

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2009 CA 1418**

*RHP by JMM*

**CONSTRUCTION AFFILIATES, INC.**

**VERSUS**

*JMM*

**BONNY BARRY PULLEN, WIFE OF/AND  
BAILEY P. PULLEN**

On Appeal from the 22nd Judicial District Court  
Parish of St. Tammany, Louisiana  
Docket No. 2007-10225, Division "H"  
Honorable Donald M. Fendlason, Judge  
Honorable Allison H. Penzato, Judge<sup>1</sup>

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Bailey P. Pullen

and

Elizabeth W. Wiedemann  
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**BEFORE: PARRO, PETTIGREW, AND McDONALD, JJ.**

Judgment rendered JUL - 9 2010

<sup>1</sup> Judge Fendlason presided over the trial and provided reasons for judgment. After his retirement, a judgment in accord with those reasons was signed by Judge Penzato, pursuant to LSA-R.S. 13:4209(B).

*Pettigrew, J. concurs. (by JMM)*

**PARRO, J.**

Construction Affiliates, Inc. (CAI) appeals a judgment awarding Dr. Bailey P. Pullen and his wife, Bonny Barry Pullen (the Pullens), an amount needed for labor and materials on a renovation and addition to their residence after the Pullens terminated CAI's services on the project. The Pullens filed a cross-appeal, seeking additional damages and reversal or reduction of the award to CAI for work it had completed, which offset a portion of the Pullens' damages. Based on our review of the evidence, we reverse in part, amend in part, and affirm as amended.

**FACTUAL AND PROCEDURAL BACKGROUND**

In early 2005, CAI made a proposal to the Pullens concerning renovations and enlargement of their home for a "design/build" contract price of \$322,500.<sup>2</sup> The Pullens paid a \$15,000 deposit in May 2005 and signed the contract proposal in July. Building permits were obtained on August 15, 2005, and work began on poured concrete footings for the addition to the home. Hurricane Katrina disrupted the building schedule and caused extensive damage throughout the region when it struck on August 29, 2005. Work on the house eventually resumed in October 2005, but the Pullens became unhappy with the delays and the quality of the work done by CAI and terminated its services in May 2006, although the project was still incomplete. CAI sued the Pullens for the unpaid balance of completed work and lost profits--basically, the remaining contract balance of \$124,107.67--minus \$29,807.25 for the cost of certain remedial work that CAI agreed was needed. The Pullens reconvened, alleging defective workmanship and asking for "a sum sufficient to pay for all of the errors in design, costs to cure, errors in construction, failures as outlined above, [and] damages to the existing structure ... ."

After a trial, the court found fault on the part of both parties and awarded CAI \$68,814 for work it had already performed, for which it had not been paid,

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<sup>2</sup> Two change orders eventually increased the price to \$357,474.

less \$17,944.06, representing the costs to correct defects in that work, plus \$5,363.69 for storage of certain doors. CAI does not contest this award. The court then awarded the Pullens the amount of \$47,189.33 for the cost of materials and \$46,730.12 for labor "to complete the project." The total award to the Pullens was offset by the award in favor of CAI, resulting in a net award to the Pullens in the amount of \$37,685.82, plus legal interest. Both parties challenge this award, with CAI contending that no "completion costs" should have been awarded, and the Pullens contending that the evidence showed additional labor costs should have been awarded. The Pullens also seek reversal or reduction of the award to CAI for the portion of the work that had been completed, but not paid, before suit was filed, and for storage fees incurred by CAI.

### **APPLICABLE LAW**

#### **Standard of Review**

A court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding that is manifestly erroneous or clearly wrong. Morris v. Safeway Ins. Co. of Louisiana, 03-1361 (La. App. 1st Cir. 9/17/04), 897 So.2d 616, 617, writ denied, 04-2572 (La. 12/17/04), 888 So.2d 872. The supreme court has posited a two-part test for the appellate review of facts in order to affirm the factual findings of the trier of fact: (1) the appellate court must find from the record that there is a reasonable factual basis for the finding of the trier of fact; and (2) the appellate court must further determine that the record establishes that the finding is not clearly wrong (manifestly erroneous). Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987). Thus, if there is no reasonable factual basis in the record for the trier of fact's finding, no additional inquiry is necessary to conclude there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a factual finding only if, after reviewing the record in its entirety, it determines the factual finding was clearly wrong. See Stobart v. State, through Dep't of Transp. and Dev., 617 So.2d 880, 882 (La. 1993); Moss v. State, 07-1686 (La. App. 1st Cir. 8/8/08), 993 So.2d 687, 693, writ

denied, 08-2166 (La. 11/14/08), 996 So.2d 1092. If the trial court's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse those findings even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. Hulsey v. Sears, Roebuck & Co., 96-2704 (La. App. 1st Cir. 12/29/97), 705 So.2d 1173, 1176-77.

With regard to questions of law, the appellate review is simply a review of whether the trial court was legally correct or legally incorrect. Hidalgo v. Wilson Certified Exp., Inc., 94-1322 (La. App. 1st Cir. 5/14/96), 676 So.2d 114, 116. On legal issues, the appellate court gives no special weight to the findings of the trial court, but exercises its constitutional duty to review questions of law and render judgment on the record. In re Mashburn Marital Trust, 04-1678 (La. App. 1st Cir. 12/29/05), 924 So.2d 242, 246, writ denied, 06-1034 (La. 9/22/06), 937 So.2d 384. A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights. When such a prejudicial error of law skews the trial court's finding as to issues of material fact, the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining the essential material facts *de novo*. Evans v. Lungrin, 97-0541, 97-0577 (La. 2/6/98), 708 So.2d 731, 735. If only one of the factual findings is tainted by the application of incorrect principles of law that are prejudicial, the appellate court's *de novo* review is limited to the finding so affected. Picou v. Ferrara, 483 So.2d 915, 918-20 (La. 1986); Rideau v. State Farm Mut. Auto. Ins. Co., 06-0894 (La. App. 1st Cir. 8/29/07), 970 So.2d 564, 571, writ denied, 07-2228 (La. 1/11/08), 972 So.2d 1168.

### **Construction Contracts**

A written contract is the law between the parties, and the parties will be held to full performance in good faith of the obligations flowing from their contract. LSA-C.C. art. 1983; Lantech Const. Co., L.L.C. v. Speed, 08-811 (La. App. 5th Cir. 5/26/09), 15 So.3d 289, 293. An agreement in which one party

undertakes to construct a building for a specified price and furnishes either his work alone or his labor and materials is a construction contract or contract to build. The price is compensation for the work performed and materials used in constructing the home. See LSA-C.C. arts. 2756 and 2757; Barcat, LLC v. Nail, 44,416 (La. App. 2nd Cir. 7/1/09), 15 So.3d 1246, 1250.

