RENDERED: APRIL 22, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001079-MR

MARLIN D. LAWS AND
ELIZABETH LAWS — APPELLANTS

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 99-CI-00162

LARRY RIDDELL — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Marlin D. Laws and his wife, Elizabeth Laws,[1] have appealed from a judgment of the Madison Circuit Court entered on May 10, 2002, following a jury verdict in favor of the appellees, Larry Riddell and Otis West, d/b/a Riddell Construction, concerning the construction of the Lawses' home. Having concluded that palpable error in the jury instructions

[1] Throughout this Opinion, Marlin Laws will be referred to as "Laws" and Marlin Laws and Elizabeth Laws will be referred to collectively as "the Lawses."

affected the substantial rights of the Lawses, we vacate the trial court's judgment and remand this matter for a new trial.

In July 1997 the Lawses purchased land in Madison County, Kentucky, with the intention of building a new home. The Lawses decided to purchase a log home kit, which consisted of plans for the home, the logs and some of the other supplies necessary to build the home. The Lawses also purchased the roofing. The Lawses obtained a loan from Peoples Exchange Bank (Peoples) for $101,263.00, which was for purchase of the land,[2] the log home kit and other supplies, and construction of the log home. The initial plans for the home prepared by Amerilink were rejected by Peoples and then revised by Burke, Parsons, and Bogey (BPB). Peoples required the Lawses to hire a contractor to assist with building the home.

Through a mutual friend, the Lawses met Larry Riddell[3] of Riddell Construction.[4] On June 26, 1998, Riddell submitted a bid of $25,500.00 to construct the home based on the first set of plans.[5] Riddell testified he agreed to set the logs and put

[2] The land was purchased for $14,000.00.

[3] Riddell testified that he had never built a log home, although some of his workers had been involved in the building of a log home.

[4] Larry Riddell is not the sole owner of Riddell Construction. We will refer to Larry as "Riddell" and the owners of the company collectively as "Riddell Construction" throughout this Opinion.

[5] The bid stated that it was for wiring the entire house, plumbing the entire house, installing all flooring, and installing the septic tank as per site evaluation. It further specifically stated for "[l]abor only" and stated

on the roof, but nothing else. He did not want to install the windows because he did not believe the windows would pass code.[6] Riddell made a second bid after the plans were revised by BPB in July 1998, in the amount of $46,900.00,[7] reflecting additional

---

that Riddell would be paid upon completion of the project. Riddell was the only person who signed the bid.

[6] Laws testified that Riddell Construction did install two of the windows.

[7] The work to be performed under the second bid included:

> Install all framing of exterior and interior framing walls.
>
> Install all wiring excluding light fixtures according to NEC.L[.]
>
> Install all plumbing according to Code. Including fixtures for 3 bathrooms.
>
> Install app. 400' water line from meter to house.
>
> Install septic system according to recommendations from health dept.
>
> Install foundation drain around entire perimeter, rock, and backfill.
>
> Build retaining wall at basement 5X6 and pour concrete.
>
> Install flu in basement and 2 stories for insert.
>
> Install metal roofing.
>
> Install 2 [s]ets of stairs: 1 to Left and 1 to basement.
>
> Install underlayment and linoleum entire house 1413 sq. ft.
>
> Pour app. 8X10 [c]oncrete slab in basement.
>
> Bury and install 100' underground cable for electric. Install 2 Ton Heat Pump and Air Handler. All duct work included.

work requested by the Lawses not included in the original bid.[8] The Lawses did not sign on the acceptance line of either bid, so the parties only had an oral contract.

There was conflicting testimony of record regarding the parties' understanding, beginning the day the log home kit was delivered to the Lawses' property. It is disputed whether Riddell was supposed to be present during the delivery of the log home kit. Laws testified that this was understood at the initial meeting of the parties and that he contacted Riddell a few days prior to the delivery and Riddell said he would be present. Riddell testified that moving the logs to the site was not his responsibility. Riddell did send an employee with a crane to move the logs about 300 feet from the drop site to the future location of the home, but the crane broke, and ultimately Laws rented a fork lift and moved the logs on site.

Construction began on the home on November 23, 1998. Laws testified that the home was to be "put in the dry" [9] 11 days after construction began; however, this did not occur. Riddell testified that, while he thought he was to complete the project as soon as possible, he was not aware of a specific deadline, nor was one stated in the bids. He further claimed he was not

[8] Riddell offered to do all the construction; however, it does not appear this was agreed to by the Lawses.

