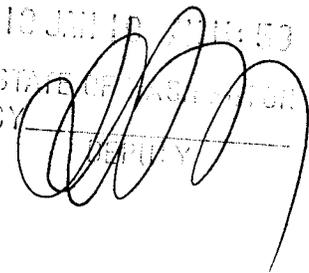


COURT OF APPEALS
STATE OF WASHINGTON

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STATE OF WASHINGTON
BY



36482-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NORTHWEST CASCADE, INC., a Washington corporation,
Appellant,

v.

TITANIC INVESTMENTS, INC., a Washington corporation;
NORMAN LEHMAN, an individual, and LOUISE LEHMAN, an
individual and their marital community; and RANGLES SAND &
GRAVEL, a Washington corporation; BUILTWELL STRUCTURES,
INC., a Washington corporation; CITY BANK, a Washington state
chartered banking institution; and EVERGREEN TITLE COMPANY,
INC., a Washington corporation

Respondents.

BRIEF OF APPELLANT

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January 15, 2010

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORTITIES.....	iii
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	1
III. STATEMENT OF CASE	7
A. NWC’s Lien.....	7
B. Lehman’s Counterclaim.....	9
C. Trial Court Procedure	11
D. Appeal Procedure.....	12
IV. ARGUMENT	13
A. The trial court erroneously found that the work performed by NWC on July 2, 2002, was solely for the purpose of reviving NWC’s lien rights	13
B. The trial court erroneously found that NWC placed an “unspecified amount of unsuitable soils” in the roadway area of the project, and that this somehow caused Lehman to import fill material at an additional expense.....	26
1. Lehman failed to prove how much allegedly “unsuitable” material was allegedly placed by NWC or where it was placed	29
2. Lehman failed to prove that the material allegedly placed by NWC was “unsuitable” at the time it was placed by NWC	31

3.	Lehman failed to prove that the allegedly “unsuitable” material allegedly placed by NWC was the cause of the damages for which the trial court awarded Lehman an offset of \$10,000	39
C.	In the alternative, the trial court erred in awarding any damages on the Lehman’s counterclaim in light of the undisputed fact that NWC was given no notice of or opportunity to cure the allegedly unsuitable soil in the roadway	43
D.	The trial court’s award of attorney’s fees was erroneous.....	44
E.	NWC is entitled to an award of attorney’s fees on appeal.....	49
V.	CONCLUSION.....	49

TABLE OF AUTHORITIES

Cases

<i>Bogle and Gates, P.L.L.C. v. Holly Mtn. Resources</i> , 108 Wn. App. 557, 32 P.3d 1002 (2001).....	40
<i>City of New Haven v. Tuchmann</i> , 890 A.2d 664, (Conn. App. 2006)	34
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579 (1993).....	35, 36
<i>ESCA Corp. v. KPMG Peat Marwick</i> , 86 Wn. App. 628, 939 P.2d 1228 (1997).....	42
<i>Hanna-Abington Alexandria, Inc. v. Budd Const. Co., Inc.</i> , 487 So.2d 743 (La. App. 1986).....	34
<i>Hansen v. State Farm Lloyds</i> , No. H-01-1457, 2002 WL 34363619, *2 (S.D. Tex. April 12, 2002).....	34
<i>Intermountain Elec. v. G-A-T Bros. Const. Inc.</i> , 115 Wn. App. 384, 62 P.3d 548 (2003).....	14, 48
<i>Kirk v. Rohan</i> , 29 Wn.2d 432, 187 P.2d 607 (1948).....	14
<i>Kumho Tire Co. Ltd. v. Carmichael</i> , 526 U.S. 137 (1999).....	35, 36
<i>McClain v. Kimbrough Const. Co., Inc.</i> , 806 S.W.2d 194, (Tenn. Ct. App. 1990).....	43
<i>Metro Hauling, Inc. v. Daffern</i> , 44 Wn. App. 719, 723 P.2d 32 (1986).....	26
<i>Piepkorn v. Adams</i> , 102 Wn. App. 673, 10 P.3d 428 (2000).....	45
<i>Pollard v. Saxe & Yolles Dev. Co.</i> , 525 P.2d 88 (Cal. 1974)	44

<i>Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha</i> , 126 Wn.2d 50, 882 P.2d 703 (1994).....	37
<i>Reese v. Stroh</i> , 128 Wn.2d 300, 907 P.2d 282 (1995).....	36
<i>Ruff v. Department of Labor & Industries of the State of Washington</i> , 107 Wn. App. 289, 28 P.3d 1 (2001).....	36
<i>Silver View Farm, Inc. v. Laushey</i> , No. 2005-09-168, 2008 WL 4867639, *4-5 (Del. C.P. Oct. 31, 2008).....	34
<i>Simpson Timber Co. v. Ljusic Industries, Inc.</i> , 1 Wn. App. 631, 463 P.2d 243 (1969).....	26
<i>State v. Farr-Lenzini</i> , 93 Wn. App. 453, 970 P.2d 313 (1999).....	24
<i>U.S. for Use and Benefit of Cortolano & Barone, Inc. v. Morano Const. Corp.</i> , 724 F. Supp. 88 (S.D.N. Y. 1989).....	43, 44
<i>Wash. State Dep't Health v. Yow</i> , 147 Wn. App. 807, 199 P.3d 417 (2008).....	16
 Rules	
ER 702	33, 35, 37
RAP 10.3(g)	17
RAP 18.1	49
 Statutes	
RCW 60.04	8, 46
RCW 60.04.021	13, 18

RCW 60.04.081(4).....	44, 47, 48, 49
RCW 60.04.091	13
RCW 62A.2-508	44

Other Authorities

4A Bruner and O'Connor on Construction Law § 14.2.....	35
5 Bruner and O'Connor Construction Law § 18:15.....	44
5 Bruner and O'Connor Construction Law § 18:41.....	43, 44

I. INTRODUCTION

Appellant Northwest Cascade, Inc. (“NWC”) appeals from a trial court judgment after trial in an action for breach of a construction contract. Although the trial court found in favor of NWC on its claim for breach of contract, the trial court also (a) dismissed NWC’s claim for foreclosure on its lien against the subject real property, and (b) found in favor of respondents Lehman¹ on a counterclaim.

The trial court dismissal of the lien claim was based on an unsupportable finding that the work performed by NWC within 90 days of recording its lien was performed solely to revive NWC’s lien rights. CP 389. The trial court’s judgment on Lehman’s counterclaim was based on an unsupportable finding that NWC had placed “an unspecified amount of unsuitable soils” in the roadway area of the project. CP 392. As a consequence of both rulings, the trial court offset part of the judgment for breach of contract, and substantially reduced the amount of attorney’s fees to which NWC would otherwise have been entitled. CP 394-95.

II. ASSIGNMENTS OF ERROR

Assignments of Error.

¹ “Lehman” refers to respondents Norman and Louise Lehman, and their marital community.

1. The trial court erred in denying NWC's motion for summary judgment on or about September 29, 2005. CP 434-35.

2. The trial court erred in making various evidentiary rulings at trial, in issuing its opinion letter on or about June 15, 2008 (CP 144-45), and in denying NWC's motion for reconsideration on or about September 8, 2006 (CP 169-182).

3. The trial court erred in entering (i) the *Judgment for the Plaintiffs* (CP 402-04) and (ii) the *Findings of Fact and Conclusions of Law* (CP 405-14), both entered on or about May 30, 2007.

4. The trial court erred in entering Finding 15, which provides, in relevant part:

15. From November 2001 through April 2002, NWC filed reports with the County relating to Temporary Erosion and Sedimentation Control ("TESC") activities. The reports were filed on November 28, 2001, December 27, 2001, January 28, 2002, February 11, 2002, March 13, 2002, and April 15, 2002. Plaintiffs Trial Exhibits Nos. 24 & 28-34. No reporting to Pierce County was required under Pierce County regulations for the months of May through September. NWC did not submit separate invoices to Lehman for the TESC work performed on November 28, 2001, December 27, 2001, January 28, 2002, February 11, 2002, March 13, 2002, and April 15, 2002.

5. The trial court erred in entering Finding 16, which provides:

16. NWC performed catch basin maintenance on the Project on July 2, 2002. On July 2, 2002 NWC sent

one of its employees to the site to perform some “mudding” around catch basins. Pursuant to the original Contract NWC was required to maintain erosion control and provide inspection work required by the Contract. The work performed on July 2, 2002 was not required to be done at the time it was performed. It was performed without notice to the Defendant, Lehman/Titanic, more than four months after NWC ceased doing work on the Project. The only reason NWC sent a man out to do some work on July 2, 2002 was to revive NWC’s lien rights. Catch basin maintenance work was within the original scope of NWC’s work under the Contract. Plaintiff’s Trial Exhibit No. 27. NWC did not submit a separate invoice for that work to Lehman or otherwise bill for it. No reporting was required under Pierce County regulations for this work. The July 2002 work was not performed under a separate contract between NWC and Lehman or Titanic.

6. The trial court erred in entering Finding 17, which provides:

17. As of July 2002, Lehman was behind in payments and the Court finds that there was a general state of “uncertainty” regarding the Project.

7. The trial court erred in entering Finding 19, which provides:

19. NWC filed a mechanic’s and materialman’s lien under RCW Chap. 60.04 on September 27, 2002, within 90 days of the July 2, 2002 work, but more than 90 days after the last TESC work reported to the County, and more than 90 days after the work performed in January 2002.

8. The trial court erred in entering Finding 21, which provides:

21. NWC’s lien rights lapsed before July 2,

2002 as the last day NWC performed work was in January 2002.

9. The trial court erred in entering Finding 22, which provides:

22. The Court concludes that the work performed by NWC on July 2, 2002 was done to revive expired lien rights.

10. The trial court erred in entering Finding 50, which provides:

50. NWC placed some unspecified amount of wet and unsuitable material on the fill area of the roadway in December 2001 when NWC was preparing the foundation for the retaining wall.

11. The trial court erred in entering Finding 51, which provides:

51. J.J. Sprague, Inc. imported 1,153 tons or approximately 800 cubic yards of "Sub-base material" for fill in April 2003. The cost of all imported material charged by J.J. Sprague, Inc. to Mr. Lehman was \$16,147.46. A portion of the imported material was necessary to replace the unsuitable soil placed by NWC on the roadway.

12. The trial court erred in entering Finding 52, which provides:

52. NWC failed to establish to the Court's satisfaction that the additional import material used by J.J. Sprague was solely attributable to the timing of the work and weather.

13. The trial court erred in entering Finding 54, which provides:

54. The Court finds that NWC placed an unspecified amount of unsuitable soils in the roadway area.

14. The trial court erred in entering Finding 55, which provides:

55. Mr. Lehman did not wholly meet his burden of proof to establish the necessity for the quantity of import materials in his counterclaim.

15. The trial court erred in entering Finding 56, which provides:

56. The Court finds that that NWC is liable for a portion for the costs for importing "Sub-base material" in April 2003 and that \$10,000 is a reasonable estimate of the sum appropriate to compensate Mr. Lehman for having to import "Sub-base material" for the Project.

