

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs March 19, 2007

WAYNE'S CONSTRUCTION, INC. v. WILLIAM JONES, ET AL.

**Appeal from the Chancery Court for Knox County
No. 162144-2 Daryl R. Fansler, Chancellor**

No. E2006-00535-COA-R3-CV - FILED JUNE 11, 2007

William and Patricia Jones (the "Homeowners") contracted with Wayne's Construction, Inc. ("Wayne's Construction") to build the Homeowners a new house. During construction, the Homeowners encountered numerous significant problems with the quality of the construction, including problems with the structural integrity of the house. The Homeowners eventually discharged Wayne's Construction. Wayne's Construction filed this lawsuit seeking over \$23,000 it claimed was earned prior to its being discharged. The Homeowners filed a counterclaim seeking a significant amount of compensatory damages which they claimed resulted from the shoddy construction. Following a trial, the Trial Court dismissed the complaint filed by Wayne's Construction and entered a judgment for the Homeowners for \$139,250 and then trebled this amount pursuant to the Tennessee Consumer Protection Act. The only issue on appeal concerns whether the proof preponderates against the Trial Court's determination as to the amount of damages incurred by the Homeowners. We conclude that it does not and affirm the judgment of the Trial Court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Chancery Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Dail R. Cantrell, Clinton, Tennessee, for the Appellants, Wayne J. Lanagan, Adam Lanagan, and Danny Breedon.

George W. Morton, Knoxville, Tennessee, for the Appellees, William Jones and Patricia Jones.

OPINION

Background

The Homeowners contracted with Wayne's Construction to build the Homeowners a new house in Knox County. In September of 2004, Wayne's Construction filed this lawsuit against the Homeowners claiming it was owed \$23,138.04 under the contract. Wayne's Construction stated in the complaint that a lien had been placed on the house for the amount allegedly owed.

The Homeowners answered the complaint and admitted they had contracted with Wayne's Construction for the construction of a house in Knox County and averred that the contract had a monetary limit of \$330,000. The Homeowners denied that they owed Wayne's Construction any money and further denied that a lien on the house had been properly perfected. The Homeowners filed a counterclaim against Wayne's Construction and a third-party complaint against Wayne Lanagan, who allowed his contractor's license to be used during part of the construction, as well as Adam Lanagan and Danny Breeden, whom the Homeowners claimed were in charge of and responsible for the construction project.¹ According to the Homeowners:

The work performed pursuant to the contract of August 4, 2003 failed to meet the standards in the community, from time to time, failed to meet various inspections; and needs additional work to correct the construction of approximately \$25,000.00. Delays and cost overruns have cost the Jones over \$75,000.00

That Third Party Defendants were aware of the budget that Counter-Plaintiffs had set for the construction of this residence and assured them that this house could be completed, and built in accordance with the plans and specifications provided, for \$330,000.00

The Homeowners claimed they were repeatedly assured by the third-party defendants that the construction would be completed on time, for the agreed-upon price, and in a workmanlike manner. According to the Homeowners, despite these assurances they eventually had to "dismiss" Wayne's Construction and the third-party defendants because of lack of progress with the construction and continued problems with the quality of the construction. The Homeowners further claimed that the third-party defendants violated the Tennessee Consumer Protection Act and the Homeowners sought damages of \$150,000, "plus additional awards under the Tennessee Consumer Protection Act." The amount of damages sought by the Homeowners later was increased to \$500,000.00.

¹ The Homeowners later amended their counterclaim asserting that when they entered into the contract, Wayne's Construction, Inc., was no longer incorporated and was being operated by Adam Lanagan and Danny Breeden doing business as Wayne's Construction Company through a contractor's license issued to Wayne Lanagan.

The non-jury trial was in January of 2006. Following the trial, the Trial Court issued a detailed memorandum opinion which discussed the facts and applicable law. The Trial Court dismissed the claim brought by Wayne's Construction for the \$23,138.04 allegedly owed it and declared the lien "cancelled and held unenforceable." The Trial Court then entered a judgment for the Homeowners against the third-party defendants individually for \$139,250.00.² The Trial Court also determined that the third-party defendants had violated the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101 *et seq.*, and that this was an appropriate case to award treble damages pursuant to that Act, thereby bringing the total judgment to \$417,750.00, plus attorney fees.

