2012 IL App (1st) 112892-U

FOURTH DIVISION
June 28, 2012

No. 1-11-2892

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

CONISTON FARM, LLC, an Illinois limited liability company,	)	Appeal from the Circuit Court of Cook County
Plaintiff and Counterdefendant-Appellee,	)	No. 05 L 6565
v.	)	Honorable Patrick Lustig, Judge Presiding.
FRIEDMAN DISTRIBUTING, INC., an Iowa corporation,	)	
Defendant and Counterplaintiff-Appellant,	)	
and	)	
COVER-ALL BUILDING SYSTEMS, INC., a foreign corporation,	)	
Defendant-Appellant.	)	

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *HELD*: The circuit court erred in denying defendants' motion for judgment

notwithstanding the verdict where plaintiff did not present any evidence regarding the cost of repair, the cost of replacement, or the diminution in value of the damaged property, and thus, did not meet its burden of proof on the element of damages. However, the circuit court did not err in denying defendants' motion for judgment notwithstanding the verdict on the counterclaim where plaintiff presented evidence that defendant did not substantially perform under the contract.

¶ 2 Plaintiff and counterdefendant-appellee, Coniston Farm, LLC (Coniston), filed an action for breach of contract, breach of implied and express warranty, and negligent design against defendant and counterplaintiff-appellant Friedman Distributing, Inc. (Friedman) and defendant-appellant Cover-All Building Systems, Inc. (Cover-All). Friedman filed a counterclaim against Coniston for breach of contract. Following a jury trial, the trial court entered judgment on the verdict against Friedman in the amount of $228, 213.01, and against Cover-All in the amount of $532, 497.02. The trial court also entered judgment on the verdict against Friedman on its counterclaim. On appeal, Friedman and Cover-All contend that the trial court erred in denying their motions for a directed verdict and judgment notwithstanding the verdict because Coniston failed to prove the necessary elements for breach of contract, breach of warranty, and negligence, and also contend that Coniston and its attorneys' misconduct and false statements warrant a reversal of the judgment. Appellants further contend that the trial court erred in denying their motion for judgment notwithstanding the verdict on Friedman's counterclaim because Friedman proved a right to recovery. Finally, appellants contend that the trial court erred in denying their motion for a new trial because the verdict was against the manifest weight of the evidence, the jury failed to follow the damage instructions, and the trial court committed various evidentiary errors. For the following reasons, we affirm in part and reverse in part.

¶ 3 BACKGROUND

¶ 4 Coniston is an equestrian facility that is owned and managed by Donna Lyon. In May 2003, Coniston contracted with Friedman to purchase a Cover-All roofing system for its equine facility in Marengo, Illinois. The roofing system consisted of a heavy, woven, fabric membrane secured to steel interior framing and was to be installed by Friedman over a riding arena, a barn with stabling and storage facilities, an office, a viewing room, and a structure connecting the arena and the barn. The contract amount was $184,510.08, with the final 25% to be paid upon completion of the installation. Coniston withheld the final payment, alleging that the roof had visible holes, tears and gaps in it that allowed water to penetrate and severely damage the interior of the facility. After attempts to resolve the issue with Friedman were unsuccessful, Coniston filed the underlying lawsuit. Counts I and II of the complaint alleged breach of contract and breach of implied warranty against Friedman, while counts III and IV alleged breach of express warranty and negligent design against Cover-All. Friedman filed a counterclaim for breach of contract against Coniston for the balance due under the contract, seeking damages in the amount of $27, 067.80.

¶ 5 Defendants filed two motions *in limine*, seeking to bar any evidence of a negligence claim under the *Moorman* doctrine, and seeking to bar Coniston's expert from testifying: (1) that there was harmful mold in the facility and that the facility had to be torn down, and (2) that the cost to rebuild the facility would be $2 million. At the hearing on these and various other motions, the trial court stated that the motion related to the negligence count was really a motion to dismiss that count. The trial court then asked why defendants had not filed a motion to dismiss that count in the 6 years the case had been pending, and defendants' counsel did not have an answer.

The trial court reserved ruling on the negligence count motion. On the motion to bar expert testimony, defendants argued that because Coniston's expert was an architect, he could not testify to anything other than design. Coniston argued that architects are qualified to testify regarding functionality, planning, and cost estimates. The trial court took both motions under advisement and ruled on them the following day, after hearing additional argument from both sides. The trial court stated that the motion regarding the negligence count was a pleading motion cloaked as a motion *in limine*, thus, it was denied as untimely. The motion to bar expert testimony was granted in part and denied in part. The trial court ruled that the expert was not allowed to testify that, in his estimation, the cost to rebuild the facility would be $2 million because he admitted in his deposition that this figure was a "guesstimate" and did not take into account demolition costs or salvage value. However, the expert was not barred completely because the trial court determined that he had the adequate background, experience and training to express the remaining opinions regarding the damage to the facility.

¶ 6 In opening statements, defendants' attorney objected to the statement that Lyon would be testifying regarding the total cost of constructing the facility. Outside the presence of the jury, defendants' counsel stated that the total cost of the project had not been disclosed. Coniston's attorney responded that the documentation provided to the defense included every invoice, canceled check and contract, even though it did not include any single document that listed the total. The objection was overruled.