Implicit in every construction contract is the requirement that the work of a builder be performed in a good, workmanlike manner, free from defects in materials or workmanship. City of Plaquemine v. North American Const., Inc., 00-2810 (La. App. 1st Cir. 11/8/02), 832 So.2d 447, 464, writs denied, 03-0329 and 03-0345 (La. 4/21/03), 841 So.2d 796 and 798. If a contractor fails to do the work he has contracted to do, or if he does not execute it in the manner and at the time he has agreed to do it, he shall be liable in damages for the losses that may ensue from his non-compliance with his contract. LSA-C.C. art. 2769. A contractor's liability is not strict or absolute, nor is it to be presumed from the mere fact that a building develops structural problems after construction is completed. Harris v. Williams, 28,512 (La. App. 2nd Cir. 8/23/96), 679 So.2d 990, 994. A building owner seeking to recover damages from a construction contractor for defects bears the burden of proving: (1) both the existence and nature of the defects; (2) that the defects were due to faulty materials or workmanship; and (3) the cost of repairing the defects. Mount Mariah Baptist Church, Inc. v. Pannell's Assoc. Elec., Inc., 36,361 (La. App. 2nd Cir. 12/20/02), 835 So.2d 880, 887, writ denied, 03-0555 (La. 5/2/03), 842 So.2d 1101.

The appropriate measure of damages as a result of a breach of a contract to build is what it will take to place the homeowner in the position he deserved to be in when the building was completed; the owner is entitled to cost of repairs necessary to convert the unsound structure into a sound one or the amount paid to remedy the defect. Martinez v. Reno, 99-114 (La. App. 5th Cir. 9/15/99), 742 So.2d 1014, 1016. Stated another way, if the owner meets the burden of proof, the remedy is to reduce the contract price in an amount necessary to perfect or

complete the work according to the terms of the contract. Moore v. Usrey & Usrey, 52 So.2d 551, 554 (La. App. 2nd Cir. 1951).

Louisiana Civil Code article 2765 states that the owner has a right to cancel the bargain he has made at his pleasure, even in case the work has already been commenced, by paying the contractor for the expense and labor already incurred, along with such damages as the nature of the case may require. A contractor may still recover part of the contract price, notwithstanding defects, when substantial performance is shown. Cascio v. Carpet, 42,653 (La. App. 2nd Cir. 10/24/07), 968 So.2d 844, 851.

### **Mitigation of Damages**

According to LSA-C.C. art. 2002, an obligee must make reasonable efforts to mitigate the damage caused by the obligor's failure to perform. When an obligee fails to make these efforts, the obligor may demand that the damages be reduced accordingly. Mitigation of damages is the functional equivalent of comparative fault within the framework of a damage claim for breach of contract. Thibaut v. Thibaut, 607 So.2d 587, 614 (La. App. 1st Cir. 1992), writs denied, 612 So.2d 37 and 101 (La. 1993). The duty only requires that the injured party take reasonable steps to minimize the consequences of the injury. The standard by which these steps are judged is that of a reasonable man under like circumstances. Easterling v. Halter Marine, Inc., 470 So.2d 221, 223-24 (La. App. 4th Cir.), writ denied, 472 So.2d 920 (La. 1985).

### **ASSIGNMENTS OF ERROR**

CAI contends in its first assignment of error that it was legal error for the court not to award its contract balance of \$121,486, when it awarded the Pullens an amount "to complete the project." It argues that the Pullens did not suffer any damages to finish the project, because they could have allowed CAI to complete the work or could have completed it for less than the contract balance, as evidenced by the court's award. In its second assignment of error, CAI again challenges the award of the costs to complete the project, since CAI was ordered

to vacate the site before the job was finished. It claims that because the Pullens cancelled the contract, they had no right to damages from CAI for its failure to complete it. In its third assignment of error, CAI argues that the Pullens did not pray for the amount needed to complete the project, but only for curative costs; therefore, the court erred in awarding them "completion costs." CAI further contends in its fourth assignment of error that if this court reverses the award of completion costs to the Pullens, CAI is due contractual interest in the amount of 1.5% per month on the unpaid balance of any payments over 30 days past due.

The Pullens contend CAI has mischaracterized the award of damages as "completion costs," when in fact, the evidence shows that these were additional "curative costs" incurred to mitigate and repair the damage done to the original house when CAI left it open to the weather, as well as curative costs not recognized in the expert's summary upon which the court's finding was based. Their first assignment of error challenges the trial court's finding that they failed to mitigate their damages. They allege their claims for labor and materials to cure the defects were broken out from the total bill to finish the house, which was considerably more than the amount claimed for the remedial work.<sup>3</sup> In their second assignment of error, the Pullens seek an additional amount to reflect the full amount of their labor costs, \$93,450.25, rather than the lower amount awarded by the court. They claim the court erred in concluding they paid too much to their laborers, based on the testimony of a local building contractor, Steve Owens, who testified as a rebuttal expert for CAI, when a much better-qualified expert, Arthur B. Middleton, III, an architect who testified on their behalf, stated that the post-Katrina labor costs paid by the Pullens were comparable to the labor costs he incurred for repairs to his own home. They claim in their third assignment of error that the evidence showed they chose the least expensive means to cure CAI's construction defects within a reasonable time, and the court

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<sup>3</sup> After CAI's services were terminated, the Pullens spent approximately \$625,000 to finish the renovations and additions to their house.

erred by failing to recognize that. Finally, they contend this court should reverse or reduce the award to CAI, since CAI admitted in its petition that the cost of necessary remedial work was \$29,807.25, and because there was insufficient evidence to support the claim for storage costs. They also argue in their fourth assignment of error that the court erred in awarding CAI \$56,223.63 for completed work,<sup>4</sup> when that work was done poorly.

In response to the Pullens, CAI contends they have misread the judgment, noting that the court specifically stated in its written reasons for judgment that the award of \$17,944.06 was for curative work and the award of \$93,919.45 was "to complete the project." CAI argues it would make no sense for the court to award one amount for curative work and then award an additional amount for more curative work, as the Pullens contend. CAI claims the \$17,944.06 awarded for curative work was extensively detailed in Owens' report and that the higher amount claimed by the Pullens included many substantial design changes that resulted in additional costs. CAI argues that it paid its carpenters far less than the \$35/hour paid by the Pullens, and that, according to Owens' testimony, the 2006 regional average of hourly wages for carpenters in St. Tammany was \$17.34 per hour. CAI further contends that much of the work described by the Pullens' carpenters as "curative" was not, and that the carpenters' invoices also reflect inordinate amounts of time for the work they claimed to be doing.

In rebuttal, the Pullens note that the trial was never about the cost of finishing the house, but was about the cost of repairing a water-damaged home and correcting poor construction techniques, poor design, and defective workmanship in the work performed by CAI. They argue that when the court stated it was awarding an amount needed to complete "the project," the project meant the work required to cure the defects, which were not only aesthetically deficient, but were also structurally incorrect and dangerous.

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<sup>4</sup> This amount actually represents unpaid completed work and storage fees, less the cost of curative work.



## REVIEW OF EVIDENCE

The record in this case could be a script for an episode of HGTV's popular "Holmes on Homes" series, in which the super-contractor "rescues homeowners from renovations gone wrong." Adding drama to our script is the fury of Hurricane Katrina, which wreaked havoc in the area where the Pullens' home renovations had been started a month earlier by CAI. Now this court must pick up where the television drama ends, after the last nail is in place, when the parties are trying to sort out who owes what to whom.

