NO. 92491-1

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 33232-2-III
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NINA FIREY,

Petitioner,

v.

NICOLASSA OROZCO, *et al.*,

Defendants,

TAMMIE MYERS, *et al.*,

Respondents.

RESPONDENT CROWN MOBILE HOMES SET-UP/SVC'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. IDENTITY OF ANSWERING PARTY

Respondents Michael F. Lyon and Joan D. Lyon, husband and wife, d/b/a Crown Mobile Home Set-Up/SVC ("Crown Mobile"), submit this Answer to the Petition for Review filed by Petitioner Nina Firey ("Ms. Firey").

II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals decision at issue here is the unpublished opinion in *Firey v. Orozco, et al.*, No. 33232-2-III, dated October 1, 2015 ("Opinion").

III. CROWN MOBILE'S RESTATEMENT OF THE CASE

1. Events leading to the lawsuit.

In 2011, Ms. Firey purchased a foreclosed house in Centralia, Washington. The house needed substantial work, so Ms. Firey hired respondent K&T Construction ("K&T") to perform repairs. After K&T had worked on the house for two or three weeks, Ms. Firey fired K&T and hired Crown Mobile on a time and materials basis.[1]

Ms. Firey and Crown Mobile did not have a written contract identifying the scope of work to be performed, nor were there written estimates, quotes, plans, or specifications. Crown Mobile worked on the project for approximately ten (10) days in late May and June 2011, and then persuaded Ms. Firey that it was too busy to continue the project and assisted her in hiring her third contractor.[2]

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[1] Opinion, at pp. 2-3.
[2] *Id.* at p. 3.

Over the next few months, Ms. Firey went through several other contractors to continue repairs to the house. With the exception of the final contractor, none of the contractors who worked on Ms. Firey's house had written contracts, plans, bids, or estimates.[3] The subsequent contractors who worked on the house destroyed or altered all or almost all of Crown Mobile's work.[4]

2. Ms. Firey's lawsuit and the decisions below.

In July 2012, Ms. Firey filed a single complaint against the first five contractors to work on the house, alleging that they had breached their respective contracts and had been unjustly enriched. After she settled with two of the contractors, this action proceeded against K&T, Crown Mobile, a third contractor, and their respective insurance companies.[5]

On or about March 28, 2014 Crown Mobile filed a motion for summary judgment ("Motion"). CP 61-74.[6] In its Motion, Crown Mobile argued that Ms. Firey did not and could not produce evidence that Crown Mobile had breached its time and materials contract. Crown Mobile also maintained that Ms. Firey could not produce evidence of defective work because the majority of the work was demolished or replaced. CP at 73-74. Finally, Crown Mobile contended that Ms. Firey's approach to the

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[3] *Id.*
[4] *Id.* at p. 10, pp. 16-17. CP 284 "each follow-on contractor demolished and replaced the work of the previous contractor."
[5] *Id.* at p. 4.
[6] K&T also filed a separate motion for summary judgment. CP 33-41. Both the trial court and the Court of Appeals treated the two motions for summary judgment as independent of one another. *See* Opinion, at p. 4.

remodel was flawed from the outset and caused the problems that she was attributing to the defendant contractors.[7]

In response to Crown Mobile's Motion, Firey submitted affidavits from herself as well as affidavits from two expert witnesses, Vince McClure ("McClure") and Ben Hamilton ("Hamilton"). CP 1-32, 308-310, and 311-324. In her own declaration, Ms. Firey did not state that any of Crown Mobile's work was deficient. Rather, she simply stated that "[a]fter working for a short period of time, [Crown Mobile] informed me that [its] schedule was too busy, and [it] could no longer dedicate time on my project. At the insistence of [Crown Mobile], Orozco Construction took over the scope of work." CP at 303.[8]

As for McClure, his initial report made general observations on defects in the house. He made no connection between the work Ms. Firey contended that Crown Mobile completed and any defects. CP 14-20. In fact, the photographs attached to Mr. McClure's report do not refer to any Crown Mobile work that was allegedly defective. CP 21-29. In a subsequent declaration dated August 15, 2013, McClure asserted that Crown Mobile "[i]mproperly leveled the house; the house wasn't level when they quit," "improperly installed insulation in the attic," "failed [t]o replace the insulation and sheetrock they removed on the second floor," "replaced hot water heater installed by K&T [and] failed to meet the various code requirements," "installed flooring in the

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[7] Opinion, at p. 8. *See also* CP 84 at ¶ 8.
[8] *See also* Opinion, at p. 13.

utility room and then ripped it when installing the washer," plus other allegations, totaling eight defects. CP at 8. He did not claim to have personal knowledge of what Crown Mobile did on the project. CP 1-12.

Mr. Hamilton, in turn, did not document specific defects or identify work attributed to an individual defendant. CP 311-312. Moreover, Crown Mobile also presented a letter from Mr. Hamilton filed early in the litigation, in which Mr. Hamilton stated that he could not say who did which incorrect work. CP 154.[9]

The trial court granted summary judgment to Crown Mobile, and the Court of Appeals affirmed after *de novo* review.[10] The Court of Appeals noted that Ms. Firey failed to establish a foundation for stating an opinion about whether any contractor's work was defective, which rendered her opinions on that subject inadmissible under ER 703.[11]

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[9] *See also* Opinion, at p. 10.

[10] Opinion.

[11] Opinion, at p. 14. Although the Court of Appeals cited to ER 703, ER 701 also supports the conclusion that Ms. Firey's opinions about alleged construction defects were not admissible evidence. ER 701 states as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

Evidence of construction defects of the sort alleged by Ms. Firey typically must be provided by expert testimony, and Ms. Firey made no effort to qualify as an expert.

Moreover, Ms. Firey's two experts "did not make any personal observations concerning either defendant's work until after several other contractors performed work, resulting in the likely alteration of K&T Construction's and Crown Mobile's work."[12] Instead, the experts relied on Ms. Firey's inadmissible opinions to support their assertions that Crown Mobile's work was defective.[13] As a consequence, they "lacked an adequate factual foundation . . . []sufficient to create a genuine issue of material fact" regarding Ms. Firey's breach of contract claim.[14] Finally, Court of Appeals affirmed summary judgment for Crown Mobile on Ms. Firey's unjust enrichment claim, because Crown Mobile did not dispute the existence of a contract, and because "[w]here a valid contract governs the rights and obligations of the parties, unjust enrichment does not apply."[15] Ms. Firey subsequently filed her timely Petition for Review.

IV. ARGUMENT AGAINST GRANTING REVIEW

1. Overview.

RAP 13.4(b) states in pertinent part that "[a] petition for review will be accepted by the Supreme Court *only*: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another

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[12] Opinion, at p. 17.
[13] *Id.* at p. 16.
[14] *Id.* at p. 17.
[15] *Id.* (citing to *Mastaba, Inc.* v. *Lamb Weston Sales, Inc.*, 23 F. Supp. 3d 1283, 1295-96 (E.D. Wash. 2014).

decision of the Court of Appeals. . . ."[16] Neither of these factors or considerations supports granting review here. The Opinion affirmed summary judgment for Crown Mobile on Ms. Firey's breach of contract claim because Ms. Firey offered no admissible evidence to create a genuine issue of fact about a necessary element of that claim.[17] The Court of Appeals further held that on the undisputed facts, Ms. Firey's unjust enrichment claim failed as a matter of law. Neither of these conclusions conflicts with any prior precedent from this Court or the Washington State Court of Appeals. Accordingly, this Court should deny Ms. Firey's Petition for Review.

2. Summary judgment for Crown Mobile on the breach of contract claim was proper, because Ms. Firey offered no admissible evidence to create a genuine issue of fact about any alleged defects in Crown Mobile's work.

As the Court of Appeals noted, "an affidavit containing *admissible* expert opinion on an ultimate issue of fact is [generally] sufficient to

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[16] RAP 13.4(b) (emphasis added). RAP 13.4(b) also lists two other factors that can support review, but Ms. Firey makes no effort to show that either the third factor (a "significant question of law under the Constitution of the State of Washington or of the United States is involved") or the fourth factor ("the petition involves an issue of substantial public interest that should be determined by the Supreme Court") supports review in this case. RAP 13.4(b). *See* Petition for Review at p. 6. Accordingly, Ms. Firey has waived any claim that the third and fourth considerations support review. In any event, it is clear that the questions of whether Crown Mobile is liable to Ms. Firey on either a breach of contract or unjust enrichment theory neither pose any "significant question[s] of law under the Constitution," nor are matters of "substantial public interest." RAP 13.4(b).

[17] Opinion, at pp. 16-17.

create a genuine issue as to that fact, precluding summary judgment."[18] However, it is also well-established that "[e]xpert opinions must be based on the facts of the case and will be disregarded entirely where the factual basis for the opinion is found to be inadequate."[19] Moreover, "if an expert states the ground upon which his opinion is based, his explanation is not proof of the facts which he says he took into consideration. His explanation merely discloses the basis of his opinion in substantially the same manner as if he had answered a hypothetical question."[20]

Here, the Court of Appeals properly concluded that Ms. Firey's affidavit provided no evidence of any defects in Crown Mobile's work.[21] It also correctly applied *Hash*, *Allen,* and *Miller,* and held that McClure's and Hamilton's "opinions were speculative because they lacked an adequate factual foundation and were, therefore, insufficient to create a genuine issue of material fact."[22] Critically, the Court of Appeals did not evaluate the credibility of either Ms. Firey or that of the

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[18] Opinion at p. 14 (quoting *J.N* v. *Bellingham Sch. Dist. No. 501,* 74 Wn. App. 49, 60-61,871 P.2d 1106 (1994)) (emphasis added).
[19] *Id.* (quoting from *Hash v. Children's Orthopedic Hosp. & Med. Ctr.,* 49 Wn. App. 130, 135, 741 P.2d 584 (1987), *aff'd,* 110 Wn.2d 912,757 P.2d 507 (1988)).
[20] Opinion at p. 15 (quoting from *Allen* v. *Asbestos Corp.,* 138 Wn. App. 564, 581, 157 P.3d 406 (2007)). *See also Miller* v. *Likins,* 109 Wn. App. 140, 149, 34 P.3d 835 (2001).
[21] Opinion, at p. 13. *See also* CP 303 at ¶ 8.
[22] Opinion, at p. 17.

experts who relied on her opinions.[23] Instead, the Court of Appeals simply followed established summary judgment law by determining whether there was admissible evidence in the record that created a genuine issue of material fact.[24] Because the Court of Appeals correctly concluded that there was no admissible evidence of defects in Crown Mobile's work, there was no need for a trial to resolve credibility issues (which only arise when there is admissible evidence on both sides of a material question of fact). The Court of Appeals properly affirmed summary judgment for Crown Mobile on Ms. Firey's breach of contract claim, and there is no basis under RAP 13.4(b) for this Court to grant review of that decision.

3. Summary Judgment was also proper on Ms. Firey's unjust enrichment claim.

The Court of Appeals also properly affirmed summary judgment for Crown Mobile on Ms. Firey's unjust enrichment claim. The existence of a time and materials contract between Ms. Firey and Crown Mobile was

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[23] Ms. Firey's claim that the Court of Appeals wrongly evaluated the credibility of admissible testimony is simply not true. *Cf.* Petition for Review, at pp. 1-2; 6-9.

[24] *See* CR 56(e) (stating that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein"). *See also John Doe* v. *Puget Sound Blood Ctr.*, 117 Wn.2d 772, 787, 819 P.2d 370 (1991) (holding that an "opinion of an expert which is only a conclusion or which is based on assumptions is not evidence which satisfies the summary judgment standards because it is not evidence which will take a case to the jury").

not in dispute.[25] Washington law clearly establishes that "[u]njust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it."[26] Accordingly, where a valid contract governs the rights and obligations of the parties, unjust enrichment does not apply.[27] As with its decision on the breach of contract issue, the Court of Appeals' decision on this point is not in conflict with any binding precedent by this Court or the Court of Appeals, and Ms. Firey's Petition for Review should be denied.

V. CONCLUSION

Contrary to Ms. Firey's chief argument in her Petition for Review, the Court of Appeals did not make any credibility determinations when it affirmed summary judgment for Crown Mobile. Instead, it correctly applied established Washington law regarding summary judgment motions and held that there was no admissible evidence supporting Ms. Firey's

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[25] Opinion, at pp. 17-18. *See also* Petition for Review, at p. 4 (noting that "Firey testified to the existence and terms of the oral contracts she had with K&T and Crown"). Although the Petition for Review alleges that dismissal of Ms. Firey's "claims" was improper, it neither lists the Opinion's dismissal of the unjust enrichment claim in its "concise statement of issues presented for review" nor makes any argument about this part of the Opinion. RAP 13.4(c)(5); cf. Petition for Review at p. 1. This provides another sufficient justification for denying review of the Court of Appeals' Opinion regarding Firey's unjust enrichment claim against Crown Mobile. See, e.g., State v. Korum, 157 Wn.2d 614, 625, 141 P.3d 13, 19 (2006)) (declining to consider issue not properly raised by appellant in conformity with RAP 13.4(c)(5) and RAP 13.7(b)).

[26] Opinion at p. 17 (quoting *Young* v. *Young,* 164 Wn.2d 477, 484, 191 P.3d 1258 (2008).

[27] *Id.* (citing to *Mastaba, Inc.* v. *Lamb Weston Sales, Inc.,* 23 F. Supp. 3d 1283, 1295-96 (E.D. Wash. 2014).

breach of contract claim. It also properly applied this Court's precedent regarding unjust enrichment. There is no basis under RAP 13.4(b) for this Court to grant review, and it should deny Ms. Firey's Petition.

Respectfully submitted this 30th day of November, 2015.

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By _____

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury under the laws of the State of Washington, that on November 30, 2015, I caused to be served a true and correct copy of the foregoing **ANSWER TO PETITION FOR REVIEW** in the manner noted below, to the following parties:

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DATED: November 30, 2015, at Bellevue, Washington.

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Good Afternoon,

I attach the following document for filing in the above referenced matter:

1. Crown Mobile Homes Set-Up/Svc's Answer to Petition for Review.

Sincerely,

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