

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

**FILED**

May 23, 1996

**Cecil Crowson, Jr.**  
Appellate Court Clerk

EAST TENNESSEE PIPE & SUPPLY COMPANY, INC.,	)	C/ A NO. 03A01-9601-CH-00025
Plaintiff - Appellee,	)	
	)	KNOX CHANCERY
v.	)	HON. FREDERICK D. McDONALD,
	)	CHANCELLOR
CONNER BROTHERS EXCAVATING COMPANY, INC.,	)	
Defendant - Appellant.	)	AFFIRMED
	)	AND
	)	REMANDED

JAMES A. McINTOSH, BAKER, DONELSON, BEARMAN & CALDWELL,  
Knoxville, for Plaintiff - Appellee.

JAY ARTHUR GARRISON, KENNERLY, MONTGOMERY & FINLEY, P. C.,  
Knoxville, for Defendant - Appellant.

O P I N I O N

Franks. J.

In this action the Chancellor awarded Appellee payment for its subcontracting work, having found that Appellee supplied materials in a timely manner, and was not responsible for the project delays.

In 1993, Appellant-Defendant Conner Brothers Excavating Co., Inc. contracted to build a storm sewer system for the Brittany Place Subdivision in Knox County. Appellant

subcontracted with Appellee-Plaintiff, East Tennessee Pipe & Supply Co., Inc. to supply the piping and drainage boxes.

The storm sewer system was not completed on time and Appellant settled a claim for delay by the developer of Brittany Place for more than \$23,000. When Appellee filed suit for payment of its subcontract, Appellant counter-claimed and sought reimbursement for the payment to the developer.

The Chancellor heard testimony from the President of East Tennessee Pipe, the developer of Brittany Place, the Vice President of Conner Brothers, and a supervisor at Conner Brothers. Appellant was ordered to pay East Tennessee Pipe for its work. The Chancellor in his opinion said:

The evidence is not convincing that any delays of Plaintiff in performance in any way injured Defendant; that is to say the evidence totally fails to prove that even if Plaintiff delayed a few days that that resulted in any loss of Defendant with respect to Gilbert's claim or otherwise. The evidence is weak, if not nonexistent, on the point.

Defendant presented a considerable amount of evidence that the concrete box structures Plaintiff sold Defendant were "too high," and had to be cut off [sic] around the top so as to be low enough to be at grade with the road. The evidence does not establish that this was Plaintiff's fault, and it appears that the problem may well have been that Defendant, whose obligation it was to install the boxes, did not install them deep enough. However that may be, the defense complaint that Defendant had taken the time and effort to correct the problem does not relieve Defendant to its obligation to pay Plaintiff for the boxes and other material it bought from Plaintiff.

The Chancellor concluded the delays in completion of the storm sewer system were caused by Appellant. He found that Appellee had timely delivered substantially all the materials to the work site, and that the evidence did not establish that East Tennessee Pipe was responsible for the

subsequent delays and any problems encountered in installing the concrete boxes.

The Trial Court's findings of fact are reviewed *de novo* with a presumption of correctness. T. R. A. P. 13(d); *Howard G. Lewis Construction Co. v. Lee*, 830 S.W2d 60 (Tenn. App. 1991). The record reveals conflicting testimony regarding who was responsible for delays in the completion of the project. The Vice President of Conner Brothers testified the delays were caused because East Tennessee Pipe delivered materials late and gave him boxes that were not the proper size. However, he also testified as to the large number of projects his company was working on at that time and produced notes purporting to keep track of the project which were largely incomplete. His supervisor at the project site stated that the boxes were too large when placed in the ground and testified that the boxes were installed according to engineering specifications. However, he could not say whether the specifications themselves might have been incorrect. The developer of the property testified to his frustration with the contractor Conner Brothers. He said that work was not taking place on the site even though materials were there ready to be installed and that this delay led him to withhold payments. The President of East Tennessee Pipe testified that Conner put off ordering certain materials, did not begin installation as soon as the materials were delivered, and created further delays by failing to set the boxes deeply enough into the ground.

The credibility of the witnesses is largely within the Chancellor's discretion to determine, and taking this into

account, the evidence does not preponderate against the Chancellor's assessment of responsibility.

We affirm the judgment of the Trial Court and remand at Appellant's cost.

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Herschel P. Franks, J.

CONCUR:

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Houston M. Goddard, P. J.

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William H. Inman, Sr. J.