Cal Jones, the owner and principal of CAI, testified on its behalf. Jones is a licensed architect and has a general contracting license, a license in residential construction, and a construction management license. He stated that over the last 29 years, CAI had been involved in residential and commercial construction, including work on the Morial Convention Center and the Zephyr baseball stadium; he estimated that CAI had done about \$2.6 billion dollars worth of work in that time. CAI's first involvement with the Pullens was designing a home intended for some other property that they owned. But when they bought the property on Jack Fork Road that is the subject of this litigation, they scrapped those plans and decided instead to renovate some buildings on the new property. CAI's first job was renovating a caretaker's cottage so the Pullens would have a temporary place to live while work was done on the main house. Other than a few minor "punch-list" items that CAI easily corrected, the Pullens had no complaints about the work done on the cottage and began consultations with Jones to design and build renovations and additions to the main house. The original structure of the main house was about 720 square feet "under beam," and the plans involved renovating that building and adding approximately 2000 square feet "under beam" in living space on three sides of the house, plus approximately another 2000 square feet of porches, decks, and carport area.

On January 17, 2005, CAI sent a letter proposal to the Pullens, outlining the scope of the work and proposing a contract price of \$322,250. The estimated

time to completion was 180 days and the anticipated start date was February or March. The letter also stated that a \$15,000 deposit would be due upon the Pullens' acceptance of the contract. That check was written on May 12, 2005, and was received by CAI shortly thereafter. At that point, the plans were refined and by July 15, CAI submitted the final set of plans to the permitting office. The plans were approved and all permits were granted by August 15, 2005. Photographs in the record dated August 22, 2005, show that work had begun on poured concrete footings for the additions to the house. On August 25, CAI invoiced the Pullens in the amount of \$63,337 for site work, concrete foundations, some masonry work, and some preparatory work for framing.<sup>5</sup> Four days later, Hurricane Katrina roared through the area, leaving landscapes and lives so altered that work on the Pullens' project was brought to a standstill.

In the aftermath of Katrina, people were displaced and businesses were shuttered; construction materials and skilled workers were hard to find. Jones testified that CAI's work force was completely gone. Since its regular framing crew was unavailable, CAI was forced to hire less experienced carpenters who had never worked together before. The lumber company that CAI generally used was closed; therefore, it had to find other sources for many materials. Additionally, because so much construction work was being done in the wake of the hurricane, the demand for and price of both materials and labor increased.

Jones testified that in early October, CAI began framing the exterior of the house. A bill for this work in the amount of \$19,687 was submitted to the Pullens on October 10 and was paid. By late October, photographs show that the addition on the side of the house facing the pond was decked and framed, and exterior framing had begun on the laundry area on one side and the bedroom addition on the other side of the house. An invoice for this work in the amount of \$11,531 was submitted November 1 and was paid. Another invoice was submitted December 20 to cover completion of most of the exterior framing and some

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<sup>5</sup> This invoice was paid September 9, 2005.

charges for electrical and plumbing work. This invoice, in the amount of \$32,369, was also paid. Photographs show that by early January, the roof had been framed, some of the exterior walls had been enclosed, the carport had been added, and some interior framing had begun. Jones said that by mid-February, CAI was trying to finish the roofing on the carport and on the addition to the north side of the house overlooking the pond. A rubberized roofing membrane had been attached to the section of the roof over the carport. Jones said about ninety-five percent of the framing was complete, interior doors had been ordered, and most of the plumbing had been installed. An invoice in the amount of \$60,719 was submitted February 15, 2006. Only \$25,000 was paid to CAI on that invoice, because the work had not progressed sufficiently for the bank inspector to approve payment of the full amount.

On February 17, the first change order was prepared by CAI and signed by Dr. Pullen. In this document, some items were added to the project and others were dropped or revised, resulting in a net addition to the total cost in the amount of \$23,800. Jones testified that by mid-March, when the February invoice had still not been paid in full, he sent the Pullens a letter requesting payment and putting them on notice of default on their contract with CAI.<sup>6</sup> In that letter, CAI offered to continue providing minimal labor to make corrections to the framing in preparation for a framing inspection. Another invoice was sent to the Pullens on April 17 for an additional \$73,095; this invoice also remained unpaid.<sup>7</sup> Jones identified a second change order reflecting work that had been discussed with the Pullens, some of which was for materials that were already installed. This change order, which added \$11,174 to the project and brought the total project cost to \$357,224, was not signed by the Pullens. On May 24, 2006, the Pullens' attorney

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<sup>6</sup> It is not clear from the record that the Pullens ever received this letter. Jones testified at one point that he hand-delivered it to Mrs. Pullen, but she testified that she had never received it from him. Dr. Pullen also testified that he had "never seen that letter." (R.1187)

<sup>7</sup> The evidence includes a Contract Balance Summary submitted by CAI, which shows the April 17 billing duplicated \$25,000 shown on the February 15 invoice. Therefore, the correct amount to be paid on the April 17 invoice was \$48,095.

sent Jones a letter, advising him that CAI was to immediately cease work on the project, based on serious deficiencies in workmanship, including structural problems threatening the integrity of the building. These defects were confirmed for the Pullens by Arthur B. Middleton, III, an architect who had reviewed the project at their request. Middleton's report was sent to CAI in June, listing a number of problems.

According to Jones, the Pullens had never told him they were dissatisfied with CAI's progress or workmanship or that they had anyone reviewing CAI's work on their behalf. Jones said there were a "couple of little things" that Dr. Pullen had pointed out, which were easily corrected and would be taken care of during the finishing work on the project. Jones acknowledged that the work "was moving a little bit slower" than it would have pre-Katrina, that the job was staffed with some unskilled workers, and that he only visited the site once every two to three weeks until early 2006, when he was there once or twice a week. However, Jones said many of the items described by Middleton were minor and would have been corrected by CAI, had it been allowed to complete the project. After receiving Middleton's report, CAI asked a local contractor, Steve Owens, to prepare a cost estimate for labor and materials needed to correct all of the items listed by Middleton. He estimated that all the items could be addressed for \$29,807.25. However, Owens did not believe all the changes shown on Middleton's list were actually needed, so he prepared a second estimate, showing the cost of all the necessary changes would be \$17,944.06. Jones testified that CAI offered to cure all of the problems listed by Middleton, but the Pullens were unwilling to have CAI do any further work on the house, and they rejected the offer.

It is clear from the testimony of the Pullens that their assessment of the deficiencies in CAI's work was very different from the easily rectified "little problems" described by Jones. At the outset, Mrs. Pullen testified that in spite of many requests, Jones never gave them a copy of the June 15, 2005 final plans for the house, which caused difficulties for them throughout the project. They had

only an incomplete preliminary sketch of the general layout of the structure. According to Mrs. Pullen, she and her husband had many meetings with Jones at which they expressed serious complaints about CAI's lack of progress. When they paid CAI \$15,000 in mid-May, Jones assured them that he would commence work within a week. Yet, it was mid-August before CAI started working on the project. The Pullens' daughter was getting married in May 2006, and it was important to them that the house be completed by that date. After Katrina, Jones assured them that he could have them in the house by December 2005. When that did not happen, Jones guaranteed that they would be in by March 2006, and that everything would be finished by that date except the exterior painting of the back of the house. Obviously, that completion date was also not met.