The third-party defendants appeal raising one issue, which is a claim that the preponderance of the evidence weighs against the Trial Court's award of compensatory damages in the amount of \$139,250 due to the claimed failure of the Homeowners to prove the amount of their damages.³

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). 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).

No transcript from the trial has been provided to this Court on appeal. Each side prepared a Tenn. R. App. P. 24(c) statement of the evidence which, when combined, have been approved by the Trial Court pursuant to Tenn. R. App. P. 24(e). Given the issue before us, we will quote significant portions of the statements of the evidence. As relevant to the issue on appeal, the statement of the evidence provided by the third-party defendants provides as follows:

Based upon the house plans given to Adam Lanagan and Danny Breeden, an agreement was entered into that stated that the estimated cost of construction was Three Hundred Thirty-Thousand Dollars (\$330,000.00) and that the house would be completed in three (3) months. However, the contract also provided that neither the price

² The Trial Court entered the judgment against all three third-party defendants jointly and severally after concluding they were partners in the operation of Wayne's Construction.

³ The third-party defendants do not appeal the Trial Court's finding that there was a violation of the Tennessee Consumer Protection Act and that the amount of compensatory damages, if properly proven, should be trebled pursuant to that Act. There also is no appeal from the Trial Court's judgment holding all three third-party defendants jointly and severally liable or from the Trial Court's dismissal of the original complaint filed by Wayne's Construction seeking payment of the \$23,138.04 that allegedly still was due under the contract. We express no opinion on any of these potential but unraised issues.

nor the time was to be limited to said amount or said time restriction....

It was stipulated at trial that the contract was entered into on August 4, 2003. After the contract was entered into, Mr. Breeden testified that after construction began Mr. and Mrs. Jones began to make numerous changes to the architectural plans. Mr. Breeden also testified that the original house plans called for a one (1) story home, but that Mr. and Mrs. Jones ultimately informed [Mr. Breeden] and Adam Lanagan that they wanted the house plans converted to allow for a two (2) story house. Mr. Breeden testified that this change in and of itself resulted in an additional eight hundred (800) to one thousand (1,000) square feet increase in the size of the house. Mr. Breeden testified that Mr. and Mrs. Jones were told that the changes they were requesting would increase the cost of the home....

Mr. Breeden further testified that he and Adam Lanagan were ultimately terminated by Mr. and Mrs. Jones effective January 2, 2004, and at the time he and Adam Lanagan were terminated the following work had yet to be done: install gutters; grade work; painting; trim; and the installation of the driveway. Additionally, Mr. Breeden testified that prior to him and Adam Lanagan being terminated, Mr. and Mrs. Jones contracted the electrical and had yet to complete the patio....

Mr. Breeden testified that as of January 5, 2004, his company had completed work on Mr. and Mrs. Jones' residence which had not been paid, and that Mr. and Mrs. Jones owed Adam Lanagan and himself the sum total of Twenty-three Thousand, One Hundred Thirty-eight Dollars and Four Cents (\$23,138.04) ... for materials and labor that was done on their residence prior to being terminated

Ron Corum, a structural engineer licensed by the State of Tennessee, testified on behalf of Adam Lanagan and Danny Breeden. Mr. Corum testified that he had done between four hundred (400) and five hundred (500) structural inspections of homes in order to determine the cause of defects in foundations. Additionally, he testified that he was a contractor licensed in the State of Tennessee....

Engineer Corum described the foundation of the Jones' house as being a girder-pier foundation with a perimeter footer. According to his expert testimony, the piers were well constructed and appeared to be adequate to support the residence. He did notice that there were

gaps between the girders and the piers and he felt that this should be corrected by the insertion of wood shims. Engineer Corum further testified that a section of the girders was not properly joined so that they would connect over a pier allowing the pier to bear the load. There were photographs showing a separation that indicated settling where the girders were joined between the piers and not over them. It was Engineer Corum's expert opinion that the large crack that had developed in the case opening between the living room and the kitchen; the sag in the living room floor; and the crack above the dining room door were caused by this defect....

