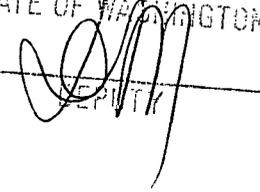


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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GENERAL CONSTRUCTION COMPANY,

Appellant
(Defendant)

v.

DAY ISLAND YACHT HARBOR, INC.

Respondent
(Plaintiff)

BRIEF OF APPELLANT GENERAL CONSTRUCTION COMPANY

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A. INTRODUCTION

After a six-day trial in which Plaintiff-Respondent Day Island Yacht Harbor, Inc. ("Day Island") sought to recover monetary damages for an alleged breach of dredging contract against Defendant-Appellant General Construction Company ("General"), wherein Day Island conceded that it received over 94% of the dredging work contracted for, the jury has reached the extraordinary result of awarding Day Island *over two times (\$1,250,000) the amount paid to General under the contract (\$615,000)*! The purported basis for the diminution in value damage award is predicated entirely upon a one sentence answer from the owner of Day Island whereby he was asked for his opinion on how much the value of his marina had dropped because of alleged problems arising from General's work. General timely objected to the question and no answer should have been allowed because of the lack of foundation and expertise by the testifying witness. The Trial Court improperly overruled the objection, ostensibly giving the owner a blank check to simply speculate as to how much his marina had lost in fair market value due to General's alleged breach. Aside from the lack of foundation and expertise, predicates required to provide an opinion on diminution in value, the owner fumbled the question and provided an answer completely unrelated to the diminution in value. Day Island failed to present any substantive evidence related to diminution in value and therefore the verdict must be set aside.

Day Island has for many decades operated a marina that requires periodic maintenance dredging. In 2008, Day Island entered into a construction contract (the “Contract”) with General to dredge material from its marina and to replace creosote pilings with steel pilings. The work performed was valued at \$615,000 under the Contract. General removed approximately 8,000 cubic yards of sediment material (which is 94% of the total amount which Day Island contends should have been excavated) and replaced the pilings. General completed its work successfully. However, Day Island alleged that General had committed three breaches, i.e. it should have removed a combined additional 400 to 500 cubic yards of material at the (1) south and (2) north ends of the project, and that it (3) replaced some pilings in the wrong location. The jury found that General had breached the Contract.¹

By general verdict form (which failed to identify the specific breach or breaches found by the jury), the jury awarded Day Island damages of \$1.25 million allegedly resulting from a diminution in the value of the marina caused by General’s unspecified breaches of the Contract. General in this appeal asks the Court to reverse the judgment

¹ This Brief will refer to the breach of Contract as alleged breaches because the record does not clarify which of the three alleged breaches the jury based its conclusion that General was in breach upon.

and to remand for a new trial on the issues of damages and liability. General makes three arguments on appeal.

First, there is no legitimate, admissible or substantial evidence to support the \$1.25 million damage award. Solely one question at trial sought to adduce evidence pertaining to the diminished value of the marina proximately resulting from General's alleged breaches, and the answer to that question constitutes 100% of the evidence quantifying Day Island's alleged damage. Over General's proper and timely objections to lack of proper foundation and required expertise, the Trial Court allowed Day Island's owner, Mr. Brian McGuire, to testify as follows:

Q. Do you have an opinion as to how much the value of your marina has dropped because you have these problems there?

MR. FERRING: Objection, foundation. Lack of expertise.

THE COURT: Overrule the objection. He can answer the question. The weight goes to the jury.

A. It could be half of what I spent. It could be 60 percent of what I spent. 70 percent of what I spent. It could come down by –

Q. That would be the range?

A. That would be the range.

RP 323-324. This answer, which relates solely to a speculative percentage of the entire \$1.9 million in project costs (Mr. McGuire testified that the entire project including materials, planning, design and engineering,

permitting, and other costs totaled \$1.9 million) is plainly deficient under the substantial evidence standard. Rather than: (1) identifying any loss in revenue or other specific direct damages; (2) comparing the pre- and post-dredging fair market values for the marina; or (3) providing any formula, calculation, or other explanation for how or why any particular alleged General breach of contract *caused* the “value” of the marina to have diminished, Mr. McGuire speculated that the loss in value to the marina was an amount that “could be” equal to 50 to 70 percent of the costs he spent on the entire project. There is no evidence in the record to support such a diminution in value award caused by any alleged breach by General.

