

**IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE**

FILED

December 17, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

RITA WRIGHT and)	No. 03A01-9903-CH-00064
MIKE McCLANAHAN)	
)	
Plaintiffs/Appellees,)	
)	
v.)	Appeal As Of Right From
)	SULLIVAN COUNTY
BILL STEVENS and)	CHANCERY COURT
GERALDINE STEVENS)	
)	JUDGE JOHN S. McLELLAN, III
Defendants/Appellants.)	By Interchange

For the Appellants:
Jonathan R. Bunn
Bristol, Virginia

For the Appellees:
Shelton B. Hillman, Jr.
Bristol, Tennessee

AFFIRMED AS MODIFIED AND REMANDED

Swiney, J.

OPINION

This is an appeal from the judgment of the Chancery Court for Sullivan County, Circuit Court Judge John S. McLellan, III sitting by interchange, on a non-jury case involving alleged construction defects in a home built by Defendants Bill Stevens and Geraldine Stevens for Plaintiffs Rita Wright and Mike McClanahan. While not exactly as stated by the parties, the

issues before us are: (1) whether the Trial Court erred in overruling Defendant's motion to dismiss at the close of Plaintiffs' proof; (2) whether the Trial Court erred in applying "personal experience" in determining damages; (3) whether it was error to award damages under both implied and express warranties; (4) whether particular findings of fact were error; (5) whether it was proper to allow additional claims to be added by amended complaint; and (6) whether the amount of damages awarded is improper. Plaintiffs presented independent expert testimony at trial setting damages based on cost to repair at \$38,163.00. After Defendants' motion to dismiss at the close of Plaintiffs proof was denied, Defendants presented testimony estimating the cost to repair the damages to be \$2,000.00. The Trial Court, by Memorandum Opinion, awarded Plaintiffs damages in the amount of \$23,221.88. Both Plaintiffs and Defendants have averred on appeal that the Trial Judge, by oral declaration made at the delivery of the Opinion and not included in the Trial Court record, said that the amount of damages was calculated by reducing the amount of the allowed damages established by Plaintiffs' expert proof by twenty-five percent, based upon the Judge's "own personal experience." Following the issuance of the Memorandum Opinion, Defendants moved for post-trial findings of fact and alteration of the judgment. The Trial Court made additional findings fact and amended the judgment to clarify the basis for the judgment and to release Defendant Geraldine Stevens from all matters related to express warranty but retaining her liability under implied warranty of habitability. A final Order on post-trial issues was later entered, finding certain of Plaintiffs' post-trial motions to be untimely, denying Plaintiffs' motion to increase the amount of the judgment, reaffirming the damages of \$23, 221.88, and finding both Defendants liable for the award under the implied warranty of habitability. For the reasons set forth in this opinion, the judgment is affirmed as modified.

BACKGROUND

On January 2, 1992 Plaintiffs contracted with Defendants to construct a residence in Bristol, Tennessee. After certain items were altered or added by agreement of the parties, construction was completed and a walk-through inspection by the parties revealed certain deficiencies in the construction. At the closing, Plaintiffs presented a warranty agreement they had drafted to cover the correction of the previously identified deficiencies along with other matters related to materials and workmanship in the construction of the home. According to Plaintiffs, execution of this warranty by Defendants was a condition precedent to closing the sale. After the Plaintiffs moved into the home in mid-1992, they contacted Defendants concerning the previously identified deficiencies, and asserted additional claims that Plaintiffs related to problems with materials or workmanship in the construction.