At their meetings with Jones, the Pullens also complained about many other matters. A major problem described by Mrs. Pullen concerned the kitchen and bathrooms. Despite her many conversations with Jones about her need for a food pantry in the kitchen, he insisted that the food pantry could be located across the entrance hallway from the kitchen. Elaine Beck, a family friend who was an interior designer, volunteered to help design the layout of the kitchen and bathrooms. Mrs. Pullen said she asked Jones several times to get in touch with Beck, but he never did so. When it was time to pick out the shower doors and other bathroom fixtures, Mrs. Pullen could not get information from Jones about the budget for those items and suggestions about where she should shop for them. There was also a problem with the proposed layout for the master bath, in that the shower door would open right onto the bathtub, and the shower itself appeared too small. When she expressed her concerns to Jones about the size of the shower, he assured her "in his very soft spoken manner," that it was adequate space. Mrs. Pullen said she could not really tell from the incomplete drawings or even the framed-out shower area whether it would be large enough.

Mrs. Pullen was at the site almost every day, because the Pullens had an operating horse farm on their property. She identified a series of photographs

that she had taken of the project at various times during the construction. These photographs showed heavy water damage throughout the house. A portion of the roof on the porch of the original main house was removed by CAI very soon after the work began, allowing water to be "gushing in" through the opening. Not long afterward, the sides of the original house were also removed. Mrs. Pullen said exposure to the weather continued for many months. As a result, the heart pine floors in the original house, which the Pullens loved and had planned to retain, became so water damaged, warped, and mildewed that they had to be torn out and replaced after CAI's services were terminated. Sheetrock on the walls of the original house was soaked and began to peel; it also had to be replaced due to the mold. The water also damaged a set of built-in bookcases in the original house. Mrs. Pullen testified that at one point, she opened a drawer in the bookcase, and it had two to three inches of water in it. The photographs showed that the beautiful tongue and groove wood ceilings in the original house had also suffered water damage and were badly stained. Mrs. Pullen said she became so upset about the water damage to the ceiling boards that she got on a ladder with blow dryers to try to dry the wood. After CAI was terminated, the ceiling of the original house had to be refurbished by sandblasting several times and refinishing it. In addition to the damage to the original house, some of the sub-floors in the new rooms had water standing on them for so long that the plywood began delaminating; the photographs showed extensive puddles on the floor and large areas of mold throughout the house.

Mrs. Pullen said that after numerous phone calls and complaints to Jones about all the water, CAI brought in a blue tarp and folded it around the open section of roof. However, since it was not secured properly, the tarp just blew open and continued to allow water in with every rainfall. The open sides of the original house merely had plastic sheeting taped across them, which also blew open. Mrs. Pullen testified that when she complained to Jones about the exposure to the weather and the damage that was being caused, he tried to placate her by

telling her it was very common for houses to take on water during construction. However, Jones admitted to her that his carpenter was inexperienced and was "not aware that he was not supposed to be taking off sections of the roof." Although Jones promised to secure the roof, that promise was never kept.

Dr. Pullen confirmed his wife's testimony and described his own concerns. He said that when the project started, his "first concern was that someone had opened up the 900 square feet home completely to all the weather." When he questioned Jones, he never received a satisfactory answer regarding this situation. His second concern was that he and his wife never had a complete set of blueprints. Dr. Pullen said the first time he saw the July 15, 2005 set of complete plans was when he was in his lawyer's office for his deposition. When the sheetrock around the entrance bathroom and behind the bookcases became soaked with water, Dr. Pullen asked the carpenter foreman to take it down, but he answered that "he was not skilled enough to remove that," because he feared he might damage the cypress bookcases. Dr. Pullen said he then called Jones and was assured that the problem would be taken care of. But even "to the end of the project, it was never taken care of." All the sheetrock on the walls of the original house had to be taken down, because it was soaked and mildewed. Dr. Pullen said he was also worried about the carport, because the main support beam was sagging. CAI's efforts to reinforce the beam were ineffective, and it had to be propped up. There was also a drop of about two and one-half inches between the kitchen and the dining room. Other matters that troubled Dr. Pullen were the "eyebrows" or roof lines at the eaves, the quality of materials being used, and the type of windows that were installed. Instead of using tongue and groove 1 x 6 boards under the eaves, CAI was using a much thinner substance, Texture 111. When Dr. Pullen asked that the more substantial material be used, Jones drew up a change order and charged more for it.

Dr. Pullen reiterated his wife's testimony concerning the water throughout the original and new sections of the house. He said that although his work often

took him out of the city,<sup>8</sup> he probably saw water in the house 30 or 40 times. He testified that he called this to Jones' attention and asked him to remedy it many times. Each time, Jones responded that they would take care of it. However, the tarpaulin coverage that CAI provided was just temporary, and the water never stopped coming in. Dr. Pullen said that during one of his meetings with Jones, he "looked him in the face" and said, "you have destroyed this 900 square feet building." Jones assured him that they would try to secure it, but Dr. Pullen responded that "it has been taking on water for eight months and it's still not secured." On cross-examination, Dr. Pullen stated that when CAI's services were terminated in May 2006, the roof decking was still not complete, and it was still raining into the house.

Dr. Pullen identified a number of documents detailing the carpentry work that was done after CAI's services were terminated. He indicated this was curative work and the total labor cost was \$93,460.25. He also identified a series of invoices from Poole Lumber Company, totaling \$47,189.33, noting that these represented the cost of materials needed for curative work. Another set of invoices represented payments to Bill Rentschler, a builder who monitored the project for the Pullens. Dr. Pullen also testified that he hired Middleton to point out problems in the work that had been done by CAI and to serve as the Pullens' expert witness. Dr. Pullen was very worried about some structural matters, explaining that he felt he needed an expert's opinion on those items, because he "was really concerned that the dwelling would not stand." Just looking at the north wall that CAI had installed, he could see there was nothing holding it up; it was not attached to any other part of the structure. Another main concern was how the new breakfast room, dining room, and kitchen were going to be held together. On Middleton's advice, "lam beams" were installed to support those areas, as well as on all four sides of the carport to correct a drop of over three

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<sup>8</sup> Dr. Pullen explained that he specializes in treatment of brain tumors with radio-surgery, which he provides through contracts with several hospitals in the area and in New Orleans.



inches. He testified that there were also problems with the sills and floor joists, as well as with the stud walls and framing, all of which required corrective work after CAI was terminated. Dr. Pullen identified payments for those materials, payments to a plumber and electrician, and payments for cabinets, beams, flooring, roofing, insulation, drywall installation and finishing, and sandblasting.<sup>9</sup>

Dr. Pullen testified that when CAI's services were discontinued, the interiors of the new sections had not been closed in at all; there was no insulation or sheetrock on the interior walls. The electrical and plumbing work was incomplete. The metal roofing was not on. The Pullens searched three months before they could find someone to complete the project. In the interim, they had Rentschler secure the building against the elements. They eventually found two carpenters from Bogalusa to do the work, "Beau" Hartfield and David Atkinson. The Pullens paid them \$35 per hour and paid their helpers \$25 per hour. According to Dr. Pullen, the wages reflected the post-Katrina scarcity of experienced craftsmen. These carpenters did not have access to a complete set of plans, because the Pullens had never received those from CAI. Despite that, Dr. Pullen said they "seemed to know what they were doing."

Dr. Pullen testified that besides the problems they already knew about, when the carpenters began their work, additional problems were discovered and had to be corrected. Because so much had to be pulled out and re-done, the Pullens made some design changes in the house, including switching the kitchen and dining room, enlarging the master bathroom, adding an additional outside deck, and putting a roofing system over both outside decks. With all of the tearing out, corrective work, design changes, and additions, it took an additional \$625,000 and 17 months of work for the Pullen house to be completed.

