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VIII. CONCLUSION

Because we find no error with the district court's judgment of dismissal, we need not address the cross-appeals of Maulsby or B & W.

AFFIRMED.

CENTURION STONE OF NEBRASKA, APPELLANT, V. TONY TROMBINO AND LORI TROMBINO, APPELLEES.

812 N.W.2d 303

Filed March 27, 2012. No. A-11-139.

1. **Courts: Appeal and Error.** The district court and higher appellate courts generally review appeals from the county court for error appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
4. **Motions for Mistrial: Jury Misconduct: Appeal and Error.** Trial counsel's failure to move for a mistrial based on alleged juror misconduct during deliberations precludes counsel from raising the issue on appeal.
5. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position that the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.
6. **Contracts: Substantial Performance: Damages.** If a construction contract has been substantially performed but there are defects or omissions in the work which are remediable at reasonable expense without taking down and reconstructing any substantial portion of the building or structure, it is generally held that the contractor is entitled to the contract price after deducting therefrom the expense of making the work conform to the contract requirements.
7. **Contracts: Damages.** Where defects cannot be remedied without reconstruction of or material injury to a substantial portion of a building, the measure of damages is the difference between the value as constructed and the value if built according to the contract.
8. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.
9. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave

it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

10. **Jury Instructions: Pleadings: Evidence.** A trial court, whether requested to do so or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence.
11. **Jury Instructions: Appeal and Error.** If all the jury instructions read together correctly state the law, are not misleading, and adequately cover issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
12. **Contracts: Substantial Performance.** Substantial performance must be shown before an action on a contract can be brought.
13. ____: ____. There is substantial performance of a building contract where all essential elements necessary to full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete strict performance that the owner obtains substantially what is called for by the contract.

Appeal from the District Court for Otoe County, DANIEL E. BRYAN, JR., Judge, on appeal thereto from the County Court for Otoe County, JEFFREY J. FUNKE, Judge. Judgment of District Court reversed and cause remanded with directions.

Karl Von Oldenburg and Sara E. Miller, of Brumbaugh & Quandahl, P.C., for appellant.

Angelo M. Ligouri, of Ligouri Law Office, for appellees.

IRWIN, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

Centurion Stone of Nebraska (Centurion) sued Tony Trombino and Lori Trombino in the county court for Otoe County to recover $10,135.61 allegedly owing on a contract to install stucco and stone to the exterior of the Trombinos' new home. The Trombinos, who have paid Centurion a total of $55,590, counterclaimed, asserting that Centurion billed them for work in excess of their $61,000 contract and failed to perform in a workmanlike manner, causing damages. After a jury found against Centurion and in favor of the Trombinos in the amount of $16,000, judgment was entered accordingly and Centurion's claim was dismissed. Centurion appealed to the Otoe County District Court, and the judgment was affirmed. Centurion now appeals to this court. We conclude that plain

error in the jury instructions requires that we reverse, and remand the cause for a new trial.

BACKGROUND

In October 2007, the Trombinos contracted with Centurion to do stucco and stone work on the exterior of their new home. There are two itemized estimates from Centurion in evidence, one for stucco work and one for stone work, that total $61,000. Each estimate recites that the job has already been "field measured" and that all applicable sales tax is included in the total. After various delays, the project was completed in January 2008. It is undisputed that the Trombinos have already paid Centurion $55,590 on the contract.

In its complaint, Centurion claimed that the Trombinos still owe $10,135.61. According to Centurion, the amount over the original $61,000 contract price ($4,725.61) was for propane to provide heat for the mortar when stones were set in cold weather and other additions to the contract. In the Trombinos' answer and counterclaim, they characterize the additional $4,725.61 charge as unreasonable and excessive and deny agreeing to it. They further allege that Centurion's faulty workmanship caused damage to their residence. Specifically, they claim that Centurion left dried mortar on the stucco and the stone, used the wrong pattern of stone, used broken and defaced stones that should have been discarded, allowed the mortar to freeze, applied the wrong color of mortar, and used poor craftsmanship in applying the stone. The Trombinos asked for judgment in excess of $7,000, "the exact amount to be proven at trial," on their counterclaim.

