No. 46388-1-II

Court of Appeals, Div. II, of the State of Washington

Nina Firey,

Appellant,

v.

Tammie Myers, et al.,

Respondents.

Brief of Appellant

Kevin Hochhalter,
Attorney for Appellant

Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501
360-534-9183
WSBA # 43124

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1. Introduction

In this construction defect case, the trial court improperly dismissed Nina Firey's claims on summary judgment, despite evidence in the record supporting the essential elements of her claims. The trial court chose to disregard the testimony of Firey's expert witnesses because it erroneously believed the experts' opinions were based solely on Firey's lay opinion of the quality of the work rather than on observable facts. Excluding the expert testimony, the trial court concluded that Firey had failed to present any competent evidence of breach or damages.

The trial court misunderstood the record before it. Firey's experts based their opinions on personal observation of the defective work, photographs of defective work before it was replaced, and other factual evidence of a type reasonably relied on by experts in their fields. Any perceived flaws in that factual basis should have gone to the weight of the opinions, not their admissibility. The opinions of Firey's experts should be presented to a jury, which can then give those opinions whatever weight is due. The trial court erred by weighing and disregarding the expert testimony at summary judgment. This Court should reverse the summary judgment orders and remand for trial.

2. Assignments of Error

Assignments of Error

1. The trial court erred in disregarding the expert testimony of Vince McClure and Ben Hamilton.

2. The trial court erred in granting summary judgment dismissal of Firey's claims.

Issues Pertaining to Assignments of Error

Whether the proffered declarations of Vince McClure and Ben Hamilton were admissible as expert opinion testimony under ER 702 and ER 703 when their opinions were based on personal observation of the defective work, photographs of defective work before it was replaced, and other factual evidence of a type reasonably relied on by experts in their fields (assignment of error #1).

Whether there were genuine issues of material fact that should have precluded the trial court from granting summary judgment (assignment of error #2).

3. Statement of the Case

Nina Firey purchased a foreclosed home in Lewis County in 2011. CP at 302. A pre-purchase home inspection revealed a number of issues that would need to be addressed to rehabilitate the home. CP at 103-24. Based on the inspection report, Firey prepared a project list. CP at 305-06. Firey had a budget of $25,000 to complete the necessary repairs. CP at 302.

Firey hired K & T Construction.[1] *Id.* K & T agreed to work on a time and materials basis but also promised it could complete the work, in a professional and workmanlike manner, within Firey's budget. *Id.* Firey did not direct how the work should be performed, instead relying on K & T, as an experienced contractor, to determine the proper order and performance of needed repairs. *Id.*; CP at 203.

After K & T had been on the job a few weeks, Firey became concerned with the quality of K & T's work and believed she was being overbilled, so she fired K & T. *Id.*; *see* CP at 128. Before leaving the job, K & T executed a written warranty. CP at 307. Firey later discovered that K & T's work was defective and needed to be redone. CP at 138, 153, 303.

After firing K & T, Firey hired Crown Mobile Home Set-up/SVC[2] to complete the project. CP at 303. Crown agreed to work on a time and

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1 Respondents Kenneth and Doris Bannister and Tammie and Ron Myers are the owners of K & T Construction. Respondent State Farm Fire & Casualty is the bonding company for K & T Construction. These parties will be referred to, collectively, as "K & T."

2 Respondents Michael and Joan Lyon are sole proprietors doing business as Crown Mobile Home Set-up/SVC. These parties will be referred to, collectively, as "Crown."

materials basis, promising it could complete the work, in a professional and workmanlike manner, within Firey's budget. *Id.* Crown replaced some, but not all, of K & T's work, which Crown said was defective. *Id.*; CP at 32. Crown did other work on the home for about one month, then left to work on other projects. CP at 303. Firey later discovered that Crown's work was defective and needed to be redone. CP at 138, 153, 303.

Crown referred Firey to Orozco Construction, who she hired to take over for Crown. CP at 303. Orozco also brought in AOK Construction and Chris Cook. *Id.* Orozco replaced some, but not all, of K & T and Crown's defective work. *Id.*; CP at 144-45. Orozco, AOK, and Cook did additional, defective work and caused damage to the existing house and other property. CP at 144-47, 303.

