

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 5, 2009 Session

**DARREN REINICHE D/B/A REINICHE CONSTRUCTION v.
JIMMIE R. McCOUN, ET AL.**

**Appeal from the Chancery Court for Rhea County
No. 10129 Jeffrey F. Stewart, Chancellor**

No. E2008-02705-COA-R3-CV - FILED AUGUST 31, 2009

Darren Reiniche d/b/a Reiniche Construction (“Contractor”) was hired as a general contractor to build a new house for Jimmie R. McCoun (“Homeowner”). After numerous problems with the construction of the house developed, Homeowner refused to make the final payment of \$21,085.30, prompting Contractor to file suit. Homeowner filed a counterclaim seeking damages for what he alleged were numerous structural and aesthetic defects with the house as built. Following a bench trial, the Trial Court determined that Contractor had breached his contract with Homeowner to construct the house in a workmanlike manner. The Trial Court dismissed Contractor’s claim, and awarded Homeowner \$100,000 in damages. Contractor appeals raising various issues. We affirm.

**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 JOHN W. McCLARTY, J., joined.

John C. Cavett, Jr., Chattanooga, Tennessee, for the Appellant, Darren Reiniche d/b/a Reiniche Construction.

Joshua H. Jenne, Cleveland, Tennessee, for the Appellees, Jimmie R. McCoun and Susan B. McCoun.

OPINION

Background

In 2004, Contractor contracted with Homeowner to build a house in Dayton, Tennessee. Contractor filed suit for breach of contract after Homeowner refused to pay \$21,085.39 that Contractor claimed still was owed on the project.¹ Contractor sought a judgment in the amount of \$21,085.39, plus interest and attorney fees.

Homeowner answered the complaint, and while he admitted entering into a contract with Contractor for the construction of a house, he denied any liability to Contractor. Homeowner also filed a counterclaim against Contractor. According to the counterclaim:

In or about December of 2003, [Homeowner] contacted [Contractor] to inquire as to the possibility of hiring [Contractor] to furnish labor and materials for the construction of [Homeowner's] new home. . . . [Homeowner] furnished [Contractor] a copy of the plans and specifications to determine whether or not [Contractor] possessed the requisite knowledge and expertise to construct their house as specified in the drawing. Additionally, [Homeowner] requested [Contractor] to provide a detail of construction costs.

At a later time, the parties again met and during said meeting, [Contractor] represented to [Homeowner] that he had examined the aforementioned plans and specifications, that he was familiar with all construction techniques thereon and that he possessed the requisite knowledge, skill, expertise and ability to construct their home in a good and workmanlike manner and to their satisfaction. Further, at or about the same time, [Contractor] furnished unto [Homeowner] a cost of construction estimate. [Homeowner], based upon the representations of [Contractor] as aforesaid and as to the nature of construction and costs, agreed that [Contractor] would construct the home in accord with the plans and specification for \$251,000. . . .

An express and implied term of the construction contract was that [Contractor] would construct [Homeowner's] home in a good and workmanlike manner. As such, [Homeowner] relied upon [Contractor] to construct their home in a good and workmanlike manner.

¹ Contractor also sued AmTrust Mortgage Corporation and Mr. McCoun's wife, Susan McCoun. AmTrust Mortgage Corporation financed the construction of the house. The Trial Court eventually dismissed AmTrust and no appeal was taken from that judgment. Because Susan McCoun did not testify at trial, we will refer solely to defendant Jimmie McCoun as "Homeowner".

During the construction by [Contractor] of [Homeowner's] home, [Contractor] failed to construct the home in a workmanlike manner and committed acts and omissions of negligence. As a direct and proximate result, the home constructed by [Contractor] has faults and defects including, but not limited to, the following:

- A. Inferior and insufficient footings, foundation, underlayment, and supporting members;
- B. Foundation floor and walls which are cracked and bowed;
- C. Foundation walls that leak water;
- D. Formation of mold and mildew;
- E. Unlevel flooring;
- F. Improper and insufficient wooden support beaming and framing;
- G. Insufficient, inconsistent and faulty masonry and brick work;
- H. Structural and architectural deviation from original house plans;
- I. Improper and insufficient exterior drainage system installation;
- J. Improper and defective framing of doors and windows on both the interior and exterior of the home;
- K. Other defective construction which has exposed the interior of the house to the exterior, thereby allowing bugs, wasps, and insects to enter and nest in the interior of the home;
- L. Interior paint over spray and leakage onto floors, moldings, cabinetry and elsewhere;
- M. Incomplete interior painting, caulking, and shoe molding;
- N. Incorrect, incomplete, or insufficient installation of various and several cabinets, appliances, and fixtures;

- O. In general a multitude of other major and minor defects in workmanship as to significantly reduce the value of the residence. (original paragraph numbering omitted)

Homeowner went on to allege that he had requested Contractor repair any damages and defects, but Contractor refused. Homeowner claimed that he already had incurred \$8,582.21 in expenses arising from repairs to the house and there were still numerous other repairs that needed to be made. Homeowner sued for breach of contract, negligence, misrepresentation, and a violation of the Consumer Protection Act.

A two day bench trial took place in the spring of 2008. Contractor was the first witness. Contractor testified he is a general contractor, that he has been licensed since 1996, and that his license has never been suspended or revoked. Contractor obtained a bachelor's degree in finance from the University of Tennessee at Chattanooga in 1990. Contractor has built approximately 30 houses ranging in cost from \$130,000 to over one million dollars. Contractor also undertakes many renovation projects.

Contractor testified that Homeowner provided him with a set of plans. Based on those plans, Contractor developed a cost of construction estimate for the house. The total cost to build the house initially was estimated at \$245,404. In addition, Contractor was to receive a flat fee of \$20,000 for building the house. Contractor stated that, at first, everything went smoothly; there were no major delays even though there were some significant changes to the plans. Some of the significant changes included changing the roof line, constructing a retaining wall that was not called for in the original plans, and changes to the window layout. Contractor discussed the various changes to the plans and acknowledged that it took an extremely long time to complete the house. Contractor stated that it was when the house was being bricked that Homeowner started noticing things that he wanted corrected. Contractor wanted Homeowner to be happy with the house, and so when complaints were made, Contractor attempted to address the problems.

By June of 2005, the house was almost complete. Contractor had been provided a punch list of items Homeowner wanted completed and most of those items had been completed. Contractor claims he advised Homeowner that he was going on a one week vacation over the 4th of July and that he would return to work on the house once his vacation was over. Contractor stated that he "definitely" made it clear to Homeowner that when his vacation was over, he would finish the work that needed to be done. When Contractor returned from vacation, he attempted to contact Homeowner several times by phone, but never got a response during the remaining three weeks in July. Finally, Contractor sent Homeowner an email in August detailing the work that still needed to be done on the house and requesting the final payment, less \$2,500 to be held until the house was completely finished. Contractor never received a response to this email. Contractor then sent another email on August 8. Contractor received a response two days later. The response was a lengthy email that detailed what Homeowner claimed still needed to be done to complete the house. The email also contained the following:

I would love nothing more than to write you a check and let you be on your way. Unfortunately, that is not going to happen. When I

have my house 100% complete, I will prepare an invoice for the outstanding rework and compare them to your final two invoices. Full payment of the difference will be made to you at that time and not before. If I need a subcontractor, I will make the necessary arrangements myself. . . .

Contractor testified that he never refused to remedy or repair any defective work. At the time Contractor received the email essentially terminating him from the job, he was owed \$21,085.39, most of which was for materials and labor already expended.

On cross-examination, Contractor admitted that he, his attorney, an engineer, and another contractor had recently inspected Homeowner's house. Contractor admitted that the floor in the main entranceway was not level. However, Contractor explained that a floor being unlevel was not out of the ordinary because of settling. Contractor also acknowledged that there was a crack in the basement floor. Again, Contractor explained it away by claiming cracks in basement floors are "very common." Contractor testified that he was unable to say definitively that there were footers under various columns in the basement that were helping to support the weight of the house. Contractor agreed, however, that if these columns did not have footers, he would consider that to be a construction defect. Contractor admitted that parts of the chimney did not have proper support and the roof decking was too short.