At trial, Robert Gress, a 64-year-old retired concrete, brick, and stone mason from Otoe County, testified about the quality of the work performed by Centurion. Gress went to the Trombinos' home on two occasions prior to trial to inspect Centurion's work. He did not take measurements; he merely observed. He described the job as "sloppy" and exhibiting "[p]oor workmanship." Specifically, he noticed discolored mortar (which he believed was due to the mortar freezing), mortar with holes in it, stones with mortar smeared on them, stones cut improperly, stones used that he would have discarded, and

uneven levels of stone along the windowsills. Supporting photographs were received in evidence. Because we remand for a new trial, we need not detail Gress' evidence about remediation of the problems with Centurion's work that he observed or his estimates of the cost of remediation.

The order and judgment of the jury was filed on May 10, 2010. The order recites that the jury found against Centurion and in favor of the Trombinos in the amount of $16,000. On May 18, Centurion filed a motion for a new trial and a motion for judgment notwithstanding the verdict. In both motions, Centurion asserted generally that the jury's verdict and award did not conform to the evidence presented at trial. After a hearing on the motions in the county court for Otoe County, the county court judge overruled both of Centurion's motions. With respect to each motion, the court specifically found in its order that the jury verdict was sustained by sufficient evidence. Centurion appealed to the district court for Otoe County. After its review, the district court found no error in the jury's verdict and affirmed. Centurion now timely appeals to this court.

ASSIGNMENTS OF ERROR

Centurion's assigned errors are as follows: (1) There was insufficient evidence of damages to support the jury's verdict, (2) the verdict was the result of misconduct by opposing counsel and the jury, and (3) Centurion substantially performed and is thus entitled to the balance due on the contract.

STANDARD OF REVIEW

[1-3] The district court and higher appellate courts generally review appeals from the county court for error appearing on the record. *Stover v. County of Lancaster*, 271 Neb. 107, 710 N.W.2d 84 (2006). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* However, in instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *Id.*

ANALYSIS

Was Evidence Insufficient to Support Jury's Award of Damages?

Having thoroughly reviewed the record with regard to this assignment of error, and recognizing that the Trombinos' evidence of damages was largely admitted without objection, we would typically answer this question in the affirmative, given our standard of review. However, we do not detail the damages evidence and why it would be sufficient to sustain a verdict for $16,000, because we find that the jury instructions were fundamentally flawed to the point that a reversal of the award and a remand for a new trial are required.

Was Jury's Verdict Result of Misconduct?

Centurion next contends that the jury's damages award was derived from improper "testimony" by the Trombinos' counsel during closing arguments. Brief for appellant at 12. Because we reverse the verdict, which fact would obviously be inadmissible in a new trial, we need not address this assignment of error.

Centurion further claims as part of this assignment of error that the jury's verdict was based on juror misconduct, which it alleges is evident from three questions the jury asked the court during deliberations. The jury's questions were:

- Can or should attorney fees and court costs be considered in damage costs or value?
- Can emotional damage be a consideration? Are there any guidelines on this subject?
- If we find for the plaintiff, the defendant must pay the $10,135.61? If we find for the defendant, is the balance of $10,135.61 null and void?

With respect to each of these questions, the record reflects that the court returned an answer stating that it was unable to answer the question and that the jury should refer to the jury instructions as well as the verdict forms. With regard to the third question, the judge directed the jury to specific instructions on the claims of the parties, the measure of damages, and the submission of the matter to the jury.

[4] We do not understand the assertion that the questions show jury misconduct. In any event, Centurion did not object to the way the trial court handled the questions from the jury, nor did it seek a mistrial based on the alleged misconduct; thus, Centurion waived its right to assert this error. See *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

Did Centurion Substantially Perform Contract, and Is It Thus Entitled to Balance Due on Contract?