16. The trial court erred in entering Finding 57, which provides:

57. The Court finds that \$10,000 is reasonable sum to compensate Mr. Lehman for having to import soil to replace unsuitable material placed by NWC.

CP 388-392.

Issues Pertaining to Assignment of Error Nos. 1-3 and 4-9:

A. Whether the trial court erred in dismissing NWC's lien claim based on an unsupportable finding that the work performed by

NWC within 90 days of recording its lien was performed solely to revive NWC's lien rights.

B. Whether other findings upon which the trial court's central finding was based were irrelevant, contrary to other findings or undisputed facts, or unsupported by evidence in the record.

Issues Pertaining to Assignment of Error Nos. 1-3 and 10-16:

C. Whether the trial court's findings that NWC placed an unspecified amount of "unsuitable" material in the roadway is unsupported by substantial evidence in the record.

D. Whether the trial court's finding that NWC's placement of the alleged "unsuitable" soil caused Lehman to import new fill material at an additional expense to Lehman is unsupported by substantial evidence in the record.

Issue Pertaining to Assignment of Error No. 3 (Attorney's Fees):

E. Whether the trial court's award of only a fraction of the attorney's fees requested by NWC was erroneously based on the trial court's erroneous rulings on the merits of the lien claim and counterclaim, the trial court's incorrect application of the fee provision in the lien statute, or both.

III. STATEMENT OF CASE

NWC is a general contractor. On August 14, 2001, NWC entered into a contract with Lehman for the construction of certain infrastructure improvements for a nine lot subdivision in Pierce County (hereafter the “Project”). CP 387 (Findings 2, 4, 5).²

NWC commenced work on or about November 5, 2001, and continued performance of the site work, storm water work, road work, and retaining wall work under the Contract through January 2002. As of January 2, 2002, NWC could not proceed further with substantial productive work and complete the storm water, grading and paving work because the water line work had not been awarded either to NWC or to another contractor by Lehman. NWC was justified in stopping work on the Project, and preparing the Project site for a winter shut down. CP 388, 391 (Findings 12, 14, 40).

A. NWC’s Lien

Part of NWC’s job pursuant to the contract was to provide temporary erosion control for the project. Ex. 1. NWC was required to ensure compliance with Pierce County regulations for Temporary Erosion and Sedimentation Control (“TESC”). CP 388 (Findings 8, 15). TESC

² A copy of the trial court’s *Findings of Fact and Conclusions of Law* dated May 30, 2007 (CP 386-397) is attached to this brief as Appendix A.

measures include, among other things, maintenance of catch basins, placement of straw bales, mulch and silt fences. VRP 60-61, 150, 183, 377. Even though NWC could not proceed with substantive work after January 2002, NWC was still responsible for the TESC work, and NWC continued to maintain the TESC measures and to file the required TESC reports. CP 388 (Finding 15)³. The last work performed by NWC on the project was TESC maintenance work on July 2, 2002. NWC performed “mudding” around some of the catch basins. CP 389 (Finding 16); Ex. 27.⁴ This work was performed pursuant to NWC’s contractual obligation to maintain the TESC measures. CP 389 (Finding 16).

By July 2002, Lehman was behind in its payments to NWC. On September 27, 2002, NWC recorded a mechanic’s and materialman’s lien against the Property under RCW Chap. 60.04. However, as late as October 2002, NWC still expected to return to the Project site, complete its work, and possibly perform the water line work. CP 389 (Findings 17-19).

³ The trial court’s finding states only that NWC filed the required TESC reports. Lehman objected to NWC’s proposed finding which stated that the TESC work was done. CP 318. However, the undisputed evidence established that NWC actually performed the TESC work on the dates set forth in Finding 15. VRP 62-66; Exs. 28-30 and 32-34 (monthly TESC reports to County for all required reporting periods).

⁴ “Mudding” refers to the process of sealing leaks in concrete products. Catch basins need to be mudded to stop the entry of silt into catch basins. VRP 243-44.

Lehman argued that the work performed by NWC on July 2, 2002, was solely for the purpose of reviving NWC's lien rights. The trial court agreed. As a result, the trial court further ruled that NWC's lien had lapsed because it was not filed within 90 days of the work performed by NWC in January of 2002. CP 389 (Findings 16, 19, 21).

B. Lehman's Counterclaim

A substantial part of NWC's work under the contract was site preparation, which included grading the project site as set forth in specific plan sheets. Exs. 1, 46.⁵ These plans indicated exactly how the site was to be graded. Ex. 1. In addition, the contract provided that "SITE BID TO BALANCE WITH NO IMPORT OR EXPORT," meaning that no fill material was to be imported or removed from the site by NWC. Ex. 1; VRP 333. If it became necessary to import fill, that would have been an extra charge to Lehman that NWC would have negotiated or proposed to Lehman. VRP 616.

As the trial court found, NWC could not do any more substantive work on the project after January 2002. CP 388 (Finding 14). Lehman breached its contract with NWC by preventing NWC from completing the work, and by hiring a new contractor to complete NWC's scope of work.

⁵ Reduced size copies of two sheets from Exhibit 46 are attached to this brief as Appendix B.

CP 391-92 (Findings 37, 42, 48). The work was completed by a new contractor, J.J. Sprague, Inc. *Id.*

Even though the original contract with NWC specified that the site would balance (no fill imported or removed), Sprague charged Lehman approximately \$16,000 to import 1,153 tons of fill material to finish the road. CP 392 (Finding 51); Ex. 42. Based on the testimony of Sprague, Lehman alleged that the imported material was necessary to replace allegedly unsuitable material placed by NWC on the roadway area of the project. VRP 334-35, 357. These allegations were unsupported by any tests, records or specific testimony about how much “unsuitable” material was alleged placed by NWC.

Similarly, the only explanation as to why the soil was unsuitable was Sprague’s admission that the soil was saturated. VRP 401, ll. 21-25; 402, ll. 1-11. This should not have been a surprise given the fact that the work done by Sprague was in early spring after a winter of heavy rains. VRP 360, ll. 24-25; 361, ll. 1-18; 362; ll. 1-5; Ex. 114 (precipitation record). Furthermore, the claim was illogical on its face because even if the soils in the road area were “unsuitable” and needed to be replaced by imported fill, the cost of importing that fill material was expressly *not* part of NWC’s contract. Ex. 1.

C. Trial Court Procedure

NWC filed this action on April 29, 2003. CP 1-6. On or about May 25, 2004, NWC filed an amended complaint to name additional parties that had acquired lots in the Project, insured title, and/or loaned funds to the new buyer of the lots after the litigation had commenced. CP 33-39, 388 (Finding 7).

A bench trial was held on May 22-24, 2006. CP 386. After the trial, the trial court issued an *Opinion Letter* that summarized the court's findings and conclusions. CP 143-45. The court ruled, *inter alia*, that:

- NWC was awarded approximately \$41,000 for work performed on the contract, lost profits, and interest;
- NWC's lien was dismissed as untimely;
- Lehman was awarded an offset of \$10,000 based a finding that NWC had placed an unspecified amount unsuitable soil on a part of the project site.

CP 144-45, 393-95. The court invited the parties to submit proposed findings and conclusions. CP 144.

NWC moved for reconsideration. CP 146-156. The trial court denied the motion. CP 169-182.

NWC moved for an award of attorney's fees pursuant to the contract. CP 183-268. Both parties submitted proposed findings and

conclusions. CP 302-367. After a hearing on April 11, 2007, the trial court entered findings of fact and conclusions of law, including an award of attorney's fees to NWC. CP 387, 394-95.

D. Appeal Procedure

NWC appealed, CP 398-435, and Lehman cross appealed. Shortly after the appeals were filed, respondents Lehman filed for bankruptcy. NWC moved to stay the appeal as required by the automatic stay in bankruptcy. This Court stayed the appeal on or about September 7, 2007.

On or about July 1, 2009, NWC notified this Court that it had obtained relief from the automatic stay in the bankruptcy court, and that NWC intended to proceed with the appeal. This Court lifted its own stay, and issued a new schedule on July 6, 2009.

On August 21, 2009, attorney Herbert Gelman, the only attorney of record for the respondents in this appeal, filed a *Notice of Intent to Withdraw*. NWC was concerned that the parties who may have an interest in the appeal should be notified that the appeal was pending. NWC moved for an extension of time, which was granted on November 5, 2009.

On or about November 30, 2009, NWC sent notice by regular and certified mail to interested parties that the appeal had restarted, and that those parties might be affected by the outcome of the appeal. *Letter to Clerk* (November 30, 2009). The letter was sent to all respondents, all

current and former property owners, current secured lenders, and current and former title insurers. *Id.*

As of the date of this brief, only Wells Fargo Bank, N.A. has appeared in this in this appeal. Wells Fargo filed a notice of appearance and motion for substitution or intervention on January 14, 2010. Wells Fargo has been served with a copy of this brief. No other interested parties have appeared in this appeal.

IV. ARGUMENT

A. The trial court erroneously found that the work performed by NWC on July 2, 2002, was solely for the purpose of reviving NWC's lien rights.

RCW 60.04.021 provides that any person furnishing labor, professional services, materials or equipment for the improvement of real property has a lien for the contract price of the of the labor, services, materials or equipment provided. For such lien to be effective, the lien must be recorded "not later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment." RCW 60.04.091. Having performed work on the project, NWC had a lien on the property pursuant to the lien statute. NWC recorded its lien on September 27, 2002, within 90 days of the last work performed on July 2, 2002. CP 389 (Finding 19).

Only certain types of work will qualify to establish the date from which the 90-day time limit runs. It is well established that the work that is the basis for a statutory lien cannot be work under a new or different contract, performed *solely* for the purpose of prolonging the time for filing the lien, or to revive lien rights that have lapsed. *Intermountain Elec., Inc. v. G-A-T Bros. Const., Inc.*, 115 Wn. App. 384, 62 P.3d 548 (2003); *Kirk v. Rohan*, 29 Wn.2d 432, 436, 187 P.2d 607, 609 (1948).

The work performed on July 2, 2002, was performed pursuant to NWC's contract. The trial court specifically found that:

- “NWC performed catch basin maintenance on the Project on July 2, 2002. On July 2, 2002 NWC sent one of its employees to the site to perform some “mudding” around catch basins. Pursuant to the original Contract NWC was required to maintain erosion control and provide inspection work required by the Contract.”
- “Catch basin maintenance work was within the original scope of NWC's work under the Contract.”
- “The July 2002 work was not performed under a separate contract between NWC and Lehman or Titanic.”

CP 389 (Finding 16). Consequently, NWC's lien was valid unless the work done on July 2, 2002 was performed solely for the purpose of reviving NWC's rights. *Kirk*, 29 Wn. App. at 436.

