

RENDERED: NOVEMBER 5, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001379-MR  
AND  
NO. 2003-CA-001448-MR

BILL DOUGLAS

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM CASEY CIRCUIT COURT  
v. HONORABLE JAMES G. WEDDLE, JUDGE  
ACTION NO. 01-CI-00200

JIMMIE COFFMAN; AND  
TERESA COFFMAN

APPELLEES/CROSS-APPELLANTS

OPINION  
AFFIRMING IN PART, REVERSING IN PART  
AND REMANDING

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BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

JOHNSON, JUDGE: Bill Douglas has appealed from a judgment of the Casey Circuit Court entered on April 10, 2003, which found that Douglas had failed to construct a house for Jimmie Coffman and his wife, Theresa Coffman, in a workmanlike manner, and awarded the Coffmans \$13,964.61 in damages. The Coffmans have

cross-appealed from that same judgment, arguing that the damages awarded for the repair of the back porch were inadequate. Having concluded that the circuit court erred by awarding \$4,941.00 in damages for the repair of the center beam of the Coffmans' home, but that the remaining arguments on the appeal and cross-appeal are without merit, we affirm in part, reverse in part and remand for further proceedings.

In early 2000 the Coffmans became interested in building a home on their property in Liberty, Casey County, Kentucky. At the time, the Coffmans were living in a mobile home on that same property. After selecting a floor plan, the Coffmans began searching for a contractor who would be willing to build a home based upon the floor plan that the Coffmans had chosen.

In February and March 2000, Douglas took the floor plan provided by the Coffmans and prepared a handwritten bid. The six-page bid outlined various details of the proposed construction, and included a total price of \$91,640.00. The parties eventually agreed to the terms as stated in the bid, and Douglas began construction in March 2000. Throughout the construction, the Coffmans made periodic payments to Douglas as various phases of the project were completed.

The Coffmans moved into the home after construction was completed in September 2000. Shortly after moving in,

however, the Coffmans began to notice structural problems with the home. Specifically, there were cracks around the areas of the door frames, doors that would not open and close correctly, cracks in the walls and ceilings, cracks in the back porch coupled with drainage problems, and problems with the wood flooring.<sup>1</sup> Because of these structural defects, the Coffmans withheld payment on the final \$8,981.27 that was due under the parties' agreement.

On November 10, 2001, the Coffmans filed a complaint in the Casey Circuit Court naming Douglas as a defendant.<sup>2</sup> Among other things, the Coffmans alleged that Douglas "carelessly and negligently constructed the residence in an unworkmanlike manner, and has refused to make repairs or complete construction." The Coffmans requested damages "to repair the defective work of Douglas and to complete construction under the contract." Douglas filed an answer on January 24, 2002, denying the material allegations in the Coffmans' complaint. In addition, Douglas asserted a counterclaim, asking that the

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<sup>1</sup> Jimmie testified by deposition that a "haze" formed on the flooring, which was apparently glue residue that had been squeezed out from underneath the floor.

<sup>2</sup> The Coffmans also named as defendants Brian and Teresa Zajkowski, both individually and d/b/a Magic Carpet & Floor Covering, and Mohawk Industries, Inc. The Coffmans alleged that Magic Carpet "carelessly and negligently installed the wood flooring," and that the wood flooring manufactured by Mohawk Industries was "defective in its finish." At the close of the ensuing bench trial, the circuit court granted these named defendants' motions for a directed verdict and dismissed the Coffmans' claims against them. The Coffmans have not appealed from that portion of the circuit court's judgment and those named defendants are not parties to this appeal.

Coffmans be held liable for the remaining unpaid balance on the parties' agreement, plus any applicable interest.

After an extensive amount of discovery had taken place, a bench trial was held in the Casey Circuit Court on August 2-3, 2002. The Coffmans and Douglas agreed that the aforementioned problems with the home were caused by an excess "settling" of the house, i.e., the center framework unexpectedly subsided and/or dipped, causing the center walls to separate from the ceiling. As might be expected, however, the parties disagreed as to the cause of the excess settling.

The Coffmans presented evidence in support of their claim that Douglas had constructed the home in an unworkmanlike manner, thereby causing the excess settling and the resulting damage to the home. However, Douglas argued that the excess settling was caused by the poor soil conditions underneath the home. Douglas further argued that he should not be held liable for the damage done to the Coffmans' home, since he was unaware of the alleged poor soil conditions underneath the home.

At the conclusion of the trial, and after considering all of the evidence presented by both parties, the circuit court entered findings of fact, conclusions of law, and judgment on April 10, 2003. Ultimately, the circuit court found that Douglas had "failed to construct the residence in a workmanlike manner," and that this failure "caused major defects in the

house." Consequently, the circuit court entered judgment against Douglas in the amount of \$13,964.61, which represented the cost of repair to the Coffmans' home.<sup>3</sup> After post-judgment motions from both parties were denied by the circuit court, Douglas's appeal and the Coffmans' cross-appeal followed.

We first address Douglas's claim that the circuit court erred by determining that he was liable for the structural damage done to the Coffmans' home. This argument is premised upon his assertion that the poor soil conditions caused the damage to the Coffmans' home, and that the circuit court erroneously determined that Douglas should be held liable for the damage caused by those alleged poor soil conditions. Douglas cites to and relies upon Surber v. Wallace,<sup>4</sup> where this Court stated that a builder is generally held liable for structural damages caused by poor soil conditions if the builder "'knew or reasonably should have known' of the subsurface condition." Hence, according to Douglas, since "there was no way that [he] should have known, or could have known" about the alleged poor soil conditions, he could not be held liable for the structural damage done to the Coffmans' home. We reject this argument.

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<sup>3</sup> The circuit court also awarded Douglas \$8,981.21 pursuant to his counterclaim, which represented the unpaid balance on the parties' agreement.

<sup>4</sup> Ky.App., 831 S.W.2d 918, 920 (1992).

Douglas's reading of the circuit court's judgment is simply incorrect. The circuit court did not base Douglas's liability upon a determination that he was responsible for the soil conditions underneath the Coffmans' home. Rather, the circuit court specifically found that Douglas had "failed to construct the residence in a workmanlike manner," which thereby "caused major defects in the house." In short, there is nothing in the circuit court's findings of fact or conclusions of law indicating that it found the soil conditions to be a cause of the structural damage, or that the circuit court's determination of liability was based upon Douglas's awareness, or lack thereof, of those soil conditions. Accordingly, Douglas's first claim of error is plainly without merit.

Next, we turn to Douglas's claim that the circuit court erred by determining that he failed to construct the home in a workmanlike manner. In essence, Douglas argues that based upon the evidence presented at trial, the circuit court erred by not determining that the alleged poor soil conditions were the cause of the excess settling in the Coffmans' home. We disagree.

Where conflicting evidence is presented at trial, the circuit court's factual findings will not be disturbed on appeal

as long as they are supported by substantial evidence.<sup>5</sup>

Substantial evidence is defined as "evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people."<sup>6</sup> Our review of the record shows that the circuit court's determination as to the causation of the excess settling in the Coffmans' home was supported by substantial evidence.

Mark Baxter, a foreman for Boyle Masonry, testified that in his opinion, the pier pads<sup>7</sup> installed as a part of the house's foundation were not sufficiently thick to support the weight of the home. Baxter further stated that the piers were not properly centered on the pier pads, which, because of the weight of the home, caused the piers to push down on the pads. Hence, the piers tilted and dropped, resulting in the excess settling near the center of the home.

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<sup>5</sup> See White v. Howard, Ky., 394 S.W.2d 589, 590 (1965)(stating that where there was "substantial and credible evidence both ways" on a contested issue, an appellate court would not substitute its judgment for that of the fact-finder); and Kentucky Rules of Civil Procedure (CR) 52.01 (providing in part that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses [emphasis added]).

<sup>6</sup> Sherfey v. Sherfey, Ky.App., 74 S.W.3d 777, 782 (2002).

<sup>7</sup> Pier pads are concrete slabs upon which blocks of concrete are placed together to form piers. The piers are intended to provide center support underneath the house.

Howard Vanoy, a carpenter who was asked to inspect the Coffmans' home following the excess settling, also testified at trial. Vanoy stated that the pier pads had not been properly centered underneath the home. As a result, Vanoy testified that the piers were improperly placed near the edges of the pads. Vanoy stated that the weight of the home pushing down on the pads caused the piers to tilt, which resulted in a failure of the house's center support system.

Finally, Jim Adams, the Boyle County Building Inspector, testified that the pier pads and piers had been improperly installed. Adams stated that the placing of the piers on the edge of the pads caused the center of the home to subside.

Hence, although there may have been evidence presented to the circuit court indicating that the alleged poor soil condition was the cause of the excess settling of the home, there was substantial evidence to support the circuit court's ultimate determination that the excess settling was caused by Douglas's failure to construct the home in a workmanlike manner. No fewer than three expert witnesses testified that the improper installation of the piers and pier pads was the cause of the excess settling in the Coffmans' home. Accordingly, since the circuit court's finding is supported by substantial evidence in the record, it will not be disturbed on appeal.



Douglas next argues that the circuit court erred by permitting Adams "to interpret and apply the law of the Kentucky Building Code"<sup>8</sup> during his testimony. Specifically, Douglas points to instances in which Adams was permitted to testify regarding whether or not a particular area of the Coffmans' home had been constructed in accordance with requirements of the building code. Douglas claims that this amounts to reversible error. We disagree.

Without deciding whether the building code was relevant to the issues litigated below,<sup>9</sup> we hold that any error the circuit court may have committed by permitting Adams to discuss the building code during his testimony was harmless.<sup>10</sup> Both Baxter and Vanoy testified that, in their respective opinions, the failure to properly install the piers and pier pads was the cause of the excess settling in the Coffmans' home.

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<sup>8</sup> See Kentucky Revised Statutes Chapter 198B.

<sup>9</sup> Despite arguing in his brief that "the Code was not even applicable to this action," Douglas failed to cite to any authority in support of this proposition. The Coffmans have ignored this issue altogether in their brief to this Court, and have offered no argument to rebut Douglas's claim that Adams improperly "testified to his interpretation of the Kentucky Building Code."

<sup>10</sup> See CR 61.01 (providing that "[n]o error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"); and Davidson v. Moore, Ky., 340 S.W.2d 227, 229 (1960)(stating that an appellate court "will not reverse or modify a judgment except for error which prejudices the substantial rights of the complaining party").

Hence, even if a portion of Adams's testimony was improperly admitted into evidence at trial, there was other evidence of substance supporting the circuit court's determination that Douglas's failure to construct the home in a workmanlike manner was the cause of the excess settling in the home. Accordingly, Douglas's claim that the admission of Adams's testimony constituted reversible error is without merit.

We next address Douglas's argument that the circuit court made several errors in its calculation of damages. Specifically, Douglas contends that the circuit court erred (1) by awarding \$4,941.00 for the repair of the center beam; (2) by awarding \$2,004.72 for the installation of reinforcing floor joists; and (3) by awarding \$838.89 for the installation of braces for the roof trusses.

In State Property & Buildings Commission of the Department of Finance v. H.W. Miller Construction Co., Inc.,<sup>11</sup> the former Court of Appeals discussed the proper measure of damages to apply for a breach of contract claim based upon structural defects in a construction project:

"When the building is completed but the construction is in some respect defective, the principle upon which damages are to be estimated will depend on whether the defect can be remedied by the expenditure of a reasonable amount of money. If in view of

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<sup>11</sup> Ky., 385 S.W.2d 211, 213 (1964)(quoting Sedgwick on Damages, § 644 (Vol. 2, p. 1293)).

the expense it is reasonable to remedy the defect, then the measure of damages is the cost of remedying it. If, on the other hand, the value of the building with the defect is greater than its value without the defect less the cost of applying the remedy, then the measure of damages is the diminution in the value of the building by reason of the defect."

In other words, the appropriate measure of damages is the amount reasonably necessary to remedy the structural defect, as long as that amount does not exceed the difference between the fair market value of the home as it should have been constructed, and the fair market value of the home as constructed with the structural defect.<sup>12</sup> As Douglas has conceded in his brief, neither party introduced evidence of fair market values at trial. Thus, we review the circuit court's damage awards merely to determine if the amounts were reasonably necessary to remedy the structural defects.<sup>13</sup>

First, with respect to the \$4,941.00 awarded for the repair of the center beam, we conclude that such an amount was unreasonably excessive. The circuit court based this award upon

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<sup>12</sup> Id. at 214 (stating that "[a]s we construe the relationship between market value and cost of remedying the defect, the latter 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 (assuming the defective condition to be known), or (b) if it amounts to more than is reasonably necessary in order to bring the building into substantial conformity with the contract").

<sup>13</sup> Obviously, if Douglas believed that the measure of damages should have been based upon a "diminution in value" determination, it was incumbent upon him to introduce evidence before the circuit court tending to show that such a measure of damages would be the appropriate standard.

a written estimate prepared by Baxter at the request of the Coffmans. However, Baxter testified at trial that he had completed the repair work on the center beam, and that he had been paid in full for the work at a price of \$849.00. Although Baxter stated that Jimmie Coffman performed some of the repair work to the center beam, no evidence was introduced at trial showing the value of this work. Accordingly, we reverse the circuit court's award of \$4,941.00 for the repair of the center beam, and remand with instructions to enter an award in the amount of \$849.00, which represents the cost of the repair work to the Coffmans as established by the evidence at the trial.

Turning to the \$2,004.72 awarded for the installation of reinforcing floor joists, and the \$838.89 awarded for the installation of braces for the roof trusses, Douglas claims that both awards were improper since the parties' agreement did not call for the construction of either the reinforcing floor joists or the braces for the roof trusses. However, this argument overlooks the fact that these damages were awarded to remedy the defects in construction. As the former Court of Appeals clearly stated in H.W. Miller Construction, supra, the general rule is that where defects are discovered in a completed home, "the measure of damages is the cost of remedying it." Vanoy specifically testified at trial that \$2,004.72 for the installation of reinforcing floor joists, and \$838.89 for the

installation of braces for the roof trusses were reasonable costs for repairing the defects in the Coffmans' home. Accordingly, the circuit court did not err by awarding these damages.

Finally, we address the Coffmans' sole argument on their cross-appeal. The Coffmans claim that the circuit court "overlooked one item" when awarding damages. Specifically, the Coffmans argue that the circuit court erred by awarding only \$1,800.00 for the repair of the back porch. The Coffmans contend that they should have been awarded \$10,850.00, which represented the full amount contained in a written repair estimate that was introduced at trial. We reject the Coffmans' argument.

The circuit court declined to award \$10,850.00 for the repair of the back porch based upon Douglas's testimony at trial that the total cost in building the back porch was somewhere between \$1,500.00 to \$1,800.00. Hence, the circuit court was justified in concluding that an award of \$10,850.00 was "more than [was] reasonably necessary in order to bring the building into substantial conformity with the contract."<sup>14</sup> Accordingly, the Coffmans' sole argument on their cross-appeal is without merit and that part of the judgment is affirmed.

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<sup>14</sup> H.W. Miller Construction, 385 S.W.2d at 214.

Based on the foregoing, the judgment of the Casey Circuit Court is affirmed in part and reversed in part, and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-  
APPELLEE:

Jerry L. Foster  
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BRIEF FOR APPELLEES/CROSS-  
APPELLANTS:

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