Firey fired Orozco, AOK, and Cook and hired Bar-None Construction to finish the project. CP at 138. With the help of Bar-None, Firey discovered the full extent of the defective work and other damages caused by K & T, Crown, Orozco, AOK, and Cook. *Id.*

Firey brought this lawsuit against K & T, Crown, Orozco, AOK, and Cook in November 2011. CP at 138-39. Firey has settled with Orozco and AOK. In March 2014, K & T moved for summary judgment dismissal of all of Firey's claims, arguing that Firey could not prove the existence of a contract, warranty, or breach. CP at 36. Crown also moved for summary judgment, making similar arguments. CP at 62.

In response, Firey argued that genuine issues of material fact existed as to all of the elements of her claims. *E.g.,* CP at 293-95. In support of this

argument, Firey submitted her own declaration (CP at 301-07) and the declarations of Vince McClure (CP at 308-10), Ben Hamilton (CP at 311-24), and Robert Floberg (CP at 325-29). Firey's response also called the court's attention to a previously filed declaration of McClure. CP at 291.[3]

Firey testified to the existence and terms of the oral contracts she had with K & T and Crown. CP at 302-03. She presented a written warranty with K & T and a list of desired work that she had shown to both K & T and Crown at the time they were hired. CP at 305-07. McClure testified to industry standards for quality of work and the failure of K & T and Crown to meet those standards. CP at 310. Hamilton agreed and further testified, having seen the home prior to any work being done on it, that K & T and Crown caused damage to the existing home. CP at 312. McClure also testified, on the basis of multiple site visits and extensive review of discovery, photographs, Firey's testimony, and discussions with Hamilton and the Lewis County Building Department, as to the specific breaches by K & T and Crown and the cost of repair. CP at 1-12.

K & T's reply brief asked the trial court to strike or disregard the McClure and Hamilton declarations, arguing that they were speculative opinions based on hearsay and were thus inadmissible under ER 702 and ER 703. CP at 331. Firey did not have an opportunity to respond except at oral argument. RP, April 25, 2014, at 7. Crown's reply argued that Firey had failed to present evidence that Crown's work was defective. CP at 357.

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[3] This McClure declaration appears in CP at 1-32. It was also presented by Crown as an exhibit to the declaration of Michael DeLeo. CP at 243-75.

The trial court found there was a dispute of material fact as to the existence and terms of the parties' contract. RP, April 25, 2014, at 21:9-14, 25:16-17. The trial court denied the motion to strike as untimely. *Id.* at 14:1-3. The trial court, nevertheless, disregarded the testimony of Firey's experts, finding their opinions inadmissible to prove "who did what and what was defective" because the trial court believed the opinions were based on Firey's lay opinion as to what was defective rather than on observable facts. *Id.* at 12:14-13:25, 21:15-22:12.

The trial court certified its summary judgment orders as final judgments under CR 54(b). CP at 389-93. Firey appealed the summary judgment orders.

4. Summary of Argument

The trial court erred in disregarding the declarations of Vince McClure and Ben Hamilton. Those declarations are admissible as expert opinion testimony under ER 702 and ER 703. The experts' opinions were based on personal observation of the defective work, photographs of defective work before it was replaced, and other factual evidence of a type reasonably relied on by experts in their fields. Any perceived defects in the opinions or the facts upon which those opinions are based go to the weight of the testimony, not its admissibility. The declarations are admissible.

The record called to the attention of the trial court disclosed genuine issues of material fact. The summary judgment motions argued that Firey could not produce evidence of breach or damages. The declarations of McClure and Hamilton present admissible evidence on both elements. Other evidence in the record also presents specific facts supporting the elements of Firey's claims. This evidence creates a genuine issue of material fact. The trial court erred in granting summary judgment. This Court should reverse the summary judgment orders and remand for trial.

5. Argument

5.1 Summary judgment decisions, including evidentiary determinations, are reviewed de novo.

This Court reviews summary judgment orders de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). The de novo standard also applies to evidentiary determinations made in conjunction with a summary judgment motion. *Id.* (applying de novo review to a trial court's decision to exclude portions of expert testimony). This is so because an appellate court is charged to engage in the same inquiry as the trial court and to construe all evidence in the light most favorable to the nonmoving party. *Id.* "An appellate court would not be properly accomplishing its charge if the appellate court did not examine all the evidence presented to the trial court, including evidence that had been redacted [or disregarded]." *Id.* The appellate court makes its own, independent determination of the admissibility of the evidence called to the attention of the trial court.