General’s second argument for reversal is related: the Trial Court committed prejudicial error in allowing Mr. McGuire’s speculative testimony regarding any diminished value caused by any alleged breach by General. No proper foundation was laid and no showing was made of sufficient expertise by Mr. McGuire, which he in fact lacked. A timely and proper objection was made at trial. In the absence of any evidence on damages, Day island’s claim fails for lack of evidence.

Third, the Trial Court erred in denying General’s properly filed Motion for a New Trial based on the above-identified errors.

In conclusion, General requests a new trial as to liability, as well as to damages. The jury verdict does not identify any specific breach (of the three alleged by Day Island) found by the jury, so that the issues of damages and liability are so intermixed that a new trial is required as to both.

B. ASSIGNMENTS OF ERROR

1. ASSIGNMENTS OF ERROR

No. 1. The Court Erred in Entering a Judgment Not Supported by Substantial Evidence.

No. 2. The Court Erred Prejudicially in Allowing Owner McGuire to Opine as to Diminution in Value When No Sufficient Foundation Was Laid and He Lacked Required Expertise.

No. 3. The Court Erred in Denying General Construction Company's Motion for a New Trial Pursuant to CR 59.

2. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Is There Substantial Evidence to Support the Judgment?
(Assignment of Error No. 1)

Was a Proper Foundation Laid, and Did Owner Mr. McGuire Have Required Expertise, to Testify as to the Amount of Diminution in Value Damages? (Assignment of Error No. 2)

Did the Trial Court Err in Denying General's CR 59 Motion for a New Trial? (Assignment of Error No. 3)

C. STATEMENT OF THE CASE

1. FACTS

General is a construction company which specializes in marine-related construction work. CP 63. Day Island is a long established marina facility in Tacoma where owners moor their yachts. CP 63. Day Island is owned by Mr. Brian McGuire. CP 60, RP 265.

a. Overview of Permitting, Scope of Work and Contract

Day Island sought to have its marina dredged and pilings replaced. CP 2. Day Island began the permitting process in 2004. RP 140-141. The permitting process required three levels of regulatory review and compliance, including approval by the Department of Ecology, Department of Natural Resources, and the US Department of Army Corps of Engineers. RP 138-39. The process took approximately four years. RP 137-138.

General and Day Island began discussing a construction contract in 2006. RP 402. Day Island contacted General because of its previous satisfactory working relationship. RP 665.

The parties entered the Contract in 2008. CP 3, 5-13. The contract included dredging of Day Island's marina to remove accumulated sediment to a ten foot depth (-10). RP 147, CP 5-13. The contract specified that the dredging work would be maintenance dredging, with "very little" virgin dredging. CP 5-13. The contract also required replacing creosote pilings

with steel pilings. CP 5-13.

The work commenced in July 2008. CP 64. General dredged the area encompassed by the contract, including the northern area twice to remove sloughing which had filled in an area that had achieved the required depth. CP 443-444. General's work included the removal of sediment that could be removed with maintenance dredging above the -10 foot depth. RP 147, 179. The work was finished by September 20, 2008. RP 595.

Day Island concedes that General completed most (approximately 94% - 97%)² of the dredging work and achieved the specified -10 feet excavation "almost everywhere":

Q. There has been about 8,000 yards taken out by General?

A. Yes.

Q. It is down to ten feet almost everywhere, right?

A. Yes.

...

Q. In a couple small places, but the marina itself is now down to ten feet?

A. For the most part.

RP 767. General was only paid for the sediment it removed. RP 452.

In spite of achieving substantial performance, Day Island took

² 94% is calculated by dividing the work Day Island concedes has been dredged, 8,000 cubic yards, by the total amount of work which could have been performed: 8,000 + 500 cubic yards of unfinished dredging: $8,000/8,500 = 94\%$. The north area was dredged twice, but sloughing material continued to fill the area in, indicating that General had completed over 97% of the dredging work.

issue with three aspects of General's work. The marina has continued to operate without impact or interruption. RP 271. No testimony was presented which quantified any alleged lost revenues suffered by Day Island.

b. Day Island's Breach of Contract Claims

We briefly detail the specifics of Day Island's alleged breach of contract claims which are pertinent to the interrelationship of damage and liability issues (as discussed in following argument). Day Island presented evidence as to three alleged breaches by General. Day Island contended that there were "two principal areas that didn't appear to be dredged." RP 175. The two areas were respectively at the north and south ends of the marina. RP 175. All told, this amounted to no more than 400 to 500 cubic yards of material (or approximately 5-6% of the contract specified dredging).³

Q. The number of cubic yards that they didn't dredge is on the exhibit that we discussed, is it not?

A. Yes.

Q. It would be your Exhibit 37. About 200 to 250 each end?

A. Roughly, yes. Not a lot. It just didn't get dredged.

RP 198. Day Island's third claim was that boathouses were in the wrong location because General replaced pilings a few feet outside of their

³ See Footnote 2.

original location. RP 176-177.

