No. 46388-1-II

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

NINA FIREY,

Appellant,

v.

TAMMIE MYERS, et al.,

Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION AND CASE SUMMARY

Respondent, Michael F. Lyon and Joan D. Lyon, husband and wife and their marital community, d/b/a Crown Mobile Home Set-Up/SVC ("Crown Mobile"), submits this response to Appellant Nina Firey's brief ("Brief").

This is not your typical construction defect case where there was a notice of construction defect, the contractor responds inadequately, or the contractor responds adequately but there is some other reason which causes a lawsuit to be filed. In this instance, Appellant purchased a House that was previously vacant and was in need of significant repairs.[1] She then proceeded to have at least twelve contractors and a friend work on the house.[2] Except for the twelfth and final contractor, the Appellant did not have any written contract detailing the scope of the work done.[3] Crown Mobile and K & T Construction ("K&T"), the other respondent in this appeal, were the first two contractors hired by Appellant.[4] Crown Mobile worked on the House after K&T for a total of about ten days pursuant to

[1] CP at 204-205.
[2] CP at 210; CP at 218; CP at 194.
[3] CP at 206.
[4] CP at 210.

an oral "time and material" contract.[5] Crown Mobile was paid by Appellant approximately $6,500 for its time spent and cost of materials.[6]

After Crown Mobile was no longer working on the House, the Appellant had at least ten more contractors perform work along with the Appellant's friend.[7] The subsequent contractors work destroyed or materially altered Crown Mobile's work thereby eliminating any evidence that Appellant was damaged by Crown Mobile.[8] There is not a single photograph in the record depicting Crown Mobile's work prior to it being destroyed or otherwise altered by the subsequent contractors. Thus, the ultimate question before this court, is whether Appellant can prevail on her breach of contract claim against Crown Mobile when she never provided Crown Mobile any opportunity to inspect, review, or repair its allegedly defective work and she instead destroyed and altered any evidence of Crown Mobile's work before filing this lawsuit?

This litigation has been pending against Crown Mobile and the other defendant contractors since November of 2011. During this time, Appellant has had three different law firms handle this matter, but she still has not produced any evidence supporting the key element of her breach of contract against Crown Mobile – that Crown Mobile's work on

[5] CP at 303.
[6] CP at 217.
[7] CP at 210; CP at 218.
[8] CP at 5.

Appellant's House caused her damages. Ironically, the evidence provided by Appellant supports Crown Mobile's position that the Appellant lacks evidence on this key element of her claim.

According to Appellant, Crown Mobile's work was ultimately destroyed by the subsequent contractors that did work on the House.[9] Appellant also had a friend do work on the House.[10] Appellant's lead expert, Vincent J. McClure of Nelson & McClure ("Mr. McClure"), testified that "each follow-on contractor demolished and replaced work of the previous contractor."[11] Appellant's other expert, Ben Hamilton ("Mr. Hamilton"), the former project manager and estimator of Bar None Construction, Inc. ("Bar None"),[12] stated that "I can't say who did which incorrect work, or why they did it/didn't explain more was needed for a correct repair."[13] Appellant and her experts failed to cite to any particular work done by Crown Mobile that caused Appellant damages and there is not a single photograph in the record identifying any allegedly defective work by Crown Mobile. Accordingly, the trial court properly granted Crown Mobile's motion for summary judgment and dismissed Appellant's breach of contract claim against Crown Mobile on the ground that

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[9] CP at 210.
[10] CP at 194.
[11] CP at 284.
[12] CP at 154. Bar None recently had its license revoked by the Department of Labor & Industries and therefore is no longer in business. CP 277-281.
[13] CP at 153.

Appellant failed to provide any evidence supporting this key element of her breach of contract claim.[14]

The trial court also properly dismissed Appellant's unjust enrichment claim against Crown Mobile on similar grounds. Appellant only partially paid Crown Mobile for its work on her House and there is no evidence that such work caused Appellant damages.[15] Accordingly, Crown Mobile was not unjustly enriched. The trial court also determined that there was evidence supporting the existence of a contract, which neither Appellant nor Crown Mobile disputes.[16] As a matter of Washington law, an unjust enrichment claim is inapplicable when a valid contract existed between the parties as it did in this instance and thus the trial court determined that "any damages would be subsumed into any contractual damages."[17] Accordingly, Appellant lacks any unjust enrichment claim against Crown Mobile.