¶ 7 Lyon testified that she entered into a contract with Friedman on behalf of Coniston to build the barn, arena, and other structures and install the Cover-All roof. The work included

venting and the installation of windows. Lyon also entered into contracts with different vendors for carpentry services, plumbing, heating and electrical work. By December 2004, Lyon testified that the barn was occupied and they started having issues with leakage from the roof and condensation. When it rained, water would come pouring in and they had to put buckets down to catch the water. At other times when it was not raining, there would be moisture from condensation on the metal frame that supported the roof and on the fabric of the roof itself.

¶ 8 Lyon sought advice from various people on how to resolve the condensation issue, including engineers, architects, and mechanical heating and venting professionals. Friedman recommended that Coniston run the ventilation fans 24 hours a day. Lyon testified that the fans installed by Friedman were not large enough, so she had larger fans installed. The problem with condensation improved, but the fans were noisy, industrial, exhaust fans and it was expensive because Coniston was heating the barn and then blowing the air to the outside.

¶ 9 Lyon testified that there were also so many holes in the roof that the water poured in from all directions every time it rained. After Friedman attempted unsuccessfully to patch the leaks, Coniston contacted Cover-All of Wisconsin. Cover-All came out and attempted to patch the visible holes but was unable to repair the leaks in the area that connected the arena and the barn. Lyon testified that Friedman had previously inspected the leakage and condensation and agreed that the roof over the connection area needed to be replaced.

¶ 10 The jury was shown excerpts from a video taken of the barn and arena while it was raining. Lyon identified a long row of buckets inside that filled up with water every time it rained. She also identified rotting wood with the paint peeled off in the connection area. Lyon

testified that the stalls were lined with pine and there was a layer of insulation between the pine and the outer cement board. She said that the insulation was ruined by mold as a result of the leaking water. Lyon stated that over half of the stalls in the barn were affected by water damage. Lyon testified that the viewing room was rotted and the wood in the office was warped. Coniston withheld the final payment to Friedman because the connection area was failing and there were leaks throughout the building. Lyon testified that the cost of constructing the facility was $760,710.03.

¶ 11 On cross-examination, Lyon was asked how she arrived at that figure. Lyon testified that her accountant had calculated the final total on the basis of receipts and invoices from her records. Lyon further testified that she had separated out anything that did not relate to the barn, the arena, and the connection area. Lyon also stated that she did not know what the cost would be to replace the roof of the facilities with a different type of fabric, or with a regular roof. Lyon confirmed that Jensen, an HVAC subcontractor, installed radiant heaters in the ceiling. Lyon testified that Friedman told her that there were scratches on the underside of the roof after the heaters were installed. Lyon explained that the original plan was to install radiant heat in the flooring but because of the thick rubber tile that had to be put down on the floors, she was told that the radiant heat would not be able to penetrate the tile and the only option was to install overhead radiant heat.

¶ 12 On redirect, it was established that Lyon had provided her attorneys with all invoices and tax records relating to the cost of building the facility. Lyon also testified that before filing her complaint, she consulted with engineers and architects to determine what could be done. She

stated that it would not be feasible to replace the fabric roof with a conventional roof, and that her understanding as a layperson was that the building would not support a conventional roof. Lyon further testified that when the radiant heating was initially installed, they had problems with condensation and mold related to the heating, but those problems were resolved.

¶ 13 John Blackburn testified that he was an architect and specialized in equestrian design. Blackburn stated that Lyon initially contacted him regarding possible solutions to the issues with her facility. Blackburn visited Coniston on a rainy day and observed buckets suspended everywhere collecting water. He observed mold, deterioration, and rips and tears in the roof. Blackburn was asked about his general conclusion on the issue of whether it would be economically feasible to repair the damage or whether it would be best to start over. Blackburn stated that if it was mold, as it appeared to be, it was a health hazard. He explained that if they attempted to clean it but the mold came back, it would still be a health hazard. Blackburn concluded that it would be best to tear the building down to its foundation and build a new facility.

¶ 14 Blackburn observed that most of the leaks appeared to be at points where the roof over the different components of the facility came together, so he would not recommend using the same type of roof on a new structure. He further opined that the mold and rot were caused by the leaks, not just condensation. He stated that he observed buckets filling with water and saw the water spilling over into buckets placed underneath those buckets and explained that you do not get that kind of water from condensation but from leaks. He also explained that if the mold and rot had been from condensation, it would have been spread more evenly throughout the building.

Instead, it was concentrated around the areas where the water leaked in from the rain and settled. On cross-examination, Blackburn stated that he was not an industrial hygienist and was not licensed to inspect and determine mold damage. He also stated that he would probably defer to a building contractor for a detailed cost benefit analysis on whether a building should be renovated or torn down.