General encountered problems dredging in the north end because of sloughing of the material from embankments. RP 444. General's evidence was that this sloughing happened because of an existing failing embankment. RP 443. General dredged this area to the -10 foot requirement and then re-dredged the area after the sloughing. RP 443-444. The sheet metal retaining wall originally included in the project plans which could have prevented this sloughing was deleted by Day Island due to costs and concerns about removing archeological artifacts by permitting authorities. RP 194. General provided testimony that it dredged the area twice and achieved depths the second time of 8.9 to 9.7 in this area in spite of the sloughing. RP 443.

As to the south end, General presented testimony that it was required to perform only maintenance dredging under the Contract, and therefore when it dredged into virgin soil layers, it had to stop dredging due to permitting limits which did not allow dredging of "hard" native materials. RP 445. Maintenance dredging is dredging of an area that has already been dredged, and there is removal of sedimentation that has built up over a period of time. For example, the sedimentation might be from mud or sand and gravel from a stream or other sources. RP 183.

With regard to some of the pilings being placed in the purported wrong location, General presented evidence that Mr. McGuire and his deck

installation contractor were responsible for locating the pilings. RP 616, 617.

The point to be drawn is that while there was disputed evidence presented by the parties with respect to each of Day Island's three alleged breach claims, the general verdict form provides no findings as to what specific breaches were found, or not found, by the jury to support related damages. No evidence allocates any specific part of the \$1.25 million damage amount to any particular alleged breach.

c. Day Island's Damage Claim--Evidence

i. Day Island Presented No Evidence of Cost to Repair

To support its damage request, Day Island was required to establish either cost to repair/complete damages or a properly supported diminution-in-value recovery, whichever is less. Day Island presented no evidence of the cost to repair or complete the work required by the Contract. Day Island apparently had intended to do so until the following adverse ruling occurring at the start of trial. In its opening argument, Day Island's counsel indicated that it would present contractor estimates of cost to repair and issues related to repair work through the testimony of owner Mr. McGuire. RP 102. Counsel for General in response indicated its anticipated hearsay objection to any such attempted introduction:

MR. FERRING: ...I could detect from Bob's opening statement, sounds like there is going to be a lot of testimony from people that aren't here that is hearsay. Logistically I thought I would bring it up now to see if it is something we want to address before we get to the testimony. When he was referencing these estimates from people, it is my understanding they are not going to be here to testify...

RP 117.

Day Island's counsel re-confirmed that the contractor witnesses listed in its witness disclosures would in fact not testify as to cost to repair, and agreed not to present the cost-to-complete and/or repair estimates as exhibits after the Trial Court indicated that the hearsay objection by General would be sustained if these estimates were sought to be introduced through Mr. McGuire. RP 122-124.

General presented evidence from Ken Preston, an estimator for General with thirty-six years of construction experience, that the cost of dredging the additional 500 yards would be \$95,000. RP 569. By contrast, Day Island indicated its cost to repair estimate, if introduced at trial through the appropriate witnesses, would have been \$207,425.00. CP 245-246. In either case, the law below establishes either number as a ceiling on damages.

ii. Diminished Value Testimony

Mr. McGuire testified that Day Island had incurred approximately

\$1.9 million in total costs for the entire project (including materials, planning, design and engineering, permits, and other costs) over the course of numerous years. RP 323. Mr. McGuire testified, having been barred from presenting cost to repair/complete evidence, that Day Island would have to start the entire project over to make repairs to remedy General's alleged breaches of contract. RP 319-320. For his part, Mr. McGuire testified that he had no knowledge of any cost to repair the work:

Q. Do you know what it would cost to fix these three problems [with General's performance]?

A. I don't know if I could do it for the price I spent with General. I wouldn't have any idea until it is done.

RP 323. Thus, Mr. McGuire conceded that any cost to repair or complete estimate by him would be speculation ("I wouldn't have any idea"). Note also that this answer is in terms of General's total contract price (\$615,000), not the total project costs (\$1,900,000).

After having testified that he did not know the cost to repair/complete, Mr. McGuire was asked to opine as to the amount of any reduced "value" of his marina resulting from General's alleged breaches. This question was posed after the filing of a pre-trial motion in limine to allow him to testify as to his property's value. CP 59-62. That motion was granted. RP 324.

