No. 46388-1-II

COURT OF APPEALS, DIV. II,
OF THE STATE OF WASHINGTON

NINA FIREY,

Appellant,

vs.

TAMMIE MYERS, et al

Respondents.

BRIEF OF RESPONDENTS K & T CONSTRUCTION, TAMMIE AND RON MYERS, KENNETH AND DORIS BANNISTER, AND STATE FARM FIRE & CASUALTY

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1. Introduction

Defendant K & T disagrees with plaintiff's brief description of the case set out in her introduction. She describes this as a construction defect case and that could be interpreted to encompass a variety of theories not asserted by plaintiff. Plaintiff's claims against K & T are for breach of contract. Specifically, she alleges K & T breached its contract with plaintiff by providing inadequate work, performing work in the incorrect sequence, and in failing to complete the work. The trial court found the evidence was not sufficient to show K & T breached the contract as claimed, and to the extent there was evidence of inadequate work, plaintiff failed to establish damages attributable to K & T's work. Summary judgment for defendant K & T was, therefore, granted.

Plaintiff did produce opinion testimony by experts, but those experts did not observe any of the work of K & T, either personally or photographically, because other contractors hired after K & T modified or removed work done by K & T. The expert testimony was critical of the work of all contractors, but did not identify work of particular contractors or quantify damage attributed to the work of K & T.

Plaintiff repudiated her contract with K & T when she fired K & T and she prevented K & T from completing its work.

2. Assignments of Error

Plaintiff has misstated the issues before the court. The issue is not whether the declarations of Vince McClure and Ben Hamilton were admissible. The trial court did not hold them inadmissible and, in fact, denied the defendant's motion to strike. Instead, the court, after considering the expert declarations, concluded they did not provide the evidence needed to show errors by K & T or the cost of correcting K & T errors, if any. The question is, therefore - did the trial court err in its determination that the expert declarations were not sufficient to create an issue of fact.

3. Statement of The Case

Plaintiff's appeal concerns two separate summary judgment orders. The pertinent record for review under RAP 9.12 is not identical for the two summary judgment orders.

Plaintiff's summary of facts is based in part on evidence which was not included in the record of this defendant's summary judgment motion. In addition, plaintiff's factual summary relies on facts assumed, but not known, by plaintiff's experts. RAP 9.12 requires that the record for review of summary judgment rulings be limited to the documents identified by the trial judge as relied upon by the court. The pertinent order with respect to defendant K & T

Construction is an order dated June 6, 2014, by Judge Hunt listing nine documents, plus the exhibits appended to those documents. CP 373-375. Plaintiff must find evidence in those documents or exhibits to create a fact issue showing that defendant K & T failed to perform contract obligations and caused specific damage to plaintiff.

Plaintiff's deposition testimony demonstrates the terms of her agreement with K & T. In her deposition, plaintiff described her conversation with Mr. Bannister, one of the principals of K & T, concerning the terms of their agreement. The following questions and answers are pertinent:

> Q: Did Mr. Bannister say anything to you about the terms under which you would be working?
>
> A: Not that I recall.

CP 47-48.

> Q: Did you understand what hourly rate K & T would be billing at?
>
> A: No. He didn't - didn't - we didn't discuss that.

CP 48.

> Q: . . . At some point did you and either Ken or Tammy agree on how you were going to approach her project? In other words, how it was going to be built, what the scope of the project was, or other such details?

A: No.

CP 50.

Q: . . . Before they began work, what was the scope of the job they were going to be doing?

A: Fixing the house up so that I could live in it . . .

Q: Well, with all due respect, I mean, "fix the house" can mean so much to so many and it can vary so much, so how did the two of you come to an agreement about what was going to be done for your $25,000?

A: Fix the house where I could live in it.

Q: And that's it? There were no other terms discussed between you and K & T?

A: There were probably little things here and there, but not in the big picture, no.

Q: Did you tell them what rooms in your house to fix?

A: No.

Q: Did you tell them what to do on the outside?

A: I told them not to touch the front porch.

Q: Other than the front porch, did you tell them what to do on the outside?

A: No.

CP 51-52.

Q: Why did you fire K & T?

A: Because he was charging me over $100 an hour for his work and Darren was doing most of the work. And I didn't think that was right.

