NO. COA10-931
NORTH CAROLINA COURT OF APPEALS

Filed: 19 April 2011

SHARON FORD and GWIN BUFFINGTON,
Plaintiffs,

v. Haywood County
No. 07 CVS 1547

ALL-DRY OF THE CAROLINAS, INC.,
Defendant.

Appeal by plaintiffs and defendant from order entered 15 January 2010 and judgment entered 11 February 2010 by Judge Dennis J. Winner in Haywood County Superior Court. Heard in the Court of Appeals 24 January 2011.

Smathers and Hyde, by Patrick U. Smathers, and Song & Song, PLLC, by Jonathan J. Song, for plaintiffs-appellants.

Young, Morphis, Bach & Taylor, L.L.P., by Paul E. Culpepper and Timothy D. Swanson, for defendant-appellant.

MARTIN, Chief Judge.

On 12 June 2006, plaintiff Sharon Ford purchased a home located at 171 Birch Road in Maggie Valley, North Carolina. Prior to her purchasing the home, three needed repairs were identified: 1) the retaining wall needed to be fixed or

replaced; 2) the foundation needed to be stabilized; and 3) the deck needed to be stabilized.

Defendant All-Dry of the Carolinas, Inc. ("All-Dry") submitted a proposal dated 1 May 2006 which quoted a price of $24,000.00 for the material and labor involved in the installation of a Grip-Tite Foundation Pier System in order to address these needed repairs. Ms. Ford was also given a copy of an unsigned warranty and literature advertising that All-Dry's Grip-Tite Foundation Pier System would cause a home to "solidly rest on bedrock or equal low-bearing strata instead of unstable soil" and to "eliminate shifting, settling problems." The literature also advertised that after installation, an "investment in a solid home or commercial building will be safe." Ms. Ford accepted All-Dry's proposal and, on or about 28 June 2006, All-Dry began the repair work on Ms. Ford's home.

The work was completed on 30 June 2006. That day, All-Dry gave Ms. Ford a document which she signed stating in part:

> This amendment is made part of the contract submitted to ___, dated ____. In the piering and foundation business, there is one overriding goal by All-Dry of the Carolinas, and this is to "stabilize" the affected area against further vertical "settlement." Until this is accomplished, any repairs of a cosmetic nature performed on your home will be futile due to the fact that this type of structural damage is usually progressive.

> As an added consideration, we will attempt to close cracks, render doors and windows operational, and move walls back to their original position. This is something we would sincerely like to see happen; however, we are painfully aware of the consequences of such efforts, and you, as our customer, must be also. There are several factors which affect any contractor's ability to cause the above mentioned items to occur.
>
> . . . .
>
> Due to the above factors [skin friction, obstructions, brick or stone veneer, concrete piers], the possibility of further cosmetic or consequential damages occurring during a lifting operation is much greater than while only stabilizing the area in question. As a result, All-Dry of the Carolinas, Inc., does not accept any responsibility for these consequential damages if they should occur. We, of course, will proceed slowly and with extreme care to minimize the possibility of any damage during the lifting process.

Approximately two months after the installation was completed, Ms. Ford began to have difficulty opening her windows and doors. Interior plaster walls cracked, there were nail pops in her ceilings and walls, and spaces developed in her window and door trim. The slope in her floors changed and the cracks that were in the basement and outside foundation walls increased in size. By August 2006, Ms. Ford noticed that her refrigerator and stovetop had begun to tilt to one side. By September 2006, she noticed additional floor sloping in her dining room. By

October 2006, cracks began to appear in her walls. Since this time, Ms. Ford's home has experienced further deepening cracks, more nail pops, more tilting of floors, pooling and running of water when it rains, a bedroom wall on the main floor of the house separating from the back wall, and shifting of stairs.

Ms. Ford filed a complaint against All-Dry on 30 November 2007 alleging breach of contract, fraud, unfair and deceptive practices in commerce, and negligent infliction of emotional distress. By an amended complaint, Gwin Buffington was added as an additional party-plaintiff, and claims for breach of warranties and negligence were asserted.

