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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000517-MR

RANDALL C. LANDWEHR
AND DEBORAH J. LANDWEHR — APPELLANTS

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE DENNIS FOUST, SPECIAL JUDGE
ACTION NO. 06-CI-00152

DAVID E. MITCHELL
D/B/A MITCHELL CONSTRUCTION — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND MOORE, JUDGES; BUCKINGHAM, SENIOR JUDGE.[1]

MOORE, JUDGE: Randall and Deborah Landwehr appeal from a jury verdict and resulting order of the Caldwell Circuit Court, which dismissed their defective

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

construction claims against David E. Mitchell d/b/a Mitchell Construction. Subsequent to the verdict, the Landwehrs moved for either a new trial or judgment notwithstanding the verdict (JNOV), which the trial court denied. The denial of this motion is the subject of this appeal. After a careful review of the record, we affirm the judgment of the trial court.

The focus of this litigation is a construction contract. In October of 2004, the Landwehrs hired Mitchell to build a home for them in Caldwell County. During construction, several disputes arose between the Landwehrs and Mitchell and, as a result of these disputes, work was stopped and this house remains unfinished. Subsequently, the Landwehrs filed suit against Mitchell, alleging that he had breached his contractual duty to construct their home in a workmanlike manner and citing to several alleged defective conditions in support of this contention. The facts regarding these defective conditions will be stated as they become relevant within the analysis.

With regard to the standard of law applicable to this case, we note at the outset that a motion for JNOV shall not be granted unless "there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998); *see also, Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985). This Court presumes the trial court's denial of a motion to set aside a jury verdict or for a new trial is correct and will reverse only upon a finding of clear error. *Bayless v. Bayer*, 180 S.W.3d 439, 444 (Ky. 2005).

By contrast, a new trial may be granted if specific grounds, as listed in Kentucky Civil Rule (CR) 59.01, exist. However, "[a]s a general rule, '[t]he decision of a trial court to overrule a motion for new trial will not be disturbed on appeal absent a manifest error or abuse of discretion.'" *Embry v. Turner*, 185 S.W.3d 209, 213 (Ky. App. 2006) (*quoting Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 741 (Ky. 1996)).

ANALYSIS

The Landwehrs contend they are entitled to either judgment notwithstanding the verdict or a new trial. They argue that Mitchell's construction of their home resulted in several defects and that Mitchell presented no evidence to refute the existence of these defects; these defects concern the first floor trusses, the basement walls, and the foundation.[2] Further, the Landwehrs contend that the jury ignored the evidence of these defects when it chose to award the Landwehrs a total recovery of "$0," and they claim grounds for a new trial on this basis, as well. We address these issues in turn below.

[2] In the argument of their brief, the Landwehrs allude to the existence of several other defects. These defects include the installation of some arched windows, the installation of some steps, and "eleven observations" that the Landwehrs' home inspector, Johnny Ross, made regarding their house.

Regarding the windows, Mrs. Landwehr testified at trial that Mitchell had corrected this issue to her satisfaction.

Regarding the steps, the entirety of the Landwehrs' argument is that the steps were "improperly installed and had to be reinstalled." As there is no indication that the reinstallation was defective, and no citation to the record regarding this condition, this contention will not be reviewed. *See Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006).

As to Ross's "eleven observations," the Landwehrs only describe three of these: the floor trusses, the height of the basement walls, and the foundation of the house. These three are addressed in the analysis. The Landwehrs fail to identify the remaining eight observations, cite to them in the record, or address them in their argument; as such, they will not be reviewed. *Id*.

I. THE FLOOR TRUSSES

The first floor trusses, as installed in the southeast quarter of the Landwehrs' house, are too short to extend to the concrete basement wall. Instead, they rest upon a nine-foot-high stud wall constructed out of two-by-fours, located just inside the concrete basement wall. A brace, constructed out of three additional two-by-fours and resembling an upside-down "U," was also connected to the ends of the trusses and rests upon the concrete wall. As their first basis for either a JNOV or a new trial, the Landwehrs argue that, in light of the evidence, the jury should have found this condition defective and awarded damages because 1) the floor trusses were too short and 2) even if the shortness of the floor trusses was mitigated by the stud wall, the stud wall itself was defectively constructed and incapable of supporting the load of the floor trusses. We disagree.