Disputes arose between the parties concerning both the cause and extent of the various repair claims asserted by Plaintiffs, but it appears from the record that in the ensuing months Defendants made efforts to address at least some of the matters at issue. However, full resolution of the disputes between the parties reached loggerheads, and Plaintiffs filed suit alleging breach of warranty on January 28, 1994. After several pretrial motions and hearings, including an amended complaint by agreed order and another later amendment to the complaint alleging additional defects and asserting claims under the Tennessee Consumer Protection Act that was contested by Defendants and is at issue here, the matter was set for non-jury trial with Circuit Court Judge John S. McLellan, III sitting by interchange in Chancery. Trial was held on December 12, 1996, and, after a lengthy continuance, concluded on May 8, 1997. After the close of Plaintiffs' proof, Defendants moved for dismissal. The Trial Court overruled the motion, and Defendants presented proof. After a brief rebuttal by Plaintiff McClanahan, the trial concluded. The Trial Court, in a four-page Memorandum Opinion filed October 21, 1997, dismissed Plaintiffs' Consumer Protection Act claims for failure to establish proof of a deceptive act or practice under the Act, dismissed Plaintiffs' claims under T.C.A. § 62-6-101 *et seq.* relating to Defendants' status as an unlicensed contractor,^o and awarded damages based upon the repair costs for seven of the nine specific claims brought forward by Plaintiffs, with a finding of reasonable repair costs totaling \$23,221.88.

Defendants moved the Trial Court to make additional findings of fact and to alter or amend judgment, with memoranda filed by both parties. By Order entered August 27, 1998, the Trial Court enumerated specific amounts for each of the seven claims for repair allowed under the previous opinion, detailing findings of credibility of the witnesses and setting forth additional general reasons for the damages awarded, finding that there was an express warranty arising from the agreement signed by Plaintiffs and Defendant Bill Stevens at the closing, and finding that the claims were also proper under an implied warranty of habitability. Defendant Geraldine Stevens was not a signatory to the warranty agreement and was found not liable under express warranty, but was found liable under the implied warranty of habitability as a signatory to the original construction contract. Following additional post-trial motions by both Plaintiffs and Defendants, the Trial Court issued a final Order filed February 2, 1999. This Order denied Plaintiffs' post-trial motions as not timely filed, but noted that even had they been timely filed, the Trial Court would have denied an increase in damages. Additionally, the Order clarified that both Defendants were liable to Plaintiffs for the award under the implied warranty of habitability, and once again adjudged damages in the amount of \$23,221.88. It is from this Order of the Trial Court that Plaintiffs appeal.

DISCUSSION

The issues as stated by Defendants are:

1. Whether the Trial Court erred when it overruled Defendants' motion to dismiss following the close of Plaintiffs' proof where the only measure of damages Plaintiffs attempted to prove was the reasonable cost of repair and where the estimates of repair proffered by Plaintiffs were extremely unreasonable.
2. Whether the Trial Court erred in using his own personal experience to assess damages when the Plaintiffs failed to prove the reasonable cost of repair.
3. Whether the Trial Court erred in awarding damages based on the theory of implied warranty where there was an express warranty which was drafted by the Plaintiffs to cover the transaction, where it was clear that the parties in executing the instrument intended that the transaction would be covered by a one-year express warranty, where the Plaintiffs made claims under the express warranty and received benefits as a result of it, and where implied warranties were excluded by the sales agreement.
4. Whether the Trial Court erred in its finding that the kitchen floor, Old Jonesboro Road garage floor, basement wall and kitchen floor [sic] were defective.
5. Whether the Trial Court erred in allowing damages for allegedly defective stairways where the first notice Plaintiffs gave Defendants regarding this claim came with the filing of their Second Amended Complaint over two years and five months from the date of Plaintiffs' possession of the house and where there was no change in the stairs in all of that time.

Plaintiffs join Defendants' issue as to the Trial Court's statement on applying the Judge's "own personal experience" in determining damages, dispute all other issues raised by Defendants as frivolous, and assert additional error in the Trial Court's denial of Plaintiffs' motion to increase the amount of damages based upon their expert's testimony.

Our standard of review of this non-jury case is *de novo*, with a presumption of correctness as to the Trial Court's findings of fact balanced against the preponderance of the evidence in the record, with great weight accorded the Trial Court's findings of credibility of witnesses. *Quarles v. Shoemaker*, 978 S.W.2d 551, 552-553 (Tenn. Ct. App. 1998). The Trial Court's conclusions of law are subject to a *de novo* review. *Campbell v. Florida Steel Corp.*, 419 S.W. 2d 26, 28 (Tenn. 1996).

