

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

BRUCE ANTHONY BRITT and wife,)
LAURIE ANN BRITT,)

Plaintiffs/Appellees,)

VS.)

HOWARD JUNIOR LEGENS and son,)
WILLIAM H. LEGENS, d/b/a)
LEGENS & SON CONTRACTORS,)

Defendants/Appellants.)

Weakley Chancery No. 13315

Appeal No. 02A01-9509-CH-00196

APPEAL FROM THE CHANCERY COURT OF WEAKLEY COUNTY
AT DRESDEN, TENNESSEE
THE HONORABLE W. M. MALOAN, CHANCELLOR

FILED

September 18, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

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AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

HOLLY KIRBY LILLARD, J.

HEWITT P. TOMLIN, JR., SR. J.

Plaintiffs brought this suit for property damages sustained when a piece of

defendant's construction equipment fell onto their house. The trial court found that defendant's employee was negligent in the operation of the equipment and awarded judgment in favor of plaintiffs. Defendant has appealed, arguing that there was insufficient evidence of negligence and that the trial court erred in its calculation of damages. We find these contentions to be without merit and, for the reasons stated below, we affirm the trial court's judgment.

Plaintiffs, Bruce and Laurie Britt, contracted with defendant, Legens & Son Contractors, to construct a basement onto their home for a contract price of \$5,692.50. Legens completed the basement in November 1990. A few months later, the basement flooded. Legens came to the Britts' house, removed the drains, and reinstalled the drainage system. In July 1992, however, the basement again flooded. Legens sent a backhoe operator and a backhoe to the Britts' house in order to determine why the drains were not working.

Bill Fisher, the backhoe operator, used the backhoe to dig out the trench that was located beside the house in order to examine the drain lines. While Fisher was operating the backhoe, the leg of the backhoe sunk into the soft ground, causing the backhoe to fall into the foundation wall of the Britts' house. Fisher described the incident as follows:

Q. Did you experience any trouble with your backhoe?

A. No, sir, nothing but just the legers giving away, the soft ground giving away with me.

Q. Soft ground?

A. Yes, sir.

Q. What happened with your leger?

A. It just slowly just sunk down into the ground, and my tractor slowly leaned against the house.

The impact from the backhoe resulted in substantial damage to the Britts' residence. Mr. Murphy, an engineer, evaluated the damage to the property and drafted a report delineating the necessary repairs. Murphy found that in addition to the damage caused by the backhoe, the basement walls that Legens had built were not properly reinforced and were not attached to the structure of the house. According to Murphy, these defects in construction resulted in an exacerbation of the damages that resulted from the impact from

the backhoe.

Local contractors submitted bids for the repairs based upon Murphy's report. Randy Edwards, the successful bidder, submitted two bids. The first was the "insurance bid" for \$30,187.71, which represented the amount for which he would return the structure to its condition prior to the backhoe incident. The second bid was the "extras bid" for \$5,146.74, which was the amount necessary to repair the deficient construction by Legens.

Edwards made the repairs reflected in Murphy's report. In order to perform such repairs, the house was lifted from the ground while Edwards and his employees removed the exterior foundation walls and rebuilt new walls according to Murphy's specifications. Edwards removed the basement walls, ceiling, and plumbing work, and replaced and painted the sheetrock.

The Britts filed a complaint against Legens, alleging breach of contract, breach of warranty, and negligence. At the conclusion of the original hearing on the matter, the trial judge stated that he was unable to determine what portion of the damages claimed by the Britts was caused by the backhoe and what portion of the damages was caused by the flooding. Edwards was the sole witness at a subsequent hearing on this issue. According to Edwards, the flood damage had no effect on the work that he performed in repairing the damages caused by the impact from the backhoe. Edwards testified:

Q. Now, when you arrived, did you have to do any additional repairs or make any additional charges to repair the water damage?

A. The water damage was kind of neither here nor there to me.

Q. Now, why do you say that?

A. What work I had to do, didn't make any difference if there was any water damage or there was not any water damage or it was in excellent shape except for the structural part of it. I had to tear it out anyway.