The only competent evidence in the record establishes that the July 2002 work was *not* performed solely to maintain NWC's lien. It was undisputed that the work performed by NWC in July of 2002 was within the scope of work of the original contract between NWC and Lehman. CP 389 (Finding 16). There is no dispute that the work had to be performed to maintain and protect the catch basins. This was admitted by Lehman's own expert. VRP 373, ll. 12-25; VRP 374, ll. 1-3 ; 376, ll. 5-17. He admitted that erosion control must be maintained even when no work is being done on site. VRP 372, ll. 5-25. As he acknowledged under cross-examination, erosion control is not a single event, but rather an "ongoing process." VRP 376, ll. 22-25; 377, l. 1. It has to be maintained and the erosion control work "repeated if the project is left open to weather." VRP 377, LL.2-19. It is undisputed that NWC continuously performed its obligations to maintain the TESC measures⁶, and that it submitted all the required reports to the County. CP 388-89 (Finding 15). There is no dispute that at the time that NWC performed the July 2002 work Lehman had not terminated the contract with NWC, and NWC had continued to perform work under its contract to fulfill its duties under the permit regarding erosion control. CP 389 (Findings 16-18).

⁶ See note 3.

Further, there is no dispute that NWC still believed at that time – as demonstrated by contemporaneous correspondence – that it would return to the project and finish the work as soon as Lehman obtained the water line permits. CP 389 (Finding 18). NWC had no notice that Lehman would hire another contractor (Sprague) until after October of 2002 – a full three months after the July 2002 erosion control work was performed. CP 390 (Finding 35). Lehman had no complaints about NWC’s work until December 2002. CP 390 (Finding 31).

These facts completely refute any notion that the work done in July 2002 was done with the intention of either renewing or extending lien rights. The work was done because NWC had a contractual and regulatory obligation to do it, and because NWC fully expected to complete its work.

Any contrary finding is not supported by substantial evidence and must be reversed. Findings will be affirmed on appeal if they are supported by substantial evidence. *Wash. State Dep’t Health v. Yow*, 147 Wn. App. 807, 818, 199 P.3d 417 (2008). Substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” *Id.* In this case there is no evidence, much less substantial evidence, to support a finding that the July 2002

TESC work was done solely for the purpose of reviving or extending NWC's lien.

The trial court found, contrary to the undisputed evidence set forth above, that "The only reason NWC sent a man out to do some work on July 2, 2002 was to revive NWC's lien rights." CP 389 (Finding 16, sixth sentence).⁷ Based on this erroneous finding, the trial court erroneously concluded that "NWC's" lien rights lapsed before July 2, 2002 as the last day NWC performed work was in January 2002." CP 389 (Finding 21).⁸ The trial court dismissed NWC's lien claim. CP 394 (Conclusions 17-18).

The trial court's central finding — that the July 2, 2002 work was only done to revive the lien — was based on a further erroneous finding that work "was not required to done at the time it was performed." CP 389 (Finding 16, fourth sentence). As a matter of contractual requirements, County requirements, and industry practice, however, the work had to be done at some point in the summer or early fall because the project would be going through another fall and winter. VRP 60, ll. 18-25; 61, ll. 1-7; 107, ll. 19-25; 108, ll. 1-3; 121, ll. 5-10; 127, ll. 7-14.

⁷ The Court made essentially the same finding in Finding 22, which states "The Court concludes that the work performed by NWC on July 2, 2002 was done to revive expired lien rights." CP 390 (Finding 22). Finding 22 is erroneous and unsupportable for the same reasons as Finding 16.

⁸ Finding 21, that NWC's lien rights lapsed before July 2, 2002, is arguably a conclusion of law for which no separate assignment of error is required. RAP 10.3(g). NWC has assigned error to this finding out of an abundance of caution.

Questioning why work was done on one day rather than another day one or two weeks later or earlier is not evidence. In sum, there is no evidence to support the trial court's finding (Finding 16, fourth sentence) that the work did not need to be done at the time it was done. Quibbling over whether certain work could or should have been done at some different time is argument, not evidence.

More importantly, any argument or finding regard why particular work was done at a particular time is irrelevant under the applicable law. It is undisputed that the TESC work was done pursuant to the contract. Unless and until the contract with NWC was terminated, TESC maintenance would continue to be done by NWC and such work would be pursuant to the contract for purposes of RCW 60.04.021. Because Lehman had not terminated NWC or relieved NWC of its contractual and regulatory obligations to maintain TESC measures, Lehman cannot be heard to argue about whether work done pursuant to the contract was "required" to be done or not at a particular time. That is not the applicable standard. There is simply no such requirement in the case law or the lien statute supporting the approach taken by the trial court. The trial court's approach would allow an owner to put a contractor, whose work is not finished, on hold for 90 days, and then terminate the contractor, destroying

the contractor's lien rights, even though the contractor continued to maintain erosion control as required by law.

Defendants created the confusion on this issue of whether the work needed to be done at a certain time or not by claiming that that work at issue was to be done in the rainy season. This was flatly refuted by Lehman's own expert. Mr. Sprague acknowledged in his direct examination that mudding the catch basins was not the highest priority at the time it was done in July, but that "It would have been done *down the line a little ways. That's for sure.*" VRP 354, ll. 16-21 (emphasis added). Mr. Sprague was clearly acknowledging that the catch basin was would have to be done some time before the fall/winter rains. Sprague also testified that erosion control maintenance often has to be repeated if a site is left open to the weather. VRP 377, ll. 12-21. But, Sprague had no idea what the actual condition of the erosion measures was in July of 2002 because he was not at the site. VRP 377, ll. 22-25. Because the purpose of mudding the catch basins was to keep silt from entering the storm system it is only logical that the work had to be done *before* the rainy season, not during the rainy season. Whether it was done in the early summer, late summer, or early fall is irrelevant. It was necessary and appropriate to perform that work at some point prior to the site enduring another rainy fall and winter rainy season, as testified to by Mr.

Afflerbaugh of NWC. VRP 121, ll. 5-10; 127, ll. 7-14. That conclusion alone refutes the notion that the work was done solely to revive or extend lien rights.

The trial court's central finding — that the July 2, 2002 work was only done to revive the lien — was also based on several *irrelevant* findings. Specifically, the trial court found that:

- “[The work] was performed without notice to the Defendant, Lehman/Titanic, more than four months after NWC ceased doing work on the Project.” (Finding 16, fifth sentence).
- “NWC did not submit a separate invoice for that work to Lehman or otherwise bill for it.” (Finding 16, eighth sentence).
- “As of July 2002, Lehman was behind in payments and the Court finds that there was a general state of ‘uncertainty’ regarding the Project.” (Finding 17).
- “NWC filed [its lien] ... more than 90 days after the last TESC work reported to the County...” (Finding 19).

CP 389.

The trial court's finding (Finding 16, fifth sentence) that the July 2002 TESC work was done without notice to Lehman and four months after NWC “ceased doing work” on the project is *irrelevant*, and provides no support for the court's central finding that the work was only done to

revive the lien. Nothing in the contract required NWC to provide notice each time it performed work pursuant to the contract. Ex. 1.

There was no evidence of any contract requirement, no custom, or practice of notifying the owner every time erosion control maintenance work was performed. Ex. 1; VRP 66, ll. 10-13; VRP 555, ll. 5-15. The court's observation that the TESC work continued after NWC "ceased doing work" proves nothing. The court's own findings establish that NWC had to stop doing *substantive* work on the project after January 2002 *because of delays by Lehman*. Nevertheless, the contract was not terminated, and it was still NWC's responsibility to maintain the TESC measures. CP 388-89 (Findings 14, 16, 18).

The trial court's finding (Finding 16, eighth sentence) that NWC did not submit a separate invoice for the July 2002 TESC work is also completely irrelevant. Similarly, because erosion control was part of the base contract, each particular item of work was not separately billed for. Ex. 1; VRP 66, ll. 10-13; VRP 555, ll. 5-15. The contract billing records are clear on that point. The line item for erosion control was billed in its entirety in December 2001, with progress billing No. 1. There were no subsequent erosion control billings, even though the work was ongoing, as demonstrated by the reports to the County. Compare Exs. 28-34 (monthly TESC reports to County) and Exs. 3-4 (progress billings by

NWC). Accordingly, the fact that there was no separate billing for the July 2002 work is immaterial. Indeed, the trial court also found that NWC did not issue separate invoices for the TESC work done between November 2001 and April 2002 either. CP 388-89 (Finding 15).

The trial court's finding (Finding 17) that there was "uncertainty" regarding the project in July 2002 is both vague and irrelevant. Uncertainty does not affect NWC's rights or obligations under the contract, which had not been terminated at that time. Until NWC's contract was terminated, NWC remained responsible for the TESC measures. CP 388 (Finding 8). NWC did not know until as late as October 2002 that the remaining work had been awarded to another contractor. CP 390 (Finding 35). "Uncertainty" is not evidence, and it does not support the trial court's finding that the July 2002 work was done to revive the lien.

The trial court's finding (Finding 19) that NWC filed its lien "more than 90 days after the last TESC work reported to the County" is irrelevant. The trial court's own findings clearly state that no reporting was required by Pierce County regulations between May and September. CP 388 (Finding 15). The fact that NWC did not file reports that were not

required proves nothing. The trial court's finding does not support the trial court's finding that the July 2002 work was done to revive the lien.⁹

After all of the trial court's erroneous and irrelevant findings are disposed of, it is clear that the trial court's central finding — that the July 2, 2002 work was only done to revive the lien — was entirely based on the completely speculative testimony of Lehman's second contractor (Sprague) regarding NWC's alleged motives in performing the work when it was performed. Sprague testified, over NWC's objection, that:

Q. What's your opinion as to why [the July 2002 TESC work] was done?

A. Well, I'm just -- just guessing from my experience and --

[Objection and colloquy; objection overruled]

Q. (By Mr. Gelman) Do you have an opinion?

A. My opinion is that -- that it was done just to reinforce some kind of lien right, something to that -- to that degree.

VRP 353-54. It is well settled that a court cannot consider such speculative opinion testimony to support a critical argument.

[W]hen analyzing the admissibility of lay opinion testimony, we first determine whether the opinion relates to a core element or to a peripheral issue. Where the opinion relates to a core element that the State must prove, there

⁹ NWC has assigned error to Finding 19, although parts of that finding — the dates and the fact that the lien was filed on September 27, 2002 — are correct.

must be a substantial factual basis supporting the opinion. Courts also consider whether there is a rational alternative answer to the question addressed by the witness's opinion. In that circumstance, a lay opinion poses an even greater potential for prejudice.

State v. Farr-Lenzini, 93 Wn. App. 453, 462-463, 970 P.2d 313 (1999)

(Improper to admit the testimony of a trooper as to the state of mind of a driver who was accused of evading an officer's pursuit.) Whether NWC performed the work with the intent to extend the lien period is an essential element of Lehman's defense that the lien is invalid. Yet the trial court's finding on this critical issue of fact was supported by nothing more than the opinion of a witness who admitted he was "*just guessing*" as to NWC's motives. VRP 353. Sprague's speculative and unsupported testimony questioning NWC's motive should not have been considered by the trial court. That testimony cannot overcome the overwhelming objective and contemporaneous evidence of the validity of the lien and NWC's valid intent in performing the routine, contractually required and regulatory required TESC maintenance work.