¶ 15 Daniel Friedman testified as an adverse witness for Coniston. He acknowledged that if a Cover-All roof leaks, there is something wrong with the roofing system. Friedman stated that he visited Coniston to investigate a complaint of too much fabric in the connection area between the barn and the arena. After unsuccessfully attempting to fix the fabric problem, Friedman notified Cover-All and Cover-All agreed to provide a new roof for the connection area. However, Friedman stated that the new roof was never installed. Friedman also observed a hole in the fabric. He visited Coniston again in response to a complaint about leaks in the roof. At that time, Friedman also saw some condensation. He stated that the condensation he observed was normal under the circumstance of not running the fans and the ventilation system.

¶ 16 After Coniston rested, Friedman and Cover-All filed a motion for a directed verdict, on the grounds that Coniston presented no evidence of negligent design, and did not meet its burden of proof regarding damages where it only presented the testimony of Lyon regarding the cost of constructing the facility. The circuit court denied the motion, finding that there was sufficient evidence presented on both causation and damages for the case to go to the jury.

¶ 17 Friedman was recalled to the stand and testified that he owned Friedman Distributing. At the time of the contract with Coniston, the company was the distributor for Cover-All. Friedman

testified that he observed workers scraping the sides of the roof in the connection area while they were hanging the ventilation tubes. Friedman explained that Cover-All never replaced the roof in the connection area because Coniston withheld the final payment on the contract. Friedman testified that he told Lyon she had to run the fans 24 hours a day or it would rain inside because of the condensation. Friedman stated that while he was at Coniston, the fans were not running and it was raining inside. Friedman acknowledged on cross-examination that if it was raining outside, he would not be able to tell if the water inside was from a leak or condensation.

¶ 18 The jury found for Coniston and against Friedman in the amount of $228, 213.01, and for Coniston and against Cover-All in the amount of $532,497.02. On the counterclaim, the jury found for Coniston and against Friedman. The trial court entered judgment on the verdicts, for a total award to Coniston of $760,710.03. Defendants filed a motion for judgment notwithstanding the verdict, arguing that Coniston failed to prove a proper measure of damages because the damages instruction refers to repair cost or fair market value, but not the initial cost of construction. Following a hearing, the trial court noted that all of the objections raised in the motion were raised and argued during the trial. The trial court denied the motion, stating that the jury received adequate evidence to reach its decision and the court would not substitute its judgment for that of the jury. Friedman and Cover-All timely filed this appeal.

¶ 19 ANALYSIS

¶ 20 Appellants contend that the trial court erred in denying their motion for a directed verdict and judgment notwithstanding the verdict, and, alternatively, that the trial court erred in denying their motion for a new trial because the jury's verdict was against the manifest weight of the

evidence. Coniston argues that because appellants do not raise any issues related to the legal determinations made by the trial court but merely attack the jury's verdict, the standard of review should be whether the jury's verdict was against the manifest weight of the evidence.

¶ 21 In *Maple v. Gustafson*, 151 Ill. 2d 445, 452-55 (1992), our supreme court has outlined the difference between the standards of review governing a ruling on a motion for judgment notwithstanding the verdict and a motion for a new trial. On a motion for judgment notwithstanding the verdict, the trial court does not weigh the evidence or make credibility determinations; "rather, it may only consider the evidence, and any inferences therefrom, in the light most favorable to the party resisting the motion." *Id*. at 453. Similarly, the appellate court should not substitute its judgment for that of the jury. *Id*. at 452. In contrast, in ruling on a motion for a new trial, the trial court weighs the evidence and will only grant the motion if the verdict is contrary to the manifest weight of the evidence. *Id*. at 454. A trial court's ruling on a motion for a new trial will only be reversed where it can be affirmatively shown that the trial court abused its discretion. *Id*. at 455.

¶ 22 In the case *sub judice*, Friedman and Cover-All filed a motion entitled "Defendants' Post Trial Motion," in which they requested both a judgment notwithstanding the verdict and a new trial. On appeal, appellants argue that the trial court erred in denying their motion for judgment notwithstanding the verdict because Coniston failed to prove that it sustained damages as a result of a breach of the contract between Friedman and Coniston, and failed to establish the correct measurement of the damages allegedly sustained. A motion for judgment notwithstanding the verdict presents a question of law regarding whether " 'there is a total failure or lack of evidence

to prove any necessary element of the [plaintiff's] case,' " when considering the evidence and all reasonable inferences in a light most favorable to the plaintiff. *Jablonski v. Ford Motor Co.*, 2011 IL 110096, ¶ 88 (quoting *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006)). " '[V]erdicts ought to be directed and judgments *n.o.v.* entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Id*. (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). It is clear that appellants' arguments related to their motion for judgment notwithstanding the verdict are based on their contention that Coniston failed to prove necessary elements of its case, and are not simply an attack on the jury's verdict. Therefore, we disagree with Coniston's contention that our standard of review on these arguments should be whether the jury's verdict was against the manifest weight of the evidence. Our review of the trial court's decision to deny a motion for judgment notwithstanding the verdict is *de novo*. *Id*.