A party may move for summary judgment, as K & T and Crown did here, by pointing out to the court that the nonmoving party has no evidence with which to meet its burden of proof at trial. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The moving party bears the initial burden of showing the absence of an issue of material fact. *Id.* The burden then shifts to the nonmoving party to set forth specific facts supporting the essential elements of its claims. *Id.* The evidence must be viewed in a light most favorable to the nonmoving party. *Id.* at 226. If "the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any," reveal facts supporting the essential elements, there is a genuine issue of material fact, and the court must deny the motion. CR 56(c).

Actions involving oral contracts, such as the oral contracts at issue here, are "generally not appropriate for summary judgment because the existence of an oral contract and its terms usually depends on the credibility of witnesses." *Donatelli v. D.R. Strong Consulting Eng'rs, Inc.*, 179 Wn.2d 84, 93 n.1, 312 P.3d 620 (2013). It is axiomatic that on a motion for summary judgment the court cannot weigh the evidence or assess witness credibility. *E.g., Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 676, 292 P.3d 128 (2012). Particularly in a *Young*-style summary judgment motion, the key question for the court is whether the nonmoving party has met its burden of production. *See Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 623, 60 P.3d 106 (2002). If the record contains evidence disclosing a genuine issue of material fact, the issue must go to trial.

5.2 The trial court erred in disregarding the expert testimony of Vince McClure and Ben Hamilton when they had a factual basis for their opinions that the work of K & T and Crown was defective.

Generally, expert opinion testimony is admissible if (1) the expert is qualified, (2) the expert relies on generally accepted theories in the scientific community, and (3) the testimony would be helpful to the trier of fact. *Johnston-Forbes v. Matsunaga*, ___ Wn.2d ___, No. 89625-9, slip op. at 6, 2014 Wash. LEXIS 648 (Aug. 28, 2014). Although opinion testimony without any factual basis should be excluded, *Johnston-Forbes*, slip op. at 12, an opinion

based on the facts presented to the expert by the party for whom they testify is admissible, *Cotton v. Kronenberg*, 111 Wn. App. 258, 266-67, 44 P.3d 878 (2002). Indeed, under ER 703 and 705, the factual basis of an expert's opinion does not even have to be revealed to the court prior to admitting the opinion into evidence. *State v. Russell*, 125 Wn.2d 24, 74, 882 P.2d 747 (1994). The rules assume that any flaws in the factual basis will be brought to the fact-finder's attention through cross-examination. ER 705; *State v. Eaton*, 30 Wn. App. 288, 294, 633 P.2d 921 (1981). Such flaws go to the *weight* of the expert's opinion, not its admissibility. *Johnston-Forbes*, slip op. at 13.

In its reply brief, K & T argued that the declarations of Vince McClure and Ben Hamilton would not be helpful to the trier of fact, claiming the opinions were not based on data or facts reasonably relied upon by experts in their fields. CP at 331-32. The trial court believed, in error, that *all* of K & T and Crown's work had been replaced before the experts observed it and, therefore, questioned how the experts could have a factual basis for their opinions that the work was defective. RP, Apr. 25, 2014, at 12:14-25 ("How could he make any decisions based upon the work that was completely taken out? That's the way that I read the materials that were presented here.").

The trial court was wrong. First, only *some* of K & T and Crown's work was replaced; McClure and Hamilton personally observed most of the defective work of which they testified. Second, McClure based his opinion of the work that he did not personally observe on information of a type reasonably relied upon by experts in his field. Third, any perceived flaws in

their opinions go to the weight of the opinions, not their admissibility. The McClure and Hamilton declarations are admissible.

5.2.1 McClure and Hamilton personally observed most of the defective work of which they testified.

One permissible factual basis for expert opinion testimony is personal observation of the facts. ER 703. Contrary to the trial court's misreading of the record, both Vince McClure and Ben Hamilton personally observed most of the defective work of which they testified. Hamilton personally observed the original condition of the home prior to any work by K & T or Crown. CP at 312. Hamilton also personally observed the condition of the home after the defendant contractors stopped working on the home and before Bar-None commenced its work. *Id.* Vince McClure personally observed those portions of K & T and Crown's work that remained after Bar-None commenced its work. *See* CP at 2-5 (at the time of McClure's two site visits, "all of K&T's work has been *or needs to be* redone," and "all of Crown Mobile's work was redone by Orozco *or still needs to be corrected."* (emphasis added)).