However, that motion in limine did not address the later arising question of whether Mr. McGuire was qualified to opine as to the diminution in value caused by a construction breach or what evidence would be sufficient to establish the alleged “diminished value.” We again quote that single question and answer which is critical to this appeal:

Q. Do you have an opinion as to how much the value of your marina has dropped because you have these problems there?

MR. FERRING: Objection, foundation. Lack of expertise.

THE COURT: Overrule the objection. He can answer the question. The weight goes to the jury.⁴

A. It could be half of what I spent. It could be 60 percent of what I spent. 70 percent of what I spent. It could come down by –

Q. That would be the range?

A. That would be the range.

RP 323-324. Mr. McGuire *does not identify any fair market value of his marina pre- and post-construction, nor does he state any analysis or formula justifying the delta between his two unidentified pre and post “before and after” property “values.”* Also, he *speculates* as to what the “drop” in value “could be”, but provides no foundation as to his qualifications or expertise to opine with respect to the amount of any

⁴ While the question as posed literally asked only if Mr. McGuire had an opinion as to diminished value, both General’s counsel’s objection and the Court’s denial thereof treated the question as eliciting the substance of the opinion. This is pertinent to a waiver issue raised by the Trial Court in the Motion for New Trial addressed *infra*.

diminished value. Nor does he explain why he answers in terms of total project costs, a factor separate from the amount of any diminished value caused by any of General's three alleged breaches. This was the sole evidence related to diminution in value of the marina (to the extent that the evidence relates to loss of value at all).

iii. Day Island's Closing Argument Sought Solely Diminution of Value Damages

In closing argument, Day Island specifically asked the jury to award Day Island 60-80 percent of the \$1.9 million in total costs which it had spent on the project, which was the basis for the \$1.25 million dollar verdict. RP 845, 894. No other damage theory, or quantification, was cited or relied upon by Day Island in closing argument, or at any time during the trial proceedings.

The jury instruction was WPI 303.01 which states that plaintiff could recover all "reasonably foreseeable" and "actual economic damages [suffered] as a result of breach" by proving "the amount of those damages", so as to put it "in as good a position as it would have been in if both plaintiff and defendant had performed all of their promises under the contract." CP 168.

2. **DISCOVERY ANSWERS PRIOR TO TRIAL
RELATED TO COST TO REPAIR**

Day Island's discovery answers identified fact and expert witnesses that it expected to call at trial to prove cost to repair damages. CP 235-238. Thus, Day Island did have evidence of cost of repair but could not get it into the evidence. Day Island should not have been rewarded for that failure by receiving \$1.25 million in diminution in value damages, an amount \$1,000,000 in excess of its own cost to repair estimates.

Five days before trial, Day Island submitted a supplemental interrogatory answer adding a composite estimate that it would be possible to repair all three alleged breaches (i.e. (1) the 250 cubic yards in the north, (2) the 250 cubic yards in the south, and (3) the replacement of three or four pilings) for \$207,425:

3. Plaintiff is informed and believes that if defendant does not specifically perform its contractual obligations with the specialized equipment, personnel, knowledge and experience available to defendant, one of the only reasonable possibilities known to plaintiff of completing the dredging to the depths specified in the contract and permits, given the placement of pilings by defendant and relocation of the boathouses to those pilings, is to contract with Thompson Pile Driving, Inc., of Port Orchard, to remove and then replace three pilings at the North end of the marina, and three or four pilings at the South end of the marina, so that three boathouses at the North end and three or more at the South end could be temporarily relocated, to allow a company such as Sound Rock and Bulkhead to

utilize a small barge and barge mounted excavator to dredge to the contract and permit depths, deposit the materials in a barge for towing to an onshore site, where the material would be off-loaded, trucked and disposed on-shore.

... bringing the total cost to plaintiff to attempt this remedy of defendant's breach to a total of approximately \$207,425.00.

CP 245-246.

Mr. McGuire indicated in his deposition testimony his lack of knowledge as to the amount of damages incurred by Day Island:

Q. How much are you seeking to recover?

A. I don't know yet.

Q. Did you ever know?

A. What I want is General to come back, finish what they started, and get out.

CP 256.

Thus, at trial, after Day Island's plan to present cost to repair and repair issue evidence through the testimony of Mr. McGuire was upended based on General's hearsay objection, Day Island changed course and presented its sole damage quantification evidence through Mr. McGuire's above-reviewed diminished value testimony found at RP 323-324.