David Atkinson, who had 30 years of experience as a carpenter, testified that when he began working on the Pullen residence, "[n]othing was right." His

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<sup>9</sup> Although Dr. Pullen identified copies of invoices for many other materials used to complete the house, the Pullens did not claim these as part of the curative costs owed to them by CAI.

description of specific problems included: plywood subfloors that had not been staggered; floor joists crowned upside down, causing humps in the floor throughout the new sections; headers that were removed and had nothing put in their place, causing sagging; many areas beneath the building where blocks had to be inserted and sills replaced; a sagging main sill where a plumber had cut it; floor joists that were not level; water damage to the new subfloors and to the pine floors in the original house; wall studs installed with the crowns facing opposite directions, making the walls wavy; wall studs crooked and spaced unevenly; some exterior siding installed backwards with the smooth side showing, rather than the textured side; bad notches and rotten areas in a beam supporting the cathedral ceiling in the kitchen; inadequate beams in the carport, causing the supporting members to sag; rafters in the carport that were crooked and not on two-foot centers; one side of the carport three inches shorter than the other; an uneven "eyebrow" structure around the whole new section; and walls in the new section that were several inches higher than those in the existing house, causing a misaligned roof line between the new and old sections. In addition to tearing out and correcting all of those problems, Atkinson said they also had to raise the chimney three feet so it would draw properly, and raise the level of the cinder blocks supporting the decks to put them level with the main dwelling. Atkinson said they never had a complete set of working drawings for the project. He identified his time sheets and explained the entries, admitting on cross-examination that his highest hourly wage before the Pullen job was \$18 per hour. Atkinson also acknowledged that although he and Hartfield were being paid \$25 per hour for each carpenter helper, they were actually paying the helpers, two of whom were their sons, only \$11 to \$13 per hour. The carpenter crew worked without direct supervision, although Middleton came out and reviewed their progress, and Rentschler provided general oversight.

The other carpenter, Beau Hartfield, reiterated many of the defects Atkinson had described and confirmed that they never had a complete set of plans

for this extensive work. He spoke of putting additional blocks, footings, and piers under the house to support it and correct sagging of the floor. Plywood decking on the subfloor had to be pulled out and reinstalled, because it was not staggered and did not hit the joists; other portions had delaminated due to standing water. Many joists were uneven and crowned improperly, so they had to be removed and replaced. Wet and moldy sheetrock and insulation in the original house was pulled out and replaced. Wall studs were not level, were crowned improperly, and were uneven. Also, there was a three-inch difference between the new walls and the existing walls, so most of the eyebrow around the new sections of the house had to be taken down and adjusted. All the tongue and groove boards had to be removed from the eaves, and the rafter tails had to be replaced. Sagging beams in the house and carport were replaced with lam beams. There were no blocks against the house walls to support the outside decks where they met those walls, so the carpentry crew raised the existing blocks and tied the decking into the building by nailing it to the sill. Hartfield discussed the entries on his time sheets, and said he and Atkinson did not waste time or do work that was not necessary. He said that as they did the work, they discovered other problems that had to be corrected, and it was not the type of construction that just came together easily. One of the inspectors told them that on the north wall in the kitchen, the studs had to go from the floor to the ceiling, so they re-constructed that wall. They also rebuilt the east wall. They had to cut some pipes during their work, but they tried to just pull back, and not cut, the electrical wiring that was in place. Hartfield testified that Rentschler visited the job site regularly and consulted with them concerning the work; Middleton also came out and took notes on the project. Hartfield said his highest wage rate on previous work was \$30 per hour.

Bill Rentschler, who had been in the construction business for forty years, testified that he began visiting the project at the request of Mrs. Pullen's father before meeting either of the Pullens. Right from the beginning, he noticed a "lot of poor workmanship" by CAI. In addition to exposure of the original house to the

weather, there was debris all over the work site and a general lack of organization. When he eventually met the Pullens, he agreed to look at the project periodically and point out problems, so they could discuss them with Jones. Rentschler commented on a number of the photographs in the record, pointing out deficiencies he had recognized, some of which he considered dangerous structural problems. He also described the ceiling decking in the addition, which was one by six tongue and groove boards supported by beams spaced between four and five feet apart, which was inadequate. Rentschler said this was all taken off after CAI was terminated and was redone using two by six tongue and groove boards. He did not mince words in providing his opinion of CAI's work, stating:

If I would have pointed [all the deficiencies] out, Mr. Jones would have been gone the first damn day. Because he had no supervision there whatsoever. I could have sent up a half a dozen children that could take and cut all that expensive material into three and four foot pieces and nailed them up on the side of the house.

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I was so disgusted with the quality of workmanship, I was ready to throw myself under the train. I said if this is what carpenters are today, I am glad as hell I am damn near dead and won't be doing this long. Because I wouldn't sign my name to that kind of crap.

Rentschler acknowledged that a reasonable length of time to complete this renovation project would have been approximately a year, but when, as in this case, you have to tear out almost everything to start over again, it takes about twice as much time.

Middleton said his first visit to the project was in June 2006. The Pullens had asked him to check the project and advise them about anything that had to be corrected. Middleton described himself as a perfectionist, saying that he was very concerned with quality work. Based on what he saw, he said it seemed the people doing the work did not really know what they were doing; either they lacked supervision or were terribly inexperienced. He acknowledged that after Katrina, it was difficult finding skilled help, but said it was available if you were willing to pay for it. For post-Katrina repair work on his own house, he paid about

what the Pullens had to pay the carpenters who did their corrective work.

He described many of the same deficiencies that had been detailed by the Pullens and other witnesses and stated, "To correct all of that is very, very labor intensive, and you almost have to go back down to the studs to get it where you can start over again and get it right." Middleton said if this had been his house, with the amount of money being spent, he would have torn it down and started over again. However, this was not practical, especially since the work had been ongoing for seven or eight months, and the house was still not totally framed.

Middleton's first written report to the Pullens' attorney was dated June 13, 2006. It stated that although the current addition was supposed to match the existing structure in materials and method of construction, there was very little match between the two. The framing of the addition appeared to have been done by someone with limited knowledge of basic framing practices, as evidenced by wood filler used to patch holes where improper cuts were made, the uneven and irregular fascia/soffit, and inappropriate lengths and crooked application of cedar siding, which appeared to be fencing material. The report described the badly notched beam or truss in the dining room, which Middleton doubted would carry the load. The report also noted that instead of the specified two by six tongue and groove boards in the ceiling, one by six boards had been used across four-foot spans, which were likely to sag over time. After listing numerous additional problems, the report summarized the following recommendations:

1. Remove and replace all roof overhang and eyebrow construction.
2. Replace 1x roof decking with 2x T & G.
3. Replace beams in Dining Room to match existing in size and type.
4. Reinforce walls where beams meet walls.
5. Remove sub-flooring where "humped." Replace floor joists to guarantee a level floor.
6. Straighten bowed, uneven studs to attain straight walls and level top plate.
7. Provide fire blocking at all walls.
8. Remove and replace all exterior siding where wood filler was used to patch improper cuts.
9. Replace main beam in carport and replace with Engineered Glue-Lam Beam.