CP 54.

K & T submitted invoices on a time and materials basis for work performed at plaintiff's property dated between May 13, 2011 and June 3, 2011. CP 55-58.

In response to the K & T summary judgment motion, plaintiff presented her own declaration dated April 2, 2014 and declarations of her experts, Vince McClure and Ben Hamilton. To the extent her declaration contradicts her sworn deposition, it should be disregarded. *Klontz v. Puget Sound Power & Light*, 90 Wn. App. 186, 951 P.2d 280 (1998).

Plaintiff's declaration at page 3 asserts that after she purchased the home in 2011, she "prepared a list of projects she wanted done." She does not claim to have given the list to K & T. At paragraph 4 she states "she explained to Mr. Bannister . . . that she had a budget of $25,000 to do repairs . . . based on the home inspection report . . ." She does not, however, state she gave Mr. Bannister the report or any other information to define K & T's scope of work. At paragraph 6 she states she fired K & T after a

few weeks because she "was concerned the work was not being done properly." CP 302.

Plaintiff then states in her declaration that she hired Crown Mobile and Michael Lyons to take over for K & T. Lyons became too busy with other work and the project was then turned over to Orozco Construction. She asserts Lyons and Orozco were provided with a list of needed repairs. CP 303. Plaintiff states Crown Mobile-Lyons agreed to correct work done by K & T, but she does not state whether the corrections were made. She further states Orozco removed "some of" the kitchen work done by K & T.

Plaintiff states some work was done by a Mr. Otterness, and Mr. Cook, but she does not state what they did. CP 303.

The testimony provided by plaintiff Firey is the only testimony concerning the scope of work by K & T and there are no other attempts to identify work performed by K & T. She claims to have prepared a list of needed repairs and identifies it as Exhibit A to her declaration. CP 302; 305-306. She does not claim to have given a list to K & T and in her deposition she denies providing K & T with any particulars. CP 50. The two page list she refers to contains the name "Crown" in the top right corner and dates along the left margin, both of which suggest this was prepared after K & T was Fired. CP 305-306.

Evidence concerning K & T's scope of work or actual performance taken from the declarations and reports of plaintiff's experts are obviously hearsay as based on statements by plaintiff to her experts. Even if an expert can reasonably rely on history given by his client, that history is not admissible other than to explain the basis of the expert's opinion. ER 703.

Plaintiff incorrectly claims the trial court held the expert's declarations inadmissible. To the contrary, the trial court overruled defendant's objections, but nevertheless found those declarations insufficient to create a fact issue. 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.

The March 31, 2014 declaration of Vincent McClure refers throughout to the "defendant contractors." He does not claim to have observed work of K & T either in person or by photograph. In his declaration of August 15, 2013, he states he visited the site on 9/20/2012 and 7/24/2013. He states he also saw photos taken by Ms. Firey and reviewed the defect list she prepared. His summary of the work performed can only have been provided by plaintiff, but it still does not attribute particular work or defects to K & T. His criticism of the work of K & T can only be based on the

statements of plaintiff because K & T's work had been repaired or modified by other contractors before McClure was on site.

It is important to note that the work of K & T was incomplete because plaintiff repudiated her contract with K & T in mid June 2011.

The declaration of Ben Hamilton did not provide the needed evidence. He also refers to the defendant contractors as a group without attempting to segregate defects or damages by individual contractor. CP 311. He simply states his agreement with McClure. Mr. Hamilton provides estimates for repair and correction planned by his company, Bar None, but does not attribute any specific repair cost to K & T.

The deficiencies of plaintiff's evidence were understood by the trial court. In the discussion concerning defendant's motion to strike the expert declarations, Judge Hunt observed, concerning the expert reliance on photographs, as follows:

> The court: Well, yes, but not anywhere in that does he say of what these photographs really were, that they were photographs of K & T, that they were photographs of Crown Mobile. If it's in there, I didn't see it, and I was looking for it, because I saw this issue well before Mr. Rodrigues filed his reply motion, so this was going to be a question that I was going to have for you regardless

> of whether Mr. Rodrigues or anybody else raised it . . .
>
> one of the main problems with this case is that the work that was done by the two remaining defendants here was destroyed by the intervening contractors . . . and there weren't any photographs produced, at least that I saw, that said, okay, this is how K & T screwed up, and this is how Crown Mobile screwed up. There are photos, I looked at them, but I don't see that.
>
> And yes, he relied on photographs, but that doesn't say when they were taken or of whom, and the only other way, given that there is an admission in there that all of the work of each of these two remaining defendants was destroyed by succeeding contractors and redone, how else would he know, how would he know this? I don't get that.