Q. Why did you have to tear it out anyway?

A. I had to tear it out to fix the damaged area.

Q. Okay. Was that necessary or --

A. Absolutely necessary.

Q. And just tell the Court, I mean, because he's not a builder and nor am I, why it was necessary to tear all of this out in order to fix the damage.

A. Okay. What we had was like a finished basement. It was

Sheetrocked [sic] inside. It was trimmed out. It was painted and decorated. The damage, whatever caused it, the house had to be lifted up. In order to lift the house up, all this had to be tore out.

What wasn't tore out to be lifted, had to be tore out to be repaired after it was lifted due to the damage of lifting the house. So that's why I say regardless if it was water damage what happened before or any kind of damage that happened before, to fix the damage I was hired to do, it had to be tore out.

Following the hearing, the trial court held that Legens was absolved from liability for any damages that occurred as a result of the flooding because there was no evidence that Legens' negligence caused the flooding. However, the trial court held Legens liable for damages in the amount of \$30,187.81 due to the backhoe operator's negligence in striking the house with the backhoe. In addition, the trial court awarded \$5,146.74 to the Britts as compensation for the expenses they incurred in curing the deficiencies in the construction of the foundation wall.

Legens has raised three issues on appeal, which are: (1) whether the trial court erred in finding defendant negligent for the acts of its employee when there was no evidence that such employee was negligent; (2) whether the trial court erred in permitting the Britts to recover for damages that were not caused by the backhoe incident; and (3) whether the trial court erred in allowing Edward's estimate of the cost of repairs into evidence when there was no evidence of the actual costs of the repairs.

Our first task in the present case is to determine whether the evidence preponderates against the trial court's determination that defendant's employee was negligent in his operation of the backhoe. Otherwise, we are bound to adhere to the trial court's findings. T.R.A.P. 13(d).

A cause of action for negligence requires three elements: (1) a duty of care owed by defendant to plaintiff, (2) a breach of that duty by defendant, and (3) damages to the plaintiff proximately caused by defendant's breach of duty. Kelley v. Johnson, 796 S.W.2d 155, 157 (Tenn. App. 1990).

The Britts argue that Fisher's testimony fully supports the trial court's finding that he was negligent in the operation of the backhoe. According to the Britts, Fisher's admission that he had problems with the backhoe in that it kept sinking into the ground indicated that he knew that a dangerous situation existed. His failure to take precautions or to discontinue digging constituted negligence.

After a review of the record, we are persuaded that the evidence does not preponderate against the trial court's findings. We therefore affirm the trial court's determination that defendant's employee was negligent in his operation of the backhoe.

Similarly, we find no error in the trial court's calculation and award of damages in the present case. Findings of the trial court that hinge upon the credibility of witnesses are entitled to great weight on appeal because the trial judge had the ability to observe the manner and demeanor of the witnesses while they testified. Galbreath v. Harris, 811 S.W.2d 88 (Tenn. App. 1990). In order to reverse an issue depending on witness credibility, there must exist in the record other real evidence compelling a contrary conclusion. State ex rel Balsinger v. Town of Madisonville, 222 Tenn. 272, 435 S.W.2d 803 (1968).

Legens failed to offer any proof contrary to Edwards' testimony regarding the distribution of damages. The trial judge apparently believed Edwards when he said that he would have had to perform the same work regardless of the flood damage. We hold that the evidence does not preponderate against the monetary award made by the trial judge.

Finally, we find no merit in Legens' contention that it is impossible to determine damages in this case due to insufficient evidence proffered by Edwards regarding his actual costs. There is simply no evidence in the record indicating that Edwards' bid was unreasonable or otherwise improperly calculated.

Accordingly, the judgment of the trial court is affirmed. Costs on appeal are adjudged against appellants, for which execution may issue if necessary.

HIGHERS, J.

CONCUR:

LILLARD, J.

TOMLIN, Sr. J.