By its answers to the complaint and amended complaint, All-Dry denied the allegations contained therein and moved to dismiss. The matter was tried by a jury. At trial, a number of different experts testified as to the manner in which the work was performed, the damages, and the cost of necessary repairs. Without any repairs, the director of building inspections for Haywood County testified that the structure would be condemned and, if not repaired, demolished.

At the close of all the evidence, All-Dry moved for directed verdict. The trial court granted the motion with respect to plaintiffs' claims for negligence and fraud, denied the motion with respect to plaintiffs' claims for breach of

contract, and reserved ruling on the motion with respect to plaintiffs' claims for unfair and deceptive practices in commerce. The jury returned a verdict finding All-Dry breached the contract and awarded damages in the amount of $126,000.00. The jury also found that All-Dry failed to obtain a building permit, that its conduct was in commerce, and that such conduct had proximately caused plaintiffs to be damaged in the amount of $146,300.00.

All-Dry moved for a new trial and a judgment notwithstanding the verdict. The trial court granted judgment notwithstanding the verdict with respect to plaintiffs' claim for unfair practices, but denied the motions with respect to plaintiffs' claim for breach of contract. Judgment was entered awarding plaintiffs $126,000.00 plus interest and the plaintiffs' costs. Both plaintiffs and defendant appeal.

PLAINTIFFS' APPEAL

I.

Plaintiffs contend the trial court erred in granting defendant's motion for directed verdict on their negligence claim. A motion for a directed verdict tests the sufficiency of the evidence to support a verdict for the non-moving party. *Williams v. CSX Transp., Inc.*, 176 N.C. App. 330, 344, 626

S.E.2d 716, 728 (citing ***Whaley v. White Consol. Indus., Inc.***, 144 N.C. App. 88, 92, 548 S.E.2d 177, 180, ***disc. review denied***, 354 N.C. 229, 555 S.E.2d 277 (2001)), ***granting petition for disc. review withdrawn***, 360 N.C. 491, 632 S.E.2d 775 (2006). The trial court takes the non-movant's evidence as true and considers it "in the light most favorable to him, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor." ***Whaley***, 144 N.C. App. at 92, 548 S.E.2d at 180. The motion should be denied unless the evidence is insufficient to justify a verdict for the non-movant. ***E.g. Dickinson v. Pake***, 284 N.C. 576, 583, 201 S.E.2d 897, 902 (1974).

"North Carolina has adopted the economic loss rule, which prohibits recovery for economic loss in tort. Instead, such claims are governed by contract law." ***Moore v. Coachmen Indus., Inc.***, 129 N.C. App. 389, 401, 499 S.E.2d 772, 780 (1998). The rule specifically provides that "[w]here a defective product causes damage to property other than the product itself, losses attributable to the defective product are recoverable in tort rather than contract." ***Id.*** at 402, 499 S.E.2d at 780 (citing ***Reece v. Homette Corp.***, 110 N.C. App. 462, 467, 429 S.E.2d 768,

770 (1993)).

> The rationale for the economic loss rule is that the sale of goods is accomplished by contract and the parties are free to include, or exclude, provisions as to the parties' respective rights and remedies, should the product prove to be defective. To give a party a remedy in tort, where the defect in the product damages the actual product, would permit the party to ignore and avoid the rights and remedies granted or imposed by the parties' contract.