Homeowner was the next witness. Homeowner is an electrical engineer. According to Homeowner, he met twice with Contractor before agreeing to have Contractor build the house. Homeowner stated that Contractor told him that he was a licensed and bonded general contractor.² Homeowner also stated that Contractor represented to him that he was qualified to build the house, and Homeowner believed him. Homeowner agreed with Contractor's testimony to the effect that, at first, everything went well.

According to Homeowner, problems started developing in September 2004. Homeowner eventually moved into the house in July 2005, although the house still was not finished at that time. Homeowner gave Contractor a punch list of things that needed to be completed. Some of them were completed, others were not. Contrary to Contractor's testimony, Homeowner claimed that Contractor made no attempts to rectify the problems before Contractor went on vacation. Homeowner acknowledged that some of the problems were aesthetic and involved things like the painting and the trim not being completed, etc.

Due to the various problems with the house, Homeowner decided to have the house inspected by a building inspector. There were numerous problems found by the inspector and these problems were detailed in the counterclaim. Some of the problems were significant and structural, such as insufficient footings and foundation. There also was a crack in the basement floor that was growing in size. The walls in the basement have cracks through the entire block. There also was a water leak in the basement which caused mold to grow. Homeowner added that there was "an

² Contractor is not bonded and denied telling Homeowner that he was.

extremely large hump” in the floor in the entranceway which keeps getting worse over time. Some of the doors will not stay open, while others will not close. There is a gap in the roof line and when Homeowner is in the attic, he can actually look outside and see the gutter. This gap allows insects to get in and there repeatedly have been wasp nests built in the attic. Homeowner testified at trial that the majority of the problems have not been fixed.

Homeowner stated that he considers Contractor to have walked off the job. Homeowner added that Contractor had many months to correct these problems. All in all, it took Contractor sixteen months to build the house to the point it was at when he allegedly walked off the job. Homeowner testified that had his house been constructed properly, it would have been worth \$350,000. With all of the defects, the house is worth \$200,000, assuming “anybody would even consider it.”

The parties stipulated to the testimony of Randy Morgan (“Morgan”), a core sampling technician. Morgan inspected the house and took core samples to determine if concrete footers existed beneath the support columns/structures located in the basement of the house. The parties stipulated that Morgan conducted the core sampling and it was his opinion that:

All of the core samples revealed the existence of poured rock and/or gravel at the column base; however, none of the core samples revealed any concrete footers were beneath the concrete pad under the column base.

Randy Morgan’s opinion would be that no footers exist beneath the core samples taken.

The next witness was Thomas Retseck, P.E. (“Retseck”), who was called as an expert witness by Homeowner. Retseck is a registered professional engineer. Retseck graduated from Purdue University and receive a bachelor’s degree in civil engineering in 1973. Retseck was licensed in Indiana in 1977 and since then has become licensed in Tennessee.

Retseck inspected Homeowner’s house in June 2006, and his inspection was limited to “structural issues and any issues that would deteriorate the structure.” Based on his inspection of the house, Retseck prepared a report wherein he set forth his conclusions that: (1) there were no footings under the basement columns; (2) due to the height of the foundation walls, an engineering plan was required prior to construction, but none existed; (3) no concrete filled cells with re-bar reinforcement were used on the foundation walls which would be necessary for a basement wall 13’ - 4” high; (4) the entire assembly which runs down the center of the family room was constructed from individually cut and nailed lumber, which caused the hump and dips observed on the main floor; this construction should have been accomplished with continuous LVL’s or Glu-Lams; (5) there was no structural rim board used around the perimeter to connect to the TJI joists and the sill plate; (6) the interior basement walls should have been blocked at mid-height; (7) there was no turned down slab along the edge of the rear patio to act as a porch column foundation; (8) there were cracks in the

basement floor concrete slab resulting from shrinking in the curing process³; (9) the roof deck was cut too short which could result in severe leaking problems; and (10) knee walls should have been installed in the attic under the chimney brick to transfer the loads to the ceiling joists. “Over time the heavy brick weight will create deflections that will warp the flashing and allow roof leaks to occur. In high winds the un-braced chimney could cause the roof decking to fall.” Retseck’s overall conclusion was that the house “was in need of major structural revisions.”