In dismissing Appellant's claims against Crown Mobile, the trial court considered all of the evidence provided by Appellant, including the opinions of Appellant's experts, Mr. McClure and Mr. Hamilton. In fact, just prior to ruling on Crown Mobile's motion for summary judgment, the trial court denied K&T Construction's motion to strike Appellant's expert

[14] RP, April 25, 2014, at 25:17-18.
[15] RP, April 25, 2014, at 22:19-25, 23:1-3.
[16] RP, April 25, 2014, at 21:9-14.
[17] RP, April 25, 2014, at 22:19-21.

opinions.[18] The trial court's order summarily dismissing Appellant's claims against Crown Mobile specifically provides that it reviewed Appellant's experts' opinions.[19] Thus, Appellants position that the trial court did not admit Appellant's expert testimony into evidence is misplaced.

II. COUNTERSTATEMENT OF ISSUES

1. Whether the trial court properly dismissed Appellant's breach of contract claim against Crown Mobile when the Appellant failed to preserve any evidence of Crown Mobile's alleged defective work, and instead Appellant intentionally altered and destroyed Crown Mobile's work prior to allowing Crown Mobile the opportunity to review or inspect the work; and because the Appellant failed to produce any evidence that Crown Mobile's alleged breaches caused Appellant damages?

2. Whether the trial court properly dismissed Appellant's unjust enrichment claim against Crown Mobile when it is undisputed that a contract existed and Appellant failed to produce any evidence that Crown Mobile's work caused Appellant damages?

III. COUNTERSTATEMENT OF THE CASE

The following facts are undisputed. Appellant is the owner of a house located at 2265 Seminary Hill Road, Centralia, Washington that is situated on a 2.5 acre lot ("House").[20] The House was acquired by the Gsamp Trust 2006-HE2 ("Trust") by way of foreclosure in July 2009.[21] The Trust subsequently sold the House to Appellant two years later in

[18] RP, April 25, 2014, at 14:1.
[19] CP at 370-372.
[20] CP at 100-101.
[21] CP at 96-98.

April 2011 for $75,000.[22] Appellant used funds that she received as a gift from her father to purchase the House.[23]

Appellant obtained a home inspection report provided by Evergreen Home Inspections ("Inspection Report") which cites numerous problems with the House.[24] Evergreen never fully inspected the plumbing and was unable to complete the electrical inspection.[25] Appellant admits that at the time she acquired the House, it was in need of significant repair.[26] Appellant did not move into the House, presumably as a result of its uninhabitable condition, and instead lived in her ten by twelve room on the property adjacent to the House.[27]

Following Appellant's acquisition of the House, Appellant commenced repairs as she saw fit by hiring a series of contractors to do various tasks.[28] Crown Mobile was the second of twelve contractors hired by Appellant to do work on the House. [29] Five of the twelve contractors hired by Appellant were sued by Appellant. Additionally, Appellant had a friend do work on the House.[30]

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[22] CP at 100-101.
[23] CP at 190.
[24] CP at 103.
[25] CP at 111-115.
[26] CP at 205.
[27] CP at 206.
[28] CP at 302.
[29] CP at 210.
[30] CP at 194.

Appellant and Crown Mobile agreed that Crown Mobile's work on the House would be performed on a time and materials basis.[31] Appellant and Crown Mobile did not have a written contract identifying the scope of the work to be performed by Crown Mobile on the House and no written estimates, quotes, plans, specifications or other documents were provided by Crown Mobile.[32] With the exception of Bar None, none of the other contractors that worked on the House had written contracts, plans, bids or estimates detailing the scope of the work on the House.[33]

Crown Mobile worked on the House for approximately ten days in late May and June 2011.[34] The bulk of the work done by Crown Mobile on the House consisted of digging out the foundation by hand to create a crawl space and hauling away the dirt and debris produced by Crown Mobile and the other contractors working on the House at that time.[35] Crown Mobile also, at Appellant's request, removed wall coverings, installed some insulation in the crawl space and the attic, and built a closet around the hot water heater.[36] Appellant paid Crown Mobile approximately $6,540 for its work on the House.[37]

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[31] CP at 303.
[32] CP at 206.
[33] CP at 206.
[34] CP at 303; CP at 134.
[35] CP at 134; CP 76-78.
[36] CP at 134.
[37] CP at 217.