First, addressing Plaintiffs' issue on the Trial Court's denial of their post-trial motion as untimely filed, judgment was entered by the Court on October 21, 1998. Plaintiffs' motion was not filed until February 25, 1999. A motion to alter or amend judgment, or make additional findings of fact, must be filed and served within 30 days after entry of judgment under T.R.C.P. Rule 59.02. It is clear from the record that Plaintiffs' motion was filed more than three months late, and the judgment of the Trial Court on this issue is affirmed.

We do not agree with Plaintiffs' assertion that Defendants' issues 1, 3, 4, and 5 are frivolous on appeal, and will address them at appropriate length along with Defendants' issue 2. As for Defendants' issue 1, regarding the Trial Court's overruling the motion to dismiss at the close of Plaintiffs' proof because Defendants asserted that the damages were "extremely unreasonable," the preponderance of the evidence adduced at trial during Plaintiffs' case in chief established adequate foundation for the Trial Court to accept Plaintiffs' principal witness as an expert witness. This expert's testimony established damages to Plaintiffs, established causation relating the damages to the work and materials furnished by Defendants under the construction contract, and thereby established the Plaintiffs' prima facie case. The Defendants' Motion To Dismiss was brought pursuant to Rule 41.02(2) of the Tennessee Rules of Civil Procedure. In such a situation, ". . .the trial court must impartially weight and evaluate the evidence as it would after the presentation of all the evidence and must deny the motion if the plaintiff has made out a prima facie case." *Smith v. Inman Realty Co.*, 846 S.W. 2d 819, 822 (Tenn. Ct. App. 1992). The Trial Court committed no error when it overruled Defendants' Motion To Dismiss at the close of Plaintiff's proof.

Defendants' issue 2, also raised on appeal by Plaintiffs, concerns a comment allegedly made by the Trial Court regarding the application of his personal knowledge in setting damages. Even though the specific comment attributed to the Trial Court does not appear on the record, we will address this issue on appeal. No transcript of the hearing where the Trial Court allegedly made this statement has been furnished to this Court as part of the record on appeal. We are faced with the bare assertions of the parties of the Trial Court's statement without being furnished the benefit of the transcript of this statement to put the Trial Court's alleged statement in context.

"Judicial knowledge upon which a decision may be based is not the personal knowledge of the judge, but the cognizance of certain facts the judge becomes aware of by virtue of the legal procedures in which he plays a neutral role." *Vaughn v. Shelby Williams of Tennessee*, 813 S.W.2d 132, 133 (Tenn. 1991). The amount of damages awarded by the Trial Court falls within the span of the disparate amounts presented at trial by Plaintiffs and Defendants. Examination of the record reveals that in the Memorandum Opinion and subsequent Orders entered by the Court, the Trial Court included written findings of fact and determinations of credibility of witnesses, and also enumerated and explained the individual allocation of damages forming the basis of the total amount of the judgment. Even taking the averments of the parties as true, the record reveals no indication that the Trial Court served in a non-neutral role, and the solid evidentiary foundation, combined with the detailed structure of the judgment as entered by the Trial Court, renders any error in the comment as alleged by the parties in

this case harmless. The preponderance of the evidence in the record is not contrary to the Trial Court's finding of fact as to the cost of repairs. Issue 2 is without merit.

Defendants' issue 3 at its core challenges the propriety of the Trial Court's application of the implied warranty of habitability after finding that an express warranty covered the claims at bar. Express and implied warranties are usually construed as consistent with each other and cumulative when such construction is reasonable. T.C.A. § 47-2-317. The implied warranty of habitability was adopted in Tennessee in 1982. The rule, as adopted from the North Carolina Supreme Court, states:

(w)e hold that in every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling then under construction, the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and that this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee.

Dixon v. Mountain City Const. Co., 632 S.W.2d 538, 541 (Tenn. 1982).

