun Construction Company. The parties —plaintiffs entered into the contract expecting Braun Construction Company to be the party obligated with respect to construction, and they did not look to Mr. Anderson or the Braun-Anderson partnership, which was a partnership having to do with financing, not with construction. Therefore, the case as to Mr. Anderson and as to Mr. Braun, insofar as Mr. Braun might be held as a partner of the Anderson-Braun [sic] partnership, is dismissed.
>
> Is Mr. Braun liable for the obligations of the corporation? Again, the answer to that is no. The evidence clearly preponderates in favor of showing that

> plaintiffs Daugherty entered into a contract with the Braun Construction Company. Mr. Braun signed as president of that construction company. Plaintiffs clearly knew that they had entered into a contract with a corporation, and that the corporation was liable, and the suit will be dismissed against Mr. Braun completely, including as a corporate owner or corporate official.

After our review of the record, we are unwilling to say that the evidence preponderates against the above findings of the trial court. To the contrary, the record establishes convincingly, that the evidence preponderates in favor of the findings of the trial court. We find no merit in either the first issue or its sub-issues.

Damages Issues

As to the second issue and its sub-issues, it is equally clear that the evidence does not preponderate against the findings of the trial court relating to damages. Each party presented expert testimony both as to the standards of building and workmanship prevailing in the area, quality of workmanship found in the subject property, and costs of repairs or damages.

It is clear that the court accredited and gave more weight to the testimony of the defendants' expert, Mr. Gary Cobble as opposed to the plaintiffs' expert, Mr. Gary Brock. Speaking of the expert testimony, the court stated:

... There is no question on the evidence that the corporation did not complete a significant number of items which result in an amount due plaintiffs by the corporation. An expert, Mr. Brock, has testified on behalf of plaintiffs, and an expert, Mr. Cobble, has testified on behalf of defendants. Each side has pointed out some deficiencies by way of error of fact made by the other's expert.

Mr. Brock, essentially, was not testifying as an expert who had inspected the specific premises involved here, and rendered an opinion that something specific was wrong. Mr. Brock testified that, assuming that certain work had to be done, how much would it cost to do the work. Thus, he was testifying in the main as an expert who gave an opinion as to costs and expenses. He did, however, with respect to some items, state that certain parts of the performance by the Braun Corporation, were not up to local standard. Putting that together with the plaintiffs having pointed out certain such defects and Mr. Brock's testimony as to cost of repair of the same, there is evidence supporting plaintiffs' claim.

Opposed to this is the testimony of defendants' expert, Mr. Cobble. Mr. Cobble testified with respect to specific items asserted by plaintiffs to be defective. Some of these assertions of plaintiffs Mr. Cobble agreed with, and he testified to the cost of repair of the same. He gave a total amount of punch list type repairs or breach of contract repairs, if that is a more proper term —it makes little difference —in the amount of eight thousand, nine hundred and ninety dollars. The evidence, we think, then, at a minimum, establishes that the plaintiffs are entitled to recover that amount.

We observed that Mr. Brock was very hesitant in his testimony when his attention was directed to specific items of damage, and he was very cautious in recognizing that certain things would be not up to standard, but he did not directly testify from observation that much of anything was not up to standard. ... His testimony as to expenses was based upon his work and method of establishing the repair costs for insurance companies which, apparently, have to do more with repairing fire and smoke damage, and that sort of thing. According to Mr. Brock, he, having identified various items to be repaired, inserted that information into a computer system, which operated in the State of Ohio, and based its calculations upon regional data, presumable that including this area, and that Mr. Cobble directly disputed the validity of

> some of the unit costs for labor used in Mr. Brock's estimate. We think that Mr. Cobble would be more reliable than some general regional data which might include areas entirely unrelated or little related to the Knoxville Area.
>
> Finally, we noted that Mr. Brock stated that the price that the company he works for would repair items in plaintiffs' home was that which his company and the insurance company would agree to. This suggests that Mr. Brock's figures are somewhat on the high side and given with the idea of having to have a cushion to agree and end up with the satisfactory agreement with the insurance company. In any event, Mr. Brock did not end up giving a very satisfactory acceptable repair figure. (Emphasis added).

Thereafter, the court beginning with the base damages established by Mr. Cobble, i.e., eight thousand, nine hundred and ninety dollars ($8,990.00), added elements of damages which the court deemed to have been properly established by a preponderance of the evidence.[3] The court considered each alleged defect for which damages were claimed, item by item. He arrived at the total damages to which the plaintiffs are entitled, as hereinabove set forth, at eighteen thousand, three hundred eighteen dollars and three cents ($18,318.03).

Applying the presumption of correctness to the court's findings of fact as we are required to do, coupled with the principle of law that while this Court is not bound by the findings of the trial court, it looks to the factual circumstances in light

[3]For comparison purposes, Mr. Cobble estimated the damages to be $8,990.00. Mr. Brock estimated the damages to be $113,256.85.

of all appropriate factors for evidence sufficient to preponderate against the presumption in order to reverse the trial court's findings. Lock v. National Union Fire Ins., 809 S.W.2d 483, 487 (Tenn. 1991). "Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances." Jones v. Hartford Accident & Indemnity, 811 S.W.2d 516, 521 (Tenn. 1991). Upon appeal from a non-jury judgment, this Court must generally defer to the finding of the Trial Court as to the weight and credibility of witnesses who testified in person. Duncan v. Duncan, 686 S.W.2d 568 (Tenn. App. 1984).

The record does not establish that the evidence preponderates against the trial court's judgment in any respect. We concur with the trial court's findings of fact and we find no error of law. We, therefore, affirm the judgment of the trial court in all respects.

Costs are taxed to the appellants and this case is remanded to the trial court for the collection thereof.

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Don T. McMurray, J.

CONCUR:

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Houston M Goddard, Presiding Judge

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Charles D. Susano, Jr., J.

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ORDER

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 no reversible error in the trial court.

We affirm the judgment of the trial court in all respects. Costs are taxed to the appellants and this case is remanded to the trial court for the collection thereof.

PER CURIAM