After Crown Mobile's departure, Appellant went on to hire at least an additional ten contractors to work on the House.[38] She also had a friend do some work on the House.[39] In early September or late August of 2011, Appellant retained Bar-None, the twelfth contractor hired by Appellant, to perform work on the House. [40] Mr. Hamilton is a former employee of Bar None and is Appellant's expert in this litigation.[41] Appellant provided Bar None a list of work that Appellant wished to have addressed on the House and the work consisted primarily of projects that had been started but not completed.[42]

Bar None first completed the plumbing work requested by Appellant.[43] Appellant then continued requesting "more projects and wanting more estimates" from Bar None.[44] Bar None subsequently advised Appellant that the House should be re-leveled before completing further work.[45] Appellant took Bar None's advice and agreed to re-level

[38] CP at 210; CP at 218.
[39] CP at 194.
[40] CP at 153.
[41] CP at 310-312.
[42] CP at 153.
[43] CP at 153.
[44] CP at 153.
[45] CP at 153.

the House before continuing with her list of work.[46] The re-leveling of the House damaged most of the work that had been done previously.[47]

Mr. Hamilton stated that "I can't say who did which incorrect work, or why they did it/and didn't explain more was needed for a correct repair."[48] Similarly, Mr. Hamilton's expert testimony failed to identify which of the eleven contractors that had previously worked on the House before Bar None was responsible for the alleged defects cited in Bar None's estimate.[49] Rather, Mr. Hamilton made the generalization that the work on the House was defective and that the prior contractors were at fault.[50] Interestingly, Mr. Hamilton does not seem to distinguish between the prior contractors that were sued by Appellant and the prior contractors that were not sued by Appellant. Furthermore, Mr. Hamilton makes no effort to distinguish between damage allegedly caused by the prior contractors and the defective conditions that were present at the time Appellant purchased the House.

Appellant's other expert, Mr. McClure similarly cannot determine who is responsible for the problems with the House. Mr. McClure testified that "each follow-on contractor demolished or replaced work of

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[46] CP at 153.
[47] CP at 154.
[48] CP at 153.
[49] CP at 311-316.
[50] CP at 154.

the previous contractor."[51] With respect to Crown Mobile, Mr. McClure states that either "all of Crown Mobile's work has been redone by Orozco or still needs to be correct", but does not specify whether the former or the latter is correct.[52] Mr. McClure does not say which work or how much of it was replaced by the subsequent contractors. Nor does Mr. McClure differentiate between the work that was incomplete and not paid for by Appellant (thus merely requiring that more be done) and the work that was allegedly performed incorrectly. Mr. McClure also does not distinguish defective conditions of the House at the time it was purchased as opposed to defects created by contractors hired by Appellant. Remarkably, the contractors who are not defendants in this lawsuit have not been blamed by Mr. McClure for any problems with Appellant's House. And despite Appellant being the sole manager of the project, no damages were allocated to her.

Appellant has produced certain photographs of the House, many of which Mr. McClure relies on in his report.[53] However, these photographs are neither dated nor labeled, and Appellant therefore cannot and does not attribute the photos to anything done by Crown Mobile.[54] Thus, Mr. McClure, in his report, uses photographs to identify current problems with

[51] CP at 284.
[52] CP at 5.
[53] CP at 16.
[54] CP at 13-20.

the House but notably fails to identify Crown Mobile as being responsible for the problems.[55]

Based upon this evidence, the trial court ruled that "I don't think that there is competent evidence showing that [Crown Mobile] did anything that would allow for recovery. If the experts could somehow tell what [Crown Mobile] did and it was defective and that [Appellant] suffered damages, then the motion for summary judgment would be denied."[56] The trial court also dismissed Appellant's unjust enrichment claim against Crown Mobile on similar grounds. The trial court found that there was "no competent evidence that would show some sort of defect in construction and therefore no unjust enrichment."[57] And, the trial court also found that any negligent construction claim against Crown Mobile was unfounded since it was not pled.[58] The trial court also found that there was evidence to support the existence of a contract between Appellant and Crown Mobile.[59] The trial court correctly dismissed Appellant's claims against Crown Mobile for the lack of evidence on a key element of her claims.