Finally, Centurion argues that it performed as promised under the contract and is therefore entitled to the amount the Trombinos still owe, which Centurion claims is $10,135.61. The Trombinos respond in their brief:

> There is no evidence supporting a judgment of $10,135.61. The original contract was for $61,000.00, of that [the Trombinos] tendered payment of $55,590.00. . . . [Centurion's] failure to perform pursuant to agreement created substantial repair and finishing work for the [Trombinos]. Further, the terms of the parties' agreement were 50% down and 50% upon completion[.] [Centurion] never completed [its] contracted obligation to the [Trombinos].

Brief for appellees at 11.

[5-7] In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position that the injured party would have occupied if the contract had been performed, that is, to make the injured party whole. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998); *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994). If a construction contract has been substantially performed but there are defects or omissions in the work which are remediable at reasonable expense without taking down and reconstructing any substantial portion of the building or structure, it is generally held that the contractor is entitled to the contract price after deducting therefrom the expense of making the work conform to the contract requirements. See *Stillinger & Napier v. Central States Grain Co., Inc.*, 164 Neb. 458, 82 N.W.2d 637 (1957). However, where

defects cannot be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between the value as constructed and the value if built according to the contract. *A R L Corp. v. Hroch*, 201 Neb. 422, 268 N.W.2d 101 (1978).

[8-11] Centurion did not object to the jury instructions at the time of trial, nor does it assign error to such in the present appeal. Accordingly, our review of the jury instructions is limited to plain error. Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Id.* The trial court, whether requested to do so or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence. See *Sand Livestock Sys. v. Svoboda*, 17 Neb. App. 28, 756 N.W.2d 299 (2008), citing *Nguyen v. Rezac*, 256 Neb. 458, 590 N.W.2d 375 (1999). In our review, we must read all the jury instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. See *Nguyen v. Rezac, supra*.

The jury instruction regarding damages, No. 18, is set forth below in its entirety. We have added letters to the individual paragraphs for ease of reference in the subsequent discussion.

> [A.] If you find in favor of [Centurion] on its claim of breach of contract claim [sic] then you must determine the amount of [Centurion's] damages.
>
> [B.] In this matter, [Centurion] is entitled to recover the contract price minus the reasonable cost of making the work conform to the requirements of the contract, minus any payments already received on the contract.

> [C.] If you find in favor of [Centurion], but do not find any actual damages, then you may award [Centurion] no more than a nominal sum.
>
> [D.] If you find in favor of the [Trombinos], on their counterclaim of breach of contract claim [sic] then you must determine the amount of the [Trombinos'] damages.
>
> [E.] In this matter, [the Trombinos] are entitled to recover the reasonable cost of making the work conform to the requirements of the contract.
>
> [F.] If you find in favor of the [Trombinos] on their counterclaim, but do not find any actual damages, then you may award the [Trombinos] no more than a nominal sum.

[12,13] At the outset, we note that the trial court took paragraph B directly from NJI2d Civ. 4.44(A) and paragraph E directly from NJI2d Civ. 4.45(B), both of which assume substantial performance on the part of the contractor. Thus, it appears that the trial court implicitly found that Centurion substantially performed as a matter of law. Substantial performance must be shown before an action on the contract can be brought. *Lange Bldg. & Farm Supply v. Open Circle "R"*, 216 Neb. 1, 342 N.W.2d 360 (1983). There is substantial performance of a building contract where all essential elements necessary to full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete strict performance that the owner obtains substantially what is called for by the contract. *Id*. No error is assigned to this implicit finding on the part of the trial court, and we cannot say that such a conclusion, assuming such to have been the trial court's intention, was plain error.

This takes us to what we believe is a substantial problem with the instructions, particularly No. 18, because although the Trombinos admitted that the contract was for $61,000 and conceded that they had paid only $55,590, the jury did not award Centurion any damages whatsoever—or at least none that we can discern under the instructions. But, when we accept for analytical purposes the trial court's implicit finding

of substantial performance, Centurion would be entitled to at least $5,410 in damages—the unpaid portion of the agreed-upon contract price—and then the jury would have to decide the merits of Centurion's claim that there was an additional $4,725.61 due for propane and other additions to the contract. Thus, the jury's finding of no damages for Centurion is clearly wrong, because such could not be a correct result under the trial court's implicit finding that Centurion had substantially performed.