¶ 23 Appellants first argue that Coniston failed to prove both the existence of mold and wood rot and that the mold and wood rot were caused by rain as opposed to condensation. Appellants argue that because Blackburn testified that he was not a mold expert, in the absence of testimony by a mold expert, Coniston did not establish the existence of mold. Appellants further argue that because Friedman testified that he observed condensation that looked like rain when he visited the facility, Coniston did not establish that any alleged mold and wood rot were caused by rain. However, both Lyon and Blackburn testified that they observed mold and wood rot, and the jury also saw photographic and video evidence of mold. Blackburn further testified that the damage

was concentrated around areas where the holes in the roof were located, rather than spread uniformly throughout the facility, as would be the case if the mold was caused by condensation. Judgment notwithstanding the verdict is inappropriate if "reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented." *York*, 222 Ill. 2d at 178 (quoting *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351 (1995)). The jury heard and saw evidence supporting Coniston's claim that the mold and wood rot existed and were caused by rain leaking through holes in the roof, and made its determination from the evidence presented. Thus, the trial court correctly declined to enter judgment notwithstanding the verdict on the issue of damages resulting from a breach.

¶ 24 Appellants next argue that Coniston failed to establish the correct measurement of damages. In general, the determination of damages is a question of fact, not law, and is within the discretion of the jury, not the court. *Poliszczuk v. Winkler*, 387 Ill. App. 3d 474, 490 (2008) (citing *Snover v. McGraw*, 172 Ill. 2d 438, 447 (1996)). A trial court can only disturb a jury's award of damages where the jury ignored a proven element of damages, the verdict resulted from passion or prejudice, or the award bears no reasonable relationship to the loss sustained. *Id.* (citing *Snover*, 172 Ill. 2d at 447)). However, "the measure of damages upon which the jury's factual computation is based is a question of law for the court [citations], and the court's instructions should limit the jury's consideration to facts that are properly a part of the damages allowable." *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 252 (2006).

¶ 25 The record discloses that a number of discussions were held between the trial court and the attorneys for the parties on the issue of whether or not Coniston met its burden of proof on

the issue of damages. After Coniston rested, defendants filed a motion for a directed verdict and argued that Coniston had failed to prove damages because it had not presented any invoice, repair bill or canceled check, but only Lyon's testimony. Coniston responded that Lyon was qualified to testify regarding the value of her own property. Coniston acknowledged that it was not the sort of elaborate evidence you might get under circumstances where you do not have to change your damages theory at the last minute, but argued that it was still credible evidence on damages. The trial court ruled that there was sufficient evidence on damages to at least get the case to the jury and denied the motion.

¶ 26 When the attorneys and the trial court discussed the damages instruction, the trial court proposed instructing the jury that damage to real property is determined by the reasonable expense of necessary repairs or by the difference between the fair market value of the real property immediately before the occurrence and its fair market value immediately after the occurrence. Defendants' counsel argued that Coniston had not provided evidence of either measure of damages. The trial court stated that if there were holes in the element of damages, then there were holes; however, there was evidence about the value of the property at the time it was constructed and evidence saying that it had to be torn down and rebuilt, which could arguably mean it was worth nothing after the occurrence. Defendants' counsel stated that there was no testimony about the fair market value of the property, and the trial court said that then it would be the replacement cost. Defendants' counsel said that the original cost could not be equivalent to the current replacement cost, and the court agreed that the replacement cost would be higher.

¶ 27 Coniston's counsel argued that Lyon testified that her property was at least worth what she spent on construction. The trial court stated that the presumption is that when you pay for something, you get what you paid for and there was ample evidence that the value of the facility at the time was what Lyon paid for it. Moreover, Coniston's expert testified that it was not worth anything currently. The trial court agreed that there were problems with that theory, but concluded that the evidence was sufficient to support the instruction. However, after additional discussion about whether any evidence was presented on the fair market value of the property, the trial court conceded that the point was well-taken and suggested modifying the instruction to the difference between the value paid for the property and what the property was currently worth. After defendants' counsel objected to the suggested modification, the trial court advised the parties to submit suggested instructions. The trial court noted that there was no evidence of reasonable cost of repair or replacement, and Coniston's counsel agreed. The trial court then stated that the only measure the evidence would support would be the value of what Lyon paid versus the value of what Blackburn testified the property was currently worth. The trial court stated that defendants' counsel could still argue that there were things that could potentially be reused, such as the HVAC system.

¶ 28 When the trial court later returned to the issue of the damages instruction, counsel for Coniston stated that it was not significant whether the language in the instruction referred to "value" or "fair market value." Counsel stated that Lyon was qualified as the owner of the property to say that the fair market value would have been at least what she paid for the facility. Counsel also pointed out that the comments to the Illinois Pattern Jury Instructions (IPI) state that

if the damage is permanent, the measure of damages is the diminution in the market value of the realty, and agreed that because they were claiming a complete tear down and rebuild, the instruction for permanent damages applied. However, the trial court noted that it was up to the jury to decide whether the damages were permanent or whether the facility could be repaired.