RP, April, 25, 2014 at pp. 11, 12.

Because the court was unable to determine what, if anything, was done wrong by K & T and what damages plaintiff suffered as a result, summary judgment was granted for defendant K & T. The expert opinions were not adequately supported by facts and, therefore, amounted to bare conclusions or speculation.

4. Summary of Argument

Plaintiff's reliance on declarations of experts, Vincent McClure and Ben Hamilton, to create an inference that K

& T breached its contract with plaintiff is misguided. Those expert opinions are insufficient because they state mere conclusions without a factual basis. Expert declarations submitted in support of, or in opposition to summary judgment must set forth factual support for the opinions. The expert declarations in this case do not show the experts had a reliable basis in fact for determining what work K & T did, or more specifically, what errors, if any, were made by K & T.

The trial court has discretion with respect to admissibility of expert testimony and if the court's reason for rejecting expert testimony as unreliable is at least "fairly debatable," it must be affirmed.

Plaintiff's claims against K & T should be dismissed in any event because plaintiff unilaterally terminated its contract with K & T, preventing K & T from completing its work.

5. Argument

5.1 Scope of review.

Defendant, K & T, does not disagree with plaintiff's description of the appellate court's scope of review of summary judgment orders. However, the scope of review concerning the admissibility of expert opinions in this context is somewhat different. A trial court is given wide discretion in ruling on the

admissibility of expert testimony. *Miller v. Likins,*, 109 Wn. App. 140, 147, 34 P.3d. 835, 839 (2001). Where the trial court's reasons for admitting or excluding the opinion evidence are "fairly debatable," it should not be disturbed on appeal. *Id., see also State v. Nation*, 110 Wn. App. 651, 661, 41 P.3d 1204, 1209 (2002).

Another important distinction in the context of summary judgment is that an expert declaration or affidavit must show the factual support for the expert's opinion. To that extent, ER 705 does not apply in the summary judgment context. *Hash v. Childrens Orthopedic Hospital and Medical Center*, 49 Wn. App. 130, 134, 741 P.2d 584 (1987). "Expert opinions must be based on the facts of the case and will be disregarded entirely where the factful basis for the opinion is found to be inadequate." 49 Wn. App. at 135. *See also, Anderson Hay & Grain Company v. United Dominion Industries*, 119 Wn. App. 249, 259, 76 P.3d 1205, 1209.

5.2 The evidence is insufficient to show K & T breached its contract.[1]

Plaintiff alleges K & T breached a contract to provide construction or remodeling work at plaintiff's home by providing

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[1]Throughout this brief references to K & T Construction are meant to refer to the company as well as its principals, Tammy and Ron Myers, Kenneth and Doris Bannister and State Farm Fire and Casualty, its surety.

"inadequate" work; providing work in an incorrect order; and in failing to complete the work. RP, April 25, 2014 at page 15.

In order to prevail on her claim, plaintiff must show the terms of the contract, a breach of those terms and the resulting damage.

The summary judgment motion filed by K & T was supported, in part, by sworn deposition testimony of plaintiff admitting there was no agreement by the parties as to the scope of work. There was simply a general request that K & T make the property liveable on a time and material basis, within a budget of $25,000. No other direction was given by plaintiff. After working on the property for about a month, plaintiff fired K & T because she was unhappy with the hourly rate charged and the work was left in an unfinished state. Plaintiff then hired several other contractors to carry out the project.