Homeowner’s next witness was Chris German (“German”), a licensed home inspector and owner of AAA Home Inspections. Prior to becoming a licensed home inspector, German was a general contractor. German has been to Homeowner’s house on two occasions. The first time was in January of 2006. German found several problems with the house. First, the basement wall had unbalanced backfill, which is the dirt that puts lateral pressure against the foundation. There also was no rebar or concrete in the block cells. This could result in horizontal wall cracks, basement leakage, and in a worse case scenario, a “complete cave-in.” There also was some negative draining and dirt above the wood floor framing of the house. A wall the height of the basement wall requires an engineering report, and no such report was prepared for this house. The main floor center beam in the basement was:

some of the poorest workmanship I’ve ever laid eyes on. Basically, it looked like somebody went out and picked up a bunch of scrap in the yard and nailed it together and made a main support beam for the house.

At that time, I thought it was probably sitting on just a standard slab that had no footing in place, due to the cracks, and you know, I saw hairline cracks about at the halfway point in the basement, and that’s where this beam is located.

According to German, other problems included: (1) humps in the floor on the main level; (2) no footing beneath the support posts; (3) visible leaks and water damage in the basement frame; (4) the roof decking was too short and allowed water to be blown into the house and also allowed wasps to get inside the attic and nest; (5) there were cracks in the basement floor⁴; (6) the chimney was only resting on wood framing and was not properly supported, which could cause it to rock in high wind and which has resulted in roof leaks; and (7) a gas line was not properly

³ Retseck’s report also indicated that the cracks in the concrete could have been controlled by “saw cutting control joints into the concrete while it is still green, usually the next day, or by providing cold joint form breaks in the concrete slab. The lack of any control joints has resulted in numerous random floor cracks in the basement floor slab that can create future moisture infiltration problems and will need to be filled and ground down before any flooring can be installed over the cracks.”

⁴ On German’s first visit, he described the hairline cracks as part of the normal settlement process. He further stated that by the time of his second visit on January 2008, the cracks had progressed and were “well beyond . . . normal settlement cracks.”

grounded. German concluded that Homeowner would continue to have problems with the house if these problems were not fixed. German stated that in his opinion, the house was not built in accordance with the Standard Building Code and was not constructed in a good and workmanlike manner. Following his second visit, German went so far as to say that the house required repairs in order to ensure the safety of the occupants.

The next witness was Charles Hybarger (“Hybarger”), who was called as a witness by Homeowner. Hybarger has been a licensed contractor for 11 years and has been involved in the construction industry for 30 years. Hybarger inspected Homeowner’s house on three occasions. Hybarger recommended Homeowner hire a structural engineer to conduct core drilling and take samples to determine if proper footings were used. Hybarger has read and agrees with the contents of Retseck’s and German’s reports. Hybarger prepared a repair estimate which is as follows, with each separate total including labor and materials: (1) repairing the missing footers for the basement load bearing walls, \$3,920; (2) repairing the improper and insufficient support beaming and framing, \$11,060; (3) repairing the brick gables that are resting on the roof framing and unsupported by proper foundation, \$1,800; (4) repairing the structural rim board that was not used around the house perimeter to connect TJI joists to the sill plate, \$8,480; (5) repairing the 2 x 6 load bearing basement walls that are missing blocking and whose studs are bowed and sagging, \$940; (6) repairing the roof decking along eaves that are too short and which resulted in a gap along the roof line, \$2,700; (7) repairing missing trim and flashing at doors and windows, \$6,000; (8) pouring an addition to the concrete slab, \$1,375; and (9) repairing the insufficient structural framing for the chimneys, \$3,650. In addition to the \$39,925 mentioned above, Hybarger also gave the following estimate:

Defect - insufficient, inconsistent and faulty masonry and brick work - exterior of home, retaining wall and chimneys contain open mortar joints and gaps, including open lentils above windows. Brick work on the entire house also contains mortar joints which are inconsistent in width.