McClure testified that the following repairs were still necessary to correct the defective work of K & T and Crown that remained at the time of his site visit:

- Remaining re-leveling work (both K & T and Crown did defective leveling work in different parts of the house);

- Remaining repairs in the utility room (both K & T and Crown did extensive defective work in the utility room; some of Crown's work replaced portions of K & T's work (CP at 32));
- Insulation work in crawl space (Crown installed crawl space insulation upside down);
- Restore finishes, insulation, and electrical up to code in 2nd floor (Crown removed sheetrock and insulation in 2nd floor without authorization);
- Siding and framing repair (K & T removed siding and improperly installed new building wrap and siding); and
- Repair of front porch (K & T tore out half of the porch without authorization).

Compare CP at 7-10 (listing the defective work performed by K & T, Crown, and others) *with* CP at 11 (listing all necessary repairs remaining to be done). Both McClure and Hamilton personally observed the defective work of K & T and Crown that necessitated these repairs. That defective work was still in place. McClure and Hamilton had an adequate factual basis for their opinion testimony that the work was defective.

5.2.2 For the work he did not personally observe, McClure relied on information of a type reasonably relied upon by experts in his field.

In addition to firsthand observation, ER 703 allows an expert to base his or her opinion on facts or data made known to the expert from some other source. "The essential purpose of ER 703 is to allow an expert to

testify based on information not acquired firsthand." Robert H. Aronson & Maureen A. Howard, *The Law of Evidence in Washington*, § 8.03(8)(b) (5th ed., 2013). The expert's factual basis may include any admissible evidence, from whatever source. *See* ER 703. The expert may even rely on inadmissible evidence, so long as it is "of a type reasonably relied upon by experts in the particular field." *Id.* The expert can establish this reasonable reliance by his or her own testimony. *Canron v. Fed. Ins. Co.*, 82 Wn. App. 480, 495, 918 P.2d 937 (1996).[4] An expert can reasonably rely upon the facts presented by the party for whom the expert testifies. *Cotton v. Kronenberg*, 111 Wn. App. 258, 266-67, 44 P.3d 878 (2002).

Here, McClure relied upon a number of other sources in addition to personal observation.[5] McClure testified:

> In addition to my site visits, I reviewed photographs taken by Ms. Firey, her defect list, and a home inspection report on the house written before the construction started, various statements and declarations, including those by Mr. Hamilton, Clayton Larson, and Jason Reimer. I have reviewed cost information and estimates provided by Mr. Hamilton, Bar None Construction, and Ms. Firey. I have also reviewed the

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[4] *See also State v. Eaton*, 30 Wn. App. 288, 294, 633 P.2d 921 (1981) ("Although the determination of what data could reasonably be relied upon is ultimately for the court, the expert ordinarily is better qualified to make this decision in his field of expertise than is the judge, and if the judge is satisfied with the expert's general qualifications to express an opinion he usually should defer to the expert's advice on that point.")

[5] Hamilton relied, for the most part, on personal observation. *But see* CP at 312, 316. His opinion was, appropriately, limited to the defective condition of the work that was in place when Firey hired Bar-None to repair the house. *See* CP at 312. Hamilton had an adequate factual basis for his opinions.

> Lewis County Building Department file. Finally, I have discussed the remaining repairs and cost of repairs with Mr. Hamilton. … This Declaration is based upon the documents noted above and other miscellaneous documents provided by Ms. Firey and her attorneys, plus visual observations of the house and site.

CP at 3. McClure later expanded on this factual basis:

> I have been to Ms. Firey's home several times. I have discussed the Firey project with local building code officials in Lewis County. I have spoken with Ben Hamilton who was a follow on contractor for Bar None Construction, who came to fix some of the damage caused by these various Defendant Contractors. I have reviewed numerous documents and materials in this matter, including Ms. Firey's records, documents produced by the various defendants, and most recently summary judgment motions and supporting declarations filed by Defendants.

CP at 309. McClure testified that "[a]ny information I have relied upon in generating my report or in forming my opinion is of the type customarily and reasonably relied upon by other experts in my field." CP at 2, 309. McClure had an adequate factual basis for his opinion that the replaced work had been defective.