Furthermore, the actual substance of Sprague's testimony was that performing the catch basin maintenance work at that time was not a priority — not that such work was not appropriate — and that there other things that in his opinion that should have been done *first*. VRP 354. Significantly, Sprague testified that performing the catch basin

maintenance work was legitimate erosion control work, but that it was not a priority at that time, and that there other things that in his opinion that should have been done first. VRP 354. Given the undisputed evidence supporting the lien claim, Sprague's speculation about NWC's motives is not only inadmissible, but also patently insufficient to rebut the overwhelming evidence that the lien was valid.¹⁰

Finally, it is clearly against public policy to deny contractors lien rights for performing work that is both required by government regulation and based on an important public policy. The TESC regulations are based on Federal and State requirements under the Federal Clean Water Act. That is not disputed. If contractors are legally foreclosed from asserting lien rights for doing ongoing TESC maintenance work when a project is temporarily shut down, or its status "uncertain", contractors will be reluctant to perform such work. Yet such work is critical to preventing silt

¹⁰ Explicit in Sprague's testimony is that the catch basin maintenance work could or should have done later, after items that he believed had higher priority were completed. Taking this testimony at face value, had the admittedly necessary catch basin maintenance work been done later, perhaps in September or October, NWC's lien rights would have been extended even further. This point highlights why arguing about whether a task should or could have been done at a different time is legally irrelevant. The only relevant questions are when was the task done, and was it pursuant to the contract. If a party opposing a lien could argue that the work performed on the last day work was performed did not need to be done at that particular point, then there would be endless litigation on virtually every lien claim over whether what was done on the last day work was performed was really required at that time or not. Such uncertainty would inevitably prompt contractors and subcontractors to file liens much earlier to protect themselves from such arguments. This would unnecessarily disrupt projects and project financing.

from clogging streams, rivers and public sewer systems. It is an essential element of protecting endangered aquatic species and preserving our streams and rivers. Contrary to the trial court's decision, contractors should be encouraged to perform such work, even when the state of a project is "uncertain" to ensure continuing compliance with State and Federal regulatory requirements and protection of the environment.

In sum, there is no competent, admissible evidence to support the trial court's finding that the July 2, 2002 work was only done to revive the lien. CP 389 (Finding 16, sixth sentence). That finding, and the erroneous, unsupported, and irrelevant findings on which it is based, must be reversed. The trial court's dismissal of NWC's lien claim must be reversed.

B. The trial court erroneously found that NWC placed an "unspecified amount of unsuitable soils" in the roadway area of the project, and that this somehow caused Lehman to import fill material at an additional expense.

Lehman presented a number of counterclaims against NWC, including breach of contract, delay damages, slander of title, and frivolous lien. CP 394. Lehman had the burden of proof on this counterclaims. CP 394; *Metro Hauling, Inc. v. Daffern*, 44 Wn. App. 719, 721, 723 P.2d 32 (1986); *Simpson Timber Co. v. Ljutic Industries, Inc.*, 1 Wn. App. 631,

641-42, 463 P.2d 243 (1969). The trial court rejected all but one of these counterclaims. *Id.*

The single counterclaim that Lehman prevailed on was based on pure alchemy. Lehman relied on a single Daily Progress Report and extra work charge from NWC that indicated that approximately 20 cubic yards of soil had been removed and replaced by pea gravel for part of a retaining wall foundation, and that the removed soil was placed in the fill area of the site (Exs. 22 and 5). Based on this evidence, Lehman claimed that NWC was somehow responsible for the need to import 1,153 tons (or approximately 800 cubic yards) of fill material. CP 392 (Finding 51). The testimony, however, clearly established that the amount of soil removed from the base of the retaining wall and placed in the fill area was only 20 cubic yards, the same volume of the material (pea gravel) that was used to replace it. VRP 112, ll. 24-25; 113, ll. 1-3; VRP 118, ll. 11-21.

That this was Lehman's theory was apparent from closing argument, VRP 689, as well as the cross examination of NWC's witnesses. VRP 112, ll. 16-25, 113, ll. 1-17; 116, ll. 9-24; 117, ll. 16-25; 118, ll. 11-21. But at no time did Lehman, Sprague or Lehman's counsel even explain how spreading a mere 20 cubic yards of material over hundreds of square feet could possibly require the removal and importation of over 800 cubic yards of material. CP 392 (Finding 51).

In his testimony, Mr. Perry explained this fundamental flaw in math and logic, showing that 20 cubic yards of material spread in the fill area would only be 1/100th of an inch thick – irrelevant to the quality of the subgrade. VRP 184, ll. 18-25; 185-87; 188, ll. 1-5. Further, he showed, based on the actual quantities of import material claimed by Lehman and Sprague, that the materials had to have been used to complete the fill in the low (fill) areas, not replace 20 cubic yards of allegedly wet material. VRP 619, ll. 24-25, 620-25 and Ex. 116. The cost of importing material was not part of NWC’s contractual obligation. Ex. 1; VRP 42, ll. 21-24. These fundamental flaws in Lehman’s claim were addressed in closing argument. VRP 670, ll. 3-17.

Notwithstanding the foregoing, and based on the testimony of Sprague, the trial court found that:

- that NWC placed an “unspecified amount of unsuitable soils” in the roadway area, and
- that the placement of this material made it necessary to import new fill material at an additional expense to Lehman.

CP 392 (Findings 50-51, 54). Based on these findings, the trial court estimated that \$10,000 was a reasonable amount of compensation for Lehman. CP 392 (Findings 56-57). The trial court offset that amount against Lehman’s liability to NWC. CP 394 (Conclusion 16).

The trial court's findings are unsupported by substantial evidence and contrary to the express terms of the Contract. The offset awarded to Lehman, which was based on those findings and erroneous application of the Contract terms, must be reversed.

1. Lehman failed to prove how much allegedly "unsuitable" material was allegedly placed by NWC or where it was placed.

The trial court found that NWC placed an "unspecified amount" of unsuitable material in the roadway area of the project. CP 392 (50, 54). Setting aside the problem that Lehman failed to prove that the material allegedly placed by NWC was "unsuitable" for the roadway, see subsection B(2) (below), Lehman completely failed to prove how much "unsuitable" soil was placed or where it was placed. This is shown by the trial court's findings, which do not indicate how much soil was placed or in what part of the roadway it was placed. CP 392 (Findings 50, 54).

The testimony offered by Lehman was extremely vague and nonspecific as to quantity or location. Sprague could not identify a quantity of "unsuitable" soil. VRP 335, l. 9. Under cross examination Sprague admitted he had no idea how much "unsuitable" soil was removed from the wall area and placed in the fill areas. VRP, 404, l. 25; 405, ll. 1-25; 406, ll. 1-3; 409, ll. 19-23.

Sprague had no records, such as daily reports, that would show how much “unsuitable” material was removed. VRP 364, ll. 16-25; 365, ll. 1-12. No measurements were taken by Sprague at the outset of his work. VRP 386, ll. 13-25. Sprague was inconsistent and confused about how much fill had been placed by NWC in the lower road area before he started work and how much he still needed to place to complete the fill work in the road. VRP 419, ll. 21-25; 420-422. Sprague eventually admitted that he had “no idea” whether NWC had “filled a foot or if they filled six inches” in the lower road/fill area before he took over the work. VRP 427, ll. 16-24. And perhaps most importantly, Sprague could not explain how much of the import was used to complete the fill work versus replace allegedly unsuitable soil. VRP 428, ll. 5-19.¹¹

Without any findings about how much “unsuitable” material was placed or where it was placed, or any substantial evidence upon which such findings could be based, the trial court had no basis for concluding that NWC caused any particular harm to Lehman. By finding only that NWC had placed an “unspecified amount” of material, the trial court

¹¹ There is no issue here as to whether NWC was liable for the cost of import to complete the fill, as the trial court found that Lehman was responsible for the project delays, that Lehman prevented NWC from completing its work (CP 391, Finding 44), and that NWC was justified in stopping work in January 2002 given the state of the project. CP 391, Findings 40-41.

effectively recognized that Lehman did not carry its burden of proof on its counterclaim.

2. Lehman failed to prove that the material allegedly placed by NWC was “unsuitable” at the time it was placed by NWC.

Lehman also failed to prove that the material allegedly placed by NWC was “unsuitable” as fill at the time it was placed by NWC. The trial court’s Findings 50 and 54 (CP 392) are unsupported by substantial evidence and must be reversed.

First, Lehman offered no evidence as to the actual nature of the allegedly “unsuitable” material. Sprague performed no standard soils tests, did not save soil samples, did not do a sieve analysis, and did not hire a geotechnical engineer to look at or test the soils; he just looked at the dirt. VRP 406, ll. 20-25; 407, ll. 1-9; 408, ll. 24-25; 409, ll. 1-8. Indeed, the trial court admitted that “there was a lack of independent, scientific evidence or environmental testing regarding the quality of the soil and the on-site soil movement by NWC.” CP 145 Given the total lack of hard evidence as to why the material was “unsuitable,” Findings 50 and 54 were not supported by substantial evidence and should be reversed.¹²

¹² NWC’s proposed finding would have disposed of this issue. Proposed Finding 49 stated “No records were maintained by J.J. Sprague Inc. of any unsuitable soils. There were no photographs of the unsuitable soils. No soil samples were retained by J.J.

Second, lacking any real evidence as to why the material was “unsuitable,” Lehman entirely relied on the vague opinion testimony of Sprague that he knows what “bad ground looks like” when he sees it. VRP 407, l. 12. That testimony lacked foundation and should have been rejected by the trial court. Sprague was never on the Project site until October 2002. CP 391 (Finding 36); VRP 328. Consequently, Sprague was not present when the grading work was performed by NWC. Sprague had no basis for any opinion as to the nature of the soils when they were placed by NWC almost a year earlier.

Sprague’s testimony was vague about the nature of the allegedly unsuitable soil. Sprague claimed that the soil in the lower road areas was “soft” and a “big mess.” VRP 335, ll. 25, 336, ll. 1-2. Nowhere on direct examination did he explain what was “unsuitable” about the soil. He simply repeated that it was unsuitable. VRP 337, 338, 345, 357.

There was no foundation for Sprague’s vague assertions about the quality of the soils. NWC specifically and repeatedly objected to the trial court allowing Sprague to testify as an expert where he was clearly not

Sprague, Inc. or Mr. Lehman. Nor was any such material tested or analyzed by a geotechnical expert for Mr. Lehman or J.J. Sprague, Inc. No measurements of any over-excavation and fill areas were taken by J.J. Sprague, Inc. or Mr. Lehman. Mr. Sprague's testimony regarding unsuitable soil did not refer to any established standards for soils. Mr. Sprague did not know what the conditions were when NWC was working on the Project site between November 2001 and January 2002.”

qualified to do so under ER 702. CP 92-94, 150-56. And the trial court acknowledged that Sprague's testimony was not proper scientific evidence. CP 145, 177. Without proper expert testimony, the trial court's findings that the material was "unsuitable" cannot be sustained.