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[55] CP at 13-20.
[56] RP, Apr. 25, 2014 at 21:17-22. The trial court extended its rulings with respect to K&T Construction to Crown Mobile. RP, Apr. 25, 2014 at 25:14-20.
[57] RP, Apr. 25, 2014 at 22:19-23:3.
[58] RP, Apr. 25, 2014 at 22:13-18.
[59] RP, Apr. 25, 2014 at 21:9-14.

IV. ARGUMENT

A. Evidentiary Standard.

Where a defendant moves for summary judgment by showing that a plaintiff lacks evidence to make out its prima facie case, then the burden shifts to plaintiff, the party with the burden of proof at trial, to demonstrate a material issue of fact for trial.[60] "If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion."[61] If a plaintiff fails to meet its burden, then "there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."[62]

While, on a motion for summary judgment, an appellate court places itself in the position of a trial court and considers the facts in a light most favorable to the nonmoving party, if the nonmoving party does not meet its burden then summary judgment is proper. Specifically, the nonmoving party cannot rely on "mere allegations, denials, opinions or

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[60] *Young v. Key Pharms., Inc.*,112 Wn.2d 216, 225, 770 P.2d 182 (1989).
[61] *Young*, 112 Wn.2d. at 225 (internal citations omitted).
[62] *Id.*

conclusory statements" to establish a genuine issue of fact.[63] Testimony and bare assertions of fact and conclusions that amount to mere speculation are insufficient to raise a question of fact to overcome a motion for summary judgment.[64] Rather, the nonmoving party must set forth "specific facts showing that there is a genuine issue for trial."[65] The Appellant did not set forth any specific facts that would create a genuine issue of material fact on key elements of her case and thus summary judgment was proper.

B. Appellant has Failed to Produce Any Evidence that Crown Mobile's Alleged Breach of Contract Caused Appellant Damages.

This litigation has been going on for over three years, and Appellant still has not produced any evidence that Crown Mobile's work on Appellant's House caused her damages. In order to prevail on a breach of contract claim under Washington law, a plaintiff must establish (1) the existence of a contractual duty, (2) defendant's breach of that contractual duty, and (3) the defendant's breach of that contractual duty caused damages to the plaintiff whom the duty is owed.[66] With respect to the

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[63] *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004) (internal citations omitted).
[64] *Urban Dev., Inc. v. Evergreen Bldg. Prods, LLC*, 114 Wn. App. 639, 652, 59 P.3d 112 (2002).
[65] *Young*, 112 Wn.2d. at 225 (quoting CR 56(e)).
[66] *Northwest Independent Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995).

first two elements, Appellant has not produced any evidence other than her bare, unsubstantiated testimony establishing the terms of the oral time and materials contract with Crown Mobile and that Crown Mobile allegedly breached such contract.[67] With respect to the third element, Appellant has not produced any evidence whatsoever creating a material issue of fact on the issue of whether Crown Mobile's alleged breach caused Appellant damages.