Firey's photographs and other documents provided a factual basis for McClure's opinion that the replaced work had been defective. Firey had over 300 photographs of the work performed by K & T, Crown, and other contractors. CP at 201. The record before the trial court reveals that Firey's photographs included numerous examples of the completed work of K & T and Crown before it was replaced by later contractors. *See* CP at 195-201 (in deposition, Firey used some of her photos to point out defective work, some

of which had since been replaced). McClure could observe, through the photos, the condition of the completed work before it was replaced. McClure also reviewed Firey's records, which included narrative accounts that identified the work performed by each contractor. *See* CP at 130-49.

The trial court was concerned that the photographs were not produced as evidence. RP, Apr. 25, 2014, at 12:9-13. However, as noted above, the factual basis of an expert's opinion does not have to be revealed to the court in order to make the opinion admissible. ER 705; *State v. Russell*, 125 Wn.2d 24, 74, 882 P.2d 747 (1994). Even though the photographs themselves were not before the trial court, McClure could reasonably rely on them as a factual basis for his opinions. The photographs and other information on which McClure relied provided him with an adequate factual basis from which to conclude that the replaced work of K & T and Crown had been defective.

5.2.3 Any perceived flaws in the experts' opinions go to the weight of their testimony, not its admissibility.

The declarations of McClure and Hamilton are admissible. Whether through personal observation or reasonable reliance on facts and data of a type reasonably relied upon by experts in their field, the opinions of McClure and Hamilton are grounded in fact, not speculation. The Rules of Evidence contemplate that such expert testimony should be admitted, after which its reliability can be tested before the fact-finder through cross-examination. *See* ER 705; *State v. Eaton*, 30 Wn. App. 288, 294, 633 P.2d 921 (1981). Any flaws in the factual basis of an expert's opinion go to the *weight* of the

expert's opinion, not its admissibility. *Johnston-Forbes*, slip op. at 13 (quoting *In re Marriage of Katare*, 175 Wn.2d 23, 39, 283 P.3d 546 (2012) ("That an expert's testimony is not based on a personal evaluation of the subject goes to the testimony's weight, not its admissibility.")).

The trial court's concerns about the factual basis of the experts' testimony were not only unfounded (as explained above) but irrelevant to the question of admissibility. McClure and Hamilton testified to the facts on which they based their opinions. For those parts of K & T and Crown's work that had been replaced before they could be personally observed, McClure testified that he relied on facts of a type typically and reasonably relied on by experts in his field, including photographs and other documents. If there are any flaws in the factual basis that might be of concern to a fact-finder, those flaws are best revealed through cross-examination at trial, after which the fact-finder, not the trial court, can weigh the probative value of the experts' testimony. The declarations of McClure and Hamilton are admissible and should be viewed in a light most favorable to Firey, the nonmoving party.

5.3 The trial court erred in granting the motions for summary judgment when there were genuine issues of material fact.

On a motion for summary judgment, the court cannot weigh testimony or witness credibility. *Barker v. Advanced Silicon*, 131 Wn. App. 616, 624, 128 P.3d 633 (2006). Rather, it must view the testimony in a light most favorable to the nonmoving party. *Folsom*, 135 Wn.2d at 663.

In their motions for summary judgment, K & T and Crown argued that Firey could not present sufficient evidence to support the essential elements of her claims. Such motions must be denied if the documents called to the attention of the trial court reveal specific facts in support of the essential elements. If such facts are revealed, there are genuine issues of material fact precluding summary judgment.

Here, the declarations of McClure and Hamilton reveal genuine issues of material fact on the elements of breach and damages. Even without the declarations of McClure and Hamilton, other evidence called to the attention of the trial court reveals genuine issues of material fact on all of the elements. This Court should reverse the summary judgment orders and remand for trial.

5.3.1 The declarations of McClure and Hamilton reveal genuine issues of material fact on the elements of breach and damages, precluding summary judgment.

Hamilton testified regarding the work of the defendant contractors that existed when Bar-None was brought in to complete the project:

> The work of the Defendant Contractors that preceded Bar None were well below minimum acceptable standards. Most of that work needed to be removed and replaced. In addition, there was considerable damage done to Nina Firey's existing home as a result of what these Defendant Contractors did.

CP at 312. He described in detail the defective work that he discovered. CP at 314-16. He attached Bar-None's estimates for the work that would be

necessary to repair the defective work. CP at 318-24. These specific facts support the elements of breach and damages.