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In opposition to the K & T summary judgment motion plaintiff relies on her own declaration as well as declarations of three experts.[2]

The precise question before the court is whether the trial court abused its discretion in disregarding the declarations of experts McClure and Hamilton. If the court's reason is "fairly debatable," there is no evidentiary error. *Miller v. Likins, supra.*

5.3 Plaintiff's experts did not provide a factual basis for their opinions.

As stated above, contrary to plaintiff's argument, an expert declaration used in the summary judgment context must affirmatively show an adequate factual basis for the opinion. *Hash v. Childrens Orthopedic Hospital, supra. See also, Rothweiler v. Clark County*, 108 Wn. App. 91, 100-101, 29 P.3d 758 (2001). In the March 31, 2014 declaration of Vincent McClure, he states a conclusion that the "defendant contractors" did not satisfy "minimally acceptable industry standards." However, the

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[2]It is important to note that portions of the clerk's papers cited throughout plaintiff's brief are not included as part of the record for review of the summary judgment in favor of K & T. The following sections of the clerk's papers are not included in this record under RAP 9.12. CP 61-74, CP 75-8, CP 92-288, CP 330-337, CP 349-353 and CP 354-365. The order granting summary judgment to K & T does not state the court relied on those portions of the record. These portions consist of papers, declarations and exhibits submitted by other defendants to support their separate motions for summary judgment.

declaration does not show the factual basis for this conclusion. It does not show that Mr. McClure inspected the work of K & T, or that he reviewed photos of work done by K & T, and does not identify any particular work performed by K & T.

In his August 15, 2013 declaration, Mr. McClure again submits conclusory statements, but not factual support. He states he visited the site on September 20, 2012, over a year after K & T was dismissed, and after nearly one year of additional work by plaintiff's "repair" contractor. He states he also visited the site on July 24, 2013, more than two years after K & T was dismissed. These visits were purportedly to go over work performed by various contractors. No specific work of K & T was identified as subject to inspection.

McClure then states he reviewed photos taken by plaintiff and he reviewed a defect list she prepared. He describes what he believes were the plaintiff's intentions and made some conclusions about the scope of work of K & T, contrary to plaintiff's sworn deposition testimony that she did not give K & T a scope of work. He claims K & T did work without plaintiff's permission, a statement obviously based on information given to him by the plaintiff. In other words, he is simply repeating what he was told.

In referring to alleged errors by K & T, he does not claim to have first hand knowledge.

Significantly, when discussing the cost of repairs, McClure states "I have not allocated repair costs on a contractor basis." CP 10.

The declarations of Ben Hamilton are also not helpful. According to the court's order, the court considered the Hamilton declaration dated April 1, 2014, however, Exhibit A to that declaration was a prior declaration dated May 14, 2013. As was the case with the McClure declarations, Hamilton made no effort to distinguish between work done by K & T and work done by other contractors. The declaration of April 1, 2014 states: "The work of the defendant contractors that preceded Bar None were (sic) well below minimum acceptable standards. Most of that work needed to be removed and replaced."

This, again, is a bare conclusion without any reference to the particular work of K & T and without any factual basis.

In his May 2013 declaration, Mr. Hamilton refers to efforts by Bar None, beginning in October 2011, to repair damage caused by, and improper work of "the defendants." He identifies the defendants at paragraph4 of this declaration as "K & T Construction, Crown Mobile, Orozco Construction, Chris Cook

and AOK Construction." There is no identification of specific work by K & T, and no statement that Hamilton reviewed photos of specific work attributed to K & T.

The declaration of plaintiff Firey does not provide the missing information.

5.4 The expert declarations were correctly disregarded.

In *Hash v. Childrens Orthopedic Hospital and Medical Center*, 49 Wn. App. 130, 741 P.2d 584 (1987), the plaintiff suffered a fractured femur while undergoing physical therapy at the hospital. The hospital moved for summary judgment supported by two affidavits from a medical doctor. The affidavits were not opposed, and the trial court granted summary judgment. The order was reversed on appeal, because the appellate court held the expert affidavits stated mere conclusions unsupported by factual analysis. The affidavits stated that the hospital's treatment met the standard of care and that such fractures can occur even without negligence. However, the affidavit was found inadequate, because no explanation was given for this particular fracture.

Plaintiff made the argument that ER 705 allows an expert to testify about an opinion without declaring the factual basis. The court responded that ER 705 does not apply to summary judgment

proceedings because otherwise the court is unable to evaluate whether the opinion has merit.

> Expert 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. *Prentice Packing & Storage Company v. United Pacific Insurance Company*, 5 Wn.2d 144, 106 P.2d 314 (1940); . . . In the context of a summary judgment motion, an expert must back up his opinion with specific facts.