1. The Work Done by Crown Mobile on the House has been destroyed by the Subsequent Contractors Hired by Appellant.

The trial court was correct when it determined that there is no evidence establishing that Crown Mobile was the cause of the damages that Appellant now seeks because any evidence that might have existed has since been destroyed as a result of the manner and method in which Appellant managed her House repair project. Mr. McClure, Appellant's expert and key witness, testified that "each follow-on contractor demolished and replaced work of the previous contractor."[68] With respect to Crown Mobile, Mr. McClure stated that either "all of Crown Mobile's work was redone by Orozco or still needs to be redone" but does not state

[67] Under Washington law, the following essential elements of a construction contract must be proven: subject matter, parties, terms and conditions, and price. *Urban Development, Inc. v. Evergreen Bldg. Products LLC*, 114 Wn. App. 639, 59 P.3d 112 (2002).
[68] CP at 154.

which is the case or cite to any specific work done by Crown Mobile that has not been destroyed.[69] Similarly, Mr. Hamilton of Bar None, Appellant's other key witness, testified that the defendant contractors "damaged each others' work".[70] This is crucial – if subsequent contractors were damaging the work how can those damages be attributed to be Crown Mobile? Mr. Hamilton further stated that "I can't say who did which incorrect work, or why they did it/didn't explain more was needed for a correct repair."[71]

It is telling that both Mr. McClure and Mr. Hamilton failed to cite to any particular work done by Crown Mobile that purportedly caused Appellant damages. Instead they assign any damages to the "defendant contractors" generally.[72] Although Appellant's experts rely on photographs taken by Appellant, these photographs are neither dated nor labeled by Appellant and thus any damage to the House in such photographs has and cannot be attributed to Crown Mobile. Without any photographs, documents or other evidence demonstrating Crown Mobile's alleged breaches caused the Appellant damages, Appellant's breach of contract claim against Crown Mobile must be summarily dismissed.

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[69] CP at 5.
[70] CP at 312.
[71] CP at 153.
[72] CP at 312; CP at 226.

Appellant specifically alleges that Crown Mobile breached its time and materials contract by improperly leveling the House, failing to install insulation up to code, performing defective work in the utility room, doing faulty plumbing and electrical work and removing sheetrock and insulation in the second floor without authorization.[73] However, according to Appellant, Crown Mobile's alleged faulty work was replaced by others that were similarly alleged to have done faulty work.[74] According to Appellant, Crown Mobile was the second of twelve contractors hired by Appellant to work on the House.[75] According to Appellant, she then paid Bar None $88,000 for work on the House including structural work that damaged prior work.[76] Based upon the evidence presented by the Appellant, Crown Mobile's work was destroyed by the subsequent contractors that worked on the House.[77]

Particularly, Orozco and AOK (Otterness), two of the subsequent contractors working on the House, purportedly did defective leveling work,

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[73] Brief of Appellant at 22-22. Crown Mobile notes that with respect to this last alleged breach that Crown Mobile removed sheetrock and insulation without authorization, Appellant does not contend that this was problematic and was neither charged nor paid for this work. Appellant's additional allegations that Crown Mobile failed to finish unspecified work in the crawl space and that Crown Mobile's work had to be redone once the House was re-leveled are discussed in sections 2 and 3 below.
[74] CP at 5.
[75] CP at 210; CP at 218.
[76] CP at 6; CP at 218.
[77] CP at 5.

electrical and plumbing work.[78] They also "damaged previous work and work by others and then did not repair it" and did "other miscellaneous damage."[79] In addition to Orozoco and AOK, there were at least eight additional contractors that did work on the House after Crown Mobile. One of the Appellant's friends also did work on the House.[80] Thus, it is understandable that Appellant cannot prove her claims. Appellant essentially destroyed and repeatedly altered the allegedly defective work done by Crown Mobile, thereby eliminating any evidence pertaining to Crown Mobile's work on the House.

2. To the Extent that Additional Work was Needed to Complete Crown Mobile's Work on the House, Appellant was Not Damaged Because the Parties Had A Time and Materials Contract.

It is undisputed that Crown Mobile and Appellant entered into an oral time and materials contract.[81] A "'time and materials' contract is a form of open-ended cost reimbursement contract under which the contractor is paid merely for furnishing construction resources of labor and materials *without significant performance risk.*"[82] A time and materials contract is typically used when there are no plans or

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[78] CP at 9.
[79] CP at 9.
[80] CP at 194.
[81] CP at 303.
[82] Philip L. Bruner & Patrick J. O'Connor, Jr., *Bruner & O'Connor on Construction Law* § 2:20 (July 2013).

specifications that would allow a contractor to accurately estimate a fixed price.[83] That was the case here. There were no written contracts, plans, specifications, estimates, quotes or other documents identifying the scope of Crown Mobile's work on the House.[84] Crown Mobile performed the limited amount of work that was requested by Appellant and agreed upon by Crown Mobile.[85] Crown Mobile charged Appellant for its time and materials. Therefore, to the extent Appellant contends that more work was required by Crown Mobile to complete a particular task, Appellant was not damaged because she never paid Crown Mobile for the additional time and materials required to complete such task.