The *Dixon* Court further established limits for invocation of this warranty. "This warranty is implied only when the written contract is silent. Builder-vendors and purchasers are free to contract in writing for a warranty upon different terms and conditions or to expressly disclaim any warranty." *Id.*

The Trial Court found that an express warranty covering the defects at issue was established by the agreement drafted by Plaintiffs and signed by Defendant Bill Stevens at the time of closing. The agreement reads:

I, Bill Stevens, seller and contractor for property and improvements located at 4281 Old Jonesboro Road, Bristol, TN, per this agreement do [sic] agree to general warranty on said property and improvements for the items listed below and other matters that shall arise related to [sic] materials and/or workmanship on said property and improvements:

- Jonesboro Garage - Trim where Roller bumped it
- Coat of Paint on Front Door
- Touch up Paint
- Grills in Windows
- Damp Blocks (moistness) in Basement

The agreement has the date of May 8, 1992 typed at the top, is signed by Defendant Bill Stevens as "Seller and Contractor," and by both Plaintiffs as "Buyer." Of this agreement, the Trial Court stated:

The Court further finds that Defendant seller and contractor agreed to a contractual "general warranty" on said

property and improvements for the items that “shall arise related to materials and/or workmanship” which contract was drafted by the plaintiffs and presented to the defendant builder for signature. Therefore, the Court finds that the language of (the contract) itself includes other matters which “shall arise” and is not thus limited to the items listed on (the contract) Due to the “open end” contractual language, the Court finds that (the contract) by its terms permits plaintiffs to raise additional items of alleged defects with regard to materials and/or workmanship not initially brought to defendant’s attention on May 8, 1992. Defendant failed to limit or to expressly disclaim any other warranty beyond the initial list of items. (emphasis in original)

In the Order filed August 27, 1998, the Court held that this express warranty was not limited to one year as argued by Defendants, that this express warranty was insufficient to disclaim the implied warranty of habitability, and that there was no effective disclaimer of warranty of any kind. The preponderance of the evidence supports these findings of the Trial Court. See *Dewberry v. Maddox*, 755 S.W. 2d 50, 54-55 (Tenn. Ct. App. 1988)(discussing factors analyzed in establishing effective disclaimer of warranty).

While the preponderance of the evidence presented at trial supports the Trial Court’s holding as to the existence of the express warranty and the intentions of the parties as to the duration of the express warranty, the finding that the implied warranty of habitability forms a concurrent basis for recovery of judgment against both Defendants is error under the rule previously discussed in *Dixon*. “The court in *Dixon* further said that this warranty is implied only when the written contract is silent.” *Axline v. Kutner*, 863 S.W.2d 421, 424 (Tenn. Ct. App. 1993)(where this Court reversed summary judgment and applied an implied warranty of habitability to claims relating to workmanship when the express warranty in the contract was silent as to quality of workmanship). The finding by the Trial Court of an express warranty that “permits plaintiffs to raise additional items of alleged defects with regard to materials and/or workmanship not initially brought to defendant’s attention on May 8, 1992,” combined with the finding that this express warranty covered the materials and workmanship at issue, establishes that the written contract was not silent as to express warranty. Such silence is required to invoke the implied warranty of habitability. Therefore, the express warranty controls Plaintiffs’ warranty claims asserted against Defendant Bill Stevens.

As previously discussed, our review of the record discloses that the Trial Court was correct in finding that no sufficient waiver of the implied warranty of habitability occurred. Although acknowledging that a stringent standard is applied in

analyzing waiver of the implied warranty of habitability, Defendants assert waiver in the following language from the original construction contract: “The terms and conditions as set forth above represent the entire contract between the Purchaser and the Seller; any other terms or conditions, verbal or implied, notwithstanding.” Such disclaimer falls short of establishing waiver. “The buyer must be given ‘adequate notice of the implied warranty protections that he is waiving by signing the contract.’ In addition, such a ‘disclaimer’ must be strictly construed against the seller.” *Dewberry*, 755 S.W.2d at 55. In *Dewberry*, this Court rejected a proffered waiver as insufficient when it failed to identify the rights asserted as waived by the buyers. See also *Axline*, 863 S.W.2d at 424-425 (where this Court again rejected an alleged waiver that did not identify the rights subject to the waiver as insufficient to disclaim the implied warranty of habitability). The disclaimer at issue mentions neither warranty, nor implied warranty, thus failing to provide adequate notice to the buyer of the implied warranty protections provided under law. Such notice is necessary in order for the Buyers to knowingly waive their rights, which they did not do here.