Engineer Corum was asked to give an opinion as to what it would take to correct this problem. He testified that the only thing that needed to be done was to install additional girders, essentially scabbing over the existing girders with 2 x 12 planks and lag bolting them into the original girder system. Engineer Corum testified that it would cost approximately Two Thousand Dollars (\$2,000.00) to correct the girders and an additional Two Thousand Dollars (\$2,000.00) to do cosmetic repairs inside the dwelling to repair the damage. He further testified that the responsibility to repair these problems would be upon Adam Lanagan and Danny Breeden

Engineer Corum further testified that there were several doors in the residence that would not close properly, and that there was a small crack in the master bath floor tile and a crack above the master bedroom closet. Engineer Corum testified that these problems were not related to the floor joint system, but were probably caused by differential settlement which could possibly (sic) have been caused by improper soil or ... excessive drainage.... Engineer Corum was further asked to evaluate the alleged lack of weepholes installed in the brick. Engineer Corum testified that upon his examination there were no weepholes. However, he testified that there was no code requirement for weepholes, and that the installation would be a relatively simple process costing approximately Two Thousand Dollars (\$2,000.00)

Patricia Jones testified that during construction she discovered that the foundation for the breakfast nook was too small and that Adam Lanagan admitted that he did not know how he "missed it." She further stated that she and Mr. Jones had several complaints regarding the floors not being level. Mrs. Jones further testified that the framing of the master bath had to be redone and that the foundation blocks were not of the appropriate size to accommodate the brick.

Mrs. Jones testified that on October 21, 2003, brick masons appeared, but that the brick had not been ordered, causing a delay in delivery. Mrs. Jones also testified that dormers on the roof had to be torn down and that when the windows arrived, they were not as specified. She also testified that of the twenty-seven (27) doors that had been installed in the home, twenty-two (22) did not work properly. Additionally, the dryer vent was not installed, nor did the commode in the bonus room flush. Prior to discharging Adam Lanagan and Danny Breeden, she had paid a total of Three Hundred Thirty-four Thousand, Seven Hundred Six Dollars and Fifteen Cents (\$334,706.15) relating to the construction of the house. She further testified that after Adam Lanagan and Danny Breeden were discharged, an additional Eighty-two Thousand, One Hundred Fifty-one Dollars and Sixty-six Cents (\$82,151.66) was paid to complete the project, [bringing] the total construction cost to Four Hundred Sixteen Thousand, Eight Hundred Fifty-seven Dollars and Eighty-one Cents (\$416,857.81)....

Mr. Jones testified that during construction he hired the electrician, Mrs. Jones' son, to do the electrical work on the home. He additionally hired an individual named Rick to do the patio. Mr. Jones testified that after Adam Lanagan and Danny Breeden were fired, he and Mrs. Jones acted as the contractors on the home. He testified that the home was not completed until August 13, 2004. Mr. Jones sent Adam Lanagan a letter dated December 27, 2003, and a letter dated January 2, 2004, ... detailing the specific reasons that they were being terminated, and that work that had not been completed pursuant to the contract. Mr. Jones provided an itemized breakdown showing Eighty-two Thousand, One Hundred Fifty-one Dollars and Sixty-six Cents (\$82,151.66) ... listing all of the work that was performed after Adam Lanagan and Danny Breeden had been terminated.

According to the information entered at trial ... Mr. and Mrs. Jones hired Creative Bobcat to do grade work on January 8, 2004. Mr. Jones also hired an individual named Tony Kelly to do the soffitts and the guttering on the home on January 22, 2004, and an individual named Charley Bivens to install the driveway on January 23, 2004. On February 2, 2004, 31-W installed insulation under the house in the crawl space. The final grade on the house was done by R. P. McCallan on March 24, 2004, and sod was put down on April 5, 2004, with general landscaping beginning on April 20, 2004....

David Underwood testified on behalf of Mr. and Mrs. Jones. He holds a general contractor's license in the State of Tennessee, and he specializes in residential construction....