49 Wn. App. at 134, 741 P.2d at 586. *See also, Parkin v. Colocousis*, 53 Wn. App. 649, 76 P.2d 326 (1989).

In *Miller v. Likins*, 109 Wn. App. 140, 34 P.3d 835 (2001), the plaintiff was injured in a motor vehicle versus pedestrian accident which he alleged was caused in part by negligence of the City of Federal Way in the design and control of the roadway. The city believed the plaintiff was riding his skateboard in the middle of the road when struck. Plaintiff contended he was walking outside the fog line and was struck by the passing motorist who was confused by the road design and markings. In opposition to the city's motion for summary judgment, plaintiff offered an affidavit by an accident reconstruction expert stating his opinion about the point of impact. He relied primarily on the testimony of a witness who was with plaintiff when the accident occurred. In deposition

testimony, the expert admitted there was no physical evidence to establish the point of impact. The court held an expert opinion based solely on witness testimony lacked adequate factual basis. *See also, Watters v. Aberdeen Recreation*, 75 Wn. App. 710, 879 P.2d 337 (1994).

Griswold v. Kilpatrick, 107 Wn. App. 757, 27 P.3d 246 (2001) was a legal malpractice case in which plaintiff alleged her prior attorney caused her to lose a beneficial settlement by delaying negotiations. The trial court granted the defendant's motion for summary judgment, disregarding expert testimony produced by plaintiff claiming that the delay in negotiation of the prior suit required plaintiff to accept a reduced settlement. The expert witness stated the basis for his opinion was his general experience in litigation of medical malpractice cases. The court concluded: "Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded." *Queen City Farms, Inc. v. Centennial National Insurance Company of Omaha*, 126 Wn.2d 50, 103, 882 P.2d 703 (1994). The court further explained:

> The factual, informational, or scientific basis of an expert opinion, including the principle or procedures through which the expert's conclusions are reached, must be

> sufficiently trustworthy and reliable to remove the danger of speculation and conjecture and give at least minimal assurance that the opinion can assist the trier of fact.

170 Wn. App. at 761-762. *See also, Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 851 P.2d 689 (1993).

The plaintiff claimed wrongful termination of employment in *Riccobono v. Pierce County*, 92 Wn. App. 254, 966 P.2d 327 (1998), and at trial offered testimony by a CPA concerning her future income loss. The expert arrived at a loss figure by calculating what plaintiff would have earned as a county employee, subtracted by what he assumed she could earn elsewhere. On cross examination the expert stated his assumptions about future income were not based on facts within his personal knowledge. The appellate court held that since the expert's opinion was based on "assumptions for which there was no factual basis . . . the award for future economic loss must be reversed." 92 Wn. App. at 268, 966 P.2d at 334.

In this case plaintiff argues, incorrectly, that an expert need not disclose the factual basis for opinions given. Plaintiff also argues the experts in this case reasonably relied upon information obtained from others, citing ER 703. However, in order to satisfy the court that the information is reasonably relied upon by an

expert in this field, it must be shown that such reliance is common outside the realm of litigation. In other words, it must be shown that experts practicing in this specialized field customarily rely on such information in their day to day practice. As stated in *State v. Nation, supra*,

> . . . The judge should not allow the opinion if (1) the expert can show only that he customarily relies upon such materials; and (2) the data are relied upon only in preparing for litigation . . . The expert must establish that he as well as others would act upon the information for purposes other than testifying in a lawsuit.

110 Wn. App. at 663, 41 P.3d at 1210.

Although plaintiff's experts in this case testified they reasonably relied on information obtained from others, they do not satisfy the test described in *State v. Nelson*. They also do not precisely identify their sources. The majority of information appears to have come from plaintiff *e.g.*, her unlabeled photographs; her description of work she considers improper, etc.

In short, the plaintiff's experts in this case relied upon, and accepted without critical analysis, the claims of the plaintiff. This is not unlike the expert opinion found inadequate in *Miller v.*

Likins, *supra*, simply based on the expert's acceptance of testimony of one witness.