Regarding the shortness of the floor trusses, at least some evidence of record demonstrated that this, in itself, was not a defective condition. Of particular note, representatives of the floor truss manufacturer visited the Landwehrs' home, inspected the placement of the trusses on the stud wall, and concluded, along with their engineer, that enough of the length of the floor trusses rested upon the stud wall to provide for an adequate bearing, so long as the trusses were nailed into the stud wall. The Landwehrs entered the truss manufacturer's letter, which memorialized this conclusion, into evidence. Phillip McIntosh, the Landwehrs' expert engineer, agreed with this conclusion. Mitchell testified that he had

attached the floor trusses to the wall as the truss manufacturer instructed, and his testimony was not contradicted.

Regarding the construction of the stud wall itself, although we reach a different conclusion, the ultimate result is the same. The Landwehrs cite to the testimony of their architect, Melissa Gray, their engineer, Phillip McIntosh, and their home inspector, Johnny Ross, to support their contention that the stud wall, as constructed, is incapable of supporting the load of the first floor trusses. Upon review of the record, however, only McIntosh and Ross stated reasons for this testimony. McIntosh testified that the footing underneath the concrete basement wall was designed to carry weight along its center, and that because the stud wall was placed at the edge of the footing, the stud wall's placement could cause the footing to rotate if the concrete floor slab was not reinforced to "carry bending moment."[3] Ross testified that because the wall consisted of vertically-placed two-by-fours, it was susceptible to lateral movement, *i.e.*, it could topple over. McIntosh gave a similar assessment, stating his concern that the wall itself was not adequately braced, strapped, or blocked.

Turning first to McIntosh's concern that the stud wall could cause the floor to rotate, Randall Merrick, the concrete subcontractor, testified that the concrete floor slab was reinforced. There was no testimony to the contrary. Thus, this matter was properly subject to the jury's determination.

[3] This term was not explained during the trial to the jury nor is it defined in the Landwehrs' brief. Presumably, it entails movement.

The concerns regarding the potential for lateral movement in the wall warrant a bit more discussion. Here, the only admissible evidence to the effect that the stud wall, as constructed, was *not* susceptible to lateral movement came from Mitchell's interpretation of a letter from the floor truss manufacturer's Vice President of Sales, Robert L. Green, stating in part that "the structural integrity of [the Landwehrs'] home is solid providing their contractor provides connection of the floor trusses to the stud wall."

This letter, while generally stating that the structural integrity of the Landwehrs' home is "solid," does not speak to the integrity of the stud wall at issue. The letter states, in relevant part:

> In a phone conversation I recently had with Melissa Gray (architect) she advised that her concern was where the floor trusses did not sit atop the "poured basement" wall at the front of the house.
>
> Upon inspection of the said area, I observed a stud wall built against the "poured wall" in the basement which provides bearing for the floor trusses. Please refer to the enclosed sealed drawings marked "B" and "B2" and note that a 1½" bearing is acceptable. However, our engineer does include a note on the sealed drawing that requires installer to "provide connection to prevent truss from sliding off bearing".
>
> I hope that this will reassure Randy and Debbie that the structural integrity of their home is solid providing their contractor provides connection of the floor trusses to the stud wall. If you have any further questions or need additional information, please call me. You will find copies of the sealed drawings enclosed.

In sum, Green "observed a stud wall" and after consulting with an engineer, determined that a floor truss could be placed upon a 1½ inch bearing. From the language of the letter itself, it is tempting to believe that the statement, "the structural integrity of their home is solid," should encompass the adequacy of the stud wall to support the load of the trusses. However, two factors prevent this conclusion. First, the letter itself addresses only the 1½" bearing of the trusses, rather than the adequacy of the structure providing that bearing and supporting the load. Second, a review of the engineer's sealed drawings, upon which Green's letter is based, reveals the following disclaimer:

> Robbins Eng. Co. bears no responsibility for the erection of trusses, field bracing or permanent truss bracing.
> . . .
> Persons erecting trusses are cautioned to seek professional advice concerning proper erection bracing to prevent toppling and "dominoing".