Mr. Underwood had never been an expert witness before. Mr. Underwood testified that he found no weepholes in the brick, and that he was of the opinion that this was a code violation and that the only way to correct it would be to tear off the brick and start over. Mr. Underwood testified that he inspected the crawl space on six (6) or seven (7) occasions and determined that seven (7) of the piers under the Jones' home had settled between 3/8 and 3/4 of an inch between late March and mid September of 2005. Mr. Underwood testified consistently with the initial report calling for repairs entered as trial Exhibit "G." Mr. Underwood also testified consistently with trial Exhibit "33", Exhibit "H" that an additional Two Hundred Thirteen Thousand Dollars (\$213,000.00) worth of repairs would have to be performed in order to meet the recommendations of Mr. Doss, and (sic) engineer hired by Mr. and Mrs. Jones.

Mr. Underwood testified that he found no problems with the Jones' residence other than those that were set forth in his reports. Mr. Underwood was cross-examined extensively about his findings contained in [his report]. He noticed substantial construction debris in the crawl space under the home. He felt that the under floor grade was not cleared of all construction materials which violated Cabo 409.3 related to the removal of the debris. Mr. Underwood further testified that there was at least one (1) pool of water on the northwestern side of the crawl space under the home. He further testified that where there is evidence of surface water in the crawl space, the under floor space is required to have a drainage system or to be graded and as high as the outside grade. He testified that he saw no drainage system, and the crawl space floor was not graded or as high as the outside grade, violating Cabo 409.4. During cross examination Mr. Underwood admitted that he could not see the ground under the crawl space because of a black polyurethane piece of insulation that has been installed by 31W on February 2, 2004. He also testified that there were three (3) things that could cause water to pool up under the home:

1. Gutter downspouts not being positioned properly;
2. The footer being dug so that it hits a water plane;
3. The grade work being done improperly.

Mr. Underwood testified that he saw no evidence that the water plane had been breached, and did not know who installed the gutter downspouts or did the grade work....

[Mr. Underwood testified] that there were no weep holes in the brick and that this was a violation of Cabo 703.7.4. He also testified that he had never actually put weep holes in a home before.... [H]e testified concerning that some piers were more than an inch taller than other piers and some adjacent piers were as much as 3/4 of an inch off. He also testified that several piers have shims made of OSB board which were used in an attempt to level floor joists. He also testified that termite shields were absent along the top of the piers. Mr. Underwood gave an estimated cost of Forty-eight Thousand Dollars (\$48,000.00) to correct the improperly installed footing piers. Under cross-examination he admitted that he arrived at this cost by calling an engineer who gave him an oral quote over the telephone without actually coming to do an inspection.

Mr. Underwood further testified that twenty-two (22) of the doors in the home did not work properly and he felt that they would have to be replaced at a cost of Five Hundred Dollars (\$500.00) per door. He also testified that additional sheetrock work would require Eighteen Thousand Dollars (\$18,000.00), and testified consistently with the other findings in his report.

Under cross-examination Mr. Underwood admitted that he did not do any remodeling, and that his experience was based solely in new home construction. He further testified that he believed in estimating high and that ultimately the decision as to how the house should be repaired needed to be made by a structural engineer.

Larry Doss, a civil engineer, testified as an expert witness on behalf of Mr. and Mrs. Jones and testified consistently with his report dated September 19, 2005.... Mr. Doss testified that his engineering background is in civil engineering, and that he was not licensed as a structural engineer. Mr. Doss testified that he observed "several breaks" in the 2 x 12's that did not rest over the foundation piers. He examined the piers under the Jones' house and found that there was as much as 1/2 inch difference in the level of some of them, and he observed water coming into the basement

Mr. Doss admitted that the original house plans called for a one (1) story home, and that the second story was added during construction.

Mr. Doss testified that a structural engineer needed to be retained in order to do an analysis of the residence. He felt that to be able to evaluate the cause of the settling of the home, and the cracks, a structural engineer would need to tear out some of the walls and monitor the floor elevation and check for any differential settlement in the foundation piers. Additionally, Mr. Doss testified that a verification of soil conditions could not be verified by the structural engineer, but rather that an engineering firm would need to be retained to take samples and to determine the bearing capacity of the existing soil beneath the footings. Mr. Doss further testified that this structural analysis would cost between Ten Thousand Dollars (\$10,000) to Fifteen Thousand Dollars (\$15,000.00), and that it would be necessary to have said information in order to do a proper evaluation of the home....