As pointed out above, the trial court, in its discretion, may disregard expert testimony it finds unreliable. The appellate court should not find an abuse of discretion if the trial court's reasons were "fairly debatable." *Miller v. Likins, supra*; *State v. Nation, supra*. As applied to this case, the trial court's distrust of the expert opinions was well founded. There were at least five contractors who worked on plaintiff's home after K & T was dismissed from the job. The experts referred repeatedly to the work of defendant contractors, in the plural, and there is no suggestion they personally identified and inspected work done by K & T.

There is no testimony by the plaintiff in the record pertaining to K & T's summary judgment motion to supply the missing information. Much of plaintiff's argument relies on evidence which is not part of the record pertaining to the K & T summary judgment. For example, at page 14 of appellant's brief, she refers to photos at CP 195-201. Those photos were submitted with a declaration by Michael DeLeo to support the motion filed by Crown Mobile Homes. At page 15 of appellant's brief, plaintiff cites personal notes of plaintiff from CP 130-149. Those notes are also part of Mr. DeLeo's motion. At page 20-21 of appellant's

brief, she cites portions of her deposition which were also part of Mr. DeLeo's submission and not submitted with respect to the K & T motion. The court's order granting K & T's motion for summary judgment lists the specific evidence relied upon by the court. CP 373. Pursuant to RAP 9.12, only evidence identified in the trial court can be considered in the record on review of a summary judgment order.

When reviewing the correct record for review, it is clear plaintiff has not submitted sufficient evidence to establish that defendant K & T breached its contract with plaintiff Firey. The expert opinions were correctly disregarded because they were unreliable and not based on any factual analysis. The opinions expressed were mere conclusions without factual support and speculation would be necessary to attribute any fault or damage to K & T.

6. Summary Judgment Was Correctly Entered Regardless of Evidence Issues Raised By Plaintiff

One of the arguments made by K & T in the trial court was not addressed by the court in the summary judgment hearing, but would nevertheless justify summary judgment for K & T. In its opening brief for summary judgment, K & T argued plaintiff could not recover because plaintiff terminated her contract with K & T.

CP 36. There is no dispute that plaintiff terminated her contract with K & T in mid June 2011, thereby preventing K & T from completing its work.

"One party to a contract who prevents another from performing as promised has no cause of action to recover for nonperformance of that promise." *Hydraulic Supply Manufacturing Company v. Mardesich*, 57 Wn.2d 104, 105, 352 P.2d 1023 (1960).

"If a contract requires performance by both parties, the party claiming nonperformance of the other must establish as a matter of fact the party's own performance." *Wallace Real Estate, Inc. v. Groves*, 124 Wn.2d 881, 897, 881 P.2d 1010 (1994).

In this case, plaintiff repudiated the contract when she fired K & T, and K & T was, therefore, relieved of any further obligation to perform. Plaintiff has no cause of action in these circumstances.

Plaintiff may contend K & T's argument was not adequately preserved. However, on this record, the facts are undisputed and the result is undeniable. The appellate court has inherent authority to consider arguments on issues not expressly raised in the trial court. *Heidgerken v. State Department of Natural Resources*, 99 Wn. App. 380, 993 P.2d 934 (2000); *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005).

It is particularly appropriate to consider this issue in this case where the plaintiff has admitted she fired K & T while work was in progress. Plaintiff should not be able to recover for breach of a contract she willfully terminated. Her reason for termination was stated as "He was charging me over $100 an hour for his work and Darren was doing most of the work. And I did not think that was right." CP 54. Despite the fact plaintiff had no agreement with K & T about the hourly rate to be charged (CP 48), plaintiff terminated the contract. Given these undisputed facts, K & T was relieved of any duty under the contract.

7. Conclusion

Because the trial court correctly exercised its discretion to disregard expert testimony which was not based in fact, summary judgment was properly entered for K & T. There was insufficient evidence to determine that K & T breached its contract in any particular respect.

Respectfully Submitted this 15th day of December, 2014.

LEHNER & RODRIGUES, P.C.

By: /s/Michael A. Lehner
Michael A. Lehner, WSB No. 14189
Of Attorneys for Respondents Myer, Bannister, K & T Construction and State Farm Fire and Casualty

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On December 15, 2014, I filed the foregoing document with the Court and serve a copy on the undersigned in the manner indicated:

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/s/Mary Welsh VandeBerg
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LEHNER AND RODRIGUES PC

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