

approximately 120 years old. Pursuant to the contract, the following work was to be performed:

"Demolition of awning across entire building. Removal of all siding on lower portion of building. Removal of steel paneling squares on upper portion of the building. *** Re-brick below awning where necessary to prepare for paint. Check upper brick for the necessity of tuckpointing [*sic*]. Replace broken and cracked brick and tuck point brick on front and South Side of building.

Prepare entire front and South side for paint. Paint building in owners[']s choice of color.

Site Clean up and debris removal is included."

The entire cost for the project was set at \$24,000.

¶ 5 On May 8, 2009, defendants filed a small claims action (2009-SC-143) against plaintiff, seeking to recover \$6,327.50, which allegedly remained due and owing on the contract. Plaintiff paid defendants approximately \$18,000 under the contract. On September 29, 2009, plaintiff filed a complaint for breach of contract (2009-LM-91), having previously denied the allegations in defendants' small claims action. Ultimately, the cases were consolidated and a bench trial ensued on September 16, 2010.

¶ 6 After hearing the evidence, the trial court determined that the agreement between the parties was not ambiguous and tuck-pointing the entire south wall of the building was required pursuant to the terms of the agreement. The trial court further determined that even if it found an ambiguity, because the agreement was prepared by defendants, the result would have been the same as ambiguities are construed against the party drafting the contract.

¶ 7 With regard to damages, Daniel Dobrinich, a masonry contractor and bricklayer who had been in business since 1981, testified for plaintiff that the cost to tuck-point the south

side of the building would be \$36,470. A written estimate prepared by Dobrinich was submitted into evidence. Dobrinich denied that the estimate would have changed in the year which had elapsed since it was prepared. No other challenge was presented to the estimate.

¶ 8 Plaintiff testified that he received a bid of \$17,844 from another contractor, but chose to enter into a contract with defendants because defendants had done work for him in the past, and he believed their estimate was fair. According to plaintiff, the difference between defendants' bid of \$24,000 and the other contractor's bid of \$17,844 was due to an additional \$6,000 for tuck-pointing the south wall under the contract with defendants. The other contractor's bid did not include a price for tuck-pointing the south wall. After plaintiff paid defendants approximately \$18,000, defendants stopped work on the project. Plaintiff testified that defendants told him the work could not be completed for the contract price, and they were losing money on the project. The instant litigation ensued.

¶ 9 After hearing all the evidence, the trial court awarded plaintiff damages in the amount of \$1,619.86, which included other matters not subject to this appeal, such as the cost of cleaning mortar from brick and caulking. With regard to the issue in this appeal, the trial court specifically stated:

"Now as far as the measure of the damages for that goes, though, [plaintiff's] own testimony was that the—you know essentially, he could have got the front done for 18 [thousand] and the south for 6 [thousand]. And so the Court is not willing to accept this \$36,470 [estimate]. Instead what the Court is willing to do is to award him the \$6,000 that you claim.

So I'm going to deny your claim for the \$6,000. It was basically an offset. He didn't have to pay you, and that was what the reasonable value of the services were going to be at that time."

Both parties filed motions to reconsider, which the trial court denied. Plaintiff filed a timely

notice of appeal.

¶ 10

ANALYSIS

¶ 11 The issue we are asked to address is whether the award of damages is against the manifest weight of the evidence. Plaintiff asserts that because the trial court ruled that under the contract the south wall of the building was to be tuck-pointed, the award of damages of \$6,000 was too low because the general rule is that the measure of damages to an injured party when performance under a contract is less than full is the cost of correcting the defective work or completing the omission. Plaintiff presented evidence that the cost to tuck-point the south side of the building would be \$36,470. According to plaintiff, the proper award of damages is, therefore, \$36,470, set off by the remaining \$6,000 due and owing under the contract, for a total of \$30,470. Defendants respond that while the measure of damages for incomplete performance is the cost of correcting the defects or completing the omissions, this rule does not apply when, as here, the cost to repair would be disproportionate to the original contract price. Defendants contend that the trial court's award of \$6,000 is supported by the evidence presented and applicable case law. We agree with defendants.

¶ 12 The primary issue below was whether the contract required defendants to tuck-point the entire south wall of the building. The trial court found that the terms of the contract required the entire south wall to be tuck-pointed, and that issue has not been appealed. The only issue before us is damages.