The engineer providing Green with the opinion that a 1½" bearing is acceptable affirmatively *disclaimed* making any opinion on the subject of whether the erection or bracing of the trusses was adequate, and actually recommended that anyone erecting a truss should seek professional advice to prevent the bracing from toppling over. Consequently, this letter does not contradict Ross's and McIntosh's opinions that the stud wall was inadequately braced and susceptible to lateral movement. Green's statement, that "the structural integrity of their home is solid," is more akin to puffery, rather than evidence that the stud wall was adequately constructed. As a consequence, Mitchell did not produce evidence demonstrating

any real conflict regarding the issue of whether the stud wall was defectively constructed.

At the conclusion of the trial, the jury awarded the Landwehrs "$0." However, in light of the record, it is impossible to determine whether the jury believed the stud wall was defective and, even assuming the jury did determine that it was, the evidence of record does not demonstrate that an award of "$0" was inappropriate.

First, it is impossible to determine whether the jury believed any defects existed because the jury instructions, which were drafted by the Landwehrs, did not ask the jury to conclude that any particular construction defect existed. The jury made no such conclusion in its answers. Instead, the instructions, as written, simply asked the jury if they believed Mitchell "substantially performed his duty." Additionally, they instructed that

> [If you] are further satisfied from the evidence that although [Mitchell] substantially performed his duty under the contract there were defects in the construction which [Mitchell] did not correct, then you will determine from the evidence the cost reasonably required in order to correct or remedy such defects[.]
> . . .
>
> [I]f, however, you find such cost to be more than $16,633.00 (unpaid balance of the contract price), you will determine from the evidence the difference between the fair market value of Plaintiffs' property with the building as it should have been constructed and the fair market value of the building as it actually was constructed and award Plaintiffs either the amount of this difference or the reasonable cost of correcting or remedying the defect, whichever is the lesser, from

> which figure you will then deduct the sum of $16,633.00 (the unpaid balance of the contract price) and award the resulting sum to the Plaintiffs.

Second, even assuming that the jury did find that the stud wall was defective, we cannot find that the jury's award of "$0" for damages entitles the Landwehrs to a new trial. The Landwehrs introduced no evidence of what it would cost to repair the stud wall or how much its condition diminished the value of their home.

In Kentucky, it is well established that damages for breach of a contract are normally that sum which would put an injured party into the same position it would have been in had the contract been performed. *Hogan v. Long*, 922 S.W.2d 368, 371 (Ky. 1995). These damages must always be proven with reasonable certainty. *Pauline's Chicken Villa, Inc. v. KFC Corp.*, 701 S.W.2d 399, 401-02 (Ky. 1985). Furthermore, contingent, uncertain and speculative damages generally may not be recovered. *Spencer v. Woods*, 282 S.W.2d 851, 852 (Ky. 1955). As this case involves a breach of contract for defective construction, the measure of damages is the cost of remedying the defect as long as it is reasonable to do so. *See State Property & Buildings Comm'n of Dep't of Finance v. H.W. Miller Const. Co.*, 385 S.W.2d 211, 214 (Ky. 1964). In this regard, the cost of repairing a defect

> becomes unreasonable only (a) if it exceeds the difference between the market value of the building as it should have been constructed and its market value as actually constructed . . . or (b) if it amounts to more than

> is reasonably necessary in order to bring the building into substantial conformity with the contract.

Id. In the event that the cost of repairing the defect would be unreasonable, then the measure of damages is limited to the difference, if any, between the building's market value as it should have been constructed and its market value as it was actually constructed. *Id*.

Here, the Landwehrs chose not to repair any defect or complete the construction of their home. The only amount of damages the Landwehrs presented to the jury regarded the difference between the total amount they paid to Mitchell ($328,637.03) and the salvage value of the unfinished house as it was built ($11,640.00), to be offset by any amount the jury chose to give Mitchell on his counterclaim. The Landwehrs do not explain whether a finding in favor of Mitchell on any one of the several defects of which they complained would have changed this calculation; rather, they state in their brief that the condition of the foundation, analyzed below, "makes the question moot."

The cost of repair, however, is the amount that the Landwehrs sought and thus, was their burden to prove. To recover damages caused by the condition of the stud wall, the Landwehrs had the burden to put forth some evidence demonstrating whether the stud wall was reasonably repairable. If it was, the appropriate measure of damages would have been the cost to repair it; if it was not, the appropriate measure of damages would have been the diminished value of their home attributable to the stud wall. *See H.W. Miller Const. Co., supra*. The

Landwehrs introduced no testimony demonstrating that the condition of the stud wall, by itself, prevented them from completing the construction of their home or that the stud wall could not be repaired. Indeed, their expert, McIntosh, testified that it required additional bracing and was not his "greatest concern," and Mitchell testified that the condition of the stud wall was "minor." Further, the Landwehrs introduced no evidence of the cost of repairing the stud wall or the diminished value of their home attributable to the stud wall.

