

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs April 24, 2008

**JAY S. GORBAN v. DAVID HARRIS**

**Appeal from the Circuit Court for Montgomery County  
No. 50400934 Ross H. Hicks, Judge**

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**No. M2007-01908-COA-R3-CV - Filed May 28, 2008**

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This is a dispute between a homeowner and the contractor he hired to build a sunroom onto his home. We have concluded that the evidence does not preponderate against the trial court's award of a judgment in favor of the homeowner for 60% of the requested damages, based upon its allocation of 40% of the fault to the homeowner.

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

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., and RICHARD H. DINKINS, J., joined.

Donrua Barnes-Hulsey, Clarksville, Tennessee, for the appellant, David Harris.

Mart G. Fendley, Clarksville, Tennessee, for the appellee, Jay Gorban.

**OPINION**

**I. FACTUAL AND PROCEDURAL BACKGROUND**

Dr. Jay Gorban owns a home in Clarksville, Tennessee. In 1999, Dr. Gorban hired David Harris, a contractor residing in Kentucky, to construct a sunroom onto his home. Dr. Gorban purchased the sunroom kit from a manufacturer and hired Mr. Harris to extend an existing deck and to erect the sunroom on top of the elevated deck. For this work, Dr. Gorban paid Mr. Harris \$10,000.

In 2003, Dr. Gorban noticed some discoloration in the ceiling of his basement. McClure Bowman, a licensed electric contractor, inspected the damage and advised Dr. Gorban that it was caused by water from leaks in the sunroom windows due to improper construction of the sunroom. Dr. Gorban hired Mr. Bowman to repair the problems he found, which required him to disassemble

the sunroom and reconstruct the supporting deck. Dr. Gorban paid Mr. Bowman a total of \$48,290 for the repairs.

Dr. Gorban filed suit against Mr. Harris in September 2004 asserting claims for breach of contract and negligence. In his answer, Mr. Harris alleged that he had “raised concerns with the instructions presented to him by [Dr. Gorban]” and that Dr. Gorban “dismissed [Mr. Harris’s] concerns and instructed that [Mr. Harris] build the room in accordance with his own instruction, contrary to the plans provided for the construction.”

The case was heard on May 14, 2007. There were significant factual discrepancies in the testimony of the various witnesses.

Dr. Gorban testified that before the sunroom project, he had hired Mr. Harris to finish a repair job on a house he owned on Lawn Street. At that time, he talked to Mr. Harris about his intention to order a sunroom and add it on to his home. Mr. Harris agreed to perform the work for Dr. Gorban. According to Dr. Gorban, he reviewed the sunroom manufacturer’s information with Mr. Harris and gave him the instructions. It was his understanding that Mr. Harris “was to assemble this sunroom kit, build the deck and put the sunroom on the deck coming off of my bedroom per the instructions provided by the company.” The manufacturer’s instructions called for six-by-six posts to be used for a supporting deck structure. After Mr. Harris began noticing problems in 2003, he and Mr. Bowman discovered that the deck was built with four-by-four posts. Part of the wood in the supporting arches was rotted. Dr. Gorban testified that the total cost of the sunroom repairs was \$48,290--\$40,596 for Mr. Bowman’s labor and \$7,694 for materials.

Dr. Gorban further testified that, after the sunroom repairs in 2003, he had Mr. Bowman do some foundation work at the front of his house. The sunroom was on the back end of Dr. Gorban’s house.

McClure Bowman, an electrical contractor, testified concerning what he discovered when Dr. Gorban asked him to inspect the water damage in his basement. He traced the source of the water damage to leakage from two places: the windows at the front end of the sunroom and a plumbing vent that had been moved to make room for the roof of the sunroom. Once Dr. Gorban hired Mr. Bowman to repair the sunroom and he began taking apart the walls, Mr. Bowman discovered water damage to the beams and found that the sunroom sagged. Mr. Bowman described the problem as follows:

Basically, a deck had been built to put the sunroom on and . . . on four-by-four posts and they hadn’t set the post even up from the ground or with enough concrete. The one that had concrete to adequately hold that weight was out sinking into the soil there.

In repairing the deck, Mr. Bowman put in “six-by-sixes on the main corners and then some of the existing four-by-fours we strengthened and then we added some extra four-by-fours also in certain

locations.” Mr. Bowman further testified that, after the sunroom repairs were complete, Dr. Gorban had him do some work on the front foundation wall. He opined that there did not seem to be any connection between the foundation work and the sunroom problems.

Rodger Bowman, McClure Bowman’s father, testified that he went to Dr. Gorban’s home and observed the damage to the sunroom structure. He took photographs, some of which were entered into evidence. Rodger Bowman testified that two of the four-by-fours under the deck were sitting on concrete and that the remaining four-by-fours were not.