3. MOTION FOR NEW TRIAL

On November 13, 2012 General filed a CR 59(a) Motion for New Trial and/or Remittur. CP 193-213. The motion was heard before the Trial

Court on December 14, 2012, and Judge Edmund Murphy entered an Order denying General's motion. CP 348-349. In making his ruling, Judge Murphy stated the following:

THE COURT:

We had a situation where Mr. McGuire was asked the question about the value, does he have an opinion as to the value of his marina? How much it has dropped because of the problems. There was an objection as to foundation, lack of expertise. The question is: Do you have an opinion? That was overruled. He then gave the opinion, which has been the focus of this argument. It was left at that.

The defense argues that is not a sufficient legal opinion. It says that the waiver issue doesn't matter. I think the waiver issue does matter. I think that there was an objection that was made to whether he has an opinion. Once the opinion is given, then that was not a further basis for any objection or motion to strike, motion under CR 50 for directed verdict after the evidence. The case went to the jury. The jury, using the information that was provided to them as far as the damages, reached the verdict that it did.

I am going to deny the motion for a new trial. The basis for that is the waiver issue. I could be wrong. The Court of Appeals will tell me if I'm wrong. I think that is the way this entire evidence played out, that there was a waiver by the defendant. The evidence that was presented, there was a basis for the jury to reach the verdict that it did. I am going to deny the motion for new trial.

RP 931-932. Day Island did not raise the issue of waiver; only the Trial Court did. General addresses the issue of waiver *infra*.

D. ARGUMENT

1. SUMMARY

The judgment should be set aside because it is unsupported by substantial evidence. Under Washington law, Day Island had two methods to prove its damages resulting from General's defective or incomplete construction: (1) cost to repair/complete or (2) the reduced market value of its property caused by the breaches, whichever is less. Day Island proved neither. The Trial Court excluded, based on hearsay, the written cost to repair estimates from contractors listed to testify in Day Island's discovery disclosures (none of whom were called). Day Island abandoned any cost to repair/complete damage theory.⁵

Instead, Day Island elected to rely solely upon non-expert owner Mr. McGuire's diminution in value testimony, which is rank speculation and conjecture rendered incompetent by the lack of proper foundation and

⁵ While Day Island asked for diminution in value damages, it nonetheless implicitly speculated that it was a percentage of the purported costs to repair/complete. Thus, Day Island sought to prove its diminution in value damages based on its speculative, unfounded, and inadmissible cost to repair damages. Additionally, Day Island presented this theory as diminution in value because Mr. McGuire admitted that he did not know the cost to repair/complete, and yet tried to backdoor such evidence in by framing his diminution-in-value testimony in terms of a percentage of total project costs. This circular argument fails and demonstrates there is no evidence to support diminution in value damages.

Mr. McGuire's lack of required expertise. The Trial Court erred prejudicially in overruling General's objection to the testimony.

Thus, Day Island failed to provide substantial evidence in support of either theory (cost to repair/complete or diminution in value). For that reason, and because of the Court's related erroneous evidence ruling, reversal is in order. Because the damage issue is inextricably tied into the liability issue, the new trial must address both damage and liability issues.

2. **MEASURE OF DAMAGES FOR BREACH OF CONSTRUCTION CONTRACT**

Day Island was required to prove its damages for defective construction by either cost to repair/complete or diminution in value methodology. Specifically, the measure of damages in Washington for a breach of construction contract due to defective or incomplete work is set forth in *Eastlake Constr. Co., Inc. v. Hess*, 102 Wn.2d 30, 686 P.2d 465 (1984)⁶:

A party may recover the reasonable cost of remedying the defects if the cost is not clearly disproportionate to the probable loss in value to the party. *Eastlake Constr. Co., Inc. v. Hess*, 102 Wn.2d 30, 46, 686 P.2d 465 (1984) (adopting proportionality rule of *Restatement (Second) of Contracts* § 348 (1981)).

⁶ Day Island concedes that the seminal case regarding damages is *Eastlake Construction v. Hess*, 102 Wash.2d 30, 686 P.2d 465 (1984). CP 321.