In the absence of this evidence, the Landwehrs' jury instructions ostensibly asked the jury to "determine from the evidence . . . the reasonable cost of correcting or remedying the defect," but the Landwehrs essentially asked the jury to take a guess. It is true that where it is reasonably certain that damage has resulted, mere uncertainty as to the amount does not preclude one's right of recovery or prevent a jury decision awarding damages. *Roadway Exp., Inc. v. Don Stohlman & Associates, Inc.*, 436 S.W.2d 63, 65 (Ky. 1968). However, a complete absence of any evidence regarding cost of repairs or diminution of property value goes beyond mere uncertainty and provides no basis for recovery. *See Young v. Vista Homes, Inc.*, 243 S.W.3d 352, 360 (Ky. App. 2007) (affirming dismissal of negligence claim regarding septic system installed in violation of zoning code, where plaintiffs failed to provide evidence regarding the cost of replacing or repairing the system, or that their property value was diminished as a result of the non-complying septic system); *see also, University of Louisville v. RAM Engineering & Const., Inc.*, 199 S.W.3d 746, 748 (Ky. App. 2005) (describing

damages for breach of a contract as "that sum which would put an injured party into the same position it would have been in had the contract been performed.")

In light of the fact that the Landwehrs provided no basis for the jury to calculate the expense of correcting the stud wall, we disagree with the Landwehrs' contention that the jury's failure to award them any damages regarding the stud wall furnishes any of the grounds for a new trial under CR 59.01(a), (d),(e), or (f), or for a JNOV. No irregularity in the proceedings of the court, jury or prevailing party prevented the Landwehrs from producing evidence of the cost of repairing the stud wall. *See* CR 59.01(a). A zero verdict is not too small or inadequate and cannot be said to have resulted from passion, prejudice, or in disregard of the evidence if the plaintiff failed to place the requisite evidence of damages into the record. *See* CR 59.01(d) and (e). Similarly, where there is zero evidence demonstrating the reparability of a condition, the cost to repair it, or the amount by which the condition diminishes the value of a home, we cannot hold that a zero verdict entitles the Landwehrs to either a JNOV or a new trial. *See* CR 59.01(f); *see also Miller v. Swift*, 42 S.W.3d 599, 601(Ky. 2001) (holding that if a jury's verdict of zero damages for pain and suffering is supported by evidence, the trial court was not clearly erroneous in denying motion for a new trial on that basis).

II. THE BASEMENT WALLS

Fairly early in the construction process, Randall Landwehr visited the construction site and discussed the height of the concrete basement walls with Mitchell. At that time, Mitchell advised him that the walls were nine-feet tall, rather than ten-feet tall as described in the architectural plans. Randall Landwehr became concerned because he had specifically asked for an eight-foot basement ceiling. However, Mitchell reassured him that he would still have an eight-foot ceiling, and installed additional sill plates on the basement wall to raise the height of the walls to accommodate the eight-foot ceiling requested by Randall Landwehr. While the Landwehrs stated that they "were not happy with this solution," they nevertheless allowed Mitchell to proceed with construction.

At trial, the Landwehrs introduced evidence to the effect that Mitchell failed to follow the architectural plans regarding the height of the basement wall, and that if the sill plates had not been installed properly and connected adequately, they constituted a defect.

Mitchell's failure to follow the plans regarding the height of the basement walls, however, was waived by the Landwehrs. *National Surety Marine Ins. Corp. v. Wheeler*, 257 S.W.2d 573, 574 (Ky.1953), explains that a waiver involves the intentional relinquishment of a known right. Here, the Landwehrs relinquished their contractual right to a ten-foot concrete wall when they allowed Mitchell to proceed with construction after Mitchell told them that he had instead constructed a nine-foot concrete wall and made up the difference with sill plates. Further, the Landwehrs state in their reply brief that "the Landwehrs did not expect

strict compliance with the architectural plans and testified, as did Mitchell and the Landwehrs' architect, that there were changes made to the plans, some of which were reduced to writing and some of which were not." In addition, both Mitchell and the Landwehrs' architect, Melissa Grey, testified that the addition of the sill plates allow for a finished basement with a ceiling with a height of at least eight feet.