In this case, Appellant specifically alleges that Crown Mobile should have done more work in the crawl space and install more insulation in the attic and crawl space.[86] However, Appellant was not damaged as a result of this because she was neither charged nor paid Crown Mobile for the time and materials needed to complete such work. Indeed, Bar None's estimate includes charges for the additional excavation work in the crawl space and additional insulation work in the crawl space and attic that

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[83] *See e.g., Lake Mich. Contractors, Inc. v. Manitowoc Co., Inc.*, 225 F. Supp. 2d 791 (W.D. Mich. 2002).
[84] CP at 206.
[85] CP at 303.
[86] Brief of Appellant at 21-22.

Appellant complains of.[87] Thus, Bar None (and not Crown Mobile) was compensated for the additional time and materials required to install additional insulation and dig out more of the foundation.[88]

3. Any Damage to the House As A Result of the Re-leveling by Bar None Was Not Caused By Crown Mobile.

Additionally, Appellant alleges that she was damaged by Crown Mobile because the work done by Crown Mobile had to be redone once the House was re-leveled. With respect to Crown Mobile, Appellant specifically alleges that the underflooring in the dining room and the upstairs needed to be redone after the re-leveling of the House by Bar None.[89] However, the evidence shows that it was the Appellant's decision on how to approach the extensive repairs required on the House, not Crown Mobile's decision. Appellant admits that she told the various contractors including Crown Mobile what work she wanted to be done on the House.[90] Appellant even told Bar None which work she wanted to be done from "her list of items" before Bar None was able to convince Appellant to re-level the foundation before proceeding with any more work on the House.[91] Once Appellant adhered to Bar None's advice, and

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[87] CP at 318.
[88] With respect to the insulation, Bar None indicates that more was needed, not that it was installed upside down as Appellant suggests. CP at 31.
[89] Brief of Appellant at pgs. 21-22.
[90] CP at 303.
[91] CP at 153.

agreed to re-level the House, much of the work that had previously been done was damaged and needed to be redone as a result.[92] This is not Crown Mobile's fault. Appellant cannot recover damages from Crown Mobile merely because Appellant initially failed to start renovations on the House from the ground up and later decided to reverse course.

4. Appellant Fails to Distinguish Allegedly Defective Work from Conditions of the House at the Time of Her Purchase.

Crown Mobile and the other defendant contractors cannot be held responsible for the damages existing at the time Appellant purchased the House. For instance, Appellant acknowledges that there were no vents for the plumbing when Appellant purchased the House,[93] yet this is a repair included in Bar None's estimate and which Appellant seeks to recover as damages for from the defendant contractors. [94] Further, although the Inspection Report points to numerous problems with the House at the time it was purchased by Appellant, it is incomplete. Neither the plumbing nor the electrical systems in the House were fully inspected.[95] Given the overall condition of the House at the time it was acquired by Appellant, and the details in the report, these systems had problems. Appellant

[92] CP at 153-154.
[93] CP at 205.
[94] CP at 158.
[95] CP at 111-115.

cannot hold Crown Mobile and the other defendant contractors responsible for problems with the House at the time it was acquired by Appellant.

In addition, according to Appellant's expert Mr. McClure, the House had previously been remodeled at least twice and probably several other times.[96] As part of these previous remodels, extensive work was done to the House which included raising walls, changing the roof line and adding windows to the House.[97] The House had also been vacant for approximately two years prior to Appellant purchasing it.[98] The culmination of these factors (i.e., that the House had been extensively remodeled and then left vacant for approximately two years) could have easily led to other damages. Thus, in addition to being unable to determine which specific damage was caused by which contractor, Appellant also cannot distinguish the alleged damage she now claims from the conditions that she accepted when she purchased the House. The damage existing at the time the house was acquired cannot be attributed to work done on the House by Crown Mobile and the other contractors.