The Washington Supreme Court adopted the proportionality rule to limit the damages available to a party who establishes liability for a breach of construction contract. The limit is a guard against economic waste and to prevent litigants from procuring a windfall. The proportionality rule “does not require the Trial Court to measure the loss in value caused by the breach, but only to determine whether the cost to remedy the defect is clearly disproportionate to the owner's loss.” *Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.* 102 Wn. App. 422, 428, 10 P.3d 417 (2000):

Once the injured party has established the cost to remedy the defects, the contractor bears the burden of challenging this evidence in order to reduce the award, including providing the trial court with evidence to support an alternative award. *See Fetzer v. Vishneski*, 399 Pa. Super. 218, 224-26, 582 A.2d 23 (1990); *General Ins. Co. of Am. v. City of Colorado Springs*, 638 P.2d 752, 759 (Colo. 1981); *cf. Andrulis v. Levin Constr. Corp.*, 331 Md. 354, 375-76, 628 A.2d 197 (1993)(using the economic waste standard); 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1089 (1964)

Panorama Village, 102 Wn. App. at 428, 429.

Thus, Restatement (Second) of Contracts (1981) (the “Restatement”) § 348 (2), as adopted by *Eastlake*, provides an owner damaged by a construction defect with a remedy of (1) diminution in property-value or (2) cost to complete, whichever is less:

If a breach results in defective or unfinished construction and the loss in value to the injured party is not proven with sufficient certainty, he may recover damages based on (a) ***the diminution in the market price of the property*** caused by the breach, or (b) ***the reasonable cost of completing performance or of remedying the defects*** if that cost is not clearly disproportionate to the probable loss in value to him.

Eastlake at 47 (emphasis added). As noted, Day Island did not provide substantial evidence in support of either theory. Instead, Day Island developed an untenable hybrid theory where, while claiming to state a claim for diminution in value to the marina, it based its claim on a percentage of the total project costs. This is neither lost value by any recognized method, nor of a cost to repair—especially when the known cost of repair is only a fraction of the diminution in value according to Day Island’s discovery response.

In adopting Restatement § 348 (2), the *Eastlake* opinion approvingly cited its *comment c* “*Incomplete or defective construction*”, which states a critical limitation upon an owner’s ability to recover such diminution in property-value:

If the contract is one for construction, including repair or similar performance ***affecting the condition of property***, and the work is not finished, the injured party will usually find it easier to prove what it would cost to have the work completed by another contractor rather than to prove the difference between the value to him of the finished and

unfinished performance. *Since the cost to complete is usually less than the loss in value to him, he is limited by the rule on avoidability of damages to the cost to complete. See § 350(1).*

Eastlake at 47 (emphasis added). Here, Day Island provided no substantial evidence of said “difference between the value to [it] of the finished and unfinished work” of General. The cited Restatement § 350 “Avoidability as a Limitation on Damages” states:

(1) *Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden, or humiliation.*

(2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.⁷

This limitation upon an owner’s ability to recover contract breach damages for diminished value to property, i.e., it cannot recover damages avoidable by completion or repair, finds its counterpart in Washington’s “Lesser-Than Rule in Limiting Damages” involving physical damages to property. The cited rule is so described in *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 541, 871 P.2d 601 (1994):

Washington courts have consistently applied the “lesser-than” rule in fixture cases where the damaged real property is affixed to land. In those cases

Where the injury is only temporary, and the property can be restored to its original condition at

⁷ (Emphasis added.)

a reasonable expense and at a cost less than the diminution in the value of the property, the general rule for the measure of damages is the cost of restoration.

Burr v. Clark, 30 Wn.2d 149, 158 190 P.2d 763 (1948).

Thus, an owner cannot recover diminished value that can be avoided by repair costs. A typical case so illustrating this legal maxim is *Thomas v. Green*, 32 Wn. App. 29, 31, 645 P.2d 732 (1982), where this court stated:

The correct measure of damages for the breach of a construction contract that has otherwise been substantially performed (as this one was) is the cost of remedying the defect, if that cost does not amount to economic waste. *Christensen v. Hoskins*, 65 Wn.2d 417, 397 P.2d 830 (1964) (applying *Restatement of Contracts* § 346 (1932)). The measure of damages is not, as the court determined, an amount equal to the diminution in the value of the house (\$ 15,000).

In *Thomas*, the cost to complete was \$858 but the trial court awarded diminished value in the amount of \$15,000. This Court reversed, holding that the trial court erred, as a matter of law, in selecting the diminished value of the house as the measure of damages. *Id.*

3. THE COURT ERRED IN ENTERING JUDGMENT ON A JURY VERDICT FOR DIMINUTION IN VALUE WHICH IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Washington precedent establishes that a diminution in value recovery is properly proven by a comparison of “the difference between the market value of the property immediately before the damage and its

market value immediately thereafter.” *Collelo v. King County*, 72 Wn.2d 386, 393, 433 P.2d 154 (1967), quoting *Harkoff v. Whatcom County*, 40 Wn.2d 147, 241 P.2d 932 (1952). Thus, the jury verdict for diminution in value may only be sustained if the Court of Appeals can conclude that the jury was presented with substantial evidence as to the difference between two fair market values of the real property in order to measure the impact General’s alleged breach of contract had on the marina. Fair market value is defined as:

Fair market value is the amount of money which a well informed purchaser, willing but not obliged to buy the property would pay, and which a well informed seller, willing but not obliged to sell it would accept, taking into consideration all uses to which the property is adapted and might in reason be applied.