There was no foundation for Sprague's vague assertions about the quality of the soils. NWC objected to the trial court allowing Sprague to testify as an expert where he was clearly not qualified to do so under ER 702. CP 92-94, 150-56. And the trial court acknowledged that Sprague's testimony was not proper "scientific" evidence. CP 145, 177. Without proper expert testimony, the trial court's findings that the material was "unsuitable" cannot be sustained.

The trial court's error was two-fold. First, it failed to recognize that Sprague's testimony about the suitability of the soil was in fact expert opinion testimony under ER 702, and thus had to meet the requirements of that rule. Indeed, the Court admitted as much. CP 145. In contrast to the trial court's attempt to analogize to whether a traffic light was red or green, what Sprague was actually saying, from a somewhat more professional perspective, was that in his opinion the soils he observed in the fill area in April 2003 could not be compacted sufficiently to meet the conditions for a solid road base. The actual technical requirements for meeting that condition are found in Pierce County road standards, and

typically require the contractor to meet a certain compaction requirement, typically 90-95% of a specified density. Compaction requirements are typically measured by geotechnical engineer, because the measurements require an understanding of soil types and various aspects of soil properties.

Although there are no Washington cases on point, it is generally recognized by courts that analysis of soil properties and conditions requires scientific expertise. See *Hansen v. State Farm Lloyds*, No. H-01-1457, 2002 WL 34363619, *2 (S.D. Tex. April 12, 2002) (finding that witness' education as a chemical engineer and "experience" in the profession did not qualify him as an expert in the area of soil movement, soil elasticity, or soil failure); *Hanna-Abington Alexandria, Inc. v. Budd Const. Co., Inc.*, 487 So.2d 743, 747 (La. App. 1986) (witness for the plaintiff was qualified as an expert in construction engineering but not in soil analysis); *City of New Haven v. Tuchmann*, 890 A.2d 664, 670-71 (Conn. App. 2006) (noting that witness without scientific expertise was not qualified to offer expert testimony regarding the load bearing capabilities of the soil; as result trial court's finding on the load bearing capabilities of the soil was unsupported by the evidence); *Silver View Farm, Inc. v. Laushey*, No. 2005-09-168, 2008 WL 4867639, *4-5 (Del. C.P. Oct. 31, 2008) (civil engineer in training, with some geotech

background, was not qualified to give testimony regarding soil erosion). *See generally* 4A Bruner and O'Connor on Construction Law § 14.2 (discussing the science of soil mechanics and exploration). Such qualifications were never established by Sprague, who had no formal education or training and only a modest amount of construction experience.

Second, and perhaps more importantly, the trial court failed to act as the “gatekeeper” under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999).

A contractor can qualify as an expert on many issues based on experience alone, and may qualify as an expert on certain soil conditions. But the “gatekeeper” function of ER 702 does not end with a threshold determination of minimal experience. The trial court must apply the *Daubert* factors to evaluate whether the opinions expressed are based on objective, scientific knowledge that will assist the trier of fact. The *Daubert* factors include:

- (1) “Whether a ‘theory or technique . . . can be tested’”
- (2) “Whether the theory or technique has been subjected to peer review and publication”
- (3) “Whether, in respect of a particular technique, there is a high ‘known or potential rate of error’ and whether there are ‘standards controlling the technique’s operation’”;

and

(4) “Whether the theory or technique enjoys ‘general acceptance’ within a ‘relevant scientific community.’”

Kumho Tire, 526 U.S. at 149-50. See also *Reese v. Stroh*, 128 Wn.2d 300, 306, 907 P.2d 282 (1995); *Ruff v. Department of Labor & Industries of the State of Washington*, 107 Wn. App. 289, 28 P.3d 1 (2001). This is not a matter of quibbling about which factors Mr. Sprague’s testimony met. Mr. Sprague’s so-called expert testimony met *none* of these standards. His statements about “dirty dirt” and his conclusory claim of soil “unsuitability,” to the extent that they related to soil properties, were not tied out to any accepted method, technique or test results. As such they should have been rejected.

A primary purpose of the *Daubert* factors is to assist courts in determining the objectivity of the expert’s opinion and whether the expert’s opinion or technique of analysis enjoys “general acceptance” in the relevant industry. *Kumho Tire*, 526 U.S. at 150-51. See also *Reese*, 128 Wn. 2d at 307. Purely subjective opinions masquerading as professional opinions simply do not qualify as expert opinion. They are “junk science.” Indeed, the classic example of “junk science” is expert testimony that says “it is so because I say it is so.” That is exactly what Sprague’s testimony consisted of.

Even if Sprague was minimally qualified to testify as to the soil conditions at the time that he performed the work, any testimony that he provided with respect to the conditions of the soils *at the time that NWC performed its work* is purely speculative and should not have been considered by the court. Sprague did no testing of the soil. He did no analysis of the quantity of allegedly poor soil at the site. He provided no testimony regarding the effect of the passage of time on the site. Even experts cannot provide testimony that is speculative and unsupported by an objective factual basis. *Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 102-103, 882 P.2d 703, 731 (1994).

It is apparent that the critical concern here revolves around the repeated use of the word “unsuitable.” That term was used repeatedly by Sprague without any real explanation about what that term meant. If the alleged “unsuitability” related in some way to the soil properties, then it is clear that Sprague provided no competent ER 702 evidence to support the claim that the soils were in some unspecified way “unsuitable.” If, on the other hand, the substance of Sprague’s testimony was that the soils he observed in April were “saturated”, and that was in fact the reason for their removal and replacement with import, then it is clear that “unsuitable” simply meant too wet, a condition that he may have been competent to opine on. However, the “saturated” condition of the soil in

April 2003 could not have been caused by any action of NWC. That condition was a direct result of Lehman's delays, the resulting natural consequence of the impact of winter rains, and Lehman's and Sprague's decision to restart road work in the early spring when the soil was still "saturated."

Although the evidence clearly established that any unsuitability of the soils in April 2003 was due to the project being exposed to heavy winter rains, including well above average rains in the month preceding Sprague's work in April (Ex. 114), the trial court erroneously shifted the burden of proof to NWC on this issue, despite the fact that the trial court found that NWC could not continue with productive work after January 2002, and that this was caused by Lehman. CP 388, 390-91 (Findings 14, 32, 35, 44). The site remained exposed and grading work remained unfinished for more than a year before Sprague completed the work in April 2003. CP 391 (Finding 42).

During the winter of 2002-2003, the site was exposed to above average rainfall. Ex. 114; VRP 617-18; 619, ll. 1-23. Significantly, Sprague admitted on cross examination that the roadways were not a significant problem in October 2002 when he installed the water line, but had turned bad by April 2003 when he came back to finish the roads and other work. VRP 360, ll. 24-25; 361, ll. 1-18; 362; ll. 1-5. Most critically,

Sprague admitted that the soils had become “saturated” and that was why the materials had to be removed. VRP 401, ll. 21-25; 402, ll. 1-11.

In light of this evidence, Lehman clearly had the burden to prove that the lengthy exposure to rain was not the cause of the alleged “unsuitable” materials that Sprague encountered in April 2003. Instead, the trial court committed a clear error of law by shifting the burden of proof to NWC:

52. NWC failed to establish to the Court’s satisfaction that the additional import material used by J.J. Sprague was solely attributable to the timing of the work and weather.

CP 392 (Finding 52).¹³

The trial court’s Findings 50 and 54 are not supported by substantial evidence. The trial court compounded this error, in erroneous Finding 52, by shifting the burden of proof to NWC where it was Lehman’s burden of proof to show that the allegedly “unsuitable” was unsuitable when it was placed by NWC. Those findings must be reversed.

3. Lehman failed to prove that the allegedly “unsuitable” material allegedly placed by NWC was the cause of the damages for which the trial court awarded Lehman an offset of \$10,000.

Even if Lehman had proven that NWC placed some “unsuitable” on the site, Lehman completely failed to prove that this was the *cause* of

¹³ The trial court repeated the same error in Conclusion 15. CP 394.

the damages claimed by Lehman. It is well established that causation is an essential element of an action for breach of contract. *Bogle and Gates, P.L.L.C. v. Holly Mtn. Resources*, 108 Wn. App. 557, 32 P.3d 1002 (2001).

The undisputed evidence completely refutes the notion that NWC could be liable for the cost of imported fill. As explained above, the contract clearly stated that the project site was a balanced site, and that NWC had not contracted to import any fill. If fill became necessary that was an extra cost to be borne by Lehman.¹⁴ The trial court's finding that NWC caused the need for imported fill is not supported by any evidence, and it contrary to the plain language of the parties' contract.

If Lehman had actually proven that NWC placed an unspecified amount of "unsuitable" material in the roadway, at most Lehman could have charged NWC for the minimal cost of scraping that material off and moving it to another part of the site. But that is not what Lehman claimed or the basis of the trial court's finding of breach or award of damages.

The trial court's own findings show that Lehman failed to prove the necessary causation. The trial court found:

¹⁴ Sprague also admitted that he could have obtained suitable material on-site for the road fill, but elected to import it for a better result. VRP 336, ll. 5-17. Lehman would have had to pay this same amount to NWC if he had made a similar decision because of the balanced site clause. Ex. 1.

55. Mr. Lehman did not *wholly* meet his burden of proof to establish the necessity for the quantity of import materials in his counterclaim. (emphasis added)

CP 392. The law does not recognize the concept of a party only partly meeting its burden of proof. This finding was erroneous as matter of law. Finding 52 establishes what is obvious from the record: Lehman did not meet its burden of proof on causation, period. Finding 56, which addresses the issue upon which Lehman failed to carry his burden of proof, must be reversed.

Finally, the lack of causation (and evidence of quantity and location) is also shown by the fact that the trial court had to guess about what portion of the imported fill was made necessary by NWC: The trial court found:

56. The Court finds that that NWC is liable for a portion for the costs for importing “Sub-base material” in April 2003 and that \$10,000 is a reasonable estimate of the sum appropriate to compensate Mr. Lehman for having to import “Sub-base material” for the Project.

57. The Court finds that \$10,000 is reasonable sum to compensate Mr. Lehman for having to import soil to replace unsuitable material placed by NWC.

CP 392. These findings regarding “a portion,” “reasonable estimate,” and “reasonable sum” are not based on any evidence in the record. There were no records, calculations or anything else upon which such findings could have been based. “Sufficiency of the evidence to prove damages must be

established with enough certainty to provide a reasonable basis for estimating it. Although the precise amount of damages need not be shown, damages must be supported by competent evidence in the record. To be competent, the evidence or proof of damages must be established by a reasonable basis and it must not subject the trier of fact to mere speculation or conjecture.” *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639, 939 P.2d 1228 (1997).

Even if one accepts at face value the absurd theory advocated by Lehman -- that somehow 20 cubic yards of unsuitable soil created the need for the import of over 800 cubic yards, it is illogical to conclude that NWC should be held liable for over 62% of the import cost when the allegedly unsuitable soil represented less than 2.5% of the alleged problem.¹⁵ This analysis further demonstrates that the trial court was simply guessing. There is no basis whatsoever for the trial court’s finding that NWC was somehow responsible for \$10,000 (over 62% of the cost) of the imported fill.