As to whether the sill plates constituted a defect, McIntosh testified that they would not be a cause for concern if the extra sill plates were well connected. In this regard, Mitchell offered testimony that the sill plates were connected adequately and installed properly. Specifically, he stated that the bottom sill plate was bolted to the concrete wall, the extra sill plates were nailed into place, and that all of the sill plates were secured to one another by use of a plywood band installed around the entire length of the basement walls. In light of the above, there was evidence demonstrating that the condition of the sill plates in the basement walls was not defective.

We are also precluded from reversing the trial court or granting a new trial upon this basis because the discussion with regard to the jury instructions and damages, as stated in the analysis regarding the floor trusses, above, is equally applicable to the issue of the basement walls. While the Landwehrs concede in their brief that this defect could have been repaired,[4] they likewise introduced no

[4] The Landwehrs write in their brief that "[w]hile it is conceivable that even this defect may have been correctable of done property [sic], the failure to install the foundation as drawn on the architectural plans makes the question moot."

evidence of how much it would cost to remedy this defect, or how much this condition diminished the value of the home if the cost of remedying this defect would be unreasonable. Accordingly, we find no error.

III. THE FOUNDATION

The Landwehrs contend the main issue warranting either a JNOV or new trial is whether the foundation, as constructed by Mitchell, is strong enough to support their home. To the effect that it is not, the Landwehrs produced evidence demonstrating that the foundation's footer was poured to a width of eighteen inches and a depth of ten inches, rather than a width of thirty inches and a depth of twelve inches as specified in the architect's plans; that the footer was measured in three places as having a depth between seven and nine inches; and that the width of the house may be insufficient to support the weight of the house, based upon an "estimated soil strength analysis."

Some evidence in the record demonstrated that the Landwehrs waived the issue of the eighteen-by-ten inch footer differing from the architect's plans. Specifically, the contract between Mitchell and the Landwehrs, which the Mitchells signed prior to the pouring of the footer, expressly provided that the footer would be eighteen-inches wide and ten-inches deep, and stated that the architect's plans would only be used as a "guideline."

With regard to the depth of the footer, the Landwehrs' own expert, Thomas Fenske, testified that the depth of the footer that was poured for the Landwehrs' house was adequate.

Finally, the evidence concerning the width of the footer also conflicted as to whether it would cause the foundation to fail. As a preliminary matter, none of the Landwehrs' experts testified that the foundation, as it was built, would fail; rather, they testified that to the effect that it *could* fail. Thus, this was an issue for the jury to determine.

Further, Mitchell impeached the only objective evidence supporting that the foundation could fail. The evidence in question was Thomas Fenske's mathematical analysis, which calculated that the foundation could not carry the weight, per square foot, of the house. In brief, the analysis considered two variables to determine whether the foundation could support the house's weight: (1) the width of the footing and the hardness of the underlying ground; and (2) softer ground required a wider footing, while harder ground allowed for a narrower one. Fenske's analysis considered the eighteen-by-ten inch footer, but assumed that the ground was "sandy clay," the softest type of ground. However, both Merrick and Mitchell testified that the ground was harder than sandy clay and more akin to clay with gravel. Fenske admitted that he never observed the ground underlying the home. The only evidence presented to contradict Merrick's and Mitchell's testimony on the subject of the hardness of the ground was a soil sample, gathered by one of McIntosh's technicians, which McIntosh described as "compromised" because it was wet.

McIntosh testified that a harder type of ground consisting of gravelly clay "probably" would not carry the weight of the house. However, the Landwehrs

did not present a separate analysis considering gravelly clay as a variable and in any event this testimony does not compel either a new trial or a JNOV. As stated in *Howard v. Louisville Ry. Co.*, 32 Ky. 309, 105 S.W. 932, 933 (1907),

> [i]n trials by jury it does not follow that because one or more witnesses testify positively concerning a fact, and there is no evidence to the contrary, the verdict must be flagrantly against the evidence. The number of witnesses who testify to a fact is not necessarily a controlling feature in determining its truth; neither does the fact that their evidence may not be contradicted by word of mouth compel its acceptance as true. The jury have the right to disregard the whole or any part of the testimony of any witness, and it is their province to give such weight to the evidence as in their judgment and discretion it is entitled to.