Donaldson v. Greenwood, 40 Wn.2d 238, 242 P.2d 1038 (1952). No “fair market values,” pre or post, were provided by Day Island, let alone values supported by any competent analysis or formula beyond Mr. McGuire’s mere speculation. Nor was there any evidence probative of the amount of any loss in value to Day Island’s property caused by General’s alleged breaches of contract. In short, there has been a complete failure of proof as to the quantification of any diminution in value damages caused by General’s alleged breach.

a. **Substantial Evidence Requires More Than Unsupported and Unqualified Speculation**

Under Washington law, a jury's verdict must be overturned when it is clearly unsupported by substantial evidence. *Herring v. Dep't of Social and Health Serv.*, 81 Wn. App. 1, 15-16, 914 P.2d 67, 76-77 (1996). Substantial evidence is "of a character which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed...." *Johnson v. Aluminum Precision Prod.*, 135 Wn. App. 204, 209, 143 P.3d 876 (2006); *Industrial Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 916, 792 P.2d 520 (1990). When applying the substantial evidence test, Washington courts have cautioned that "[a] verdict cannot be founded on mere theory or speculation." *Id.* While circumstantial evidence may be used to meet the substantial evidence test, "[i]n applying the circumstantial evidence submitted to prove a fact, the trier of fact must recognize the distinction between that which is mere conjecture and what is a reasonable inference." *Callahan v. Keystone Fireworks Mfg. Co.*, 72 Wn.2d 823, 829, 435 P.2d 626 (1967) (quoting *Gardner v. Seymour*, 27 Wn.2d 802, 808-09, 180 P.2d 564 (1947)). No circumstantial or direct evidence was presented at trial to support either the pre- and post- breach fair market value of the marina, or that established a causal link between any diminution in value resulting from

General's alleged breach. Therefore, there is no evidence of diminution in value.

b. **No Substantial Evidence: Mr. McGuire did Not Testify as to a Market Value of the Marina Property (either Pre- or Post- Breach) and He Admitted He had No Knowledge of the Cost to Repair or Complete General's Work**

Here, the ultimate issue became (since Day Island opted to abandon its cost to repair theory): what is the amount of any diminution in value to Day Island's marina resulting from alleged breach(es) by General? Resolving that issue required that the value of the marina be established both pre- and post-construction, and that causal links be proven between General's alleged breach(es) and any diminution-in-value amount. Day Island provided no probative or competent evidence of any impact to the fair market value of the property caused by the alleged breaches of General. It simply is non-existent.

i. **The Evidence Required Was Not Provided**

Having decided to pursue a damage theory based solely on diminution in value Day Island was required to prove, consistent with Restatement § 348(2) and *Eastlake*, and the "less than" rule, three things: (1) the pre-breach fair market value of the Day Island marina property; (2) the diminished post-breach value of that property resulting from General's alleged breach(es); and (3) that it could not "avoid" any portion of that

loss in value by completing or repairing the work as required by Restatement § 348 (2), and comment c and its incorporated § 350. Mr. McGuire's testimony did none of these things. This can perhaps be best illustrated by noting the implicit three steps of Mr. McGuire's testimonial argument:

Argument Step 1 (Evidence as to the Project Cost): Mr. McGuire testified to a \$1.9 million cost for design, engineering, materials, permits and construction, including General's work of \$615,000.

Argument Step 2 (Evidence as to Percentage of Diminished Value): Mr. McGuire testified without foundation or basis that General's deficient performance could have reduced the value of his property by 50-70 percent of what he had spent for the maintenance dredging project.

Argument Step 3 (Conclusion Drawn from Step 1-2 Evidence): Therefore, Day Island's counsel asked the jury to conclude that Day Island had suffered damage of \$1.25 million, being 65.8 percent of the approximate \$1.9 million in total project costs.

