

3700 BUILDING CONTRACTS: MEASURE OF DAMAGES

Question 1 asks whether (builder/contractor) breached the contract.

Question 2 asks what amount of money, if any, will fairly compensate (plaintiff/owner) for the breach by (builder/contractor)? In answering Question 2, you must first determine the diminished value of (the structure). "Diminished value" is the difference between the value of the structure as built and the value of the structure if it had been built according to the contract.

If you determine that the structure cannot be repaired, the diminished value is your answer to Question 2.

If, however, you determine that the structure can be repaired, you must also determine the cost of repairs to the structure. "Cost of repairs" is defined as the reasonable cost of remedying defects, so far as can be done practicably. If the "diminished value" of the structure and the "cost of repairs" of the structure are different, the lesser of the two is your answer to Question 2.

SPECIAL VERDICT

1. Did (builder/contractor) breach the contract?

Answer: _____

Yes or No

2. If you have answered "yes" to Question 1, what amount of money, if any, will fairly compensate (plaintiff/owner) for the breach by (builder/contractor)?

Answer: \$_____

[ALTERNATIVE:

If you have answered "yes" to Question 1, what is the reasonable cost of repairs?

Answer: \$_____

If you have answered "yes" to Question 1, what is the diminished value of the property?

Answer: \$_____]

COMMENT

This instruction and comment were approved in 2005. The comment was revised in 2011.

A damaged party is entitled to have what he or she contracts for or its equivalent. Champion Companies v. Stafford Development, 2011 WI App 8, 331 Wis.2d 208, 794 N.W.2d 916; Jacob v. West Bend Mut. Ins. Co., 203 Wis. 2d 524, 543, 553 N.W.2d 800 (Ct. App. 1996). The application of this rule is "troublesome" when there is an issue on whether the defective construction should be repaired or whether the work was substantially performed. A "damaged party" is not entitled to be placed in a better position than if the contract had been performed. Pleasure Time, Inc. v. Kuss, 78 Wis. 2d 373, 385, 254 N.W.2d 463 (1977). Instead, a party is only entitled to a remedy that puts the party in as good a position as if the contract had been fully performed. Champion Companies, supra, ¶ 11 and ¶ 13. For a discussion of the economic waste rule, see Hinkston, Mark, "Repair or Replace," Wisconsin Lawyer, August 2011, p.6.

The measure of damages is the reasonable cost of remedying defects, so far as can be done practicably, and the diminished value of the property so completed because of defects not so remediable. W.G. Slugg Seed & Fertilizer, Inc. v. Paulsen Lumber, Inc., 62 Wis. 2d 220, 226, 214 N.W.2d 413 (1974). If reconstruction involves unreasonable economic waste, then the injured party is to recover the difference between the value of the property if it had been properly constructed and the value that the property has as constructed. W.G. Slugg Seed at 226. Diminished value is defined as the "difference between the value of the house as it stands with faulty and incomplete construction and the value of the house if it had been constructed in strict accordance with the plans and specifications." Plante v. Jacobs, 10 Wis. 2d 567, 103 N.W.2d 296 (1960). "Where defects are such that they may be remedied without destruction of any substantial part of the benefit which the owner's property has received by reason of the contractor's work, the equivalent is sometimes held to be the cost of making the work conform to the contract." DeSombre v. Bickel, 18 Wis. 2d 390, 398, 118 N.W.2d 868 (1963).

Once the jury provides its damage answers as to cost of repairs and diminution in value, the trial court is in a position to determine the appropriate measure of damage. Jacob at 543. In Jacob, the judge substituted the stipulated cost of replacement by the parties for the jury's determined cost of repair/diminution in value to make the plaintiffs whole and give the plaintiffs exactly what they contracted for.

The "reasonable cost of repairs" rule was applied because the cost did not "involve any reconstruction of the building or great sacrifice of inwrought material." Buchholz v. Rosenberg, 163 Wis. 312, 314, 156 N.W. 946 (1916). The "diminished value" rule was applied as to the basement floor in Buchholz because, in order to put the basement into the form contracted for, such an effort would require a substantial reconstruction of the building and sacrifice of much of the work already put into the project. Buchholz at 314.

The rules of damages set forth here are rules of law, and are not waived in the same manner as objections to evidence are waived. Venzke v. Magdanz, 243 Wis. 155, 160, 6 N.W.2d 604 (1943).

Usually, a trier of fact should determine which measure is more appropriate. W.G. Slugg Seed at 227. "[T]he burden to prove by credible evidence to a reasonable certainty the damages and the amount thereof is with the claimant. He must establish at least to a reasonable probability the amount of these damages." Naden v. Johnson, 61 Wis. 2d 375, 387, 212 N.W.2d 585 (1973). If the claimant only brings forth evidence regarding the cost of repairs, it is the respondent's burden to bring forth further evidence about diminution in value in order for the trier of fact to consider both measures of damages. Engel v. Dunn County, 273 Wis. 218, 222, 77 N.W.2d 408 (1956). "The absence of such evidence does not render evidence of cost of repairs insufficient to support a finding of damage in that amount." Engel at 222. "Damages must be proven with reasonable certainty." DeSombre at 398 (citing Maslow Cooperage Corp. v. Weeks Pickle Co., 270 Wis. 2d 179, 70 N.W.2d 577 (1954)). The claimant must put some "reasonable basis of computation" into evidence. DeSombre at 399 (citations omitted). See Pleasure Time, Inc. v. Kuss, 78 Wis. 2d 373, 385, 254 N.W.2d 463 (1977).