**24.09E BUILDER’S DAMAGES FOR SUBSTANTIAL BUT NOT COMPLETE PERFORMANCE**

Alternative A

If you find that the plaintiff substantially performed [his her its] promise, you must then decide how much money, if any, the plaintiff is entitled to recover. To do this, you must first determine the amount of money that the defendant promised to pay the plaintiff. From this amount you must subtract: (1) the amount the defendant has already paid the plaintiff; and (2) the reasonable cost of putting the [insert subject matter of the agreement] in the same condition it would have been in if the plaintiff had performed as promised. The amount that remains after subtracting (1) and (2) is the amount you should award as damages.

Alternative B

If you find that the plaintiff substantially performed [his her its] promise, you must then decide how much money, if any, the plaintiff is entitled to recover. To do this, you must first determine the amount of money that the defendant promised to pay the plaintiff. From this amount you must subtract: (1) the amount the defendant has already paid the plaintiff; and (2) the difference in value between what the plaintiff promised the defendant and what the defendant actually received. The amount that remains after subtracting (1) and (2) is the amount you should award as damages.

# Alternative C

If you find that the plaintiff substantially performed [his her its] promise, you must then decide how much money, if any, the plaintiff is entitled to recover. There are two different methods which can be used to decide the amount of the plaintiff's damages.

The usual way to decide what damages to award the plaintiff is to determine the amount of money that the defendant promised to pay the plaintiff and then subtract from this amount: (1) the amount the defendant has already paid the plaintiff; and (2) the reasonable cost of putting the [insert subject matter of the agreement] in the same condition it would have been in if the plaintiff had performed as promised.

However, if you find that it would be impractical and unreasonably wasteful, in proportion to the benefit to be gained, to put the [insert subject matter of the contract] in its promised condition, you should not use this method. Instead, you should determine the amount of money that the defendant promised to pay the plaintiff and then subtract from this amount: (1) the amount the defendant has already paid the plaintiff; and (2) the difference in value between what the plaintiff promised the defendant and what the defendant actually received. The amount that remains after subtracting (1) and (2) is the amount you should award as damages.

# **Use Note**

These instructions should be modified if both parties agree on what the contract price was and/or what payments have been made toward it. Alternative A should be used when there is no real question whether the alleged variations from contract specifications can be reasonably remedied. Alternative B may be used if the parties agree that the cost of remedy would be unreasonable or cannot be determined. Alternative C should be used if there is a dispute as to whether the defects can be reasonably remedied.

This instruction must only be given in a case in which the builder is claiming substantial performance.

**Comment**

In *Hopkins Constr. Co. v. Reliance Ins. Co*., 475 P.2d 223, 224‑25 (Alaska 1970), the Alaska Supreme Court stated that “it is generally agreed that once substantial performance has been shown, a construction contractor is entitled to recover the contract price, less reasonable costs of remedying the defects in work or materials.”

This rule was reaffirmed in *Alaska State Hous. Auth. v. Walsh & Co*., 625 P.2d 831, 835 (Alaska 1980).

The measure of damages for remedying the defects in construction is either the cost of correcting the deficiency or, if this would involve unreasonable economic waste, the difference in value between the project as contracted for and as received. *Walsh*, 625 P.2d at 836 (citing *Nordin Constr. Co. v. City of Nome*, 489 P.2d 455 (Alaska 1971); *Hopkins Constr. Co.*, 475 P.2d 223; and Annot., 76 A.L.R.2d 805 (1961)). The Alaska Supreme Court has stated that:

The aim in assessing damages for deficiencies in performance should be to put the injured party in substantially as good a position as performance in accordance with the contract. The law recognizes, however, that sometimes actual reconstruction in compliance with the plans and specifications of the contract may be possible only at a cost that would be imprudent and unreasonable. Restatement of Contracts § 46, comment b at 574 (1932); A. Corbin, *Contracts* § 1089, at 486‑87 (1964). In such cases, the court should consider alternative measures of recoupment which will substantially compensate the injured party for the deficiency in a less economically wasteful manner.

*Walsh*, 625 P.2d at 837. In the view of the court, as a last alternative, if a defect cannot be remedied without economic waste, the defendant must be awarded the diminished value of the object of the contract due to the defect. *Id*.

Once the plaintiff has shown that the plaintiff has substantially performed, the defendant bears the burden of proving any nonsubstantial defects in performance and how those defects should be reflected in a recoupment. *Walsh*, 625 P.2d at 835; *Hopkins*, 475 P.2d at 225, 226. In *Walsh*, the supreme court suggested that where a contractor has conceded that the work is incomplete or defective, it may be fair to require the contractor to establish the amount to be deducted, which the owner may then contest. 625 P.2d at 835 n.4.