Id. at 401-02, 499 S.E. 2d at 780; *see also Wilson v. Dryvit Sys., Inc.*, 206 F. Supp. 2d 749, 754 (E.D.N.C. 2002), *aff'd*, 71 F. App'x. 960 (4th Cir. 2003) (applying North Carolina law and noting that defendant's "cladding is an integral component of plaintiffs' house. The damage caused . . . therefore constitutes damage to the house itself. No 'other' property damage has resulted, and plaintiffs have suffered purely economic losses"); *Land v. Tall House Bldg. Co.*, 165 N.C. App. 880, 884, 602 S.E.2d 1, 4 (2004); *Gregory v. Atrium Door & Window Co.*, 106 N.C. App. 142, 143-44, 415 S.E.2d 574, 575 (1992) (water damage to flooring caused by malfunctioning and deteriorating doors constituted economic loss not recoverable in negligence); *Warfield v. Hicks*, 91 N.C. App. 1, 10, 370 S.E.2d 689, 694, *disc. review denied*, 323 N.C. 629, 374 S.E.2d 602 (1988).

In the present case, plaintiffs alleged that All-Dry's

negligent construction caused damage only to the house itself. As such, even taken in the light most favorable to plaintiffs, the economic loss rule prevents any recovery on a claim for negligence and therefore defendant's motion for a directed verdict as to that claim was properly granted.

II.

Plaintiffs next allege that the trial court erred in granting All-Dry's motion for judgment notwithstanding the verdict on their claim that All-Dry committed unfair and deceptive practices in commerce. Specifically they allege that a finding by the jury that defendant failed to obtain a building permit as required by law constitutes an aggravating circumstance to support a verdict for plaintiffs on their claim for a violation of North Carolina's act prohibiting unfair and deceptive practices in commerce. We disagree.

The act declares "unlawful" "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1(a) (2009). Whether an alleged commercial act or practice is unfair or deceptive in violation of N.C.G.S. § 75-1.1 is a question of law. *Hardy v. Toler*, 288 N.C. 303, 310, 218 S.E.2d 342, 346-47 (1975) (noting that the jury should determine the facts, and based on the jury's findings, the court should then

determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices). Our review of questions of law is *de novo*. *E.g. Davis v. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 513, 516, 565 S.E.2d 716, 719 (2002).

"In determining the unfair or deceptive nature of an act or practice, each case is fact specific." *Carcano v. JBSS, LLC*, __ N.C. App. __, __, 684 S.E.2d 41, 50 (2009) (citing *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981)). "'A practice is unfair when it *offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers*.'" *Id.* (quoting *Bus. Cabling, Inc. v. Yokeley*, 182 N.C. App. 657, 663, 643 S.E.2d 63, 68, *disc. review denied*, 361 N.C. 567, 650 S.E.2d 599 (2007)). "Stated another way, 'a party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.'" *Id.* (quoting *McInerney v. Pinehurst Area Realty, Inc.*, 162 N.C. App. 285, 289, 590 S.E.2d 313, 316-17 (2004)). "The 'relevant gauge' of an act's unfairness or deception is '[t]he effect of the actor's conduct on the marketplace.'" *Id.* at __, 684 S.E.2d at 50 (quoting *Ken-Mar Fin. v. Harvey*, 90 N.C. App. 362, 365, 368 S.E.2d 646, 648, *disc. review denied*, 323 N.C. 365, 373 S.E.2d 545 (1988)).

Additionally, while under the act "commerce" is intended to include all types of business activities, "the Act does not apply to all wrongs in a business setting." *Id.* at __, 684 S.E.2d at 50 (citing *Hageman v. Twin City Chrysler-Plymouth, Inc.*, 681 F. Supp. 303 (M.D.N.C. 1988) (holding that the act does not apply to every dispute between parties)). In order to recover under the Act, the unfair or deceptive act or practice must be more than just a breach of contract. *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 367-68, 533 S.E.2d 827, 832-33 ("'[A]ctions for unfair or deceptive trade practices are distinct from actions for breach of contract, and . . . a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1.'") (quoting *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700, *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992)), *disc. review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000). The plaintiff must show *substantial aggravating circumstances* attending the breach in order to recover under the Act. *Id.* at 368, 533 S.E.2d at 833. We note that, given this substantial requirement, it is, in fact, "'unlikely that an independent tort could arise in the course of contractual performance, since those sorts of claims are most appropriately addressed by asking

simply whether a party adequately fulfilled its contractual obligations.'" *Id.* (quoting *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 347 (4th Cir. 1998)); *see also Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 42, 626 S.E.2d 315, 323, *disc. review denied*, 360 N.C. 531, 633 S.E.2d 674 (2006).