In sum, Findings 50-52, and 54-57 are not supported by substantial evidence and must be reversed. The trial court’s award of an offset of

¹⁵ The correct and obvious explanation of what the import was used for was supplied by Mr. Perry, after listening to Mr. Sprague testify. The imported material was used to complete the fill of the low areas that had been left “low” when NWC ceased work in January 2003. *See* discussion *supra* at 27-28; CP 391 (Finding 41). The contract between the parties, however, made that cost an owner responsibility. Ex. 1.

\$10,000 on Lehman's counterclaim was erroneous and must be reversed.

Lehman's counterclaims should have been dismissed in their entirety.

- C. In the alternative, the trial court erred in awarding any damages on the Lehman's counterclaim in light of the undisputed fact that NWC was given no notice of or opportunity to cure the allegedly unsuitable soil in the roadway.**

Parties have a common law right to cure alleged breaches. As stated in one treatise, "Cure is a fundamental common-law right implied in every contract as a matter of law." 5 Bruner and O'Connor Construction Law § 18:41 (2010). A corollary to that right and an essential prerequisite to the exercise of that right is that the non-breaching party must provide notice of default to the allegedly breaching party, particularly when information material to the performance of a contract is within the peculiar knowledge of only one contracting party. *U.S. for Use and Benefit of Cortolano & Barone, Inc. v. Morano Const. Corp.*, 724 F. Supp. 88, 98 (S.D.N. Y. 1989) ("Despite the absence of any contractual provision, a subcontractor alleged to be in default is entitled to receive more notice than [the subcontractor] received here."); *McClain v. Kimbrough Const. Co., Inc.*, 806 S.W.2d 194, 198-199 (Tenn. Ct. App. 1990) (holding that a contractor had a common law duty to give its subcontractor notice of default and stating, "Notice ought to be given when information material to the performance of a contract is within the peculiar knowledge of only

one of the contracting parties”); *Pollard v. Saxe & Yolles Dev. Co.*, 525 P.2d 88, 92 (Cal. 1974); 5 Bruner and O’Connor Construction Law §§ 18:15, 18:41 (2010). The remedial purpose behind the notice and cure requirement is to (1) give the allegedly breaching party the opportunity to cure, (2) permit the allegedly breaching party to mitigate its damages, and (3) permit the parties to reach an agreement or settlement of the dispute. *Id*; *McClain*, 806 S.W.2d at 198-199; *U.S. for Use and Benefit of Cortolano & Barone*, 724 F. Supp. at 98; *Pollard*, 525 P.2d at 92. Washington recognizes this fundamental contract right in its adoption of the UCC provision establishing the right to cure. *See* RCW 62A.2-508.

The trial court specifically found that “NWC had no knowledge of the claim of unsuitable soils, and NWC was not asked to remove and replace the unsuitable soils.” CP 392 (Finding 53). Under the principles set forth above, and evidence presented at trial, the trial court erred as a matter of law in awarding any damages on Lehman’s counterclaim because NWC had no knowledge of the allegedly unsuitable soil and was given no opportunity to cure the condition it allegedly created.

D. The trial court’s award of attorney’s fees was erroneous.

The parties’ contract provides for an award of fees to the prevailing party. CP 388 (Finding 10). In addition, NWC’s lien claim is governed by RCW 60.04.081(4), which provides:

(4) If, following a hearing on the matter, the court determines that the lien is frivolous and made without reasonable cause, or clearly excessive, the court shall issue an order releasing the lien if frivolous and made without reasonable cause, or reducing the lien if clearly excessive, and awarding costs and reasonable attorneys' fees to the applicant to be paid by the lien claimant. If the court determines that the lien is not frivolous and was made with reasonable cause, and is not clearly excessive, the court shall issue an order so stating and awarding costs and reasonable attorneys' fees to the lien claimant to be paid by the applicant.

The trial court specifically ruled that NWC's lien was not frivolous, clearly excessive, or made in bad faith. CP 394 (Conclusion 19).

Where, as here, a case involves multiple claims or causes of action, the court must determine which party is the prevailing party. "If neither party wholly prevails then the party who substantially prevails is the prevailing party, a determination that turns on the extent of the relief afforded the parties.'" *Piepkorn v. Adams*, 102 Wn. App. 673, 686, 10 P.3d 428 (2000) (quoting *Marassi v. Lau*, 71 Wn. App. 912, 916, 859 P.2d 60 (1993)).

NWC's motion for an award of fees explained that NWC was clearly the substantially prevailing party in this case. NWC prevailed on its contract claims, and was awarded both interest and lost profits. CP 187, 393-94. In contrast, Lehman prevailed on only a small fraction of its

counterclaim for defective work. *Id.* Lehman's claims for delay damages, slander of title, and frivolous lien were all dismissed. CP 394.

NWC's attorney's fees and costs amounted to approximately \$124,000. CP 194. NWC requested an award of this amount, and NWC's request was supported by detailed declarations and documentation. CP 183-268.

The trial court awarded NWC \$35,000 in attorney's fees, which was only a fraction of the fees NWC requested and to which it was entitled. CP 395 (Conclusion 22). This award consisted of two parts. The trial court awarded NWC \$25,000 in fees on the contract claim. CP 394 (Conclusion 10). The trial court also held that NWC was the "substantially prevailing party" on Lehman's counterclaims, and that reasonable fees for defending those claims was \$10,000. CP 394-95 (Conclusion 21).

The trial court did not explain how it came up with those specific numbers. The trial court further ruled that neither party would be awarded fees on the lien claims. The trial court stated:

20. Because both parties prevailed on lien issues raised, the fees on that issue offset each other and no fees will be awarded to either party on the lien issues under RCW Chap. 64.04.¹⁶

¹⁶ The trial court's reference to "64.04" is clearly a scrivener's error. The citation should be to Chapter 60.04 RCW.

CP 394. The trial court's rulings on fees were erroneous as a matter of law for two reasons, both of which require a remand.

First, the trial court's ruling was expressly based on the trial court's erroneous rulings on the merits. The trial court did not award fees on the lien claims because the fees on that issue "offset each other." CP 394 (Conclusion 20). If this Court agrees with NWC that the trial court's dismissal of the lien claim was erroneous (*see* section A), then the trial court's conclusion on the attorney's fee award for the lien claims was also erroneous.

The trial court also ruled that NWC was only the "substantially" prevailing party on Lehman's counterclaims. CP 295 (Conclusion 21). NWC was not a wholly prevailing party because of the trial court's offset award of \$10,000 for the alleged "unsuitable" material. If this Court agrees with NWC that Lehman's counterclaims should have been dismissed (*see* Section B), then the trial court's conclusion on the attorney's fee award for the counterclaims was also erroneous.

Second, even if this Court were to affirm the trial court's decisions on the merits, the trial court's application of the attorney's fee provision in RCW 60.04.081(4) was erroneous as a matter of law. That statute requires an award of attorney's fees to the lien claimant (NWC) unless the trial court determines that the lien is frivolous and made without reasonable

cause, or clearly excessive. This provision requires an award of fees to the lien claimant **even if the lien is held to be invalid.** *Intermountain*, 115 Wn. App. 384. In *Intermountain*, the plaintiff subcontractor filed two liens. The Court of Appeals held that the first lien was invalid but not frivolous, and that the second lien was both invalid and frivolous. 115 Wn. App. at 388. Applying the fee provision in RCW 60.04.081(4), the court concluded that:

- the lien claimant (subcontractor) was entitled to an award of fees for the first lien even though that lien was invalid, and
- the defendant was entitled to an award of fees for establishing that the second lien was frivolous.

115 Wn. App. at 395. Because both parties in *Intermountain* prevailed on lien claims, each was entitled to a proportionate award of fees. 115 Wn. App. at 395-96.

In this case, the trial court ruled that NWC's lien was not frivolous. CP 394 (Conclusion 19). Therefore, even if this Court affirms the determination that NWC's lien was invalid, NWC is still entitled to an award of fees on the lien claims under RCW 60.04.081(4) and *Intermountain, supra*. The trial court's contrary conclusion was erroneous.

The trial court's award of only \$35,000 in attorney's fees was erroneous as a matter of law. This case should be remanded to the trial court for a correct determination of attorney's fees.

E. NWC is entitled to an award of attorney's fees on appeal.

NWC is entitled to attorney's fees under both the parties' contract, CP 388 (Finding 10) and RCW 60.04.081(4). *See* Section C. NWC respectfully requests an award of attorney's fees pursuant to RAP 18.1.

V. CONCLUSION

For all these reasons, the Court should reverse the erroneous decision of the trial court. The case should be remanded to the trial court to (i) enter judgment for NWC on its lien claim, (ii) vacate the offset of \$10,000 awarded to Lehman on the counterclaim, and (iii) re-determine the amount of attorney's fees to be awarded to NWC.

VI. APPENDICES

Appendix A *Findings of Fact and Conclusions of Law* dated
May 30, 2007 (CP 386-397)

Appendix B Portion of Exhibit 46

Dated this 15th day of January, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. J. Murphy", written over a horizontal line.

Michael J. Murphy, WSBA #11132

William J. Crittenden, WSBA #22033

Attorneys for Appellant

GROFF MURPHY, PLLC

300 East Pine Street

Seattle, WA 98122

(206) 628-9500

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on January 15, 2010, true and correct copies of the foregoing document to the parties of record listed below, via the method indicated:

Norman and Louise Lehman
802 19th Avenue SE
Puyallup, WA 98372

- Hand Delivery Via Messenger Service
- First Class Mail
- Federal Express
- Facsimile
- Electronic Mail

Titanic Investment, Inc.
802 19th Avenue SE
Puyallup, WA 98372

- Hand Delivery Via Messenger Service
- First Class Mail
- Federal Express
- Facsimile
- Electronic Mail

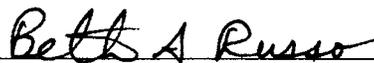
Builtwell Structures, Inc.
Attn: Cheryl Sedlickas
25415 – 99th Avenue Ct. E.
Graham, WA 98338

- Hand Delivery Via Messenger Service
- First Class Mail
- Federal Express
- Facsimile
- Electronic Mail

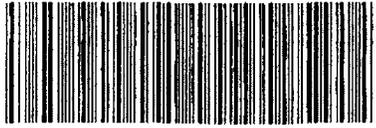
Brian S. Sommer
Routh Crabtree Olson, P.S.
3535 Factoria Blvd. SE,
Suite 200
Bellevue, WA 98006

- Hand Delivery Via Messenger Service
- First Class Mail
- Federal Express
- Facsimile
- Electronic Mail

DATED this 15th day of January, 2010.


Beth A. Russo, Legal Assistant
Groff Murphy, PLLC

Appendix A



03-2-07073-0 27585843 FNFLC 05-30-07

HON. HENRY HAAS *Pro Tempore*

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FILED
IN COUNTY CLERK'S OFFICE

A.M. MAY 30 2007 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

NORTHWEST CASCADE, INC., a Washington corporation,

No. 03-2-07073-0

Plaintiff,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

v.