Nebraska law is that if a construction contract has been substantially performed but there are defects or omissions in the work which are remediable at reasonable expense without taking down and reconstructing any substantial portion of the building or structure, the contractor is generally entitled to the contract price after deducting therefrom the expense of making the work conform to the contract requirements. See *Stillinger & Napier v. Central States Grain Co., Inc.*, 164 Neb. 458, 82 N.W.2d 637 (1957).

In jury instruction No. 2, the court presented Centurion's claim that the Trombinos had breached the contract by failing to pay for the goods and services. The instruction does not list an amount owing on the contract, and paragraph B in jury instruction No. 18 clearly left that issue up to the jury to decide. The court instructed that if Centurion proved the elements of its claim, "then your verdict must be for [Centurion]." Also in instruction No. 2, the court presented the Trombinos' "claims," which in shortened form were that Centurion did not do what it agreed to do, did poor work, and caused damage to the Trombinos' home. After setting forth the elements the Trombinos had to prove, the court instructed that if the Trombinos had met their burden of proof, "then your verdict must be for the [Trombinos]." The instruction does not tell the jury what to do in the event both parties proved their claims—which is clearly a possible conclusion from the evidence.

We previously found no merit to Centurion's argument that the jury questions submitted to the trial judge are evidence of juror misconduct; however, we do think the jury's third question, in particular, shows that the jury was confused by the

instructions, because it did not know what to do if it found merit to Centurion's claim for additional payment on the contract. In short, how was the jury to reconcile the claim and the counterclaim? Under the pleadings and evidence, it is clear that the jury could find that Centurion was still owed money on the contract and that the Trombinos were entitled to damages for remediation of substandard work. In other words, a finding for Centurion on its claim would not necessarily prevent a corresponding finding for the Trombinos on their counterclaim, and vice versa. But, not only was the jury not expressly told this was permissible, it was not told via the instructions what to do in the event such was its conclusion, in order to reconcile its findings and return a single verdict for one party or the other. In the jury's third question, the jury asked: "If we find for the plaintiff, the defendant must pay the $10,135.61? If we find for the defendant, is the balance of $10,135.61 null and void?" These questions strongly suggest that the jury was confused about how to "balance the books" and what it should do if it found that each party had proved the elements of its claim.

Jury instruction No. 18 puts the jury in the position of having to reach an "all or nothing" decision for one party or the other. In order words, if the jury found that Centurion proved the elements of its claim, then the jury was told to use paragraph A, B, or C. Alternatively, if the jury found that the Trombinos proved the elements of their claim, then the jury was told to use paragraph D, E, or F.

To avoid the above problems, the jury should have been asked to determine what amount, if any, was unpaid to Centurion on the contract, which Centurion claimed was $10,135.61, remembering that the Trombinos conceded that the original contract price was $61,000, leaving $5,410 thereof admittedly unpaid because the Trombinos had paid $55,590. Then, the court should have instructed the jury to determine the Trombinos' counterclaim by determining whether there was defective or nonconforming performance of Centurion's contract and, if so, the fair, reasonable, and necessary cost of remediation of such defects. Then, figuring the ultimate jury award becomes a matter of simple math. An appropriate damages instruction that

is tailored to the factual scenario of this case would have read along the following lines:

> A. If you find in favor of Centurion on its breach of contract claim, then you must determine the amount of money that Centurion is still owed on the contract, and that amount shall be entered as your verdict for Centurion, unless you have also found for the Trombinos on their counterclaim, in which case your final verdict will be determined by the instructions that follow.
>
> B. Even if you find in favor of Centurion on its claim, you can find for the Trombinos on their counterclaim for breach of contract if they have proved the elements thereof, and then you must determine the amount of the Trombinos' damages, as set forth below.
>
> C. The Trombinos are entitled to recover the reasonable cost of making the work conform to the requirements of the contract, and that amount shall be entered as your verdict in favor of the Trombinos, unless you have also found for Centurion on its claim, in which case your verdict will be determined by the instructions that follow.
>
> D. If you have determined that both Centurion and the Trombinos have proved their claims and that both parties are therefore entitled to recover, then your final verdict shall be determined as follows: If the amount of Centurion's recovery on the contract is greater than the amount of damages you have found that the Trombinos sustained, the difference shall be the amount that you shall award to Centurion. If, on the other hand, the damages you have found the Trombinos sustained are greater than the amount that is owed to Centurion on the contract, the difference shall be the amount that you shall award to the Trombinos.
>
> E. If you have found in favor of both Centurion and the Trombinos, then you shall also complete the special interrogatory form by filling in the amount owed to Centurion on the contract as well as the amount of damages that you found the Trombinos to have sustained.

Quite plainly, the evidence presented in this case does not support the jury's finding that Centurion was owed nothing

on its breach of contract claim, assuming that there was substantial performance of the contract, as the trial court implicitly concluded. As explained above, the Trombinos admit that they paid only $55,590 on the $61,000 contract. Thus, given the implicit trial court finding that there was substantial performance, Centurion sustained damage of at least $5,410. But, there is no way under the jury's instructions and verdict forms to know that the jury included in its calculation of the Trombinos' award of damages any consideration of any amounts owing to Centurion on the contract, because the jury was not instructed to do so. That said, the clear inference from the jury's third question is that it was confused about this issue and did not know how to handle it.

Thus, the jury's award of $16,000 to the Trombinos for "the reasonable cost of making the work conform to the requirements of the contract" potentially gives the Trombinos a windfall and is not in accord with established Nebraska law with respect to calculating damages for breach of a construction contract when there has been substantial performance. See, *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998); *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994) (in breach of contract action, ultimate objective of damages award is to put injured party in same position that injured party would have occupied if contract had been performed, that is, to make injured party whole). The basic calculation here is to determine the amount owing Centurion on the contract, if any, then to determine if the Trombinos were damaged and the cost of remediation, after which it is a simple mathematical calculation to determine who owes whom how much. Due to the trial court's implicit determination that Centurion substantially performed as a matter of law, Centurion was entitled to the contract price after deducting therefrom the expense of making the work conform to the contract requirements. See *Stillinger & Napier v. Central States Grain Co., Inc.*, 164 Neb. 458, 82 N.W.2d 637 (1957). But, the trial court's jury instructions do not incorporate this basic and well-established concept in a clear, understandable, and usable way.

We find, after our plain error review, that the failure of the trial court to correctly instruct the jury on the calculation of

damages, given the competing claims of the parties, leaves us with no confidence that the jury actually reached a fair and just result. We bear in mind that the jury's questions suggest that the jury felt Centurion's claim had some validity but that it did not know what to do, given its obvious conclusion that the Trombinos' claim also had validity. The error in the jury instructions prejudicially affects Centurion's substantial right and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. See, e.g., *Sand Livestock Sys. v. Svoboda*, 17 Neb. App. 28, 756 N.W.2d 299 (2008) (trial court committed plain error by instructing jury to determine question of law).

CONCLUSION

We cannot determine how the jury arrived at its verdict of $16,000 for the Trombinos, given that the instructions were drafted so as to force a verdict for one party or the other without any balancing of the competing claims. The nature of the case is that the jury needed to determine the merits of each party's claim, the damages on such, and then "do the math" to arrive at a final verdict for one party or the other. Because the court failed to clearly instruct the jury on how to "balance the books" in the event that it found merit and damages on each party's claim, we must reverse the verdict and remand the cause for a new trial under proper instructions. By including a special interrogatory on the amount of damages on each party's claim, if any, the court can then determine how the verdict was determined. Our assumption that the court found that there had been substantial performance is only an assumption for discussion purposes, and such is not binding upon retrial. Therefore, we reverse, and remand to the district court with directions to reverse, and remand to the county court for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.