McClure testified in greater detail regarding the defective work performed by each of the defendant contractors. CP at 7-8. As noted above, McClure's testimony regarding which contractors performed what work—and the defective quality of that work—was based on personal observation and on photographs and other factual information of a type reasonably relied on by experts in his field. McClure's testimony clearly identifies the work performed by K & T and Crown and describes how that work was defective. These specific facts support the element of breach.

McClure also testified:

> It is my professional expert opinion that the Defendant Contractors in this case did not do their work to minimally acceptable industry standards and as a result Ms. Firey suffered damages. … Such standards would include doing work in conformance with the requirements of the building code, doing work in a commercially reasonable manner so to provide the intended end product and so as to not cause damage to the existing home and work performed by other contractors, doing work in a reasonably timely manner, and following applicable code and industry regulations such as what is required by Labor and Industries and by the local building officials in executing the work.

CP at 310. McClure estimated the cost to repair and complete the defective work to be $189,652 for the work of all defendants. CP at 11-12. These specific facts support the elements of breach and damages.

When proper consideration is given to the admissible expert testimony of McClure and Hamilton, viewed in a light most favorable to

Firey, the nonmoving party, the record discloses specific facts supporting the essential elements of Firey's claims. Thus, there are genuine issues of material fact that preclude summary judgment. This Court should reverse the summary judgment orders and remand for trial.

5.3.2 Even if the trial court was correct to disregard the declarations of McClure and Hamilton, other evidence called to the attention of the trial court reveals genuine issues of material fact precluding summary judgment.

Summary judgment is only proper if the documents called to the attention of the court show that there is no genuine issue as to any material fact. CR 56(c). Even excluding the declarations of McClure and Hamilton, the record before the trial court reveals genuine issues of material fact precluding summary judgment. The record contains specific facts that support the essential elements of Firey's claims.

Firey's own declaration creates a dispute of material fact on the existence of a contract with K & T and with Crown. Firey testified that she agreed with Ken Bannister to have K & T perform the necessary repairs on the home, on a time and materials basis, in a professional and workmanlike manner, within her budget for the project. CP at 302. She testified that after firing K & T, she agreed with Michael Lyons that Crown would take over the project, on a time and materials basis, in a professional and workmanlike manner, within her budget for the project. CP at 303. These specific facts support the existence of a contract and create a genuine issue of material fact for trial. Determining the existence of an oral contract usually depends

on the credibility of witnesses and is not appropriate for summary judgment. *Donatelli v. D.R. Strong Consulting Eng'rs, Inc.*, 179 Wn.2d 84, 93 n.1, 312 P.3d 620 (2013). The trial court correctly recognized the genuine issue of fact on this element.

The record before the trial court also contained specific facts supporting the elements of breach and damages. Firey testified in deposition to specific defective work performed by K & T, supported by photographs that were identified as exhibits to the deposition. *See, generally,* CP at 192-201. She also wrote narrative accounts of the work that was done by K & T, Crown, and others, describing the defects and estimating damages. *See, generally,* CP at 130-144. These accounts identify the following specific defects, to which Firey could testify at trial:

- K & T put down new underflooring in the kitchen without remediating the rotten and moldy floor underneath (CP at 141, 193);
- K & T installed a new kitchen window before attempting to level the floor, causing the wall and window to warp once the floor was properly leveled (CP at 193);
- K & T performed electrical work in the kitchen and utility room, which was not up to code and had to be redone: water heater not grounded, junction without a box, improperly placed outlets and switches, fan not vented, bad light fixtures (CP at 194, 200, 201);
- K & T installed plumbing in the kitchen and utility room that was not properly positioned (CP at 141, 193, 196, 200);