Repair estimate:

• Remove old brick \$600 per 1,000 bricks (house contains approx. 38,000 bricks)	\$22,800.00
• New brick cost \$400 per 1,000	15,200.00
• Lift rental \$2,500 per week	2,500.00
• Landfill disposal cost	5,000.00
• Mortar and sand	1,500.00
• Labor for new brick installation \$750 per 1,000	<u>28,500.00</u>

TOTAL: \$75,500.00

As to the bricks, Hybarger testified as follows:

A. Well, there was a lot of brickwork outside. A lot of mortar joints were different sizes. Some were wide. Some were narrow. Some [of] the windows weren't – they looked like they had been laid with the wrong rough opening size in mind and they tried to just cram some board covering up with trim coil, which is a vinyl siding product, to make it work. I mean, it was just a bad job.

Q. What, if anything, did you notice about the manner that the brick is attached to the framing of the house?

A. We were trying to determine if there was any brick ties put in this home or not.

Q. What is a brick tie?

A. It's a piece of metal that actually ties the brick to the structure, the house structure itself. If you didn't have those in there, then you have a problem with the brick actually falling off. It can fall off from it, pull away from it.

Q. Okay. Was there any evidence of that as far as you're concerned?

A. No, there wasn't.

Q. Why are we going to have to replace this brick according to your estimate? Why is it necessary to take them off and start over?

A. In brick, if you go in and try to cut out certain sections and replace it, more likely you are not going to get the same consistency, same color. . . . So if you go in and do a bunch of patchwork, you're going to have a spotty house. So, my estimate was to replace it all because that's what I would want. I feel like that would be the right thing to make it right.

There were other repairs which Hybarger felt were needed but which he determined would be cost prohibitive, such as repairing the foundation walls that were not constructed with an engineered wall cast in concrete containing rebar and repairing the cracked foundation floor which was not poured using sawn or formed control joints in all slabs. All in all, the total repair estimate by Hybarger was \$115,425. Hybarger also testified that it would be appropriate to add a 20%

contingency fee of \$23,085 since it was likely that there was concealed damage. This brought his total estimate to \$138,510.

Bryan Freytag (“Freytag”) was called as an expert witness by Contractor. Freytag has been a general contractor for 15 years. Freytag’s contracting license is in good standing and has never been revoked or suspended. Freytag builds homes and also provides repair and remodeling work. Freytag inspected Homeowner’s house on one occasion. Freytag acknowledged that there were no footings under the columns in the basement. Freytag stated that he could fix that problem for \$2,150. Freytag testified that he conducted sonar testing of the foundation walls and in his opinion they contained concrete, so nothing was needed to remedy that problem. Freytag acknowledged that there were some humps in the floor on the main level. He stated that this could be repaired by taking a 1/4 inch steel plate and bolting it under the beam, at a cost of \$1,500. With regard to the TJI joists not being connected to the sill plate, Freytag testified that this could be repaired for \$2,000. As to the studs that were bowing, Freytag said he could add pieces of blocking between them, at a total cost of \$150 each for the six to eight places currently lacking blocking. According to Freytag, the lack of foundation on the porch could be corrected for \$700. Freytag agreed that knee walls needed to be installed in the attic, but did not state how much it would cost to correct that problem. Freytag also agreed that the roof decking along the eaves was too short in several areas. Freytag stated that problem could be repaired by installing a metal drip pad around the whole perimeter of the house for \$1,350. Freytag indicated that he could repair the chimney for \$200. Freytag did not believe there was anything structurally wrong with the way the house was bricked and that it would cost \$2,500 to fill in the holes in the joints. Freytag testified that the cracks in the foundation floor were simply caused by settling, and the cracks could be caulked for \$100. All in all, Freytag testified that he could make the necessary repairs for \$10,000 to \$12,000.

On cross-examination, Freytag acknowledged that he graduate from the University of Tennessee at Chattanooga with a degree in psychology and has no specialized training in engineering or structural work. All of his knowledge was from “on the job training.”⁵

Contractor’s next witness was Michael Roberts (“Roberts”), who has worked almost 20 years as a concrete finisher. Roberts testified that concrete was used in the basement walls and that he personally put steel in the walls. Roberts also stated that, to the best of his knowledge, footings were poured under the support beams in the basement.

John Gadd (“Gadd”) was called as a witness for Contractor. Gadd was the brick mason on Homeowner’s house. Gadd has been a brick mason for thirty years. Gadd testified that the reason the mortar joints were not consistent was because of the type of bricks that Homeowner wanted used on the house. Gadd admitted that Homeowner was not happy with the brickwork.