¶ 29 The trial court proposed an instruction that the damages are determined by the reasonable expense of necessary repairs to the property which was damaged or the difference between the fair market value of the real property immediately before the occurrence and its fair market value immediately after the occurrence, whichever is less. Counsel for Coniston requested that the phrase "immediately before the occurrence" be replaced with "had the property functioned as intended" and that the phrase "immediately after the occurrence" be replaced with "in the condition plaintiff actually received it." The trial court suggested using the exact language in the IPI and having the attorneys explain the significance of the instruction in closing arguments because that way there would be less risk of reversal on appeal. The parties agreed to the proposed instruction.

¶ 30 During closing arguments, counsel for Coniston told the jury that the damages instruction would include a reference to reasonable repairs, but that there had been no evidence of repair costs because Blackburn testified that the property was so damaged it needed to be torn down. Counsel went on to explain that the only evidence presented was Lyon's testimony that if the roof had worked as expected, the facility would have been worth the money she paid for it. Counsel concluded by asking the jury to award the amount Coniston paid for the facility. Counsel for defendants told the jury that Coniston had not provided sufficient evidence for them to make a

reasonable determination of damages. Counsel pointed out that the jury had not heard an estimate or proposal for the cost of tearing the facility down and rebuilding it. He also pointed out that Coniston had not presented any evidence on the issue of fair market value. In rebuttal, counsel for Coniston argued that the damages instruction related to the diminution in value between what the facility would have been worth if it did not leak and what it was worth because it did leak. The trial court instructed the jury as follows:

> "The damage to real property is determined by the reasonable expense of necessary repairs to the property which was damaged or the difference between the fair market value of the real property immediately before the occurrence and its fair market value immediately after the occurrence, whichever is less."

In denying defendants' posttrial motion, the trial court did not distinguish between the motion for judgment notwithstanding the verdict on the damages issue and the motion for a new trial, but merely relied on the record of its prior rulings on all of the issues raised in the motion.

¶ 31 We must now determine whether Coniston failed to prove any measure of damages allowed under Illinois law. Appellants contend that because Coniston presented no evidence on repair costs or the fair market value of the property, it failed to prove a necessary element of its cause of action. Coniston responds that the evidence established the construction cost of the facility and that, if the facility had been built correctly, it would have been worth approximately that amount. Coniston further argues that a property owner is qualified to express an opinion on the value of the property he owns. Because the evidence also established that the damage to the facility was so severe and pervasive that the only practical repair was its total reconstruction,

Coniston contends that the cost of original construction represents the reasonable cost of repair.

¶ 32 We note that this argument is inconsistent with Coniston's position at trial, and with the evidence presented at trial. The trial court and both parties agreed that no evidence was presented on the reasonable expense of necessary repairs. In proposing that the repair cost element of damages be included in the instruction, the trial court noted that if the jury decided that the damage was not permanent, the only evidence it could possibly use to determine the cost of repairs was the evidence regarding the amount Coniston paid for the installation of the roof. Coniston repeatedly stated at trial that the facility could not be repaired and expressly told the jury that it had presented no evidence of repair costs and the only relevant measure of damages was the fair market value of the property. Moreover, as counsel for defendants and the trial court both noted, the cost of tearing the facility down and rebuilding it a number of years later cannot be the equivalent of the initial cost of construction, particularly where testimony established that a new facility would require a different type of roof and no evidence was presented regarding the salvage value of anything in the existing facility or the cost of tearing down the facility.

¶ 33 Coniston's reliance on *Linhart v. Bridgeview Creek Development, Inc.*, 391 Ill. App. 3d 630 (2009) is misplaced. In *Linhart*, the common foundation for four townhomes settled an additional 7 to 10 inches after construction, causing extensive structural damage to the homes. *Id*. at 633. The jury heard the testimony of four experts and awarded damages for the cost of repair based on the testimony of the expert who stated that the only feasible way to repair the structure would be total demolition and rebuilding at a cost of $1,380,781. *Id*. at 636. The defendants challenged the award as against the manifest weight of the evidence, arguing that the

maximum repair cost supported by the evidence was $733,453. *Id*. at 635. This court held that the verdict represented the maximum cost of repairs supported by the evidence and was reasonably related to the damages incurred. *Id*. at 636.

¶ 34 In the case *sub judice*, the trial court barred Blackburn from testifying that the cost of demolition and rebuilding would be $2 million. Thus, while Blackburn was allowed to testify that the only feasible way to repair the structure would be to tear it down to its foundation and rebuild it, he was not allowed to testify what that would cost. As a result of this ruling, Coniston's attorney admittedly changed damages theories and argued that the measure of damages was the value of the facility, equating "value" with "fair market value." The only evidence presented to the jury regarding value was the amount Coniston paid to construct the facility and Lyon's testimony that she believed that her facility was worth at least that. Unlike the situation in *Linhart* where four separate experts presented evidence on the issue of repair costs, the trial court and the parties here agreed that no evidence was presented regarding repair costs and the cost of initial construction could not represent the cost of reconstructing the facility. Moreover, even though the *Linhart* court accepted evidence of the cost to demolish and rebuild the structure as evidence of the maximum cost of repairs, Coniston presented no evidence related to the cost of tearing down the facility and rebuilding it. Thus, despite considering all of the evidence and inferences therefrom in the light most favorable to Coniston, we cannot conclude that any evidence was presented regarding the cost of replacement or repair.