- K & T improperly installed the water heater: the supply line didn't flow properly, electrical wasn't grounded, overflow was directed down into the floor instead of outside the house (CP at 136, 141, 197);
- K & T installed drain pipes in the utility room that led outside onto the ground instead of into the septic system (CP at 196);
- K & T failed to repair the sagging utility room roof (CP at 198);
- K & T sealed off the crawlspace under the utility room, rendering it inaccessible and unventilated (CP at 140, 199);
- K & T left a pile of garbage on top of new lumber that was intended for use elsewhere on the house (CP at 199);
- K & T tore out half of the front porch, contrary to Firey's instructions (CP at 132, 136);
- K & T broke the water main and repaired it improperly (CP at 136);
- Crown replaced much of K & T's electrical and plumbing work, but still did it improperly and not to code, including failing to provide any vents for their plumbing work, draining the washer and utility room sink to the ground outside instead of to the septic system, and replacing the water main with unsuitable plastic without sufficient insulation to prevent freezing (CP at 137, 143);
- Crown replaced the floor in the utility room, but then damaged it when they installed the washer and dryer (CP at 143);
- Crown incorrectly installed insulation in the attic and in the main house crawlspace (upside-down) (CP at 143);

- Crown failed to finish work in the crawlspace, including leveling the house, prior to their work on the first and second floors of the house (CP at 143); and
- Crown installed underflooring in the dining room and upstairs, which must all be redone after the house was properly leveled (CP at 137).

In addition to these specific defects, the record before the trial court discloses other facts that Firey could bring to bear at trial. For example, Mr. Lyons (Crown) stated that K & T's work was not properly performed and needed to be corrected. CP at 303. Crown even prepared a letter detailing defective work of K & T that they had to replace. CP at 32. Ben Hamilton, in a letter presented to the trial court by counsel for K & T, described the work performed by Bar-None Construction and some of the defects they discovered in the work that had been performed previously by K & T, Crown, and others. CP at 153-54.

All of these specific facts in the record called to the attention of the trial court support the elements of breach and existence of damage. On the amount of damages, the record before the trial court includes estimates for repairs provided by Hamilton and Bar-None, CP at 151, 156-83, and Firey's own estimate of the cost of repair (based on estimates from Bar-None and others). CP at 139. Even without the expert opinion testimony of McClure and Hamilton, there were genuine issues of material fact on the essential elements of Firey's claims. This Court should reverse the summary judgment orders and remand for trial.

5.3.3 The trial court erred in dismissing Firey's unjust enrichment claim.

Unjust enrichment is a quasi-contract claim. It is commonly pled as an alternative cause of action in the event the court finds there was no valid contract. Here, the issue of whether there was a valid contract is yet to be determined. Without a binding determination that there was a contract, it was premature to dismiss Firey's alternative claim of unjust enrichment. This Court should reverse.

6. Conclusion

The trial court erred in disregarding the declarations of McClure and Hamilton. Their opinions had an adequate factual basis in personal observation, photographs, documents, and other factual information of a type reasonably relied on by experts in their fields. On de novo review of the summary judgment orders, this Court should find the expert declarations admissible.

The trial court also erred in dismissing Firey's claims. With or without the expert declarations, the record before the trial court disclosed genuine issues of material fact on the essential elements of Firey's claims. This Court should reverse the summary judgment orders and remand for trial.

Respectfully submitted this 31st day of October, 2014.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On October 31, 2014, I filed the foregoing document with the Court and served a copy on the undersigned in the manner indicated:

Court of Appeals, Div. 11 950 Broadway, Suite 300 Tacoma, WA 98402	___ U. S. Mail ___ Legal Messenger _X_ Electronic Filing ___ Hand Delivery
Carl Rodrigues Michael Lehner Lehner & Rodrigues, P.C. 1500 SW First Avenue, Suite 900 Portland, OR 97201 crodrigues@lrlawnw.com mlehner@lrlawnw.com mvanderberg@lrlawnw.com	___ U. S. Mail ___ Legal Messenger _X_ Electronic Mail ___ Hand Delivery
Michael S. DeLeo Peterson Russell Kelly, PLLC 10900 NE 4th Street, Suite 1850 Bellevue, WA 98004-8341 mdeleo@prklaw.com rwhite@prklaw.com	___ U. S. Mail ___ Legal Messenger _X_ Electronic Mail ___ Hand Delivery
Laurel Tiller The Tiller Law Firm P. O. Box 58 Centralia, WA 98531-9301 ltiller@tillerlaw.com hwallace@tillerlaw.com	_X_ U. S. Mail ___ Legal Messenger _X_ Electronic Mail ___ Hand Delivery

/s/ Rhonda Davidson
Rhonda Davidson, Legal Assistant

CUSHMAN LAW OFFICES PS

October 31, 2014 - 8:20 AM

Transmittal Letter

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Case Name: Firey v. K&T

Court of Appeals Case Number: 46388-1

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