10. Brace roof joists to walls or beam, not to ceiling joists.
11. Provide wood column at west end of carport where beam meets wall.

Middleton's report estimated this corrective work would cost between \$121,200 and \$135,135. In a follow-up letter on March 30, 2007, Middleton addressed deficiencies that had become apparent since his initial report, design oversights resulting in additional work and costs, job conditions that led to damage to the original structure, work performed to correct deficiencies and bring the building up to code, and costs to rectify these matters. He opined that, in light of the originally unseen deficiencies, the cost of the corrective work had been reasonably accomplished for \$190,000. These costs were expended to bring the project to the point at which it should have been when CAI was told to cease construction.

Steve Owens, a local contractor, testified on rebuttal that he used Middleton's June 13, 2006 report to prepare cost estimates for correcting the deficiencies in CAI's completed work. He went to the site, took measurements of the areas that needed work, and estimated the cost of materials and labor as \$29,807.25. However, there were some items that he did not feel were really necessary. Therefore, he did a second estimate of the costs to repair just those items that he believed were needed. That estimate was \$17,944. He also testified that he was shocked at how much the carpenters had charged the Pullens to do the work after CAI's services were terminated. He said the high average in the St. Tammany area for 2006 was \$17.34 per hour for a carpenter and \$13 per hour for a laborer. Owens had reviewed the carpenters' time sheets and could not find material invoices to match the work they were recording. He also noticed that their work did not seem to be logically organized; for example, instead of working on all the floor joists at one time, the time sheets showed their work on floor joists was intermittent. Owens also believed that some of their time was for extra work required when the designs were changed, rather than for actual curative work. He said that to complete the repairs enumerated by Middleton, a two or three-man crew could have finished in about 25 days, and the entire

house, as originally designed by CAI, could have been completed in three months. Owens said he believed the Pullens received bad advice, and small items were blown out of proportion. For example, he said that although he admired Middleton's expertise, he "overreacted looking at it, because he's a perfectionist, you know. He likes to see something dead perfect straight." Also, Owens believed the people doing the work "could find more things wrong so they could keep making more money than they have ever made before in their lives."

Several other witnesses were called by the Pullens. Frank L. Deffes, an electrician working with Sugarland Electric Construction, L.L.C., whose name was affixed to the electrical permit obtained by CAI, testified that he had bid the Pullen job, but was not awarded the contract. He did not apply for the permit, did not sign it, and did no work on the job.

Deborah Young, a good friend of the Pullens, visited them at the construction site on Easter Sunday in April 2006.<sup>10</sup> She noticed the contrast between the beautiful post and beam construction in the original house and the poor quality of materials and workmanship in the new areas. Young described "a warped, old piece of salvaged lumber" that had "just sort of been toenailed in" to support a load-bearing wall. She saw that one of the windows was not installed, and used a tape measure and level that she found at the site to determine that the opening was not level, such that a window installed in that opening would not open and shut. Young said some of the wall studs were about an eighth of an inch smaller at the bottom than at the top and were not true 16-inch center-to-center spacing. As they walked through the house, she noticed the seams of the plywood subfloors were not staggered. When she saw the original, "gorgeous cypress and oak built-in bookcases," they were water damaged. She said, "It was just awful." Also, there was water damage all along the baseboards and so much white mold all over the heart pine floors that she did not believe they could be

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<sup>10</sup> Young had acted as general contractor on her own house, had built five barns, and her husband was an electronics engineer. Therefore, the court allowed her testimony as an informed lay witness concerning what she saw at the Pullen house.

salvaged. She noticed problems with the wiring, and said her husband came in and said it was not according to code and would all have to be taken out. The sheetrock in the original walls was wet and there was mold everywhere, "[e]ven places you wouldn't think there would be mold." Because of openings in the roof, "the wind and rain was blowing into this house." Young asked the Pullens to show her the blueprints, and was told that they did not have any, only "a little piece of paper that was like a line drawing of the floor plan," which had no specs, did not show how the doors swung, and had no elevations. She said that looking up, she could see that none of the rafters were even. The biggest problem she saw was with the angle of the new roof where it met the existing house. She thought the integrity of the structure might be compromised. The beam down the middle of the carport was already sagging, and the roof was not even on yet. Young believed that the entire carport might come down in a strong wind, and told Mrs. Pullen that it needed to be re-worked with an engineered beam or an I-beam.

Gary Richmond, who was hired by CAI as a cleanup person and moved to carpenter's helper after a week on the Pullen job, testified that he began working there shortly after Katrina, and left toward the end of February 2006. His hourly wage in both positions was \$10 per hour. The project was being supervised by Jade Rung, but he was not at the job site very often, and left the job toward the end of October. The head carpenter on the job was Mike Akers;<sup>11</sup> however his hours varied, and when he was not there, no one supervised the work of the rest of the crew, all of whom were inexperienced carpenter's helpers. Richmond helped put up the stud walls. He said a lot of the studs were twisted or warped, and although some of them were cut out and replaced, it still did not solve the entire problem. When they were ready to tie in the exterior walls to the existing house, they realized the new walls were about three inches too high. However, there was nothing that could be done at that point, so they just tied them into the

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<sup>11</sup> Jones described Akers as "an average-grade carpenter" who had "done some construction work before."



existing house. Richmond also helped lay the subflooring; he and the other carpenter's helpers were not told to install the plywood in a staggered fashion. He said there was one place with a really bad hump in it, which he was told would be taken care of with compound on the floor. There was also a lot of water damage. Rain came through the rafters of the new section and through the windows and roofing that had been removed at the front of the original house.

Jade Rung testified that he was a licensed construction engineer and had been a construction manager for CAI. He was the project manager for the beginning of the Pullen job, including the foundations, the piers, the floor joists, and the start of the floor decking. He left at the end of October 2005. Rung said they had a complete set of plans that were on file with the parish and included foundation drawings, framing drawings, electrical layout, and HVAC layout. He said there were some uneven sections of the flooring that would require shimming or cutting a joist or two loose to free them up, but no major problems. He testified that the electrical work was done by an employee of Sugarland Electrical who was not a licensed electrician. Although the permit was in the name of Sugarland, the company did not perform any electrical work on the premises. While he was managing the project, he was on site only once or twice a week, because he was also working another project for CAI.

Elaine Beck testified that she observed the damaged walls and floors as the result of rain coming into the structure. The floors were severely warped. Mrs. Pullen had expressed her dislike of the planned kitchen area, because it was too small, with no food pantry or microwave, and was not very functional in relation to the living area. So Beck suggested switching the location of the kitchen and dining room, which resulted in a larger kitchen with a nice size pantry. Also, as a result of this change, the dining room was immediately to the right of the front entrance, rather than that being the location of the kitchen. Beck sketched the layout of the rooms and planned the kitchen to make use of cabinets that had already been ordered by CAI and were in storage. She also made some

recommendations concerning the master bathroom, because the shower door was opening into the tub. So the shower was moved and enlarged, making the bathroom space more functional. Beck said she was never given a complete set of plans, and whenever she asked, Mrs. Pullen told her that Jones "is working on it." In September 2006, she herself made a sketch of the kitchen layout in order to guide the installation of fixtures and cabinets.