Howard qualifies this principle in the event that evidence exists indicating "passion or prejudice on the part of the jury." *Id*. However, in light of the further evidence that no cracks have appeared in the foundation after four years and the absence of any evidence demonstrating that the jury was biased in favor of Mitchell or against the Landwehrs, this principle applies.

Moreover, the issue of the absence of any evidence regarding the cost to correct the allegedly defective condition, as discussed in relation to the stud wall and basement walls, is also present with the foundation. In their brief, the Landwehrs contend that Mitchell "presented no evidence that the Landwehr house will not fail, no evidence that there are repairs which could be made to the house which would stabilize the foundation and made no objection to the Plaintiffs' calculation of damages." Further, the Landwehrs state that "there was no evidence

presented at the trial as to any cost to remedy the defective foundation." However, the Landwehrs' architect, Melissa Gray, testified that the foundation could be remedied if its condition caused it to be defective. Further, it was the Landwehrs' burden, as plaintiffs, to prove their case. *See Purcell v. Michigan Fire & Marine Ins. Co. of Detroit*, 295 Ky. 232, 173 S.W.2d 134, 141 (1943). As such, they, not Mitchell, bore the risk associated with failing to persuade the trier of fact of whether repairing any defective condition would have been reasonable and how much those repairs would have cost. Having failed to do so, the Landwehrs cannot claim error on this basis.

IV. THE JURY INSTRUCTIONS

At the trial level Mitchell counterclaimed against the Landwehrs for an amount he alleged was due under the building contract, and the jury awarded him damages. This counterclaim was based upon Mitchell's estimation of how much he would be entitled to receive under the contract if he completed building the Landwehrs' home. However, Mitchell testified that he did not intend to complete the Landwehrs' home. Following the Landwehrs' motion for judgment notwithstanding the verdict, the trial court vacated this award because, in light of the fact that Mitchell did not intend to finish construction, he had no basis for claiming damages.

Mitchell does not appeal the Landwehrs' judgment notwithstanding the verdict. Rather, the Landwehrs contend that when the trial court vacated Mitchell's award, it became obligated to grant them a JNOV or a new trial regarding their breach of contract claim against Mitchell. As the basis for this argument, the Landwehrs cite to the jury instructions, analyzed above, which asked the jury to determine whether Mitchell substantially performed his duty and/or determine the cost of repairing any defects. Their argument, as stated in their brief, is:

> The jury returned a verdict for the Defendant on his counter-claim and awarded zero to the Plaintiffs on their breach of contract claim. Further investigation following the trial revealed that the jury actually intended to award zero damages to both parties. . . . This finding, however, is not possible if the jury followed the Trial Court's instructions.
> . . .
> Having denied the Defendant's counter-claim, then the jury's finding should have been for the Plaintiffs with the only question being the amount of damages and the only evidence at trial being the money paid to the Defendant under the contract minus the salvage value of the materials in the unfinished house.

In short, the Landwehrs argue that a zero verdict, or a verdict in favor of Mitchell on the Landwehrs' claim, could only be the result of juror misconduct. *See* CR 59.01(a).

This argument has no merit. While it is true that Mitchell was precluded from recovering on his counterclaim, the reason he was so precluded was because he did not prove that he was damaged. Mitchell's failure to prove

damages did not preclude the jury from determining that Mitchell substantially performed his duties under the contract. Moreover, the fact that his award was vacated does not demonstrate that he did not substantially perform his duty to the Landwehrs under the contract; it merely demonstrates that he would not continue to perform it.

The fact that the Landwehrs received no award merely demonstrates that the jury either believed there were no defects, or that, assuming there were defects, they cost nothing to repair. This latter conclusion appears as logical as the former, in light of the Landwehrs' statement that the "only evidence at trial" regarding damages was "the money paid to the Defendant under the contract minus the salvage value of the materials in the unfinished house," and because a review of the record demonstrates that the Landwehrs introduced no evidence regarding the cost of repairing any defect.

CONCLUSION

For the reasons herein stated, the Caldwell Circuit Court's denials of a new trial or judgment notwithstanding the verdict in favor of the Landwehrs are AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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