¶ 35 Therefore, the only possible measure of damages allowed under Illinois law on the evidence presented in this case is the difference between the fair market value of the real property

immediately before the occurrence and its fair market value immediately after the occurrence. On appeal, although Coniston states that it introduced sufficient evidence on both damages measures, it only discusses the evidence it contends supported the reasonable cost of repair measure of damages. At trial, Coniston argued that the diminution in value measure of damages meant that if the facility had not leaked, it would have been worth what Coniston initially paid for it. We must therefore determine whether Illinois law provides for such an interpretation of the diminution in value measure of damages. If it does not, we must determine whether a landowner's testimony that her property was at least worth what she paid for it constitutes evidence of the fair market value of the property prior to the damage, and whether an expert's opinion that the facility needs to be torn down and rebuilt constitutes evidence that the fair market value of the property after the damage was zero.

¶ 36 This court has noted that "[t]he law of torts attempts primarily to restore the injured party to as good a position as he held prior to the tort." *Myers v. Arnold*, 83 Ill. App. 3d 1, 7 (1980). Thus, "courts must be mindful of the fact that rules governing the proper measure of damages in a particular case are guides only and should not be applied in an arbitrary, formulaic, or inflexible manner, particularly where to do so would not do substantial justice." *Id.* See also *First Baptist Church of Lombard v. Toll Highway Authority*, 301 Ill. App. 3d 533, 544 (1998); *LaSalle National Bank v. Willis*, 378 Ill. App. 3d 307, 329 (2007). Indeed, Illinois law has been somewhat inconsistent in its application of the correct measure of damages for injuries to real property. See *Williams-Bowman Rubber Co. v. Industrial Maintenance, Welding & Machining Co.*, 677 F.Supp. 539, 541-45 (1987) (discussing the history of Illinois case law related to the

proper measure of damages for injuries to real property and concluding that Illinois courts consider the nature of the injury involved when determining whether to apply the cost of repair or diminution in value measure of damages).

¶ 37 However, when citing to *Myers* for the proposition that the rules governing the proper measure of damages are merely guides and should not be applied in an arbitrary manner, Illinois courts have been primarily concerned with whether to apply the cost of repair even in situations where the diminution in value is actually less than the cost of repair. See, *e.g.*, *Willis*, 378 Ill. App. 3d at 331 (holding that the proper measure of damages was the cost of repair even though the diminution in value was less, where the damage was to a personal residence and could have been corrected with a reasonable expenditure); *First Baptist Church of Lombard*, 301 Ill. App. 3d at 545-46 (remanding for a determination of the value of the property at issue in order to determine whether the repair could be accomplished without expending amounts wholly disproportionate to the value of the land); *Wujcik v. Gallagher & Henry Contractors*, 232 Ill. App. 3d 323, 328, 330 (1992) (adopting replacement value as the proper measure of damages instead of diminution in value where the damage could be repaired at moderate expense in relation to the value of the entire parcel). In each of these cases, evidence was presented on both measures of damages and the only question was whether to apply the cost of repair measure of damages even though it was higher than the diminution in value. Because Coniston presented no evidence regarding the cost of repair, the case law in support of the proposition that the damages rules are merely guides does not provide any guidance on the interpretation of the diminution in value measure of damages. The instruction given to the jury here on the diminution in value

measure of damages was that it is the difference between the fair market value of the property immediately before and after the occurrence.

¶ 38 Fair market value is defined as " 'the price which property would bring if it were offered for sale by a willing seller to a willing buyer.' " *Chicago City Bank & Trust Co. v. Ceres Terminals, Inc.*, 93 Ill. App. 3d 623, 630 (1981) (quoting *Housing Authority v. Kosydor*, 17 Ill. 2d 602, 606 (1959)). We have found no case law in Illinois in which the term "fair market value" is treated as a synonym for "value." Coniston explained to the jury that the diminution in value standard meant that if the facility had not leaked, it would have been worth at least what Lyon paid for it. First, we note that closing arguments are not the law. Second, we have found no case law in Illinois that supports such an interpretation of the diminution in value standard for real property.

¶ 39 A standard of compensation other than fair market value, such as replacement cost, may be used for real property that has special capabilities that make it useful primarily to its owner, such as churches, school buildings, and railroad terminals. *Id*. In *Matich v. Gerdes*, 193 Ill. App. 3d 859 (1990), this court affirmed a damages award that was based on the testimony of an expert that he was unable to find suitable comparable-sale values for a refurbished barn that was completely destroyed and instead based his determination of fair market value on the cost of replacement minus depreciation. *Id*. at 864, 868. Although no evidence was presented regarding any special characteristics of Coniston's facility that made it impossible to determine fair market value, it could be argued that this facility was unique and gained its principal value from personal use, just like the refurbished barn in *Matich*. However, we cannot substitute replacement cost for

fair market value here when Coniston did not produce any evidence of replacement cost.