C. Appellant's Conclusory Statements are Insufficient to Defeat a Motion for Summary Judgment under CR 56(e).

Rule 56(e) provides in relevant part that a court may consider a fact undisputed where a party fails to properly support an assertion of fact

[96] CP at 226.
[97] CP at 226.
[98] CP at 96-101.

and grant summary judgment.[99] In this instance, Appellant responded to Crown Mobile's motion for summary judgment with conclusory statements and bare assertions of fact. For example, Mr. Hamilton's declaration in support of Appellant's response provides the following:

> The work of the Defendant Contractors that preceded Bar None were well below minimum acceptable standards. Most of the work needed to be removed or replaced. In addition, there was considerable damage done to Nina Firey's existing home as a result of what these Defendant Contractors did. I know because I remember what condition of the home general was before Ms. Firey purchased it.[100]

Mr. Hamilton's bare assertion that the defendant contractors damaged Appellant's House is not supported by any specific examples attributed to Crown Mobile or any other contractor. Additionally, Mr. Hamilton states that he remembers the condition of the House when it was purchased by Appellant, yet he notably fails to describe any specific condition and distinguish from his later visits. This is insufficient to create a material issue of fact to under Rule 56(e) that can defeat summary judgment.

Similarly, Mr. McClure's testimony in response to Crown Mobile's motion for summary judgment contains unsubstantiated and generalized statements that the defendant contractors somehow caused

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[99] CR 56(e).
[100] CP at 312.

Appellant damages. Mr. McClure makes the general statement that "the Defendant Contractors in this case did not do their work to minimally acceptable standards and as a result Ms. Firey suffered damages."[101] Yet, this conclusion is not supported by any specific facts. Mr. McClure does not identify any of the work done by Crown Mobile that led to any damages Appellant now seeks. Mr. McClure admits that Crown Mobile's work was altered or destroyed by the time he inspected the House and he fails to identify any photo of Crown Mobile's allegedly defective work before it was altered or destroyed.

In fact, neither Mr. Hamilton nor Mr. McClure personally observed the work done by Crown Mobile as Appellant suggests in her Brief.[102] By their own admission, the work done by Crown Mobile had been destroyed or materially altered by Orozco and AOK prior to Appellant retaining them.[103] Accordingly, Appellant's bare assertion that her experts observed Crown Mobile's work is not supported by the facts. Under Rule 56(e), this is insufficient to create a material issue to overcome Crown Mobile's motion for summary judgment.

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[101] CP at 310.
[102] Brief of Appellant at pg. 11.
[103] CP at 5.

D. Appellant's Unjust Enrichment Claim against Crown Mobile is Unfounded Because the Parties had a Contract and Appellant Has Not Produced Any Evidence that Crown Mobile's Work Was Paid for Defective Work.

Appellant's unjust enrichment claim against Crown Mobile should be dismissed as a matter of law because the parties entered into a valid time and materials contract. "Unjust 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."[104] "Unjust enrichment does not apply where there is a valid contract governing the rights and obligations of the parties."[105] Here, the trial court found, and the parties agree, that Appellant and Crown Mobile had a valid time and materials contract governing Crown Mobile's work on the House. Consequently, Appellant has an adequate legal remedy for breach of contract and the equitable remedy of unjust enrichment is not applicable to this case.

Additionally, as discussed above, Appellant has not produced any evidence that Crown Mobile's work caused her damages. Accordingly, Crown Mobile cannot have been unjustly enriched by any payments made for its work on the House when there is no support in the record that such work caused Appellant damages. Further, Appellant has not disputed the fact that Crown Mobile was only partially paid for its work on the

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[104] *Young v. Young*, 164 Wn. 2d 477, 484, 191 P.3d 1258 (2008) (emphasis added).
[105] *Goddard v. CSK Auto, Inc.*, 177 Wn. App. 1010 (2013).