Our research reveals no North Carolina precedent for concluding that failure to perform an administrative act, such as obtaining a building permit, is a "substantial aggravating circumstance" sufficient to enhance a claim for breach of contract to one for a violation of the act prohibiting unfair practices in commerce. Failing to obtain a building permit does not amount to the required "inequitable assertion of [defendant's] power or position." *Carcano*, __ N.C. App. at __, 684 S.E.2d at 50. We cannot say that plaintiffs established the additional egregious, immoral, oppressive, unscrupulous, or substantially injurious acts needed to impose the heightened penalty under the Act. Thus, we will not disturb the trial court's ruling granting All-Dry's motion for judgment notwithstanding the verdict on the unfair practices claim.

III.

Plaintiffs next contend the trial court erred in limiting its instruction on plaintiffs' unfair practices claim to

defendant's failure to obtain a building permit. The verdict sheet submitted to the jury first asked the jury to find whether there was a breach of contract. Immediately following the breach of contract issue, the verdict sheet asked the jury to determine whether All-Dry "perform[ed] repairs to the plaintiffs' foundation without obtaining a building permit as required by law?" Plaintiffs argue that the jury should have been permitted to consider additional factors which plaintiffs allege were substantially aggravating in violation of the act prohibiting unfair and deceptive practices in commerce, including misleading written promotional materials given to plaintiffs, the faulty installation of the Grip-Tite system, and less than full disclosure of relevant and material facts and terms until after completion of the project. We disagree.

Plaintiffs acknowledge that statements made in All-Dry's promotional materials "may be accurate statements . . . when the Grip-Tite pier system is properly designed and installed." They argue, however, that in the present case, those statements were misleading because of the minimal experience of the All-Dry employees involved in the project. Any warranties made and breached in the written representations given to plaintiffs, along with the actual faulty installation of the Grip-Tite system, are relevant to the breach of contract claim; but

neither of these factors rise to the level of being substantially aggravating for the purposes of an unfair and deceptive practices claim. "Neither an intentional breach of contract nor a breach of warranty . . . constitutes a violation of Chapter 75." *Mitchell v. Linville*, 148 N.C. App. 71, 74, 557 S.E.2d 620, 623 (2001) (citing *Branch Banking & Trust Co.*, 107 N.C. App. at 62, 418 S.E.2d at 700; *Trust Co. v. Smith*, 44 N.C. App. 685, 691, 262 S.E.2d 646, 650, *disc. review denied*, 300 N.C. 379, 267 S.E.2d 685 (1980), *overruled on other grounds*, *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981)).

Plaintiffs also contend the trial court erred by not instructing the jury that it could consider whether All-Dry did not fully disclose all relevant, material facts and terms until after completion of the project. Failure to disclose information has been considered deceptive when tantamount to misrepresentation, *Kron Med. Corp. v. Collier Cobb & Assocs.*, 107 N.C. App. 331, 339, 420 S.E.2d 192, 196, (holding that defendant insurance broker's failure to correct plaintiff's belief that a deposit on insurance premiums would be refundable if the actual coverage used was less than projected constituted a violation of an insurance regulation statute, which constituted an unfair or deceptive practice as a matter of law), *disc. review denied*, 333 N.C. 168, 424 S.E.2d 910 (1992);

however, in the present case, the damage incurred by plaintiffs as a specific result of any false representations by defendant was not ***separate and apart*** from the damage arising out of the breach of contract claim. "Plaintiffs are entitled to one recovery for the same alleged wrongful conduct, but not multiple recoveries under theories of breach of contract and unfair and deceptive trade practices." *See* ***Decker v. Homes, Inc./Constr. Mgmt. & Fin. Grp.***, 187 N.C. App. 658, 666, 654 S.E.2d 495, 501 (2007) (citing ***Marshall v. Miller***, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), ***modified and aff'd***, 302 N.C. 539, 276 S.E.2d 397 (1981); ***United Labs. v. Kuykendall***, 335 N.C. 183, 191-92, 437 S.E.2d 374, 379 (1993)). We hold therefore that plaintiffs' assertions that the trial court erred in instructing the jury are without merit.