However, under the *Dixon* rule there must have been a finding that the express warranty did not govern the defects at issue to apply the implied warranty of habitability to the warranty claims against Defendant Bill Stevens. Because the Trial Court found an express warranty covered the defects at issue, the implied warranty of habitability does not arise as to Defendant Bill Stevens. The express warranty covered only warranties given by Defendant Bill Stevens, and did not speak to warranties given by Defendant Geraldine Stevens as she was not a signatory party to the express warranty. Judgment against Defendant Bill Stevens should have been under express warranty and judgment against Defendant Geraldine Stevens should have been under the implied warranty of habitability that arose under the original construction contract to which she was a party.

However, this determination by us has no effect on the correctness or the amount of the judgment, as each Defendant was liable for the damages under separate warranty claims.

Defendants’ issue 4 concerns specific findings of fact made by the Trial Court based upon testimony at trial and the record as a whole. As noted above, our review is based upon the preponderance of the evidence in the record, with the presumption of correctness as to findings of fact, and great weight is accorded the Trial Court’s findings regarding credibility of witnesses. The Trial Court addressed the specific findings of fact and findings regarding credibility of witnesses in the Memorandum Opinion filed October 21, 1997, and the Order filed August 27, 1998. The preponderance of the evidence in the record, which includes a videotape that demonstrates the listed defects both visually and aurally, combined with the Trial Court’s determinations of credibility of the witnesses for both Plaintiffs and Defendants, supports the Trial Court’s findings

regarding the specific conditions of which Defendants complain. Certainly the preponderance of the evidence is not otherwise.

The judgment of the Trial Court as to the defective condition of the kitchen floor, Old Jonesboro Road garage floor, and the basement wall is affirmed. Defendant's issue 4 is without merit.

Defendants' issue 5 concerns amendment of the complaint prior to trial. This issue is governed by T.R.C.P. Rule

15.03. The rule states:

Whenever the claim or defense asserted in amended pleadings arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party or the naming of the party by or against whom a claim is asserted relates back if the foregoing provision is satisfied and if, within the period provided by law for commencing an action or within 120 days after commencement of the action, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The amended complaint at issue names the same parties as the original complaint, so the second sentence of the rule does not apply. Based upon our review of the record, we find that the first sentence of the rule does apply, and that the claim asserted arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading.

It seems crystal clear to us that the amended pleading asserts a claim which arose out of the conduct, transaction or occurrence set forth in the original complaint. As this court noted in *Gamble v. Hospital Corp. of America*, 676 S.W.2d 340 (Tenn. Ct. App.1984) – "Our Supreme Court has stated that Rule 15.03's language is so clear and unequivocal that it is virtually self-construing." *Karash v. Pigott*, 530 S.W.2d 775 (Tenn.1975).

Hensley v. Fowler, 920 S.W.2d 649, 650 (Tenn. Ct. App. 1995).

Therefore, because we find that the additional claims asserted in the amended complaint relate back to the original complaint, judgment of the Trial Court as to this issue is affirmed.

CONCLUSION

The judgment of the Trial Court is modified to reflect that the express warranty between Defendant Bill Stevens and Plaintiffs forms the basis for recovery of the judgment against Defendant Bill Stevens, and that the implied warranty of habitability forms the basis for recovery of the judgment against Defendant Geraldine Stevens. We affirm the judgment of the Trial Court in all other respects and this cause is remanded to the Trial Court for such further proceedings, if any, as may be required, consistent with this Opinion, and for collection of the costs below. Costs of this appeal are assessed against the Appellants, Bill Stevens and Geraldine Stevens.

D. MICHAEL SWINEY, J.

CONCUR:

HOUSTON M. GODDARD, P.J.

HERSCHEL P. FRANKS, J.