John Dewey Lee James, who worked on the sunroom repair job with McClure Bowman, testified about the water damage that he observed. He described the repair work:

When we took down the old beams and everything, we had to replace some of the wood on it and we had to replace the four-by-four posts going into the ground underneath the deck that supported the entire structure because the center posts on the deck itself underneath it were not poured in concrete. So, I don’t know, I’m assuming that’s what caused them to sag. I’m the one that actually cut them off and removed those posts and I pulled them out of the ground by hand. They were not poured in concrete. The corner posts were but the center posts were not.

Mr. James testified that he and five or six other laborers worked on the sunroom repair project for a couple of months. The project was already underway when Mr. James started working on it.

After these witnesses testified, Dr. Gorban ended his proof. David Harris testified on his own behalf. He stated that Dr. Gorban bought all of the materials for the project. Mr. Harris’s recollection was that Dr. Gorban had previously hired someone else to install the sunroom who had walked off of the job. He testified that when he arrived at the job site, “the deck that [Dr. Gorban] wanted the sunroom put on was laying in the backyard.” Mr. Harris testified that he had expressed concerns to Dr. Gorban about the project:

Well, he said he was going to put a room up on top of a deck with stilts under it. And we had the conversation up on top of his deck by his back door that I thought he ought to dig a footer, pour concrete and lay blocks, and then he could use that area underneath it for garage storage, put a riding lawn mower or whatever in it. And if you’re going to build a room, it should be on a foundation.

According to Mr. Harris, Dr. Gorban replied that “he had paid McClure to put that deck up and he wasn’t spending any more money on it.” Mr. Harris was told that “that deck just the way it laid on the ground was the way that I was to put it up.”

Mr. Harris testified about other concerns he had about the project, including the presence of a sink hole about 130 yards away from the proposed deck. Mr. Harris stated that Dr. Gorban “had enough four-by-four posts to do across the front” and that Mr. Harris “went and bought out of [his]

own money enough four-by-four posts to go across the center of that room and put a box beam under it.” Mr. Harris stated that he never got any foundation plans for the project: “All I got was the room itself. There was no foundation. Nothing in what I got, and I gave it to you, had anything about six-by-six or four-by-fours or what to use.” Mr. Harris testified that he had not seen the manufacturer’s instructions regarding the foundation, which called for six-by-six posts, until his deposition. Mr. Harris expressed his opinion that the foundation problems at the front of Dr. Gorban’s house could have affected the sunroom structure. During cross-examination, Mr. Harris reiterated that “I told him before we started putting the room on there that that wasn’t enough of a support for that room.” It was Mr. Harris’s understanding that Dr. Gorban was acting as his own contractor and was telling Mr. Harris what to do. Mr. Harris reiterated his position about the manufacturer’s instructions: “I never got the part of that book that had foundation in it. If I had of, I would have quit right there on the spot. But I never got that part of the book.” He further claimed that Dr. Gorban had not properly maintained the sunroom structure since it was built. According to Mr. Harris, he and his workers put the posts under the deck two feet deep with “concrete under them, concrete around them and we usually put a leg bolt in all four sides of it to bind into the concrete.”

The next witness was Jason Harris, a contractor and son of David Harris, who worked with his father on Dr. Gorban’s sunroom. Jason Harris testified:

Initially before we started the job, there was some discussion over the materials on-site [Dr. Gorban] had provided all the materials for. And there was some discussion over to what was there and steps in which should be taken to put the room up. And there were some suggestions as to how the room should be done a little more structurally, but it was our understanding that he wanted us to use the materials that he had provided for us. So, we ensued with the job under his direction and went with what he had for us. . . . He had already purchased the stuff that was there and especially didn’t want to have to do that over, buy more materials, go in a different direction. He wanted to utilize what he had.

Jason Harris stated that he and his father had reviewed the instruction book: “The only instruction that I ever saw or used were basic instructions on the installation of the components of the room. There was no foundational or structural instruction that I’m aware of whatsoever.”

On rebuttal, Dr. Gorban testified again. Dr. Gorban denied hiring someone before Mr. Harris to construct the deck and stated that he had never hired McClure Bowman before he repaired the sunroom. Dr. Gorban thought Mr. Harris must be confusing the sunroom project with the Lawn Street project Mr. Harris had done for him, where there had been another person who walked off the job. According to Dr. Gorban, the lumber in his yard was probably left over from the Lawn Street job. Dr. Gorban denied that Mr. Harris had ever warned him about the construction methods he was using on the sunroom. Dr. Gorban testified that he had maintained the sunroom since its construction. He stated that when Mr. Bowman was disassembling the deck, he did not see any concrete footers underneath the four-by-four posts. When questioned about the instruction booklet, Dr. Gorban acknowledged that the foundation diagrams were not part of the book but were provided

separately since he was planning to build an elevated sunroom.