David Morin, a licensed general contractor in the State of Tennessee and Florida, testified as a [rebuttal] witness. Mr. Morin was the subcontractor in charge of framing Mr. and Mrs. Jones' residence. Mr. Morin testified that there were significant delays in the construction process which were caused by extensive revision to the original floor plan. Mr. Morin testified that the plans provided to him by Mr. and Mrs. Jones were incorrect and that the stairwell could not be installed per the plans. Mr. Morin further testified that prior to installing the stairwell, he had told Adam Lanagan that it would not work, but that Adam Lanagan had told him to proceed anyway because they were on a tight schedule. Mr. Morin testified that after the stairwell was constructed, pursuant to Adam Lanagan's orders, the stairwell had to be torn out and refigured. Mr. Morin testified that there were no weep holes in the brick of the home, but that not having weep holes was not a code violation, nor was it a common practice. Mr. Morin testified that weep holes could be inserted in the existing brick, at a cost of approximately Two Thousand Dollars (\$2,000.00). Mr. Morin testified that the twenty-two (22) doors that Mr. Underwood said would have to be replaced merely needed to be re-hung. He also testified that he disagreed with Mr. Underwood's estimate of the repair cost, and felt that the total cost of repairing the home ..., including correcting the repairs required that needed to be made pursuant to engineer Corum's analysis, would be between Twelve Thousand Dollars (\$12,000.00) and (\$15,000.00). Mr. Underwood further testified that Mr. and Mrs. Jones would make revisions to the floor plans which required the tearing out of framing, and the re-framing of rooms.

The statement of the evidence filed by the Homeowners provides as follows with respect to the issue of damages:

[Mrs. Jones] described the ongoing problems with the house and entered pictures.... She described how cracks had occurred in the wallboard other than the joints; the floor was dropping below the baseboard, and floor cracks were growing in length. Several other shortcomings were described. She complained of work quality, costs that exceeded the original estimate of \$330,000.00, and delays in work. As a result, the contract was terminated January 2, 2004. They spent significant money to complete.

Mrs. Jones stated that she followed the contractor and their expert witness, Mr. Corum, when they inspected the house after this lawsuit was filed. She stated she overheard the expert witness tell the contractor that the weight of the second level was too great for the supports below....

The amount of \$334,706.15 had been spent at the time the contractor was fired. The sum of \$82,151.66 was paid to complete the house to occupancy.

Mrs. Jones stated that she and her husband had not been able to do the repair work or obtain a structural engineer and soil studies because the excess cost of the house had required Mr. Jones to sell his stock investments and they did not have funds to do more.

She stated that they complained of the floors not being even and the breakfast nook being too small, and Adam Lanagan admitted he did not know how he missed it. On one occasion the brick masons appeared to work, but the bricks had not been ordered.

Dormers on the roof had to be torn down. Windows arrived, which were not as specified. Mrs. Jones claimed that 27 doors were installed in the house but 22 work improperly. No dryer vent was installed. The commode in the bonus room does not flush....

William Jones testified, essentially confirming his wife's testimony.

Mike Underwood testified as an expert witness and residential contractor for over 20 years. He testified that he had examined the Jones house and inspected the house.

Mr. Underwood testified to code violations in the crawlspace, failure to provide weep holes in the bricks, support pillars being off as much as 3/4 of an inch, no termite shields, incorrect materials, sagging house, walls throughout the house not square. Contractors had substituted a commode that would not flush. Windows were improperly installed. Concrete blocks were not of the appropriate size to accommodate brick.

After his deposition, Mr. Underwood again inspected the house. He confirmed that there were not only no weep holes but that there was no waterproof membrane between the brick and the siding as required by the building codes.

He also stated, after comparing measurement during inspection that the support piers were sinking. Seven areas had settled between 3/8 and 3/4 of an inch between March 2 and September 4, 2005. His original estimate for repairs was \$139,200.00.

Mr. Underwood then stated that because of the pier problem his best estimate of cost for the repairs, subject, however, to a full structural evaluation including a soil study, was \$213,000.00 but before he could say that the needed repairs would be adequate there would need to be a soil study.