House.[106] Under these circumstances, it would be improper for Crown Mobile to return such payments to Appellant when Crown Mobile was never paid in-full for its work, and Appellant inevitably benefited from the bulk of Crown Mobile's work.

V. CONCLUSION

The evidence furnished by Appellant supports Crown Mobile's position – that Appellant lacks evidence that Crown Mobile's work caused Appellant damages. Appellant's experts have stated that Crown Mobile's work was destroyed or materially altered by the subsequent contractors that worked on the House after Crown Mobile.[107] By the time Appellant's experts were retained, at least ten additional contractors and Appellant's friend had done work that destroyed or materially altered Crown Mobile's work.[108] Moreover, there is not a single photo of Crown Mobile's work or other shred of physical evidence showing that Crown Mobile did anything wrong or any work that caused Appellant damages. Mr. Hamilton sums it up best when he states that "I can't say who did which incorrect work."[109] Without any evidence of Crown Mobile's work or that Crown Mobile's work caused Appellant damages, Appellant cannot prevail on her breach of contract and unjust enrichment claims.

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[106] CP 73; CP 338-348.
[107] CP at 5; CP at 284.
[108] *Id.* CP at 210; CP at 218; CP at 194.
[109] CP at 154.

Appellant agrees that she needs to prove that Crown Mobile's work caused her damages in order to prevail on her breach of contract claim,[110] yet nowhere in Appellant's Brief does Appellant point out any specific work done by Crown Mobile that caused her damages.[111] Rather, on the issue of causation and damages with respect to Crown Mobile, Appellant relies on the conclusory statements of her experts that the "defendant contractors" alleged breaches caused Appellant damages.[112] These statements are insufficient under CR 56(e) to defeat a motion for summary judgment.

Crown Mobile never disputes the existence of an oral time and material contract.[113] Thus, Appellant's arguments that a contract existed with Crown Mobile do not create "a dispute of material fact" as she suggests in her Brief.[114] Moreover, the parties' oral time and materials contract defeats Appellant's unjust enrichment claim against Crown Mobile because, as the trial court properly noted, "any damages would be subsumed into any contractual damages."[115] And, because Appellant has no evidence that Crown Mobile's work caused her damages, Crown

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[110] CP at 342.
[111] Appellant's Brief.
[112] CP at 18-19.
[113] CP at 63.
[114] Appellant's Brief at pgs. 19-20.
[115] RP, April 25, 2014, at 22:19-21.

Mobile cannot have been unjustly enriched by Appellant's payments in the amount of approximately $6,500.[116]

In sum, this isn't a typical construction defect case. Crown Mobile was never notified of any defect before this lawsuit was filed and has never had an opportunity to review its purportedly defective work. Instead, Appellant proceeded to destroy or materially alter Crown Mobile's work and then sued Crown Mobile alleging that its work caused Appellant damages. But, having destroyed any evidence of Crown Mobile's work or that Crown Mobile's work caused Appellant damages, Appellant cannot prove an essential element of her case. Consequently, the trial court properly dismissed Appellant's claims against Crown Mobile.

Respectfully submitted this 15th day of December, 2014.

Peterson Russell Kelly PLLC

By 

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[116] CP at 217.

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury under the laws of the State of Washington, that on December 15, 2014, I caused to be served a true and correct copy of the foregoing **BRIEF OF RESPONDENT** in the manner noted below, to the following parties:

Courts of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402	[ ] Via Facsimile [ ] Via U.S. First Class Mail [ ] Via Messenger [X] Via Electronic Transmission
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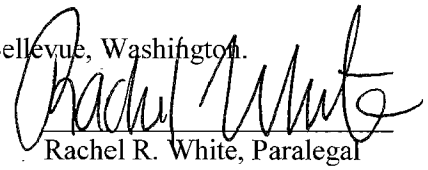
DATED: December 15, 2014, at Bellevue, Washington.



Rachel R. White, Paralegal

PETERSON RUSSELL KELLY PLLC

December 15, 2014 - 3:41 PM

Transmittal Letter

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Comments:

Brief of Respondent Lyon d/b/a Crown Mobile Homes Set-Up/SVC

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