After hearing all of the testimony, the court made findings from the bench. The trial court identified three theories advanced by Dr. Gorban: failure to perform in conformance with the manufacturer's instructions, breach of contract, and negligent workmanship. The court found that Dr. Gorban had not met his burden of proof on the first two claims. As to the claim of negligence, however, the court found that Dr. Gorban had carried his burden of proof:

Mr. Harris is the expert such as it is in this case. Mr. Harris recognized, according to his testimony, a need to advise Mr. Gorban. There's a dispute of fact about this but Mr. Harris says he told Dr. Gorban that we need to really put in concrete block. We need to put in concrete footers and so forth. That wasn't done. Mr. Harris says that wasn't done because Dr. Gorban insisted it be done otherwise and wasn't going to pay for it to be done the way he suggested. That would have been a good point for Mr. Harris to have gotten out of the project. But instead, he undertook it. And again, there's a dispute of fact about how the materials got to the site and whose materials they were and who had paid for them and whether or not Mr. Bowman was supposed to do the deck and didn't do it. Really that doesn't make any difference. Mr. Harris undertook to construct the deck. He's the one who put in the posts. He's the one who did construct the deck upon which he knew he was going to construct or add this sunroom. And even if the materials had been on-site, he knew there weren't enough. He went out and bought more posts and he bought four-by-four posts. And it was his responsibility having undertaken to do the deck to do it in a way that it would support this building. The proof is that they weren't placed on concrete footers. There may have been concrete poured around the posts but they weren't on footers. And there's certainly evidence from which the Court can find that that work was not done in a workmanlike manner.

On the other hand, for the reasons I've already mentioned, I'm not satisfied that Dr. Gorban actually provided to Mr. Harris the plans from which Mr. Harris should certainly realize that what he was doing was not in accordance with what the manufacturer recommended. It looks to me like those materials came in two different times. And I find that . . . particularly for that reason, that Dr. Gorban on a negligence theory is guilty of comparative fault in this matter as well. And so, 40 percent of the fault in this case is to be assessed against the Plaintiff.

Based upon these findings, the trial court entered judgment against Mr. Harris for \$28,974.00, which represents 60% of the total damages of \$48,290.00. The court denied Mr. Harris's motion for a new trial and motions to alter or amend by both parties. Mr. Harris has appealed.

## II. STANDARD OF REVIEW

The trial court's findings of fact are reviewed "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). Our consideration of the preponderance of the evidence "is tempered by the principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such credibility determinations are entitled to great weight on appeal." *Rice v. Rice*, 983 S.W.2d 680, 682 (Tenn. Ct. App. 1999). Review of a question of law is also de novo, but "with no presumption of correctness afforded to the conclusions of the court below." *King v. Pope*, 91 S.W.3d 314, 318 (Tenn. 2002) (quoting *State v. McKnight*, 51 S.W.3d 559, 562 (Tenn. 2001)).

## III. ANALYSIS

Mr. Harris raises two issues on appeal. First, he asserts that the trial court erred in finding that the damages to the sunroom were a result of negligent construction rather than structural foundation problems with the house itself. Second, Mr. Harris argues that the trial court erred in finding total damages in the amount of \$48,290.00 because this figure included the front foundation work. Dr. Gorban raises two additional issues. He argues that the record did not support the court's finding that he was 40% at fault and that Mr. Harris should have been found liable for breach of contract and warranty of proper workmanship.

### (1)

#### Negligence

\_\_\_\_\_ Mr. Harris essentially argues that the proof did not establish that improper construction of the sunroom, rather than foundation problems with the house, caused all of the damages to the sunroom.<sup>1</sup>

As Mr. Harris points out, there was evidence that Mr. Bowman did work on the foundation at the front of Dr. Gorban's house after he finished the sunroom repairs. There was testimony from Mr. Harris of a sink hole in the area. However, there was also significant evidence in support of the trial court's conclusions. Mr. Bowman found that the source of the original water stains on the ceiling of the basement was water that had been coming in around the sunroom windows. Further

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<sup>1</sup>While not presented as a distinct issue, Mr. Harris also asserts that Dr. Gorban was acting as his own general contractor and thereby "assumed a larger burden for supervising and controlling the project, as well as an assumption for liability if his decisions did not turn out to his satisfaction." Dr. Gorban argues that Mr. Harris was acting as an independent contractor. The determination as to whether someone is acting as an employee or an independent contractor hinges upon the application of a number of factors, including the right to control the conduct of the work, to the facts of a particular case. *See Carver v. Sparta Elec. System*, 690 S.W.2d 218, 220 (Tenn. 1985). In this case, there was a factual dispute over who controlled the materials to be used to build the supporting structure. The evidence therefore does not preponderate against the trial court's implicit decision to treat Mr. Harris as an independent contractor.

investigation revealed problems with the deck structure that had caused the sunroom to sag. The front foundation work was in another part of the house from the deck and sunroom. Mr. Bowman stated that there appeared to be no connection between the front foundation work and the problems with the sunroom.