⁵ Freytag admitted that he went to high school and undergraduate school and was good friends with someone identified at trial as “that gentleman sitting over there.” Freytag stated that he has been friends with this person for over 25 years. Unfortunately, counsel for Homeowner did not identify who “that gentleman” was so we have no way of ascertaining with 100% certainly exactly who counsel was referring to. However, on re-direct examination, Freytag admitted that he was friends with Contractor and was not being paid for testifying at trial.

Gadd stated that while the brickwork may not have been perfect, he could have tried to fix any problems if he had been given the chance.

Following the trial, the Trial Court announced its decision from the bench. The Trial Court began by discussing the contract between the parties and how, at least initially, everything went fine. However, over time problems began to occur. Then:

[T]he whole issue kind of came to a head by the end of June 2005. [Homeowner] did not feel like the house was finished. [Contractor] felt like he had done all he could do; he was ready to complete what was on the punch list. . . .

[I]t finally got to the point where [Homeowner was] just not going to pay [Contractor] any more money. And [Contractor] ultimately filed suit in December of 2005 seeking a judgment for \$21,085.39. That was for the cost of materials that he had procured for the house and for the remainder of his fees.

[Homeowner] refused to pay; [he] felt the house had some serious problems. As a result of that, [Homeowner] hired a home inspector to come somewhere around the first part of 2006, I believe in January of 2006, a Mr. German. And it was at that time they learned . . . that he thought the house had some serious structural defects. . . .

Quality of the house, workmanlike work, the satisfaction of the homeowners were the most important parts of this case. There were problems, problems with the delays, there were problems with the bricking, there were problems with painting, there were problems with – there was just lots of things, and there were changes made throughout. . . .

There was a home inspection in 2008, which was two years after Mr. German had actually come there and looked. And, you know, at the end of the day, at the end of all of the proof that I heard, after all the inspectors and all the witnesses, there really were some things that there wasn't a dispute about.

There's not a dispute that the floor is not level on the first floor. There's a hump I think was the way you all described it. There's not any question, that the testimony showed, that the support columns that support the first floor are not setting on footers. Even if there was what they call a monolithic pour, it's not underneath where the footers are. I mean, the core samples clearly showed that.

There's some question about the integrity of the basement wall. The parties elected to build a much higher wall, I think, than the plans had called for and it ended up being some 13 feet plus some inches high as opposed to nine feet. And so there was some question about whether or not that wall was solid, whether it was filled with rebar, whether it was an engineered wall. There's no question that it was not an engineered wall because they didn't go to an engineer and get a plan. So there is no doubt about that.

The dispute was whether or not there was rebar in it and whether there was concrete in it. We heard testimony from several people on that subject Now, [Contractor] said he drilled the rebar for the first four feet in the foundational concrete pour. But there is no question that as the wall should go up, according to the experts that we had, in four-foot increments, that is, rebar and concrete every four foot, that didn't happen. I don't think there is any proof in here that shows that it happened. . . . I have looked at the photographs. That's the only evidence that I have, other than what people said. In looking at Exhibits 27, 28, 29 and Exhibit Number 14, which were photographs, there is no showing that the rebar was bought or placed there. So, in regard to whether there's rebar or whether there's steel in those walls, I would have to find that there hasn't been an adequate showing that those things were done.

With regard to the chimney, there's proof, and I don't think there is any dispute about this, that the chimney is not properly supported, which can cause structural defects in the house. There is no question that the roof decking at some point was too short, and as a result, there was some water damage that resulted from that. . . .

I want to talk a little about what Mr. German said. He actually was the one who went out and looked at this place in 2006, and then he returned in 2008, and he said he found things in much worse shape. One of the things that he talked about was where those footers should have been under the basement pour, the fact that there was not adequate footing for that has led to there being a crack in the basement floor, and it's getting bigger and it's [getting] wider.

So there's settlement cracks in the floor, the beams supporting the first floor [are not] properly footed, it's improperly built, he said that there were some joists that were improperly placed and he talked about that at some extent, there were problems in the brickwork which resulted in some water damage, and, again, the foundational problems are clear by the crack in the basement floor, and they found

no evidence, in their testimony, of there being proper engineering of the basement wall that was in question. . . .