ALL-DRY'S APPEAL

I.

All-Dry contends the trial court committed prejudicial error by not submitting to the jury its requested instruction on plaintiffs' duty to mitigate. Where a party properly requests the trial court to give specific jury instructions and those instructions are correct and supported by the evidence, "the trial court is required to give the instructions." ***Maglione v. Aegis Family Health Ctrs.***, 168 N.C. App. 49, 55, 607 S.E.2d 286,

291 (2005) (citing *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 464, 553 S.E.2d 431, 441 (2001), *disc. review denied*, 356 N.C. 315, 571 S.E.2d 220 (2002)).

As a threshold issue, it is not at all clear from the record that All-Dry properly tendered a written request for the mitigation instruction. When the topic of a mitigation instruction was broached during the charge conference, the trial judge replied, "I hadn't—you didn't request such a charge, so I hadn't thought about it." Defendant's attorney responded that "I would request that you think about it." The trial judge then replied, "you haven't formally requested it in a way that I've got to give it." "'Where a requested instruction is not submitted in writing and signed pursuant to G.S. 1-181 it is within the discretion of the court to give or refuse such instruction.'" *Lusk v. Case*, 94 N.C. App. 215, 216, 379 S.E.2d 651, 652 (1989) (quoting *State v. Harris*, 67 N.C. App. 97, 102, 312 S.E.2d 541, 544, *disc. rev. denied*, 311 N.C. 307, 317 S.E.2d 905 (1984)). As All-Dry did not submit a written request, it was within the trial judge's absolute discretion whether or not to give the instruction. As such we do not need to reach the issue of whether a properly requested mitigation instruction would have been appropriate and we find no error in the trial court's refusal to instruct the jury with respect to plaintiffs'

duty to mitigate.

II.

All-Dry also alleges that the trial court erred in denying its motions for directed verdict prior to the jury deliberations and for judgment notwithstanding the verdict or a new trial after the verdict was announced with respect to plaintiffs' breach of contract claim.

"The standard for appellate review of a trial court's decision on a motion for directed verdict is the same as the standard of review for a judgment notwithstanding the verdict (JNOV)." *Poore v. Swan Quarter Farms, Inc.*, 94 N.C. App. 530, 532, 380 S.E.2d 577, 578 (citing *Colony Assoc. v. Fred L. Clapp & Co.*, 60 N.C. App. 634, 637, 300 S.E.2d 37, 39 (1983)), *decision modified on denial of reargument*, 95 N.C. App. 449, 382 S.E.2d 835 (1989). "A motion for a directed verdict or a JNOV must be granted if the evidence when taken in the light most favorable to the non-movant is insufficient as a matter of law to support a verdict in favor of the non-movant." *Id.* (citing *Harvey v. Norfolk S. Ry. Co.*, 60 N.C. App. 554, 556, 299 S.E.2d 664, 666 (1983)). "The evidence is sufficient to withstand either motion if there is more than a scintilla of evidence supporting each element of the non-movant's case." *Id.* at 523-33, 380 S.E.2d at 578 (citing *Broyhill v. Coppage*, 79 N.C. App.

221, 226, 339 S.E.2d 32, 35 (1986)).

The elements of a breach of contract claim are "(1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). The parties do not contest that a valid contract existed.