TITANIC INVESTMENTS, INC., a Washington corporation; NORMAN LEHMAN, an individual, and LOUISE LEHMAN, an individual, and their marital community; and RANGLES SAND & GRAVEL, a Washington corporation; BUILTWELL STRUCTURES, INC., a Washington corporation; CITY BANK, a Washington state chartered banking institution; and EVERGREEN TITLE COMPANY, INC., a Washington corporation,

Defendants.

The Court conducted a bench trial in this case from May 22 through May 24, 2006. In addition, the Court heard argument on Plaintiff's Motion for Reconsideration on August 9, 2006 and issued an order denying same on September 5, 2006. On December 28, 2006 the Court heard

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EVERARD PLLC
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(206) 628-9500
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ORIGINAL
CP 386

1 argument on the parties' respective requests for attorneys' fees, and initial argument on the parties
 2 respective [Proposed] Findings of Fact and Conclusions of Law. On April 11, 2007 the Court
 3 heard further argument on the parties respective [Proposed] Findings of Fact and Conclusions of
 4 Law. After reviewing all of the admitted evidence and hearing the argument of counsel, the court
 5 hereby enters the following:

6 **FINDINGS OF FACT**

7 1. Northwest Cascade, Inc. ("NWC") is a Washington corporation, licensed to do
 8 business in Washington as a general contractor. NWC was experienced at constructing plat
 9 improvements.

10 2. Titanic Investments Inc. ("Titanic") is a Washington corporation wholly owned by Mr.
 11 Norman Lehman and his wife, Louise Lehman.

12 3. Mr. Lehman was experienced in plat/subdivision development.

13 4. The Geller Addition was a nine (9) lot subdivision being developed by Mr. Lehman in
 14 unincorporated Pierce County, Washington (the subdivision is hereinafter referred to as the
 "Project").

15 5. On August 14, 2001 Mr. Lehman and Northwest Cascade, Inc. ("NWC") entered into
 16 a contract for construction of certain infrastructure improvements for a 9 lot subdivision referred to as
 17 the Geller Addition (hereinafter the "Contract"). Titanic was not a party to the Contract, nor was it
 18 identified in the Contract in any way. Mr. Lehman did not disclose to NWC that he was acting as an
 19 agent for Titanic for purposes of the Contract either before or when he signed the Contract. Mr.
 20 Lehman entered into the Contract individually and on behalf of his marital community and not as a
 disclosed agent for Titanic.

21 6. Randles Sand and Gravel filed a lien on the Project. That lien was dismissed from this
 22 litigation with prejudice on August 7, 2003. That lien did not arise from work performed by NWC.
 23

1 7. NWC filed an amended complaint on May 27, 2004 naming additional parties that had
2 acquired lots in the Project (including Builtwell Homes, Inc.), insured title, and/or loaned funds to the
3 buyer of lots for construction purposes.

4 8. The Contract called for NWC to perform certain work as called for in the Contract, the
5 plans and specifications noted on the plans. Compliance with Pierce County regulations relating to
6 the TESC measures was part of the NWC's scope of work under the Contract.

7 9. The Contract expressly excluded certain items, as expressly set forth in Attachment A
8 to the Contract.

9 10. The Contract provided for interest on unpaid amounts due NWC and attorneys fees for
10 the prevailing party in any dispute.

11 11. The parties both read the Contract and were aware of all Contract provisions.

12 12. NWC commenced work on or about November 5, 2001, and continued performance of
13 the site work, storm water work, road work, and retaining wall work under the Contract through
14 January 2002.

15 13. The parties were aware of and understood that completing the water line work was a
16 condition precedent to completing other elements of the Project that were part of NWC's scope of
17 work.

18 14. As of January 2, 2002, NWC could not proceed further with substantial productive
19 work and complete the storm water, grading and paving work because the water line work had not
20 been awarded either to NWC or to another contractor by Mr. Lehman.

21 15. From November 2001 through April 2002, NWC filed reports with the County
22 relating to Temporary Erosion and Sedimentation Control ("TESC") activities. The reports were filed
23 on November 28, 2001, December 27, 2001, January 28, 2002, February 11, 2002, March 13, 2002,
 and April 15, 2002. Plaintiff's Trial Exhibits Nos. 24 & 28-34. No reporting to Pierce County was
 required under Pierce County regulations for the months of May through September. NWC did not

1 submit separate invoices to Lehman for the TESC work performed on November 28, 2001, December
2 27, 2001, January 28, 2002, February 11, 2002, March 13, 2002, and April 15, 2002.

3 16. NWC performed catch basin maintenance on the Project on July 2, 2002. On July 2,
4 2002 NWC sent one of its employees to the site to perform some "mudding" around catch basins.
5 Pursuant to the original Contract NWC was required to maintain erosion control and provide
6 inspection work required by the Contract. The work performed on July 2, 2002 was not required to
7 done at the time it was performed. It was performed without notice to the Defendant,
8 Lehman/Titanic, more than four months after NWC ceased doing work on the Project. The only
9 reason NWC sent a man out to do some work on July 2, 2002 was to revive NWC's lien rights.
10 Catch basin maintenance work was within the original scope of NWC's work under the Contract.
11 Plaintiff's Trial Exhibit No. 27. NWC did not submit a separate invoice for that work to Lehman or
12 otherwise bill for it. No reporting was required under Pierce County regulations for this work. The
13 July 2002 work was not performed under a separate contract between NWC and Lehman or Titanic.

14 17. As of July 2002, Lehman was behind in payments and the Court finds that there was a
15 general state of "uncertainty" regarding the Project.

16 18. As of October 2002, the correspondence between NWC and Mr. Lehman demonstrates
17 that NWC still expected to return to the Project site, complete its scope of work, and possibly perform
18 the water line work.

19 19. NWC filed a mechanic's and materialman's lien under RCW Chap. 60.04 on
20 September 27, 2002, within 90 days of the July 2, 2002 work, but more than 90 days after the last
21 TESC work reported to the County, and more than 90 days after the work performed in January 2002.

22 20. NWC commenced its lien foreclosure action on April 29, 2003, within 8 months of
23 filing its lien.

21 21. NWC's lien rights lapsed before July 2, 2002 as the last day NWC performed work
22 was in January 2002.

1 22. The Court concludes that the work performed by NWC on July 2, 2002 was done to
2 revive expired lien rights.

3 23. NWC substantially performed all work that it billed Mr. Lehman for.

4 24. NWC submitted its second progress payment on January 31, 2002.

5 25. NWC was not paid all of its second progress payment. NWC was underpaid by
6 \$18,222.11.

7 26. There was no reasonable basis for withholding the \$18,222.11, which was due and
8 owing at that time.

9 27. NWC was not paid for all work performed.

10 28. NWC is due \$18,222.11, plus interest at the Contract rate of 1% per month from
11 March 1, 2002 to the date judgment is entered.

12 29. Mr. Lehman excluded the water line work from the Contract.

13 30. The plans provided to NWC by Mr. Lehman contemplated a logical and sequential
14 work schedule that NWC substantially followed.

15 31. Mr. Lehman had no complaints concerning any delays in NWC's performance during
16 the course of the work, but raised issues of concern in a letter dated December 13, 2002.

17 32. Mr. Lehman was aware and understood that completing the water line work was a
18 condition precedent to completing other elements of the Project that were part of NWC's scope of
19 work.

20 33. NWC submitted a proposal to perform the water line work on September 14, 2001
21 based on the plans for that work then in existence, which had been prepared for Mr. Lehman. This
22 proposal was never accepted by Mr. Lehman.

23 34. Titanic entered into a "Water System Extension Agreement" on December 18, 2001.

 35. Mr. Lehman never awarded the water line work to NWC or to any other contractor
until October 2002, when he awarded the water line work to J.J. Sprague, Inc., without disclosure to
NWC.

1 36. The water line work was performed by J.J. Sprague, Inc. in late October 2002 for
2 \$21,464.28, which was approximately \$2,000 more than NWC had proposed to do the same work for.

3 37. J.J. Sprague, Inc. was the last entity to perform work in the roadway areas after
4 January 2002 and before April 2003.

5 38. Even if Mr. Lehman's lender refused to disburse sufficient funds, that was not
6 disclosed to NWC by Lehman.

7 39. Lehman had no plausible excuse for not awarding the water line work to NWC in time
8 for it to complete its work on the Project.

9 40. As of January 2002, NWC might have been able to perform some minor aspects of the
10 work, but could not complete the Project until the water line work was performed. NWC was
11 therefore justified in stopping work and preparing the Project site for a winter shut down.

12 41. In January 2002, NWC left the cut areas in the roadway high and the fill areas low.
13 This was confirmed by the testimony of Mr. Sprague.

14 42. Without disclosure to NWC, Lehman entered into a separate contract with J.J.
15 Sprague, Inc. in April 2003 to perform the remaining scope of work on the NWC Contract that could
16 not be completed due to Lehman's failure to timely award or perform the water line work.

17 43. Rainfall levels between November 2002 and April 2003 were reflected on Exhibit 114.

18 44. NWC was prepared to complete its scope of work, and do the water line work per its
19 September 14, 2001 proposal, and Mr. Lehman was solely responsible for both the delay in the work
20 and the inability of NWC to complete its scope of work.

21 45. NWC completed its work within a reasonable period of time taking into account all of
22 the circumstances.

23 46. Lehman breached the Contract by failing to pay NWC for work performed and by
preventing NWC from completing the performance of the work within the scope of its contract.

 47. NWC did not breach the Contract with respect to the timely performance of its work.

1 48. NWC lost \$8,051.84 in lost profits on the work Lehman prevented it from performing
2 when it awarded the balance of NWC's scope of work to J.J. Sprague, Inc.

3 49. NWC should have been able to complete this water line work no later than October
4 26, 2002 when J. J. Sprague completed it, and thus is entitled to interest from that date forward.

5 50. NWC placed some unspecified amount of wet and unsuitable material on the fill area
6 of the roadway in December 2001 when NWC was preparing the foundation for the retaining wall.

7 51. J.J. Sprague, Inc. imported 1,153 tons or approximately 800 cubic yards of "Sub-base
8 material" for fill in April 2003. The cost of all imported material charged by J.J. Sprague, Inc. to Mr.
9 Lehman was \$16,147.46. A portion of the imported material was necessary to replace the unsuitable
10 soil placed by NWC on the roadway.

11 52. NWC failed to establish to the Court's satisfaction that the additional import material
12 used by J.J. Sprague was solely attributable to the timing of the work and weather.

13 53. NWC had no knowledge of the claim of unsuitable soils, and NWC was not asked to
14 remove and replace the unsuitable soils.

15 54. The Court finds that NWC placed an unspecified amount of unsuitable soils in the
16 roadway area.

17 55. Mr. Lehman did not wholly meet his burden of proof to establish the necessity for the
18 quantity of import materials in his counterclaim.

19 56. The Court finds that that NWC is liable for a portion for the costs for importing "Sub-
20 base material" in April 2003 and that \$10,000 is a reasonable estimate of the sum appropriate to
21 compensate Mr. Lehman for having to import "Sub-base material" for the Project.