¶ 40 Therefore, we must determine whether the evidence Coniston presented at trial and any inferences therefrom, when viewed in the light most favorable to Coniston, was sufficient to meet its burden of proof on the diminution of value element of damages. In *Department of Transportation v. Harper*, 64 Ill. App. 3d 732, 734 (1978), this court discussed whether Illinois law allowed a landowner to testify to the fair market value of his property in condemnation proceedings. The *Harper* court noted that previous Illinois decisions held that witnesses other than landowners were competent to testify regarding real estate valuation where they were familiar with the property and had knowledge of real estate values in the vicinity. *Id*. The court then examined conflicting cases from other jurisdictions in which some courts held that no preliminary showing of a landowner's knowledge of real estate values was necessary before his testimony on the subject was admissible, while others held that ownership does not qualify a person to testify to the value of real estate unless he is familiar with property values in the area. *Id*. at 734-35. The *Harper* court adopted the intermediate position that the owner of land taken is generally held to be qualified to express his opinion of its value by virtue of ownership. *Id*. at 735. A landowner is " 'deemed to have sufficient knowledge of the price paid, the rents or other income received, and the possibilities of the land for use, to have a reasonably good idea of what it is worth. The weight of his testimony is for the jury.' " *Id*. (quoting 5 Nichols, The Law of Eminent Domain, s 18.4(2) (rev'd 3rd Ed. 1969)). The court noted that the rule was not absolute and that " 'mere ownership does not render a person competent to render an opinion as to value, unless he is in fact familiar with facts which give the property value.' " *Id*. However, the *Harper*

court interpreted this language as an exception that was limited to special circumstances "where, for example, a person has inherited the property or has no realistic idea of its value." *Id*. The *Harper* court then held that one landowner was competent to testify where he testified that he had knowledge of real estate values in the area, and another landowner, despite a lack of evidence indicating he had familiarity with property values, was competent to testify where the opposing party failed to explore the subject on cross examination. *Id*. at 735-36. Although *Harper* dealt with the value of land in the context of an eminent domain proceeding, this court has extended application of the rule that a landowner is qualified to testify to the value of his real property to a property distribution dispute following a judgment for dissolution of marriage (*In re Thornton*, 89 Ill. App. 3d 1078 (1980)), an action seeking damages for trespass (*Klimek v. Hitch*, 124 Ill. App. 3d 997 (1984)), and a negligence action (*American National Bank & Trust Co. v. City of North Chicago*, 155 Ill. App. 3d 970 (1987)).

¶ 41 In the case *sub judice*, Lyon testified that she paid $760,710.03 to construct the facility in 2003. Prior to her testimony, defense counsel objected on the grounds that the amount it cost to construct the facility was irrelevant. The trial court stated that if expert testimony would establish that the facility would have to be rebuilt, then one measure of damages would be what the facility cost to build. Defense counsel stated that he understood the law to be that the measure of damages would have to be what it would cost to rebuild. The trial court stated that it could reverse its earlier ruling barring the testimony that it would cost $2 million to rebuild the facility if defense counsel would prefer. We note that defense counsel correctly stated the law with regard to the measure of damages. We have found no case law in support of the proposition

that a proper measure of damages to real property is the amount it cost to construct the building that was damaged. Moreover, the trial court's ruling to bar the expert's testimony that it would cost $2 million to rebuild the facility was based on the expert's deposition testimony in which he stated that the $2 million figure was just a "guesstimate," that a contractor would have better knowledge of the actual numbers, and that he had not considered salvage or demolition costs in arriving at the $2 million figure. It was not based on a general bar to any testimony regarding the cost to rebuild the facility, which Coniston could have provided through a qualified expert.

¶ 42 On cross-examination, Lyon acknowledged that she was not an expert on determining costs related to construction or repair costs, and did not have the expertise necessary to state that a product was defective. She also stated that she had no idea what it would cost to construct the facility at the current time. Over objection, Lyon also acknowledged that she had not provided the jury with any means to calculate how she had arrived at the total of $760,710.03. She stated that her accountant came up with the total from information she provided, and acknowledged that her accountant had not determined the salvage amount of any items that could be kept and reused at the facility. Lyon further testified that she did not know what the cost would be of replacing the fabric roof with another type of roof. On redirect, Lyon stated that the figure included the cost of the extensive excavation of the property that was required before the facility could be constructed. Blackburn testified that his recommendation to Lyon was to tear the facility down to the foundation and rebuild it. He read his letter to Lyon from the witness stand. The letter stated that "[s]tall systems and much of the other equine equipment, HDH equipment, fixtures and furnishings, can be salvaged and reused." The letter went on to state that Blackburn did not

recommend retaining any of the wood in the stall systems or walls.