All-Dry alleges that it completed the necessary work pursuant to the parties' contract by installing seventeen pushpiers in plaintiffs' home. The trial court, however, allowed the issue to go to the jury based upon a theory that All-Dry did not perform its duties under the contract in a "workmanlike manner" as the contract implied. The trial court also noted that there was some evidence that All-Dry breached its express warranty in that a jury could find that plaintiffs' house settled subsequent to the installation of the pushpier system. However, because we agree with the trial court that there was substantial, competent evidence to support the jury's finding that the contract was breached by reason of All-Dry's failure to perform in a workmanlike manner, we need not reach the issue of whether there was sufficient evidence to additionally support the jury's verdict on the alternative theory of express warranty.

All-Dry points to *Everts v. Parkinson*, 147 N.C. App. 315, 332, 555 S.E.2d 667, 678 (2001) and *Oates v. Jag, Inc.*, 66 N.C. App. 244, 246, 311 S.E.2d 369, 370 (1984), *rev'd on other grounds*, 314 N.C. 276, 333 S.E.2d 222 (1985), in support of its argument that an implied warranty is only available to vendee-grantees against vendor-builders. However, these cases stand for the proposition that breach of the implied warranty of *habitability* is not available to future purchasers of a home against the original home builder when the parties have no privity of contract. This line of cases is inapplicable to the present case as All-Dry and plaintiffs were in privity of contract and, furthermore, plaintiffs did not allege a breach of the implied warranty of habitability but rather a breach of the implied warranty of workmanlike installation. When a party contracts to install something, there exists an implied warranty that it will be installed in a workmanlike manner. *Cantrell v. Woodhill Enters.*, 273 N.C. 490, 497, 160 S.E.2d 476, 481 (1968) ("It is the duty of every contractor or builder to perform his work in a proper and workmanlike manner, and he impliedly represents that he possesses the skill necessary to do the job he has undertaken.").

Substantial evidence was presented upon which the jurors could base their finding that the implied workmanlike warranty

was breached. No building permit was obtained for the job. No engineering analysis was prepared prior to the start of the job. Evidence was presented that All-Dry failed to address the need to support an interior foundation wall. Other evidence showed that one of the piers installed did not sit flush with the house and that, to compensate, All-Dry inserted a wooden shimmy to fill the space between the pier and the house. There was evidence that the brackets were not attached to the house and that such failure was a fault in workmanship. Furthermore, testimony was presented that the brackets were not, as they should have been, encased in concrete in order to be protected from the elements, and that no backfill was placed around the piers. Some of the piers were not completely vertical and therefore did not have full bearing contact. One expert testified that the work performed appeared to be incomplete and that the system installed did not ensure continued lateral stability of the house, thus exerting an upward force and causing additional cracking.

Plaintiffs' experts Roger Moore and William Burgin both testified that All-Dry's installation of the push pier system failed to meet the standard and quality of workmanlike construction in the area. This testimony more than supported

the jury's conclusion that All-Dry breached its contractual obligations to plaintiffs.

Nevertheless, All-Dry further contends that its motions for either a directed verdict or a judgment notwithstanding the verdict should have been granted on the breach of contract claim because, it alleges, any damages were speculative. Again, we do not agree.

Contrary to All-Dry's assertions, there was substantial evidence demonstrating the costs which would be incurred in order to repair the home and bring the plaintiffs to the same position that they would have been in had All-Dry fully performed the contract in a workmanlike manner. During the trial, William Burgin testified that plaintiffs would incur approximately $50,000.00 in repair costs. He specifically testified that to complete the remaining structural work would cost approximately $25,000.00 and to repair the esthetic and architectural damage would cost approximately $25,000.00. John Chase estimated that the costs to repair would be between $141,000.00 and $146,000.00.

Edward Medlock also testified about the costs that would be incurred in repairing the home. He testified that a repair plan to stabilize the structure would require a complete geotechnical evaluation that would cost approximately $10,000.00. Medlock

also suggested that a specialty engineering firm conduct a site specific evaluation and then design and install a foundation support system at a cost of approximately $50,000.00. He then estimated that addressing the foundation and framing issues would cost approximately an additional $5,000.00 and that the construction costs to replace or repair the structural damages would cost an additional $50,000.00. Ultimately, Medlock testified that the costs to repair the home would likely outweigh its value such that demolition of the existing structure and building of a new home may be more cost-effective.