[9] The Lawses state in their brief that "'[p]ut in the dry' means the house would appear finished from the outside but would be unfinished if you looked inside; it consists of putting up the walls, and most importantly, the roof."

hired to install the windows, so he could not have put the house "in the dry".[10]

Riddell testified that the log home package did not match the house plan, and thus, he cut the main roof beam because it would not line up with the roof trusses. Laws testified that this change by Riddell was the first of many problems and stated that cutting the main roof beam altered the dimensions of the home. The Lawses also contend that too much of the metal roof was being wasted. The Lawses further claimed that Riddell Construction built one-half of the roof and then started cutting the steps to the basement. According to Laws, a hole was cut in the floor and then left open. Instead of going back to work on the roof, Riddell Construction started on the inside framing.[11] The roof was not covered until January 11, 1999.

After Laws complained to Riddell about the construction, a meeting was scheduled for January 27, 1999. At this time, Laws had not paid Riddell Construction any money.[12]

---

[10] The log home company set the initial logs, i.e., approximately the first three tiers. A representative from the manufacturer was on site every day and Riddell was on site a few times per week.

[11] The Lawses claim the interior framing was done incorrectly because Riddell Construction failed to leave a three-inch space between the trusses and the top of the wall. Laws testified that he complained to Riddell, who said he would take care of it, but nothing was done to correct the problem. Riddell denies every having this discussion with Laws.

[12] Riddell Construction was supposed to have received a draw, but apparently had never requested it.

Riddell told Laws that if he was not paid for the work completed at that point, he would file a lien against the real estate. Laws told Riddell that he would probably have to finish the work himself because he was going to run out of money, due to wasted materials. At the time of the meeting, the Lawses had purchased the land, the log home kit, the roof, the interior wood, three doors, and the windows for approximately $62,000.00. Riddell had purchased plumbing supplies, the trusses, the hot water heater, the septic system, and the heating and air system.[13] At the meeting, Riddell presented a figure of $37,500.00 due for materials and labor as of that date.[14]

Laws testified that he was "shocked" at the amount claimed by Riddell, but he wrote Riddell Construction a check for $30,000.00 from the construction account at Peoples and signed a $7,500.00 unsecured promissory note, dated January 27, 1999, and due June 27, 1999. Riddell Construction resumed work on the log home through February 3, 1999. The day after the meeting, Laws informed Peoples of what had occurred. Peoples stated that the home would not pass inspection with its current problems and recommended Laws stop payment on the check. He did so without notice to Riddell, who was unaware of the stop

[13] Laws testified that the heating and air system was not large enough.

[14] Charges for labor as of that date were $10,100.00. Riddell had not inspected the house at the time he made the demand.

payment order until February 3, 1999, when his bank informed him.

Pursuant to KRS[15] 376.010, Riddell Construction filed a mechanic's lien against the Lawses' real estate on February 5, 1999. Subsequently, Riddell Construction filed a complaint on February 16, 1999, for the monies allegedly owed by the Lawses and on March 16, 1999, the Lawses filed an answer and counter-claim against Riddell Construction, alleging duress, misrepresentation, fraud, poor workmanship and breach of warranties of merchantability, fitness for the particular purpose, and habitability, and violation of the Consumer Protection Act.[16] Peoples was also named as a party and filed an answer on March 9, 1999. On November 15, 1999, the trial court entered an order holding Peoples's claims in abeyance pending the outcome of the jury trial, as the litigation between Riddell Construction and the Lawses would not affect Peoples's first lien on the real estate.

After various continuances, a jury trial was held on April 22 and 23, 2002. The evidence at trial consisted of the two unsigned proposed contracts, the testimony of Laws, Riddell,

[15] Kentucky Revised Statutes.