We cannot say that the evidence preponderates against the trial court's findings regarding the cause of the sunroom damages. The trial court was in the best position to assess the credibility of the witnesses, and we give that assessment great weight. *Rice*, 983 S.W.2d at 682.

(2)  
Amount of damages

Mr. Harris further asserts that the trial court erred in determining the amount of the damages owed to Dr. Gorban as a result of repairs to the sunroom. He argues that the \$48,290.00 figure used for the total amount of damages included the cost of the front foundation repairs.

When asked to give the cost of the repairs to the sunroom, Dr. Gorban testified that the cost was \$48,290 (\$40,596 for labor and \$7,694 for materials). Later, on recross-examination, Dr. Gorban was asked how much he paid Mr. Bowman to "do all this work." Dr. Gorban stated that "it was a total of \$48,000." Mr. Bowman was asked on cross-examination: "And the construction costs on this total project you did was over \$25,000?" He replied: "Not on any single part of the repair, no." Later, Mr. Bowman was asked: "You were paid \$48,000 by Mr. Gorban, correct?" Mr. Bowman stated that he did not have the exact figures with him. After the court announced its findings and judgment from the bench, counsel for Mr. Harris specifically stated to the court: "I thought the proof was that the \$48,000 was what was paid for the front portion and the deck?" The court stated: "I understand it was . . . the proof is what he paid for the deck, \$48,290. That's what he testified to and that's what [counsel for plaintiff] indicated on the front end he was seeking."

Mr. Harris argues that Dr. Gorban "would have spent half the sum that he paid Mr. Bowman if he had purchased a new sunroom kit and started construction from the ground up." There is, however, no proof in the record to support this assertion. When the case was heard, Mr. Harris did not elicit any testimony or put on any proof to call into question the figures given by Dr. Gorban.

The evidence does not preponderate against the trial court's determination that the total amount of damages resulting from the improper construction of the sunroom was \$48,290.00.

(3)  
Comparative negligence

Dr. Gorban assigns error to the trial court's allocation of 40% of the fault to him.

The trial court's comparative fault determination was predicated upon its finding that Dr. Gorban did not provide Mr. Harris with the manufacturer's instructions regarding the foundation requirements. On that issue, the trial court found "that it's not clear to the Court that the instructions

with regard to the foundation itself were, in fact, provided to Mr. Harris.” The evidence does not preponderate against the trial court’s finding on this issue, especially since it required the court to resolve the factual discrepancies by assessing the credibility of the witnesses.

Dr. Gorban further argues that, even if he did not have the foundation instructions, Mr. Harris should have contacted the manufacturer himself. There is no proof that Mr. Harris was aware that additional instructions existed. While Mr. Harris could have contacted the manufacturer, we cannot say that the trial court erred in finding Dr. Gorban at fault for failing to provide the relevant instructions that were in his possession to Mr. Harris.

(4)  
Breach of contract

Dr. Gorban also asserts, in a brief argument without citation to authority or to the record, that Mr. Harris should also have been found liable for breach of contract and an implied warranty of proper workmanship.

The complaint does not include an allegation of a breach of implied warranty. The complaint states: “There existed between [Dr. Gorban] and David Harris a contract for David Harris to install the sun room in accordance with the plans and specifications provided by the manufacturer of the sun room.” The transcript of the hearing does not contain any references to an implied warranty. In its findings, the trial court described the first theory of liability as an allegation that “the project was not done in a proper manner and in accordance with the instructions from the manufacturer.”

Based upon the trial court’s findings and the complaint, the breach of contract and implied warranty claims are both grounded in the allegation that Mr. Harris did not comply with the manufacturer’s instructions. There was a factual dispute between the parties as to whether or not Dr. Gorban ever provided the foundation instructions to Mr. Harris and his crew. As previously stated, the evidence does not preponderate against the trial court’s resolution of that factual dispute. We conclude, therefore, that the trial court did not err in finding that Dr. Gorban did not meet his burden of proof on the breach of contract and implied warranty claims.

**IV. CONCLUSION**

For the foregoing reasons, we affirm the judgment of the trial court. Costs of the appeal are assessed equally against the appellant and the appellee, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE