No. 46388-1-II

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

Nina Firey,

Appellant,

v.

Tammie Myers, et al.,

Respondents.

Reply Brief of Appellant

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Table of Contents

Table of Authorities

Table of Cases

Statutes and Court Rules

1. Introduction

The trial court improperly dismissed Nina Firey's claims on summary judgment, despite evidence in the record supporting the essential elements of her claims. Firey raised two issues on appeal: whether the trial court erred in disregarding the testimony of her experts and whether there were genuine issues of material fact that should have precluded summary judgment dismissal of her claims. Respondents argue that the trial court did not exclude the expert declarations, effectively conceding that the expert testimony was admissible. The only remaining issue, then, is whether Firey presented specific facts supporting the elements of her claims and creating a genuine issue of material fact.

Firey's experts, McClure and Hamilton, offered opinions on ultimate issues of fact: that the work of K & T and Crown was defective and that it caused damage to Firey. This alone is sufficient to defeat summary judgment. However, McClure went even further, identifying numerous, specific flaws in the work of K & T and Crown and estimating the cost to repair or replace the defective work or damage to the home. K & T and Crown's arguments that Firey's experts failed to identify any specific, defective work of K & T or Crown are unsupported by the record. To accept their arguments, this Court would have to ignore the specific facts articulated by McClure and improperly weigh the testimony and credibility of Firey's witnesses.

There were genuine issues of material fact that should have precluded summary judgment dismissal of Firey's claims. This Court should reverse and remand for further proceedings.

2. Rebuttal of Respondents' Counter-Statements of Fact

Both K & T and Crown misstate the facts, misrepresent the contents of the expert declarations of Vince McClure and Ben Hamilton, and draw inferences in favor of themselves instead of Firey, the nonmoving party.

K & T highlights the deposition testimony of Nina Firey regarding the terms of her contract with K & T. K & T Brief at 3-5. K & T then argues, for the first time on appeal, that Firey's declaration submitted in response to the summary judgment motions should be disregarded as contradicting her deposition testimony. K & T failed to raise this objection below and is thus barred from making any such argument now. *Becerra Becerra v. Expert Janitorial, LLC*, 176 Wn. App. 694, 721, 728, 309 P.3d 711 (2013). The Court should view Firey's declaration, as all other evidence, in a light most favorable to her, as the nonmoving party.

K & T claims that the McClure declaration does not attribute particular work or defects to K & T. K & T Brief at 7. This is untrue. McClure identifies numerous, specific defects in K & T's work. CP 4, 7-8. K & T claims that McClure's criticism of K & T's work can only be based on statements of Firey because the work had been repaired or modified before McClure came on site. K & T Brief at 8. This is also untrue. As shown in Firey's opening brief, McClure personally observed portions of K & T's defective work *that had not been* replaced or modified, Brief of Appellant at 11-12, and reviewed photographs and other materials relating to those portions that *had been* replaced or modified, Brief of Appellant at 13-15.

Crown similarly claims that all evidence of defective work or damage caused by Crown was destroyed. Crown Brief at 2. This is untrue, for the same reasons. McClure personally observed portions of Crown's defective work *that had not been* replaced or modified, Brief of Appellant at 11-12, and reviewed photographs and other materials relating to those portions that *had been* replaced or modified, Brief of Appellant at 13-15.

Crown argues that there is not a single photograph in the record depicting Crown's work prior to any modification by later contractors. Crown Brief at 2. This may be true (*but see* CP 22-30, some of which relate to leveling or depict the interior of the second floor, where Crown removed sheetrock and installation without authorization), however, the record **does** reflect that such photographs exist and were reviewed by McClure in forming his opinions. CP 3 (McClure reviewed Firey's photos), 195-201 (Firey's used some of her photos in deposition to point out defective work, some of which was replaced after the photos were taken). Because Crown concedes that McClure's expert opinion is admissible, Crown cannot complain that the photographs are not in the record when McClure's testimony of the specific facts he was able to glean from the photographs **is** in the record.

Crown appears to raise an issue that Firey never provided Crown an opportunity to inspect, review, or repair its defective work. Crown Brief at 2. Crown did not raise this issue before the trial court and does not provide any argument that would make this issue material to the outcome. This Court should disregard this allegation.

Crown claims that Firey and her experts fail to cite to any particular work of Crown that caused Firey damage. Crown Brief at 3. This is untrue. McClure identifies numerous, specific defects in Crown's work. CP 5, 7-8.

Crown claims that the bulk of its work consisted of digging out the foundation and hauling dirt and debris. Crown Brief at 7. This statement mischaracterizes the evidence in the record. The pages Crown cites, CP 76-78 and 134, demonstrate that Crown's work also included repairing K & T's work in the utility room, doing plumbing work, electrical work, work on the water main, installing insulation and vapor barrier in the crawl space, installing flooring and a new hot water heater, and deconstructing the second floor. The record also demonstrates that the particulars of what work Crown did or did not perform or complete remain in dispute. To the extent these facts are material, the dispute should have precluded summary judgment dismissal of Firey's claims.

Crown claims that Hamilton does not distinguish between defective conditions existing when Firey bought the home from damage caused by the defendant contractors. Crown Brief at 9. This is untrue. Hamilton testified that he was aware of the condition of the home shortly before Firey purchased it. CP 312. Thus, he knew what had been done to the home by the defendant contractors and could testify that the defendant contractors had damaged the home. *Id.*

Crown misreads McClure's statement that "all of Crown Mobile's work has been redone by Orozco or still needs to be corrected." Crown Brief at 10. The statement is not either/or. As can be gleaned from the

context of McClure's declaration, it means that portions of Crowns work were redone, while other portions still need to be corrected. This accords with McClure's identification of insulation work in the crawl space and insulation, electrical, and finish work on the second floor (work McClure attributes to Crown) as "remaining repairs." *Compare* CP 7-8 *with* CP 11.

Crown faults McClure for not differentiating any work that was not complete, rather than defective. Crown Brief at 10. However, it is Crown's burden, not Firey's, to prove that any of the work was merely incomplete. To the extent Crown believes this issue is material to the outcome, it is a factual dispute that requires remand for a trial.

In considering the facts in the record, the Court should take care not to fall into the traps set by K & T and Crown. The Court must view the facts and all reasonable inferences in favor of Firey. The Court should not seek to resolve any factual disputes, only to determine whether they exist. K & T and Crown misrepresent the facts when they claim that Firey fails to identify specific defective work. The Declaration of Vince McClure sets forth specific facts supporting the elements of Firey's claims and creating a genuine issue of material fact. This Court should reverse the trial court's orders of summary judgment and remand for further proceedings.

3. Argument

3.1 Standard of Review.

On appeal of a summary judgment decision, this Court engages in the same inquiry as the trial court, including de novo consideration of any evidentiary determinations. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

K & T, despite its concession that the testimony of Firey's experts is admissible, argues that the abuse of discretion standard should apply to exclusion of expert testimony. K & T is incorrect. K & T cites a 2001 decision of the Court of Appeals, *Miller v. Likins*, 109 Wn. App. 140, 34 P.3d 835 (2001), which applied the abuse of discretion standard to an evidentiary determination on summary judgment.[1] However, our Supreme Court adopted the de novo standard in *Folsom*:

> An appellate court would not be properly accomplishing its charge if the appellate court did not examine *all* the evidence presented to the trial court, including evidence that had been redacted. The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party, and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court.

Folsom, 135 Wn.2d at 663 (emphasis in original).

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[1] *State v. Nation*, 110 Wn. App. 651, 41 P.3d 1204 (2002), also cited by K & T, involved an evidentiary ruling **at trial,** and is therefore inapposite.

The Supreme Court reiterated the standard in *Davis v. Baugh Indus. Contractors*, 159 Wn.2d 413, 416, 150 P.3d 545 (2007) (citing *Folsom*), reviewing de novo—and reversing—a trial court's exclusion of evidence on summary judgment. This standard has been cited and applied by numerous appellate court cases since *Folsom*. *See, e.g., Keck v. Collins*, 181 Wn. App. 67, 80 n.2, 325 P.3d 306 (2014) (citing examples). Division One of this Court recently observed, **"it is well settled** that summary judgment orders and all rulings made in conjunction with summary judgment are reviewed de novo." *Taylor v. Bell*, ___ Wn. App. ___, slip op. at 12 n.13, 340 P.3d 951, 958 n.13 (Dec. 29, 2014) (emphasis added). If the Court reaches the evidentiary issue, the Court should apply de novo review.

3.2 The declarations of Vince McClure and Ben Hamilton presented sufficient facts to preclude summary judgment.

3.2.1 Both K & T and Crown concede that the expert declarations of Vince McClure and Ben Hamilton are admissible.

Both K & T and Crown argue that the trial court did not exclude the expert testimony of McClure and Hamilton as inadmissible. K & T Brief at 2 ("Plaintiff has misstated the issues … the trial court did not hold [the expert declarations] inadmissible"); Crown Brief at 5 ("Thus, Appellants position that the trial court did not admit Appellant's expert testimony into evidence is misplaced"). Instead, K & T and Crown argue that the expert declarations simply failed to present sufficient facts to present an issue of material fact to

preclude summary judgment. *E.g.,* K & T Brief at 2; Crown Brief at 13. Because the court can only consider admissible evidence in deciding a motion for summary judgment, CR 56(e), the argument by K & T and Crown that the trial court admitted and considered the expert declarations amounts to a concession that the declarations were admissible.

There is, therefore, no need for this Court to consider Firey's first issue and assignment of error, as all parties agree to the admissibility of the expert declarations. The key issue for this Court, then, is whether the expert declarations and other evidence in the record presented genuine issues of material fact that should have precluded summary judgment dismissal of Firey's claims.

3.2.2 K & T's real concern is that expert opinion testimony offered on summary judgment should disclose specific facts creating a genuine issue of material fact.

K & T's Brief, despite arguing that the expert declarations were admitted, frames its arguments in terms of the factual basis of the experts' testimony. However, K & T's central concern is apparent: K & T, like Crown, believes that the experts did not present the court with specific facts to create a genuine issue of material fact. *See, e.g.,* K & T Brief at 1 ("The trial court found the evidence was not sufficient… The expert testimony … did not identify work of particular contractors or quantify damage attributed to the work of K & T."), 7 ("The expert opinions did not identify specific defective workmanship attributed to K & T Construction, and did not identify damage

sustained by plaintiff due to K & T work."), 15 ("a bare conclusion without any reference to the particular work of K & T").

The court in *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 49 Wn. App. 130, 741 P.2d 584 (1987), shared this same concern. The court held that an expert declaration that "sets forth a number of conclusions, but does not contain facts relating to, or explaining how, the fracture occurred," was insufficient to establish the fact of causation. *Id.* at 133. The declarations stated the factual basis for the doctor's opinions: the doctor's expertise as a pediatric rheumatologist, a firsthand examination of the child, and review of the child's medical history. *Id.* at 137 (Thompson, J., dissenting). The majority's concern, however, was that the declarations failed to set forth specific facts relating to proximate cause:

> We are not told, however, just how, mechanically, the fracture occurred, and without knowledge of the proximate cause of the fracture, summary judgment is improper.

Id. at 135. Even though the *Hash* court, like K & T, framed its reasoning as lack of a factual basis, its real concern was that the expert did not testify to specific facts.

Similarly, the court in *Watters v. Aberdeen Recreation*, 75 Wn. App. 710, 879 P.2d 337 (1994), had concerns about the factual basis of a portion of the expert's opinion, but the fatal flaw was that the expert's opinion failed to set forth specific facts to establish an essential element of the claim: that the unsafe condition was caused or known by the defendant. *Id.* at 713-14.

The other cases cited by K & T exclude expert opinion testimony where, unlike here, the experts were unable to identify any factual basis that would reasonably lead to the conclusions contained in their opinions. *See Queen City Farms v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 103-04, 882 P.2d 703 (1994) (the expert's opinion that the insurance underwriters would have reached a different decision about issuing the policy if they had known about the waste ponds on a dump site was unsupported because the expert had no knowledge or experience relating to the practices of the particular underwriters or to insuring dump sites); *Miller v. Likins*, 109 Wn. App. 140, 149-50, 34 P.3d 835 (2001) (the expert did not conduct any independent analysis to reach his opinion); *Griswold v. Kilpatrick*, 107 Wn. App. 757, 761-62, 27 P.3d 246 (2001) (the expert's opinion of the settlement value of a case was based only on his general litigation experience, though he had no experience in cases with similar facts); *Riccobono v. Pierce Cnty.*, 92 Wn. App. 254, 268, 966 P.2d 327 (1998) (the expert's opinion of future economic loss was based on a set of unconfirmed assumptions that had no basis in the facts of the case).

Unlike the expert opinions in these cases, the McClure and Hamilton opinions are supported by a factual basis that reasonably leads to the conclusions expressed. As set forth in Firey's opening brief, only *some* of K & T and Crown's work was replaced by later contractors. Brief of Appellant at 11-12. McClure and Hamilton personally observed most of the defective work of which they testified. *Id.* McClure also based his opinion on his own independent investigation and analysis. *Id.* at 13-14. Applying their

own knowledge, expertise, and independent judgment to the facts they obtained, McClure and Hamilton could reasonably conclude that the work of K & T and Crown was defective and caused damage to Firey. The issue, then, is not whether the McClure and Hamilton declarations were admissible; indeed, K & T and Crown concede that they were. The issue is whether those declarations set forth specific facts creating a genuine issue of fact to preclude summary judgment dismissal of Firey's claims.

3.2.3 The McClure and Hamilton opinions, supported by a factual basis, constitute specific facts creating a genuine issue of fact.

An expert witness is entitled to testify to facts in issue in the form of an opinion. ER 702. Testimony in the form of an opinion or inference on an ultimate issue of fact is likewise properly considered. ER 704. The opinion of a qualified expert, supported by a basis in the facts of the case, is sufficient to create a genuine issue of material fact to preclude summary judgment. *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 910-11, 223 P.3d 1230 (2009).

Mr. Hamilton offered a general opinion on breach and damage caused by all defendants:

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

CP 312. Dr. McClure was more specific to each defendant:

> Aside from the some kitchen interior wall sheathing, all of K&T's work has been or needs to be redone. In addition, their work damaged the porch, the kitchen cabinets, and the costs of doing so exceed what they were paid. This contractor caused property and consequential damages beyond the scope of their work.
> …
> Effectively, all of Crown Mobile's work was redone by Orozco or still needs to be corrected. In addition to the defective work, Crown Mobile damaged wall finishes and insulation on the second story, resulting in property and consequential damages.

CP 4-5. Dr. McClure went on to describe, in detail, the specific portions of K & T and Crown's work that was defective, unauthorized, or caused property and consequential damages. CP 7-11. The opinions of Firey's experts that K & T and Crown's work was defective and caused property damage to the existing home were sufficient to create genuine issues of material fact and preclude summary judgment dismissal of Firey's claims.

3.2.4 The McClure declaration sets forth specific facts supporting his opinion that the work of K & T and Crown was defective and caused damage to Firey.

The McClure declaration was not limited to his opinions of ultimate fact. McClure went on to testify to specific defects and damages caused by K & T and Crown:

- K & T removed kitchen cabinets without authorization, CP 7;
- K & T removed half of the front porch after being explicitly told not to do so, CP 7;

- K & T failed to obtain permits and did electrical and plumbing work without proper state licenses, CP 7;
- K & T attempted to level one corner of the kitchen after installing the kitchen window, resulting in a warped window frame, CP 7;
- K & T failed to remove and replace dry rotted wood before attempting to level the kitchen, CP 7;
- K & T's leveling efforts were ineffective, CP 7;
- K & T failed to install the utility room floor framing correctly. The floor was at the wrong height and had inadequate support, CP 8;
- K & T attempted and failed to correct a sag in the utility room roof, CP 8;
- K & T failed to properly build the back steps to the utility room. The steps are dangerous as constructed and do not meet building code requirements, CP 8;
- K & T installed utility room insulation incorrectly, CP 8;
- K & T made the crawl space access door too small and then sealed it with plywood, CP 8;
- K & T installed the wrong size back door, did it incorrectly, and damaged the door in the process, CP 8;
- K & T improperly modified the shed roof. It is unsafe, blocks the back door, and allows water to enter the covered space, CP 8;
- K & T installed the water heater in the wrong location, did not ground it, and piped the overflow into the crawl space. None of this work complied with building codes, CP 8;

- K & T improperly installed building wrap, CP 8;
- K & T installed underlayment over rotted and moldy flooring, CP 8;
- Crown removed sheetrock and insulation in the upstairs area without authorization, CP 7;
- Crown attempted to level floors upstairs and in the dining room, rendering the existing floor sheathing and underlayment unusable, CP 7;
- Crown failed to obtain permits and did electrical and plumbing work without proper state licenses, CP 8;
- Crown improperly installed insulation in the attic, CP 8;
- Crown's reinstallation of the water heater failed to meet building code requirements. It was not strapped, was in a closet that did not have access, and was not property wired, CP 8;
- Crown damaged the finish flooring in the utility room, CP 8; and
- Crown installed crawl space insulation upside down, which had to be replaced, CP 8.

McClure also testified to the costs of repairing or replacing all of this defective work. CP 11.

Both K & T and Crown argue that Firey's experts failed to identify any specific work of K & T or Crown that caused damage. *E.g.,* K & T Brief at 14-15; Crown Brief at 15. This is simply not true, as demonstrated above. K & T and Crown base their arguments on a strained reading of the general statements of McClure and Hamilton, while ignoring specific statements such as those set forth above. The declarations of McClure and Hamilton set

forth specific facts establishing the elements of breach and damages. These specific facts created genuine disputes of material fact that should have precluded summary judgment dismissal of Firey's claims. This Court should reverse and remand for further proceedings.

3.3 This Court should consider the Crown documents in deciding the K & T motion for summary judgment.

K & T asks this Court to disregard about 200 pages of the record solely because those pages were called to the attention of the trial court by Crown, even though the trial court unquestionably had all of the evidence before it as it prepared to hear and decide the K & T and Crown motions, on identical issues, at the same hearing, on the same day.

This issue is the subject of a Motion to Modify currently pending before the Court. Although Firey believed that the burden should have fallen upon K & T to bring its challenge to the record by motion, in an abundance of caution, Firey filed a motion with the trial court for a supplemental order under RAP 9.12 to clarify whether the trial court considered all of the documents together in deciding the two summary judgment motions or whether the trial court segregated the evidence. The trial court denied the RAP 9.12 motion. Firey filed a motion with this Court, under RAP 9.13, to review the trial court's decision. The commissioner issued a letter ruling denying the motion. Firey brought a motion to modify that ruling.

The documents supporting Crown's motion were unquestionably called to the attention of the trial court at the time the trial court was considering the K & T motion. The record suggests that the trial court

actually considered all of the evidence. Even if the trial court did not actually consider the Crown documents, it had a duty to do so, and so does this Court. Segregation of the evidence as urged by K & T would lead to absurd and unjust results. The Court should consider the Crown documents in deciding the K & T motion for summary judgment.

But even if the Court accepts K & T's invitation to turn a blind eye to half of the evidence, it should not affect the outcome of this appeal. As shown above, McClure adequately sets forth specific facts supporting the elements of breach and damages. McClure's testimony alone, without the additional evidence in the Crown documents, is sufficient to create a genuine issue of material fact precluding summary judgment dismissal of Firey's claims. This Court should reverse and remand for further proceedings.

3.4 Any arguments relating to the terms of the contracts require the Court to remand for a trial.

Both K & T and Crown raise alternative arguments for affirmance based on the terms of the contracts between themselves and Firey. The trial court correctly held that there was evidence of the existence of contracts but did not make any findings regarding the terms other than "an implied duty of fair dealing in good faith." RP, April 25, 2014, at 21:9-14, 25:14-17. The record reflects that the particular terms of the contracts are in dispute.

K & T and Crown argue that they cannot be liable for breach when their work was terminated before it could be completed. However, this argument requires resolution of the terms of the parties' contracts, which remain in dispute. This Court cannot resolve the dispute on appeal of

summary judgment orders. It would also require evidence of what work was completed (and defective) and what was merely incomplete. The record before this Court is inadequate to parse out such details. To the extent K & T and Crown's alternative arguments might have any legal merit, they require a trial in order to resolve disputed issues of material fact. This Court should reverse and remand for further proceedings.

4. Conclusion

K & T and Crown concede that the expert declarations are admissible. Those declarations set forth not only opinions of ultimate fact, but also specific facts supporting Firey's claims that specific work of K & T and Crown was defective and caused damage. There are genuine issues of material fact precluding summary judgment dismissal of Firey's claims. This Court should reverse the trial court's erroneous summary judgment orders and remand for further proceedings.

Respectfully submitted this 10th day of March, 2015.

/s/ Kevin Hochhalter
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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On March 10, 2015, I filed the foregoing document with the Court and served a copy on the undersigned in the manner indicated:

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