Mr. Underwood was recalled as a witness to rebut the testimony of the contractor's witness, Mr. Corum who had testified that the code did not require a plastic membrane behind the brick. Mr. Underwood pointed out in the code that Mr. Corum was referring to provisions referring to frame houses and not brick exterior housing. Mr. Underwood pointed out the provisions which applied to brick veneer houses. The Jones house violated code.

Larry Doss testified on behalf of [the Homeowners]... Mr. Doss felt that the distance between the piers was excessive and was in violation of the building code. He observed several "breaks" in the 2 x 12s that did not rest over the foundation piers. He examined the piers and found that there was as much as 1/2 inch difference in the level of some of them. He also observed water coming into the basement.

Mr. Doss acknowledged that the house was originally designed as a one-story and that a second story was added during construction. He is of the opinion that there is a questions (sic) as to whether the outside walls have been designed to bear this additional weight. He

also noted that the addition of the second story required a closer spacing between the piers.

Mr. Doss was of the opinion, that as to the first floor problems, the foundation was definitely the cause. He recommended that a structural engineer do a complete analysis of the house so as to in effect “design the house from top down, including the trusses and so forth.”

He also recommended installing 18 new piers and was of the opinion that the defendants would have to find some way to support the second floor from the roof down.

Mr. Doss is of the opinion that the house would have to be jacked up to do the repairs. He felt that this would cause additional damage to sheet rock and was hopeful that it would not disturb (sic) the plumbing. He also felt the ductwork in the house would have to be moved in order to get into the crawlspace to do the work. He felt that the foundation needed considerable work to prevent additional damage.

Mr. Doss also felt that additional evaluation by a structural engineer would necessitate extensive tear out of the walls in the dwelling. He was of the opinion that the cost of additional engineering analysis would be in the range of \$10,000.00 to 15,000.00 in order to come up with a plan to completely repair ... the residence.

Both Mr. Doss and Mr. Underwood stated that cracks in the floors were getting worse and the house was falling apart....

Mr. Corum testified that he was a structural engineer who had practiced in Florida before moving to Knoxville. He admitted that if the piers were sinking his analysis could be inaccurate.

The framing contractor has testified ... that the plans were incorrect with respect to a stairwell and the same could not be installed per the plans. He stated that Adam Lanagan told him to proceed anyway because they were on a tight schedule.

The Trial Court’s memorandum opinion summarized the evidence presented to the Trial Court basically as set forth above, and made numerous findings of fact based on this evidence. The Trial Court found that the third-party defendants failed to perform the construction in a workmanlike manner. The Trial Court also noted that the third-party defendants’ own experts

conceded to significant structural problems that did not meet the applicable building codes. The Trial Court observed that the third-party defendants' "own experts concede to significant structural problems ... [and] that many of the cracks in the floors, walls, and ceilings in ... the residence result from this improper construction."

The Trial Court noted that Underwood had prepared two estimates at different points in time. The most recent estimate concluded that it would cost \$213,000 to repair the house; and the cost of repair set forth in his earlier estimate was \$139,250. The Trial Court apparently accepted, to the third-party defendants' benefit, the conclusion contained in Underwood's first estimate when finding and setting the Homeowners' damages at \$139,250.

In *Pratt v. Gibson*, No. E2003-00114-COA-R3-CV, 2004 WL 1387845 (Tenn. Ct. App. June 22, 2004), *no appl. perm. appeal filed*, this Court was confronted with a somewhat similar lawsuit involving alleged shoddy construction of a house. *Pratt* involved what the defendants claimed was defective masonry work which required the bricks to be removed and replaced. *Id.* at *1. According to the defendant, the masonry work was defective because there were no weep holes and an insufficient number of wall ties. *Id.* at *3. We affirmed the trial court's conclusion that the masonry work was defective. *Id.* at *5. However, we also held that the trial court incorrectly concluded that the defendant had not proven that the bricks needed to be removed and replaced. We stated:

The Trial Court certainly was presented with a wide array of testimony regarding the workmanlike quality of the masonry work performed by Plaintiffs on lot 13. In assessing this conflicting testimony, the Trial Court had the opportunity to assess the credibility of the various witnesses, as well as any biases each particular witness may have had. "Unlike this Court, the trial court observed the manner and demeanor of the witnesses and was in the best position to evaluate their credibility." *Union Planters Nat'l Bank v. Island Mgmt. Auth., Inc.*, 43 S.W.3d 498, 502 (Tenn. Ct. App. 2000). A trial court's determinations regarding credibility are accorded deference by this Court. *Id.*; *Davis v. Liberty Mutual Ins. Co.*, 38 S.W.3d 560, 563 (Tenn. 2001). In the present case, the credibility of the witnesses obviously impacted the Trial Court's conclusions. The Trial Court was most impressed with the testimony of Fox who unequivocally testified that the masonry work was not in compliance with applicable codes in at least two regards, these being the lack of weep holes and the lack of wall ties. We do not believe the evidence preponderates against the Trial Court's findings that the masonry work was not performed in a "workman-like" manner and that it was in violation of applicable codes. We, therefore, affirm the Trial Court's conclusion that Plaintiffs breached the oral contract with Defendant.

The next issue involves Defendant's claim that the Trial Court erred when it concluded Defendant failed to prove by a preponderance of the evidence that it was necessary to remove and replace all of the masonry work. In reaching this conclusion, the Trial Court noted that while proof had been introduced that the lack of wall ties could cause structural problems, Defendant offered no direct proof that the brick walls on lot 13 were going to fall or that structural problems actually existed.

Based on the facts of this case, we do not believe Defendant was required to prove that a collapse of the walls was imminent. Even if the walls were structurally sound for the moment, the house nevertheless was not in compliance with the requirements of the Oak Ridge City Code and/or the Southern Standard Building Code because of the lack of wall ties and weep holes. Relying on the testimony of Fox, the only witness whose testimony favorably impressed the Trial Court, it is clear that the wall ties were "very, very sporadic" even in those areas that had the ties. The proof also established that a lack of wall ties can lead to structural problems. We do not believe Defendant was required to adopt a "wait and see" attitude and keep his fingers crossed hoping that the walls would not collapse. The potential liability should the walls collapse could be immense. We conclude that the evidence preponderates against the Trial Court's conclusion that Defendant did not prove that the bricks had to be removed and replaced in order to correct the code violations.

Pratt, 2004 WL 1387845 at **5, 6. We then modified the Trial Court's judgment by increasing the judgment to the defendant to include the cost of removing and replacing the bricks. *Id.* at *6.

In the present case, the third party defendants' various arguments on appeal are essentially claims that the Trial Court should have relied on the testimony of the third party defendants' experts as to the cause of the problems with the house as well as the amount necessary to remedy those problems. However, as we explained in *Pratt, supra*, it is up to a trial court to resolve conflicting proof. The Trial Court obviously was impressed favorably with Underwood's testimony and credited Underwood's testimony over that of the third-party defendants' experts. Regardless of which expert is believed, it is clear that there were significant problems with the construction of the house. The problems were much more than cosmetic problems and involved the structural integrity of the house. In fact, two of the experts went so far as to state that the house was "falling apart." As in *Pratt*, we do not believe the Homeowners were required to adopt a wait and see attitude to see if the house was going to fall down before being able to come to court with proof that was sufficiently definite to support an award of damages.

There was a wide array of testimony offered at trial as to the cause of the problems, who was responsible for the problems, how the problems could be repaired effectively, as well as the overall cost of repairing those problems. Costs of repairing the problems ranged from a low of \$12,000 to \$15,000, to a high of \$213,000. The precise issue on appeal is whether the evidence preponderates against the Trial Court's finding and ultimate conclusion that it would cost the Homeowners \$139,250 to repair the significant structural and cosmetic problems associated with their new home. After carefully reviewing all of the evidence presented to the Trial Court and according deference to the Trial Court's credibility determinations and factual findings, we are unable to conclude that the evidence preponderates against any of the factual findings of the Trial Court including the Trial Court's ultimate finding as to the amount of damages, \$139,250. The judgment of the Trial Court is, therefore, affirmed.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellants Wayne J. Lanagan, Adam Lanagan, and Danny Breeden, and their surety.

D. MICHAEL SWINEY, JUDGE