All-Dry also contends plaintiffs failed to offer any proof that the damage to their property resulted from any breach by All-Dry. However, we direct All-Dry to, among other evidence, testimony by William Burgin that the pushpier system, as installed by All-Dry, continues to worsen the cracking in plaintiffs' walls and the sloping of plaintiffs' floors.

Finally, All-Dry argues that, because of the express warranty provided to plaintiffs, the measure of damages in this case was incorrectly calculated and should have been limited to the cost of making the work conform to the contract. In general, when assessing damages in construction contract disputes:

> '[t]he fundamental principle which underlies

> the decisions regarding the measure of damages for defects or omissions in the performance of a building or construction contract is that a party is entitled to have what he contracts for or its equivalent. What the equivalent is depends upon the circumstances of the case. In a majority of jurisdictions, where the defects are such that they may be remedied without the destruction of any substantial part of the benefit which the owner's property has received by reason of the contractor's work, the equivalent to which the owner is entitled is the cost of making the work conform to the contract. But where, in order to conform the work to the contract requirements, a substantial part of what has been done must be undone, and the contractor has acted in good faith, or the owner has taken possession, the latter is not permitted to recover the cost of making the change, but may recover the difference in value.'

Hayworth v. Brooks Lumber Co., 65 N.C. App. 555, 558, 309 S.E.2d 572, 574 (1983) (quoting *Robbins v. Trading Post, Inc.*, 251 N.C. 663, 666, 111 S.E.2d 884, 887 (1960)).

As All-Dry correctly points out, "[i]f a construction contract provides that the contractor will repair, replace or adjust defects in materials or workmanship at no cost to the buyer then the measure of damages for such defects is limited to the cost of making the work conform to the contract." *Id.*, at 558, 309 S.E.2d at 574 (citing *Leggette v. Pittman*, 268 N.C. 292, 150 S.E.2d 420 (1966)). The warranty in this case "guarantee[d] the performance of the Grip-Tite Piering System

for a period of twenty-five (25) years. This guarantees that the footings will not settle. If such settling does occur, [All-Dry] will correct the problem at [its] expense or refund the full amount of the money paid to [it]."

Here, however, settling was not the only breach of contract by All-Dry. The failure to perform in a workmanlike manner caused a number of other problems besides settlement——including gaps in window and door frames, cracks in walls, nail pops in ceilings and walls, spaces in window and door trim, changes in floor slopes, cracks in basement and outside foundation walls, walls separating from other walls, and shifting of stairs. With all of these extensive needed repairs, it is clear that plaintiffs are entitled to the difference between the value of what they contracted to obtain——a repaired home without foundation or other construction issues——and the present condition of the home after the unworkmanlike construction did not address its foundational issues and in fact caused a great deal of further damage. *See id.* at 558, 309 S.E.2d at 574.

John Chase testified that in its present condition, the house is worth approximately $36,100.00. He testified that if the foundation was repaired, the value of the home would increase to $163,000.00 and that if the sheetrock and floors were also repaired, the value of the home would increase to

approximately $196,000.00. Bruce Crawford, the Haywood County director of building inspections testified that, without repair, the structure would be condemned and demolished.

William Burgin testified that it would cost plaintiffs approximately $50,000.00 to repair the damages caused by All-Dry. Edward Medlock estimated that it would cost plaintiffs $115,000.00 to repair the damages. John Chase estimated that it would cost between $141,000.00 and $146,000.00 to repair the damages to the home.

The jury's conclusion that plaintiffs were entitled to $126,000.00 in damages is a figure consistent with estimates that the home required repairs which would cost between $50,000.00 and $146,000.00 in order that its value could be increased by approximately $126,000.00 to $159,900.00 so that the home would be repaired and undamaged as contracted for by plaintiffs.

Affirmed.

Judges HUNTER and THIGPEN concur.

Report per Rule 30(e).