[O]n the issue . . . of whether there was a breach [of contract], I think the evidence is clear that there was a breach in the failure to provide work in a workmanlike fashion . . . and I find then the breach is on [Contractor] and not on [Homeowner] for failure to pay. . . .

Now the question is to what degree should [Homeowner] prevail on this subject of the breach in their counterclaim. They've raised an issue of whether or not the Consumer Protection Act should apply, and I find that it doesn't under the facts and circumstances of this case.

They had a Mr. Hybarger who testified about the damages. Mr. Hybarger said that, not counting what he [felt] is a structural defect in the basement wall, that the range of damages would be between \$115,000 and \$138,000 to do the repairs. Now, [Contractor] countered with testimony from various witnesses who actually testified that the costs of repair would be [far] less than that. I didn't total these numbers up, but it would be an amount less than what he actually was suing for in the \$21,000 range.

Now, the largest amount of his testimony addressed, in terms of damages, was the replacement of the brick, which was on the house. He said it had to be a complete removal. [Homeowner] testified as a homeowner as to the worth of his house, and he testified that, of course, having the cost that he had in the house of some substantial amount, that he thought the house should be worth \$350,000, but with its structural damages or structural problems that exist in the house, that he's damaged by the amount of \$150,000. He says the house is probably not worth more than \$200,000 now.

As a result of finding then the breach on behalf of [Contractor], I think the breach is a substantial breach. I think this house has substantial structural defects as a result of it. I've enumerated the foundational problems, starting at the floor in the basement, going up to the support of the floor, all the way up to the support for the chimney. And there have been settlement problems, which, in the testimony of the expert, would continue, and as a result of that, I am going to award damages to [Homeowner] in the amount of \$100,000 for this breach.

Contractor appeals raising the following issues: (1) Homeowner failed to mitigate his damages by not allowing Contractor or his employees to make the repairs; (2) the Trial Court erred

when it awarded damages to replace all of the brick; and (3) the preponderance of the evidence weighs against the Trial Court's reliance on Homeowner's experts.⁶

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).

Before discussing the specific issues raised by Contractor, we will discuss two cases with similar facts that are helpful in the resolution of this appeal. In *Pratt v. Gibson*, No. E2003-00114-COA-R3-CV, 2004 WL 1387845 (Tenn. Ct. App. June 22, 2004), *no appl. perm. appeal filed*, we affirmed the trial court's determination that masonry work on a house had been performed in an unworkmanlike manner. In reaching this conclusion, 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.

⁶ We note that Contractor does not appeal the dismissal of his claim seeking \$21,085.30 in damages, and Homeowner does not appeal the Trial Court's determination that the Consumer Protection Act is not applicable to this case based upon the facts presented at trial. Accordingly, we express no opinion on either of these issues.

Pratt, 2004 WL 1387845, at *5. We also concluded that the plaintiff had proven that all of the bricks needed to be removed and replaced, and reversed the Trial Court's judgment to the contrary. *Id.* at *6.

More recently, in *Wayne's Construction, Inc. v. Jones*, No. E2006-00535-COA-R3-CV, 2007 WL 1670298 (Tenn. Ct. App. June 11, 2007), *no appl. perm. appeal filed*, this Court relied on *Pratt* when affirming a judgment in favor of the homeowners who sued the general contractor claiming there were significant problems affecting the structural integrity of their new house. On appeal in *Wayne's Construction*, as in the present case, the contractor argued that the trial court erred when it relied on the testimony of the homeowners' expert over that of the contractor's expert. We rejected this argument stating:

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.

Wayne's Construction, 2007 WL 1670298, at *10.

The same principles discussed in *Pratt* and *Wayne's Construction* hold true in the case now before us. The proof at trial certainly was conflicting as to many issues, including: (1) how the relationship between Contractor and Homeowner ended (i.e., was Contractor fired or did he essentially walk off the job), (2) whether Contractor was given sufficient time to correct the problems; (3) the type and significance of the various problems with the house; and (4) the cost to remedy these problems. We note, however, that even Contractor's experts agreed that there were numerous problems with the house.