John M. Klein, Jr., a plumber operating under the trade name of John's Plumbing, worked on the plumbing for the Pullens after CAI had been terminated. He testified that when he began the job, there were some things that were not up to code and were preventing them from passing inspections. Klein was actually the second plumber who worked on the Pullen property after CAI's services were discontinued. Therefore, he did not know which work had been done by CAI and which had been done by the previous plumber.

#### **ANALYSIS**

We address first CAI's first three assignments of error, all of which are based on its contention that the court legally erred in awarding the Pullens an amount "to complete the project" and not awarding CAI its contract balance. CAI also argues that no damages for failure to complete the project should have been awarded, since the Pullens terminated CAI's services and would not allow it to complete the project or correct its errors. We disagree with CAI's characterization of the award. This award was not for damages for CAI's failure to complete the Pullens' residence, nor was it for "completion costs." Based on a thorough review of the evidence, we are convinced that the trial court's award to the Pullens of an amount "to complete the project" was actually the amount the court found was needed to bring the construction to the point where it should have been when CAI's services were terminated, thus completing the project to that date. The evidence shows that this award was made to remedy defects that were not itemized by Middleton in his initial report and were not priced by Owens in either of his reports. Middleton's June 13, 2006 letter listed only those items in the new

section of the house that he could see at the time and that he believed should be corrected. That letter did not address **any** of the damage to the original house, which was extensive and necessitated repair and refurbishing of that structure. Also, as he noted in a follow-up letter a year later, there were additional problems that were discovered during the curative work; these also had to be corrected and were not included in his June 13, 2006 letter. Owens testified that he based his cost estimates on the items listed in that letter only. The court used the lesser of Owens' two cost estimates as the basis of its award for "curative work." Therefore, although the court used the words, "to complete the project," we do not interpret this as an award of "completion costs," which the evidence showed were actually \$625,000.<sup>12</sup> Therefore, we find no legal error in the court's decision to award labor costs for additional work, beyond what was itemized in Middleton's letter and Owens' cost estimate as "curative work."<sup>13</sup>

Turning to the Pullens' assignments of error, the first three assignments challenge the court's finding that the Pullens were at fault in failing to mitigate their damages by not properly supervising the work being done on their home and by paying too much in labor costs after terminating the contract with CAI. The Pullens seek the full amount of their labor costs, which they contend were reasonable under the post-Katrina circumstances. Based on our review of the evidence, we conclude that the court's finding that the Pullens did not mitigate their damages was manifestly erroneous.

The evidence concerning the costs for post-Katrina labor was from the Pullens, the two carpenters whom they hired, Middleton, Jones, and Owens. The Pullens testified that they looked diligently for three months before they could find skilled carpenters to correct the construction defects, repair the damages to the original structure, and complete the house. They were finally able to locate

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<sup>12</sup> We pretermitted discussion of CAI's fourth assignment of error, since it was premised on this court's reversal of the award to the Pullens and an award to CAI of its unpaid contract balance.

<sup>13</sup> As will be discussed in the succeeding paragraphs of this analysis, although the court's decision to make such an award was not legal error, the amount of the award will need to be adjusted due to manifest error in some of the computations.

Hartfield and Atkinson in Bogalusa, based on a recommendation from Mrs. Pullen's father. There is no doubt that their hourly rates were high, but Middleton testified that he had hired carpenters to do repair work on his own house in the wake of the hurricane, and their wages were comparable to what the Pullens paid. Jones was asked what he paid his carpenters in that time frame or today. He responded, "Carpenters that are working for me **today**, if they are a foreman, they're making probably someplace between 20 and \$25 an hour. Helpers are making between 10 and 12. Carpenters, assistant carpenters [are] making in the 18 to \$20 range." (Emphasis added). The case was tried in May 2008. Jones did not offer hourly wage figures or produce payroll records for the work done during the late 2005-2006 time period. In fact, CAI presented **no** evidence of the amounts it was paying its one carpenter and several carpenter's helpers who worked on the Pullens' house during that time. The hourly wage rate for skilled laborers at the time of trial in May 2008 has no relevance to the hourly wage rate for the same laborers in the extreme situation following Katrina. Moreover, Owens, although he referred to a statistical report of the average regional wage for carpenters in 2006, never stated what he was paying his own workers during that time period, saying only, "I generally try to pay all my people 10 to 20 percent above the regional average." In addition, Owens was not at the site while the work was being done, and had no way of knowing what the crew was doing on any particular day. Although Owens claimed he could not match up materials with the type of work the carpenters claimed to be doing, the initial purchase from Poole Lumber when they first began working included many of the items Owen mentioned. Therefore, his testimony was more speculative than factual, and there is no other evidence in the record that the wages paid by the Pullens were excessive or that the carpenters "padded" their work records.

We note also that the Pullens, who were not knowledgeable in construction and renovation, took reasonable steps to minimize the possibility of problems with the construction of their home. They hired an architect/contractor with years of

experience and a good reputation, whose work they already knew. They also had a high personal opinion of him and a friendly relationship with him and his wife. Mrs. Pullen was on the job site almost every day to review the progress of the work. The Pullens asked many times for a copy of the full set of plans, so they could monitor what was being done. They consulted with Rentschler and had him observe the progress of the job, in order to learn if there were deficiencies in the materials or workmanship, so they could relay those concerns to Jones. They met with Jones or called him on many occasions to communicate their worries about the progress and quality of the work. When he failed to deliver on his promises, and they could clearly see the damage to the original house and the defects in the new construction, they sought the advice of an architect. When they finally decided they had to terminate CAI's services, they hired Rentschler to oversee the rest of the work on their behalf. The evidence shows they did everything they could reasonably do to protect their investment and ensure proper performance of the construction contract. When, despite their continued best efforts to monitor the work, CAI breached the contract by delays, shoddy construction, and irreparable damage to portions of the original house, the Pullens chose the only reasonable alternative and found other people to complete the project. Their decisions to modify and expand the design to make it more functional and to upgrade some of the materials has no relevance whatsoever to whether they did what was reasonable to mitigate the damages that had already been caused.

Finally, although CAI contends the Pullens submitted many invoices for labor that was necessitated by design changes or were simply needed to complete the house, the evidence shows that the Pullens claimed damages only for items required to correct deficiencies and repair damages.<sup>14</sup> A "Carpenters Recapitulation" in the record is supported by weekly time sheets with entries for

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<sup>14</sup> CAI included in its argument an allegation that some of the materials were also not needed for "curative" work. However, CAI did not assign as error the cost of those materials, and in fact, stated that it did not contest the court's factual finding on that point.

each item of work done. That work is then summarized for each week as curative work, non-curative work, or miscellaneous. The entries on the carpenters' time sheets can be correlated with their testimony concerning the curative work that had to be done. The recapitulation shows that, as would be expected, the initial weeks of work are spent entirely on curative work. As the job proceeds, later weeks begin to show more non-curative work, such as putting on the roof and installing the outer decks. The total of \$93,460.25 claimed for the carpenters' work includes the labor costs for curative work only, plus the rental cost of the sandblaster used to refurbish the ceiling in the original house. On reviewing these entries, however, we noticed that there were three weeks during which changing of windows is shown as curative work. This should not have been so labeled, because in the first change order, Dr. Pullen approved the use of aluminum windows, rather than wood windows, throughout the house. Therefore the labor costs for this activity, totaling \$6,019.50,<sup>15</sup> should not have been included as curative work, thus bringing the cost of such labor to \$87,440.75.<sup>16</sup>

Accordingly, although there was an evidentiary basis for the court's factual finding, our review of the entirety of the record persuades us that the court was clearly wrong in finding that the Pullens did not mitigate their damages and in reducing the labor costs they incurred in curative work. Based on our review of the evidence, the total labor cost for curative work, in the amount of \$87,440.75, should have been awarded to the Pullens. However, this **total** labor cost includes the amount that was needed to repair the defects in the work that had already been completed by CAI, and is not an award in addition to that work. The carpenters' time sheets did not differentiate between work that they did to correct the defects in CAI's completed work, and work that they did to rectify damage to the original structure and to correct additional problems they discovered. This will

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<sup>15</sup> The week of 11/14/06 included \$1,680; the week of 11/20/06 included \$2,372; and the week of 11/27/06 included \$1,967.50.