¶ 43 Although a property owner is qualified to testify regarding the fair market value of her property, it is not at all clear to us that testimony from the property owner that she believes her facility is worth at least what she paid to construct it is evidence of its fair market value. That may be the value of the facility to her, but value and fair market value are not synonymous. Fair market value is the price that a willing buyer would pay for the property. It would be quite a stretch to conclude that a property owner's testimony that what she paid for the facility is what the facility is worth could be deemed evidence of the property's fair market value. On these facts, that would allow the cost of construction to equal fair market value just because the owner thinks she got what she paid for. In the context of purchasing already constructed real property, such a conclusion would mean that homeowners who purchase property only to see the property values go down after the time of purchase could claim that the fair market value is what they originally paid for the property because they think the property is still worth what they paid for it despite the market fluctuation. It would also potentially open the door to other types of evidence for fair market value, such as a property owner's testimony regarding the sentimental value of the property. We cannot say that Lyon's testimony that her property was worth at least what she paid for it is evidence of its fair market value.

¶ 44 We note that the focus of Lyon's cross-examination was how she arrived at the total of what she paid for the construction and not on her qualifications to express an opinion regarding the fair market value of her property. Although we have concluded that a statement that real property is worth the cost of construction does not constitute evidence of fair market value, it

could be argued that such a determination was instead a matter of weight for the jury and that an inference could be made from Lyon's testimony that $760,710.03 represented evidence of the property's fair market value. However, even if we were to liberally construe the term fair market value to encompass value generally and accept the cost of construction as representative of the property's value, the diminution in value measure of damages also requires evidence of the fair market value after the occurrence. We cannot, as the trial court suggested, treat the evidence that the facility needed to be torn down and rebuilt as evidence that the fair market value of the facility after the occurrence was zero. There was nothing in Blackburn's testimony to indicate the price a willing buyer would pay for the property after the damage. In fact, Blackburn testified that his recommendations to Coniston expressly stated that certain components of the facility could be salvaged. He also testified that the facility need only be torn down to its foundation and rebuilt, and Lyon testified that extensive excavation was required prior to putting in the foundation and that she included that cost in her calculation of value. Presumably then, the cost of the foundation was also included in the total, and no breakdown was ever provided to the jury for the various components. Thus, the evidence does not support an inference that because the facility must be torn down and rebuilt that its fair market value was zero.

¶ 45 We are extremely reluctant to reverse a jury's verdict, particularly where, as here, the jury determined that a breach occurred and that the plaintiff suffered damages as a result of the breach. As our supreme court has noted, a more nearly conclusive evidentiary situation is required before a judgment notwithstanding a verdict is entered than is necessary to justify a new trial. *Maple*, 151 Ill. 2d at 453-54 (quoting *Mizowek v. De Franco*, 64 Ill. 2d 303, 310 (1976)).

"[T]he standard for obtaining a judgment notwithstanding the verdict is a 'very difficult standard to meet,' and limited to 'extreme situations only.' " *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 548 (2005) (quoting *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1125 (2000)). Unfortunately, because Coniston, through its trial counsel, failed to present any evidence regarding the cost of repair, replacement, or fair market value before and after the occurrence, it did not meet its burden of proof on the element of damages. See *Schoeneweis v. Herrin*, 110 Ill. App. 3d 800, 808 (1982) (noting that the party seeking to recover has the burden to not only establish that he sustained damages but also to establish a reasonable basis for computation of those damages). The jury was not provided with any reasonable basis for computation of damages under either of the measures provided in the trial court's instruction on damages, and was consequently forced to award the only number provided, which did not represent any measure of damages to real property recognized under Illinois law. In considering the evidence and any inferences therefrom in the light most favorable to Coniston, it is clear that the evidence overwhelmingly favors the appellants and no contrary verdict could stand, thus, the trial court erred in denying the motion for judgment notwithstanding the verdict on the issue of damages.

¶ 46 Appellants further contend that the trial court erred in denying Friedman's motion for judgment notwithstanding the verdict on its counterclaim. Appellants argue that because Friedman substantially performed under the contract, Lyon had no right to withhold the final payment of $27, 067.80. Appellants contend that Friedman is entitled to judgment notwithstanding the verdict because Coniston failed to provide evidence of diminution in value and thus, has not contradicted that it is liable for the remaining balance on the contract.

Appellants cite no authority for this proposition.

¶ 47 Although we have concluded that Coniston failed to provide evidence of diminution in value, we have found no case law to support the proposition that this means Friedman substantially performed under the contract. It simply means that Coniston failed to provide evidence of a proper measure of damages. However, as previously noted, the jury did conclude that there was a breach and that Coniston suffered damages because of the breach. Substantial performance may be found even when there are some defects in the material or workmanship, but only when such defects do not impair the structure as a whole and can be repaired without doing material damage to other parts of the structure. *Doornbos Heating and Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.*, 403 Ill. App. 3d 468, 483 (2010). Whether there has been substantial performance under a contract is a question of fact. *Id.* at 484. Judgment notwithstanding the verdict is inappropriate if "reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented." *York*, 222 Ill. 2d at 178 (quoting *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351 (1995)). We will not disturb the jury's verdict where there was evidence to support its finding that Friedman did not substantially perform under the contract. Therefore, the trial court did not err in denying defendants' motion for judgment notwithstanding the verdict on the issue of Friedman's counterclaim.

¶ 48 Because we are reversing the judgment of the trial court on the damages award, we need not address appellants' remaining arguments.

¶ 49 Affirmed in part and reversed in part.