22 57. The Court finds that \$10,000 is reasonable sum to compensate Mr. Lehman for having
23 to import soil to replace unsuitable material placed by NWC.

58. Mr. Lehman was aware of the NWC lien when he sold the property to Builtwell
Homes, Inc., but the lien had no effect on the sale of property.

1 9. NWC is entitled to judgment against Lehman in the amount of \$18,222.11 and
2 \$8,051.84, plus prejudgment interest on those amounts as calculated on Exhibit A.

3 10. NWC is entitled to an award of reasonable attorneys fees pursuant to the Contract
4 because it prevailed on both contract claims. Reasonable fees for this work are \$25,000.00.

5 11. Mr. Lehman and Titanic had the burden of proving that NWC breached its Contract
6 and that such a breach caused it damage.

7 12. Mr. Lehman's counterclaim for delay damages in the form of increased interest
8 expense is denied.

9 13. Mr. Lehman's and Titanic's counterclaim for delay damages is dismissed with
10 prejudice.

11 14. Mr. Lehman's and Titanic's counterclaim for slander of title is dismissed with
12 prejudice.

13 15. NWC failed to establish to the Court's satisfaction that the additional import material
14 was solely attributable to the timing of the work and weather.

15 16. Lehman is awarded an offset in the amount of \$10,000.00 against the judgment owed
16 NWC. Lehman is not entitled to prejudgment interest on this amount.

17 17. NWC's lien was invalid as it was filed more than 90 days after last performing work.

18 18. NWC's lien claim is dismissed with prejudice.

19 19. NWC's lien claim was neither frivolous, clearly excessive nor made in bad faith under
20 RCW 60.04.081(4). Accordingly, the defendants are not entitled to an award of attorneys fees under
21 RCW 60.04.081(4).

22 20. Because both parties prevailed on lien issues raised, the fees on that issue offset each
23 other and no fees will be awarded to either party on the lien issues under RCW Chap. 64.04.

 21. With respect to Lehman's counterclaims, Lehman was awarded an off-set for part of
the counterclaim and thus partly prevailed. However, because NWC prevailed in defending against

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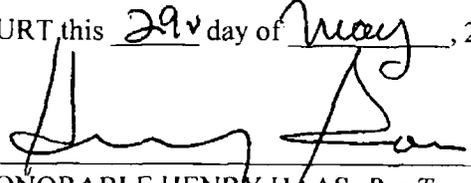
the counterclaims when viewed in their entirety, NWC is the substantially prevailing party on Lehman's counterclaims. Reasonable fees for defending the counterclaim are \$10,000.00.

22. NWC is awarded attorneys' fees in the total amount of \$35,000, and 1/2 of its out of pocket costs, or \$3,477.70.

23. Lehman is awarded 1/2 of his costs in the amount of \$612.00.

IT IS HEREBY ORDERED that Plaintiff shall prepare a judgment for entry under the civil rules consistent with these Findings of Fact and Conclusions of Law.

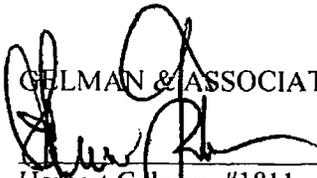
READ AND ENTERED IN OPEN COURT this 29th day of May, 2007.


HONORABLE HENRY HAAS, *Pro Tempore*

Approved as to form:

GROFF MURPHY TRACHTENBERG
& EVERARD PLLC


Michael J. Murphy, WSBA #11132
Attorney for Plaintiff Northwest Cascade Inc.


GELMAN & ASSOCIATES
Herbert Gelman, #1811
*Attorney for Defendants Norman Lehman and Louise Lehman,
Titanic Investments, Inc., Builtwell Structures, Inc., Evergreen
Title Company, and City Bank*

FILED
IN COUNTY CLERK'S OFFICE
A.M. MAY 30 2007 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY  DEPUTY

Exhibit "A"

EXHIBIT A TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Amount Due NWC for Work Performed	\$18,222.11
2. Interest from 3/1/02 to 4/11/07 at 1% per month (or \$5.99/day for 1868 days)	\$11,189.32
Subtotal	<u>\$29,411.43</u>
3. Amount Due NWC for Lost Profits	\$8,051.84
4. Interest on \$8,051.84 from 10/26/02 to 4/11/07 at 1% per month (or \$2.65/day for 1629 days)	\$4,316.85
Subtotal	<u>\$12,368.69</u>
5. Less offset awarded to Lehman	<u>(\$10,000.00)</u>
Total Due NWC (w/o fees & costs)	\$31,780.12

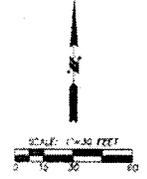
Appendix B

GELLER ADDITION

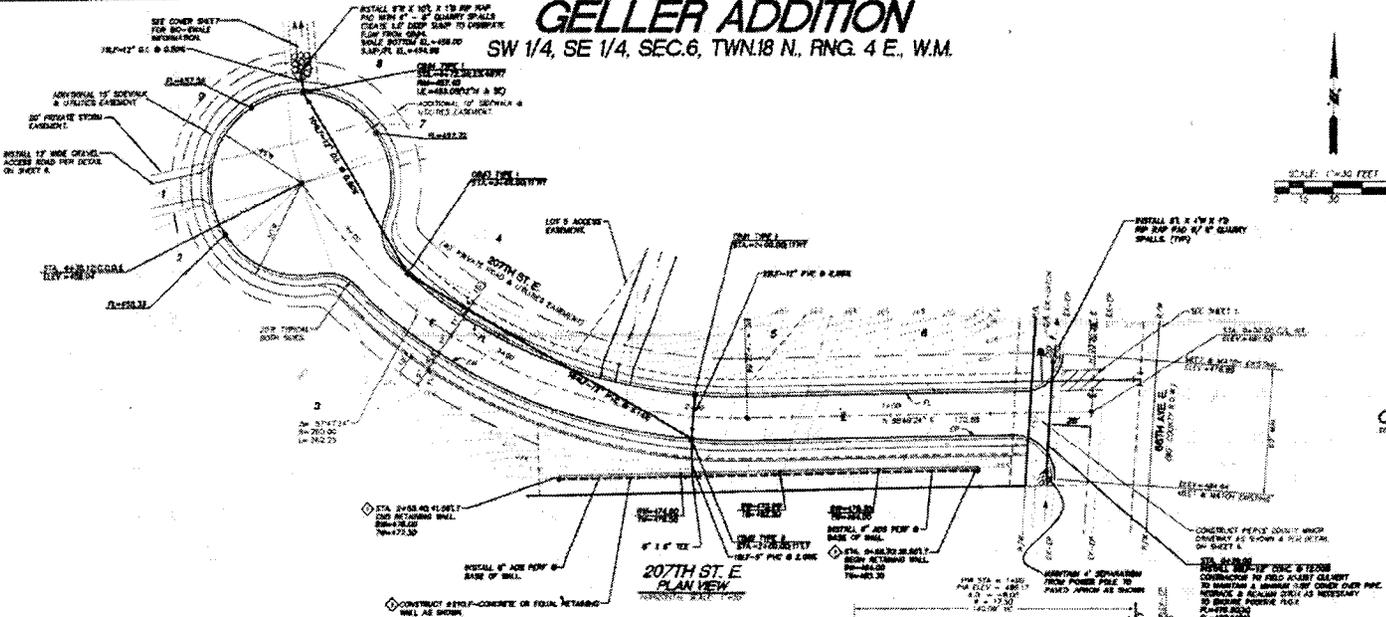
SW 1/4, SE 1/4, SEC. 6, TWN. 18 N., RING. 4 E., W.M.

THESE PLANS MEET THE MINIMUM REQUIREMENTS OF PIERCE COUNTY ORD. 80-122 & 80-123.
 ALL WORK IN THE PUBLIC RIGHT-OF-WAY IS SUBJECT TO PERMITS FROM THE PIERCE COUNTY PUBLIC WORKS DEPARTMENT.
 THE SUBMITTER SHALL OBTAIN PERMITS AT HIS OWN RISK.

PROJECT NO.	6833PR02
DATE	12/20/04
SCALE	1" = 40'
SHEET NO.	1 OF 2
TOTAL SHEETS	2

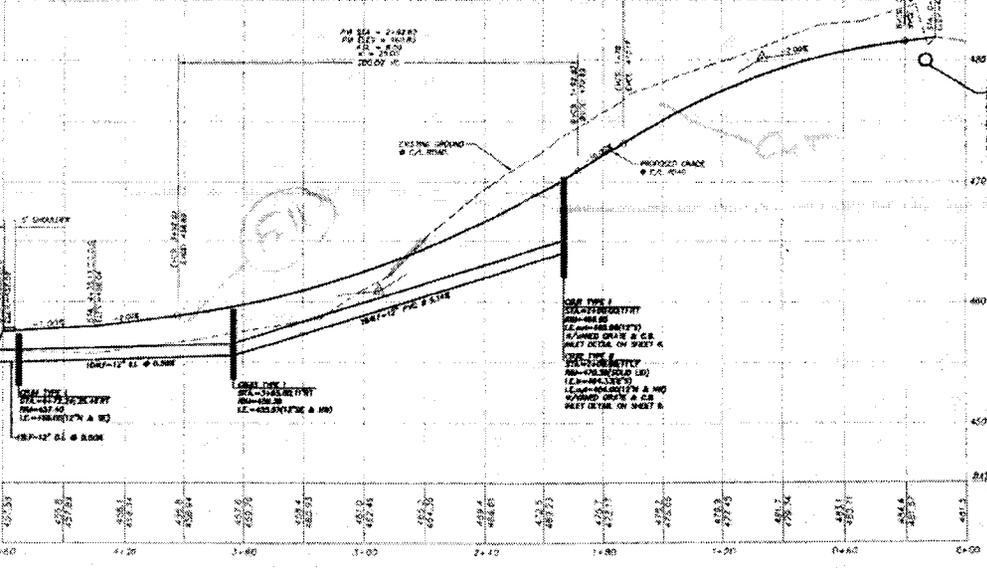


VERTICAL CURVE
 PIERCE COUNTY
 BM 9-2
 PAIING SPINE IN THE EAST FACE
 OF A RIVER WIDE LOCATED 20 FEET
 WEST OF SOUTH AVENUE. HAD 40 FEET
 NORTH OF THE SUBWAY TO RESIDENTS
 SITE.
 ELEV. 481.258
 CONTOUR INTERVAL = 2'



CONSTRUCTION NOTE

CONTRACTOR IS RESPONSIBLE FOR OBTAINING BUILDING PERMITS FOR RETAINING WALL.



REVISION BLOCK			
NO.	DATE	DESCRIPTION	BY
1	12/17/04	FOR PIERCE COUNTY RECORDS	APS

NOTE: CALL 1-800-424-5555 BEFORE YOU DIG.

LARSON AND ASSOCIATES, INC.
 2002 N. 18th Ave.
 P.O. Box 1000
 Tacoma, WA 98401
 (253) 465-1100

Appendix B - E
 PLAN & PROFILE