[16] Clarence Powell and Mary Powell, who sold the real estate to the Lawses, were named parties, but were never served with a summons. Clarence Powell was deceased at the time Riddell Construction filed the lawsuit, and Mary Powell had released the Powells's lien against the property on October 16, 1998.

a representative for the manufacturer of the log home kit, Riddell Construction's bookkeeper, and the job foreman. The Lawses' main contentions were that they had been forced to agree that certain work had been performed and to its value, and that their constant complaints had been ignored. The Lawses claim that the evidence they presented showed that the log home was constructed improperly and that it would cost over $80,000.00 to correct the defects.[17]

---

[17] The Lawses claimed in their brief as follows:

> Construction began in late November of 1998, and was supposed to be "put in the dry" in eleven days. The cabin was not put in the dry within that time frame and several rainy periods resulted in water damage to the cabin. The roof was assembled incorrectly and daylight shows through the holes. The porch was constructed improperly and now sags. One of the logs that was to be used on the porch was used elsewhere and a substitute piece of lumber from a local retail lumberyard was used, altering the look of the home. Some of the logs in the kit were cut, which altered the dimensions of the home. Material that was to be used as the floor inside the home was instead used on the roof. A drain that was installed at the bottom of the steps outdoors has never worked. Stairs that were to be installed inside the house were altered which resulted in reduced square footage for living space [footnote omitted].

Riddell Construction responded in its brief as follows:

> The Appellee complained in his defense of the action that the Appellee could not get the building square however, with instruction from the manufacturer representatives the workers for the Appellees erected the walls of the home. The Appellants' expert witness, Paul Lawson[,] testified that the log package appeared to be erected correctly. The roof was framed using manufactured trusses and a steel roof was installed on the building. During the time of construction between the first part of November, 1998, and January 27, 1999, the Appellees faced a great deal of rain. The roofers had difficulty staying on the roof. It became impossible to dig

Both parties tendered jury instructions[18] which the trial court found were not materially different. The trial court submitted the following instructions to the jury:

INSTRUCTION NUMBER 1

> It was the duty of Larry Riddell and Riddell Construction to perform the work contracted for in a workman like manner pursuant to the contract between Riddell Construction and the Laws[es]. In order to find for Larry Riddell and Riddell Construction under this instruction, you must believe from the evidence that Larry Riddell and Riddell Construction performed the work contracted for in a workman like manner.
>
> Do you find for Larry Riddell and Riddell Construction under this instruction?
>
> Yes_____ No_____

INSTRUCTION NUMBER 2

> It was the duty of Larry Riddell and Riddell Construction to not misrepresent facts in order to induce the Laws[es] to use their services. In order to find [for] Marlin Laws and Liz Laws under this instruction, you must believe from the evidence that Larry Riddell and Riddell

---

> holes to install the permanent posts for the support of the front porch because water filled the holes or caused them to collapse. As a result, temporary support posts for the porch had to be used until the posts furnished with the kit could be used. The Appellants had windows delivered to the site and expected the Appellees to install them however this was not included in the proposal under which the work was being done and the Appellees did not install the windows [citations to record omitted].

[18] Neither parties' tendered instructions were made a part of the record.

Construction made false statements to the Laws[es] in order to induce the Laws[es] to use the services of Riddell Construction.

Do you find for [ ] Marlin Laws and Liz Laws under this instruction?

Yes_____ No_____

INSTRUCTION NUMBER 3

"Workman Like Manner" means such care as the jury would expect an ordinarily prudent contractor to exercise under similar circumstances.

INSTRUCTION NUMBER 4

If you find for Larry Riddell and Riddell Construction under Instruction Number 1, you will determine from the evidence and state sum or sums of money that will fairly compensate Larry Riddell and Riddell Construction for such of the following damages as you believe from the evidence they incurred:

(a) Reasonable expenses incurred for services rendered.

$_____
(not to exceed 37,500.00)

INSTRUCTION NUMBER 5

If you find for Marlin and Liz Laws under instruction Number 2, you will determine from the evidence and state sum or sums of money that will fairly compensate Marlin and Liz Laws for such of the following damages as you believe from the evidence they incurred:

(a) Cost of Log Kit.

$_____

(not to exceed $27,000.00)

(b) Supplies.

$_____
(not to exceed $20,000.00)

Proceed with this Instruction only if your answer to Instruction No. 1 was "NO", otherwise, continue to Instruction No. 7.[19]

The trial court, submitted an additional instruction as follows:

INSTRUCTION NUMBER 6[20]

Even if you have found against Larry Riddell and Riddell Construction under Instruction No. 1, they may recover for any services they substantially performed to which you feel they may be entitled.

Do you believe that Riddell Construction should recover for any services they performed for which the Laws have received a substantial benefit?

[19] Instruction No. 7 stated that "[n]ine or more of you may agree upon a verdict. If all 12 agree, the verdict need be signed only by the foreperson; otherwise it must be signed by the nine or more who agree to it." The only signature that appears on the verdict form is that of the foreperson.

[20] The Lawses argue that this additional instruction was contrary to Instruction No. 1, which called for a determination of whether the work was performed in a workman like manner. Riddell Construction argues that Instruction No. 6 merely called for the jury to determine if its work resulted in a benefit to the Lawses. It argues that it is entitled to direct reimbursement for material purchased, which is not subject to a quality standard with respect to "workmanship". Further, Riddell Construction argues that the other work was found acceptable by the Lawses' expert witness in an unfinished state, and that the log package appeared to be properly erected. This expert opinion, according to Riddell Construction, was based solely on the Lawses' interpretation of the contract, not a review of the actual documents, under which the work was being performed. However, in its brief to this Court, Riddell Construction admits that there were things wrong with the construction, but states that the jury obviously found that Riddell Construction gave the Lawses something of value for which Riddell should be compensated.

YES _____ NO_____

If your answer is “YES”, what amount should Riddell Construction recover?

$_____

The trial court informed the parties that it was adding the additional instruction and would take note that both sides specifically objected to the additional instruction. The trial court asked if they wanted to make further objections and both parties declined. When the jury returned its verdict, it marked “NO” on Instruction No. 1 and thus did not reach Instruction No. 4, but marked “YES” to Instruction No. 6, and awarded Riddell Construction $33,100.00, which was less than Riddell Construction requested. The jury also checked “NO” on Instruction No. 2, and therefore did not reach Instruction No. 5. The trial court entered a judgment on May 10, 2002, based on the jury award, with interest at 12% per annum from the date of the filing of the mechanic’s lien on February 5, 1999, until paid.

The Lawses filed a motion to alter, amend, or vacate the judgment on May 12, 2002, raising various issues; however, the only issues before this Court concern the adequacy of the jury instructions and the sufficiency of the evidence. In response to the motion, Riddell Construction argued that neither party objected to the instructions and that the instructions did

not call for inconsistent findings of fact because Instruction No. 6 called for compensation for services benefiting the Lawses even though the work did not meet the standards set out in Instruction No. 1. The Lawses' motion was finally denied on May 9, 2003.[21] This appeal followed.[22]

The Lawses argue (1) that Instruction No. 6, which the trial court unilaterally added, was improper and resulted in the jury making an improper award of damages to Riddell Construction; and (2) that the jury's award to Riddell Construction under Instruction No. 6 was not supported by the evidence of record. In its response, Riddell Construction argues that unlike the verdict in Anderson's Ex'x v. Hockensmith,[23] the verdict in this case was not confusing, the

[21] The Lawses filed a petition for writ of mandamus which was denied by order entered August 13, 2003. This Court stated that relief had been granted by the trial court in the May 9, 2003, order, disposing of the Lawses' motion to alter, amend, or vacate.

[22] The rendition of an Opinion in this case was greatly delayed due to the Lawses untimely filing of their prehearing statement and brief.

[23] 322 S.W.2d 489, 491 (Ky. 1959). Anderson's Ex'x states as follows:

> Here we have an erratic verdict. The jury found for both the defendant and the plaintiff on the same issues. The verdict is meaningless because of the contradiction in finding for the defendant twice and then in proceeding to award damages to the plaintiff. So obscure was the intention of the jury that the court must have resorted to speculation in order to enter a judgment on the verdict. More than that, it will be observed that instruction No. 2 authorized a verdict for the plaintiff of a maximum of $3,331.56, less $478; and instruction No. 3 authorized a verdict for the defendant of a maximum of $1,416.08, less any finding for the plaintiff under instruction No. 2. If the word "defendant" was

jury's award was well within the evidence introduced by the parties, and Instruction No. 6 was not inconsistent with the other instructions.

The parties agree that in reviewing the jury instructions, we must consider CR[24] 51(3), which states:

> No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

The Lawses claim that they adequately preserved this issue for appeal because they tendered instructions and objected to Instruction No. 6 prior to its submission to the jury,[25] but they also argue in the alternative that we should review the instructions as palpable error. While we do not believe the

---

> inadvertently used instead of "plaintiff," still, the jury was bound to have credited the $1,416.08 by at least $478, which was directed to be done in instruction No. 2. This but confounds confusion. The verdict does not accord with the instructions. A jury is bound to accept and apply the law as it is contained in the instructions. If it does not, the verdict should be set aside as contrary to law [citations omitted].

[24] Kentucky Rules of Civil Procedure.

[25] See Brown v. Todd, 425 S.W.2d 737, 739 (Ky. 1968); Surber v. Wallace, 831 S.W.2d 918, 920 (Ky.App. 1992) (stating that when a party tenders instructions that clearly state his position, an objection is not necessary); and Cobb v. Hoskins, 554 S.W.2d 886, 888 (Ky.App. 1977).

error was preserved,[26] we do find palpable error. CR 61.02 states:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

To be palpable, the error must be "easily perceptible, plain, obvious and readily noticeable."[27] "[T]he palpable error must result from action taken by the court rather than an act or omission by the attorneys or the litigants."[28] Relief will only be granted from a palpable error if a substantial possibility exists that the result in the trial court would have been

---

[26] We agree with the Lawses that upon tendering proposed jury instructions under CR 51(3) they were not required to specifically object to Instruction No. 6. However, the Lawses' tendered instructions are not in the record, so "we are unable to determine whether they clearly set forth their position and, consequently, whether they have properly preserved the alleged error for appeal." Surber, 831 S.W.2d at 919. The trial judge upon informing the parties of Instruction No. 6, stated that he noted specific objections by both parties. However, neither party made specific objections when given the opportunity. "'The important considerations should be: (1) the protection of the trial court from inadvertent error; and (2) the protection of the parties' rights to a fair trial when counsel in good faith attempts to question the substance of [t]he instructions'" [citations omitted]. Todd, 425 S.W.2d at 739. We do not find the objection met these considerations, nor did it "fairly and adequately present the party's position with respect to a recognized legal theory . . . ." Id.

[27] Burns v. Level, 957 S.W.2d 218, 222 (Ky. 1998) (citing Black's Law Dictionary (6th ed. 1995)).

[28] Cobb, 554 S.W.2d at 888. See also Carrs Fork Corp. v. Kodak Mining Co., 809 S.W.2d 699, 701 (Ky. 1991).

different but for the error.[29] The Lawses argue, and we agree, that their substantial rights were affected by the trial court's action of adding Instruction No. 6. Without this erroneous instruction, there is a substantial possibility that the jury would have awarded less damages to Riddell Construction or none at all.

"The purpose of instructions to a jury is to submit disputed issues of fact for their determination,"[30] and fairly present the legal issues involved.[31] "While clarity in an instruction is desirable, the substance is of greater importance than is the form" [citations omitted].[32] Instruction No. 6 commanded the jury to decide whether Riddell Construction had substantially performed the oral contract between it and the Lawses. "[I]n the performance of a building and construction contract it is the duty of the contractor to perform his work in a proper and workmanlike manner."[33] Under the substantial performance doctrine, a builder, upon substantial performance, is entitled to recovery of the contract price notwithstanding

[29] Butcher v. Commonwealth, 96 S.W.3d 3 (Ky. 2002).

[30] Bennett v. Horton, 592 S.W.2d 460, 464 (Ky. 1979).

[31] Cobb, 554 S.W.2d at 887.

[32] Louisville & Nashville Railroad Co. v. Blevins, 293 S.W.2d 246, 248 (Ky. 1956).

[33] Shreve, 777 S.W.2d at 617.

the work may have been defective or incomplete.[34] However, the doctrine further provides that the homeowner is entitled to recover damages from the builder for incomplete or defective work.[35] Thus, Instruction No. 6 failed to include the entire law applicable to this case. This Court in Shreve stated as follows:

> As is evident, this rule is two-part. Not only is the contractor allowed recovery of the contract price; of equal importance is the contractee's right to recover damages. Without the second half of this rule "substantial performance" would simply amount to a windfall for the breaching contractor. We think that the objected-to instruction did not accurately state the relative rights of the parties in this regard. It put the jury in an either/or position, forcing them to choose between finding for the plaintiffs or finding for the defendant.[36]

Likewise, we conclude that Instruction No. 6 was misleading to the jury because it only dealt with one aspect of the substantial performance doctrine, i.e., recovery by the contractor. The instructions failed to allow for recovery by the Lawses for damages due to the unworkman like quality of Riddell Construction's performance. Instruction No. 1 required the jury to decide whether Riddell Construction's work was of a

[34] Meador v. Robinson, 263 S.W.2d 118 (Ky. 1953).