¶ 13 The amount of damages awarded will not be overturned unless it is palpably inadequate or against the manifest weight of the evidence. *Montgomery v. City of Chicago*, 134 Ill. App. 3d 499, 502, 481 N.E.2d 50, 53 (1985). A trial court's judgment is against the manifest weight of the evidence only where an opposite conclusion is apparent or where the findings appear unreasonable, arbitrary, or not based upon the evidence. *Dargis v. Paradise Park, Inc.*, 354 Ill. App. 3d 171, 177, 819 N.E.2d 1220, 1227 (2004). The burden is on the

plaintiff to prove damages resulting from the defendants' breach of contract. *Oakleaf of Illinois v. Oakleaf & Associates, Inc.*, 173 Ill. App. 3d 637, 646-47, 527 N.E.2d 926, 932 (1988).

¶ 14 The general rule is that when performance by a contractor has been less than full performance of a construction contract, the measure of damages is the cost of correcting the defects or completing the omissions, unless the application of such measure of damages would require an unreasonable destruction of the work done by the contractor or would require the contractor to incur costs disproportionate to the results obtained. *Mayfield v. Swafford*, 106 Ill. App. 3d 610, 613-14, 435 N.E.2d 953, 956 (1982). This rule is recognized and explained in the Restatement (Second) of Contracts, section 348(2)(b), which provides in pertinent part as follows:

"Alternatives to Loss in Value of Performance

(2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on

(b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him." Restatement (Second) of Contracts ¶ 348(2)(b) (1981).

In the instant case, the breach was not due to defective work, but rather failure to complete the project.

¶ 15 Plaintiff presented evidence that the cost to tuck-point the entire south side of the building would be \$36,470; however, given the fact that the entire amount of the project was set at \$24,000, it is obvious that an award of over \$36,000 would be disproportionate to the

actual contract price and the actual loss suffered by plaintiff. Plaintiff testified that he received two bids for the project. One bid was for \$17,844, but this bid did not include the cost to tuck-point the south side of the building, whereas defendants' bid of \$24,000 did include the cost of tuck-pointing the south side of the building. Plaintiff agreed that \$6,000 of the \$24,000 contract price was attributable to tuck-pointing the south side of the building. Plaintiff already paid defendants \$18,000 for work that had been performed under the contract.

¶ 16 The trial court found the cost to tuck-point the south wall to be \$6,000, which was the amount due and owing under the parties' original contract. The trial court also determined that \$6,000 was a "set-off" of the balance due and owing. In light of the record before us, the trial court's determination appears well-reasoned. Given the fact that plaintiff admitted that the agreed-upon price of tuck-pointing the south wall was \$6,000, the trial court's award of damages is not unreasonable, arbitrary, or not based upon the evidence in the record.

¶ 17 We find the instant case is similar to *Witty v. C. Casey Homes, Inc.*, 102 Ill. App. 3d 619, 430 N.E.2d 191 (1981). In that case, one of the issues presented was the proper measure of damages for a breach of specifications for face brick veneer in a home construction contract. The trial court found that while there was a breach of contract, judgment should be entered in favor of the defendant contractor because the plaintiff's proposed measure of damages, cost of repair, was impractical, and the plaintiff failed to introduce any evidence that the defective brick diminished the value of the home. *Witty*, 102 Ill. App. 3d at 623-24, 430 N.E.2d at 194-95. The cost of repair and replacement of defective material, approximately \$50,000, almost equaled the original contract price of the home, \$54,566. *Witty*, 102 Ill. App. 3d at 623, 430 N.E.2d at 194. The trial court found that diminution in value was the proper measure of damages, not the cost of repair. Because the plaintiff failed to introduce any evidence of diminished value, the trial court entered judgment, despite the

breach, in favor of the defendant, and the trial court's judgment was affirmed on appeal. *Witty*, 102 Ill. App. 3d at 624, 430 N.E.2d at 195.

¶ 18 We are cognizant of the fact that the instant case is distinguishable from *Witty* because here we are dealing with the cost to complete a contract rather than the cost to repair defective workmanship; nevertheless, the rationale in *Witty* is applicable here. While the normal measure of damages will be the reasonable cost of correcting the defects or completing the omission, where application of that measure of damages would require the contractor to incur costs disproportionate to the results, the normal measure should not be employed. *Witty*, 102 Ill. App. 3d at 625, 430 N.E.2d at 196. To award plaintiff \$30,470, (Mr. Dobrinich's estimate of \$36,470 set off by the remaining \$6,000 due and owing under the original contract of \$24,000) would be to award plaintiff a windfall clearly disproportionate to the probable loss in value to him. Plaintiff admitted that the cost of tuck-pointing the south side of the building under the contract was set at \$6,000. Under these circumstances, we cannot say the trial court's damage award is against the manifest weight of the evidence.

¶ 19 For the foregoing reasons, the judgment of the circuit court of Montgomery County is hereby affirmed.

¶ 20 Affirmed.