Contractor's first issue is his claim that Homeowner failed to mitigate his damages. Specifically, Contractor argues that he should have been allowed the first opportunity to conduct any needed repairs and Homeowner's refusal to allow Contractor to do so prohibits Homeowner from recovering any damages. Contractor argues that this issue was raised at the Trial Court level, but for some unknown reason, it was not addressed in the Trial Court's judgment.

We conclude that this issue was raised, but that it was implicitly rejected by the Trial Court. There was proof to the effect that Contractor was given ample opportunity to correct the numerous and substantial problems, but for whatever reason, these problems were not corrected by Contractor. Both Contractor and Homeowner agree that the construction of the house took an inordinate amount of time. We do not believe that Homeowner's duty to mitigate damages required him to allow Contractor even more time to complete the house. Homeowner testified that when the contractual relationship ended, Contractor had been on the job for sixteen months. We find that Contractor was given more than enough time to complete any necessary repairs to the house. As stated by this Court:

The critical factor in determining fulfillment of a plaintiff's duty to mitigate is whether the method which he employed to avoid consequential injury was reasonable under the circumstances existing at the time. The rule with respect to the mitigation of damages may not be invoked by a contract breaker "as a basis for hypercritical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter." As stated in McCormick, *Damages*, Sec. 35 (1935), "a wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him."

Salley v. The Pickney Co., 852 S.W.2d 240, 244 (Tenn. Ct. App. 1992)(quoting *Action Ads, Inc. v. William B. Tanner Co.*, 592 S.W.2d 572, 575 (Tenn. Ct. App.1979)).

We conclude that under the circumstances of this case, Homeowner acted reasonably. The Trial Court's implicit conclusion that Homeowner did not fail to mitigate his damages is affirmed.

Contractor's next issue is his claim that the Trial Court erred when it awarded Homeowner \$75,500 in damages to remove and replace all of the brick. We are unable to conclude from the record before us that the Trial Court awarded the full amount needed to remove and replace all of the bricks. The Trial Court did not expressly state that it was awarding the full \$75,500 that Hybarger testified was needed to remove and replace all of the bricks. Rather, the Trial Court awarded \$100,000 in damages to cover all of the various problems with the house. For us to conclude that \$75,500 of the total \$100,000 judgment was so Homeowner could remove and replace all of the bricks would be pure speculation on our part. Contractor has failed to establish that the Trial Court did in fact award the full \$75,500 for the removal and replacement of the brick.⁷

Contractor's final issue is closely related to the immediately preceding issue. Specifically, Contractor claims that the Trial Court erred when it relied on the opinions of Homeowner's experts over those of Contractor's experts. In the present case, as in *Wayne's Construction, supra*, it is clear that there were significant problems regardless of which expert was found to be more credible. Likewise, there is no doubt that some of the problems affected the structural integrity of the house. The damages estimates ranged from a low of \$10,000 to \$12,000, to a high of \$150,000, with Hybarger's estimate coming in at between \$115,000 to \$138,000. After reviewing all of the evidence offered at trial, and according deference to the Trial Court's credibility determinations, we are unable to conclude that the evidence preponderates against the Trial Court's findings and award of \$100,000 in damages to Homeowner.⁸ Because the proof supports the total award of \$100,000 for all of the construction problems, and because Contractor has failed to establish that the total award does in fact include \$75,500 to remove and replace all of the brick, the judgment of the Trial Court is affirmed.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Chancery Court for Rhea County solely for collection of the costs below. Costs on appeal are taxed to the Appellant, Darren Reiniche d/b/a Reiniche Construction, and his surety, for which execution may issue, if necessary.

⁷ After oral argument, Contractor filed a "Motion" discussing proof offered at trial surrounding whether there were any structural problems with the masonry work. This Motion was filed to correct a statement made at oral argument. Because we have considered all of the proof offered at trial, this Motion is denied as being moot.

⁸ It is important to note that Hybarger's cost estimate did not include several structural problems that he felt were too cost prohibitive to repair and which could be considered by the Trial Court in determining the amount of damages.

D. MICHAEL SWINEY, JUDGE