[35] Id.

[36] Shreve, 777 S.W.2d 618.

workman like quality and the jury answered in the negative. Instruction No. 4 allowed Riddell Construction to recover if the jury found that its work was of a workman like quality, but there was no converse instruction allowing the Lawses to recover for Riddell Construction's failure to perform its duties in a workman like manner. The only way the Lawses could recover under the instructions submitted to the jury was if it was found under Instruction No. 2 that Riddell Construction misrepresented the facts to the Lawses to induce them to use its services. The jury found in favor of Riddell Construction under this instruction, and thus, the Lawses recovered nothing.

The jury's determination that the Lawses were not misled in any way by Riddell Construction does not negate the fact that the jury also found that Riddell Construction's work was not of a workman like quality. Under the substantial performance doctrine, it was error for the trial court not to instruct the jury to consider awarding damages to the Lawses simultaneously with the award to Riddell Construction for the benefit received by the Lawses. "Where a verdict is ambiguous, irregular or defective in form or in substance, a trial court has the power, indeed, the duty when its attention is called to the verdict, to require the jury to reconsider and change its verdict whether or not the court is requested to do so"

[citations omitted].[37] We conclude that the trial court's failure to do so in this case constituted palpable error entitling the Lawses to a new trial.

In Palmore, Kentucky Instructions to Juries,[38] the following instructions are provided:

> 1. It was P's duty under the contract with D to build the home in a good and workmanlike manner, free of defects, and in accordance with the plans and specifications referred to in the contract. If you are satisfied from the evidence that P substantially performed this duty, you will find in his favor and award him the sum of $_____ [unpaid balance of contract price], less, however such amount as you may find D to be entitled to deduct under Instruction 2. Otherwise you will find for D on P's claim against him.
>
> 2. If you find for P under Instruction 1 but are further satisfied from the evidence that although P substantially performed his duty under the contract there were defects in the construction which P did not correct, then you will determine from the evidence the cost reasonably required in order to correct or remedy such defects and (a) if that amount is not more than $_____ [unpaid balance of the contract price], deduct it from the balance otherwise due P on the contract as provided in Instruction 1; (b) if, however, you find such cost to be more than $_____ [unpaid balance on the contract price], you will determine

[37] Anderson's Ex'x, 322 S.W.2d at 490.

[38] Palmore, Kentucky Instructions to Juries, § 38.05 (5th ed. 1989).

from the evidence the difference between the fair market value of P's property with the building as it should have been constructed and its fair market value with the building as it actually was constructed, and award D either the amount of this difference or the reasonable cost of remedying or correcting the defects, whichever is the lesser, from which figure you will then deduct the sum of $_____ [unpaid balance of the contract price] and award the resulting sum to D.

The term "fair market value" as used in this instruction is the price that a person who is willing but not compelled to buy would pay and a seller willing but not forced to sell would accept for the property in question.

3. If you find for D under Instruction 1, and are further satisfied from the evidence that P failed substantially to perform his duty as set forth in Instruction 1, you will find for D on his counterclaim against P and award him the sum of $_____ [amount deposited or paid on the uncompleted contract].

4. [Number of jurors required for a verdict. See Instruction 9, Sec. 15.01.]

The above instructions are consistent with the holding in Shreve and clearly indicate the necessity of determining any recovery for the owner of the property in awarding the contractor damages for substantial performance of the work. While the instructions in this case allowed for a determination of the quality of Riddell Construction's work, they provided no

remedy to the Lawses for damages resulting from Riddell Construction's failure to perform the work in a workman like manner. Having concluded that the instructions to the jury were inadequate and constituted palpable error, we do not reach the Lawses' second issue of whether the verdict was supported by the evidence.

Accordingly, the trial court having erroneously instructed the jury in this case and such error constituting palpable error which affected the substantial rights of the Lawses, we vacate the judgment of the Madison Circuit Court and remand this matter for a new trial consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Traci H. Boyd
Lexington, Kentucky

BRIEF FOR APPELLEE:

Philip M. Owens
Irvine, Kentucky