<sup>16</sup> \$93,460.25 - \$6,019.50 = \$87,440.75.

be taken into consideration in our amendments to the judgment.

We also find that the trial court manifestly erred in reducing the award for curative costs to \$17,944.06, based on Owens' second estimate, rather than using his first estimate, which included all the defective items Middleton had noted in his June 13, 2006 letter. CAI admitted in its petition that it recognized that certain remedial work was needed to correct defects in its construction, as was described in Middleton's letter and Owens' first cost estimate, and that the cost of this remedial work was \$29,807.25. Other than Owens' opinion, there was no evidence that the items described by Middleton were not necessary or required by the contract. Owens eliminated some items from his second computation, because they were not required by the local building codes or were not needed for structural integrity. For instance, he eliminated the replacement of the ceiling decking that Middleton had recommended, because it was not in a place on which people would walk. However, the contract called for a match between the old and new structures as much as possible. Therefore, the use of two by six tongue and groove boards was required by the contract. Moreover, even Jones admitted that the one by sixes were incorrect; he said he thought the supplier must have "shipped the wrong material and the guys just put it in." Another item that Owen thought was unnecessary was the replacement of the main beam in the carport with an engineered glue-lam beam. He opined that it could simply be jacked back up and have additional plywood added. However, the record shows that CAI attempted a similar repair to that beam, and according to all the witnesses except Jones, the beam continued to sag. Most significantly, Jones testified, "I agree with Mr. Middleton's report," which stated **all** of the items should be corrected. Therefore, the award to CAI will be adjusted to reflect \$29,807.25 as the curative costs to be deducted from its award for the work it had completed on the job.

However, as noted above, these curative costs were included in the total labor costs that we have determined should have been awarded. Therefore, to avoid a double recovery to the Pullens for the total curative work, the total award

for labor costs will be reduced to \$57,633.50.<sup>17</sup>

The Pullens also claim there was insufficient evidence to support CAI's claim for storage costs for certain cabinets and doors, for which the court awarded CAI \$5,363.69. The court's reasons for judgment explain that this amount was "for storage of the doors which were never picked up by defendants." Jones testified that he had ordered custom doors, which the lumber company was willing to store for a while. However, at some point, CAI was asked to take the doors. Since CAI was no longer on the job and Jones had no place to put them, he rented a PODS unit in which to store them, so they would not deteriorate. Jones also said CAI had put down a deposit on cabinets for the kitchen and master bedroom. According to Jones, the cabinet company, Singer Kitchens, said it would store them for a while, and then told CAI it would have to start charging for storage of the units. Jones testified that he thought CAI paid storage charges for a couple of months until eventually, the Pullens went to the cabinet company, paid the balance, and retrieved the cabinets. He identified the entries for storage charges on CAI's statement dated March 25, 2008. PODS rental charges for storing the doors were shown as \$157.69 per month from June 2006 through May 2007, and \$158.41 per month from June 2007 through March 2008; cabinet storage was shown as \$250 per month from June 2006 through November 2006.

Mrs. Pullen testified concerning the Singer cabinets. She said Singer Kitchens called her to say the cabinets were there, that it could not keep them, and that there was a balance due. Within about two weeks, she paid the balance due, picked up the cabinets, and put them in a storage unit she was sharing with a friend. The Pullens then received a letter from Jones, seeking payment of storage charges for the cabinets, and she immediately called Singer to ask whether there were storage fees due and whether CAI had been paying storage fees. According to Mrs. Pullen, the bookkeeper told her that nothing had been charged for any type of storage, saying, "They told me without a doubt there was

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<sup>17</sup> \$87,440.75 - \$29,807.25 = \$57,633.50.



never a charge to Construction Affiliates or Mr. Cal Jones." The record also includes invoices from Southern Kitchens, which do not show any storage fees charged or paid.

We note first that there was no evidence in the record to dispute Jones' claim about the storage of the custom doors in a PODS rental unit. The Pullens said nothing about picking up or using those doors. The CAI statement shows twenty-two months of such storage, for a total of \$3476.38.<sup>18</sup> Therefore, this amount was properly awarded to CAI. However, the charges for six months' storage of the cabinets was disputed, both by Mrs. Pullen's testimony and by the actual invoice from Singer Kitchens, which did not show any such charges, either paid or unpaid. We conclude, therefore, that there was insufficient evidence supporting the court's award to CAI for six months' storage of those cabinets, or \$1500,<sup>19</sup> and that portion of the award to CAI was manifestly erroneous. Therefore, the award to CAI for storage fees will be amended to \$3,476.38.

The Pullens' last assignment of error challenged the court's award to CAI for completed work for which it had not been paid. They allege that award should be reduced, because the work was done poorly. We disagree with this argument. The court's award took into account the defects in that work when it subtracted the amount needed to cure the deficiencies. However, we have found that the court erred in deducting only \$17,944.06, rather than \$29,807.25, a difference of \$11,863.19. Therefore, the award to CAI for work it had completed, but for which it had not been paid, will be reduced to \$39,006.75.<sup>20</sup>

#### **SUMMARY OF AMENDMENTS TO JUDGMENT**

As a result of this court's findings, the award to the Pullens for total labor costs is increased to \$57,633.50; the award of \$47,189.33 for materials is

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<sup>18</sup> 12 months @ \$157.69 = \$1892.28; 10 months @ \$158.41 = \$1584.10.

<sup>19</sup> The court's award of \$5363.69 exceeds the total storage costs shown on the statement, which were only \$4976.38.

<sup>20</sup> The trial court awarded \$68,814.00 for the balance due for the work performed. Deducting \$29,807.25 from that amount to cure the defects in the work yields a balance of \$39,006.75.

affirmed. Therefore, they are entitled to the total sum of \$104,822.83. CAI is entitled to an award for completed work for which it was not previously paid, in the amount of \$39,006.75, and a further award for storage of doors in the amount of \$3,476.38, for a total award of \$42,483.13. After applying the amounts due to CAI as a credit and offset against the amount owed to the Pullens, the Pullens are entitled to an award of \$62,339.70.

#### **CONCLUSION**

Based on the foregoing, the judgment of February 2, 2009, is amended to increase the net award in favor of the Pullens to \$62,339.70. In all other respects, the judgment is affirmed. Costs of this appeal are assessed to CAI.

**REVERSED IN PART, AMENDED IN PART, AND AFFIRMED AS AMENDED.**