Thus, Day Island did not provide substantial evidence and failed to carry its burden of proof regarding diminution in value damages. Instead, Day Island's damages proof relied solely upon Mr. McGuire's pulled out-of-thin-air speculation that the "value drop" of his marina "could be" between 50 and 70 percent of \$1.9 million total project costs (of which only \$615,000 was related to General's contract). RP 323-324. Why, how, and on what basis, is that 50-70 percentage figure derived? The jury, and this Court, were and are left to guess. The consequence is that Mr.

McGuire's speculative, conjectural, and otherwise unsupported and incompetent testimonial opinion is simply not probative of diminished value.

ii. **Mr. McGuire's Status as an Owner Did Not Qualify Him to Opine as to Cost to Repair or Otherwise Render His Speculative Testimony Competent Evidence**

It is one thing to say that Mr. McGuire could competently testify as to the value of his property pre-breach, although he never did so. It is quite another to say that he can testify as to a diminution in value of his property, resulting from alleged breach(es) by a construction contractor, when he lacks competence to evaluate the factors involved in such an analysis and which requires an expertise that he lacks. The following cases so illustrate.

State v. Wilson, 6 Wn. App. 443, 444, 493 P.2d 1253 (1972), an eminent domain case, is analogous here. That case involved an owner's attempt to establish a loss in the fair market value of his property. The appellate court, while noting that normally an owner is qualified to testify as to the fair market value of his real property (something that Mr. McGuire did not do), ruled that such testimony becomes incompetent when it is based on a consideration of irrelevant factors, and/or ignores

relevant factors. The court's discussion of the type of evidence required to show diminution in value is pertinent here:

The owner of real property has a right to testify as to the value of his property. The rationale behind this right is that one who has owned property is presumed to be sufficiently acquainted with its value and the value of surrounding lands to give an intelligent estimate of the value of his property. Because of this rationale no inquiry into knowledge is required to qualify the owner, although knowledge will affect the weight to be accorded his opinion. *Wicklund v. Allraum*, 122 Wash. 546, 211 P. 760 (1922); *Cunningham v. Town of Tieton*, 60 Wash.2d 434, 374 P.2d 375 (1962); *Spring Valley Water-Works v. Drinkhouse*, 92 Cal. 528, 28 P. 681 (1891). ***In giving his opinion the owner is entitled to explain his valuation by relevant and competent methods of ascertaining value.***

The owner, in the instant case, demonstrated that he had an exceptional knowledge of his property and he had prepared himself to ascertain the cost of reconstruction on a comparable lot. ***His estimate of valuation was not competent however, because (1) it was grounded solely upon reconstruction cost on a comparable lot, and (2) he did not consider depreciation of the building he had reconstructed 20 years ago.***

6 Wn. App. 451 (emphasis added).

In *Wilson*, the plaintiff testified that his medical office and apartment rental had been diminished in value by an amount equal to the cost to replace the building. The Trial Court struck that evidence and the Court of Appeals reviewed whether the evidence pertaining to cost to replace should have been considered:

The trial court struck the valuation testimony of the owner and excluded it from the consideration of the jury because the owner based his valuation on replacement cost.

Id. at 446.

Reviewing the methodology that the plaintiff in *Wilson* utilized, the Court of Appeals held that though the plaintiff was qualified to testify as to fair market valuation, he failed to do so when he attempted to prove fair market value based on solely the cost to redo or replace his building. Because the owner's "valuation testimony was based upon cost of replacement alone," "his estimate of valuation was not competent..." *Id.* at 451. The Court of Appeals also held that competent evidence which is probative of diminution in value could be based on:

In appraising realty containing a business structure, expert real estate appraisers frequently use three approaches to the determination of fair market value:

1. The current cost of reproducing a property less depreciation from deterioration and functional and economic obsolescence.
2. The value which the property's net earning power will support, based upon a capitalization of net income.
3. The value indicated by recent sales of comparable properties in the market.

American Institute of Real Estate Appraisers, *The Appraisal of Real Estate* 60 (5th ed. 1967).

Id. at 448-49.

Wilson thus teaches that an owner's status, as such, does not ipso facto render him competent to provide an opinion as to the diminished value of his property when such testimony requires specialized construction expertise (e.g., "the current cost of reproducing a property" [*Id.*, at 447]) or appraisal expertise (e.g., "net earning power ... based upon capitalization" [*Id.*]). Similarly, *Wilson* holds that an owner's opinion will be incompetent if he ignores factors pertinent to diminution in value, or relies upon irrelevant factors.

Here, Mr. McGuire considered *no factors in his diminution in value testimony, because he offered no analysis, formula or justification beyond his naked speculative opinion, let alone did he consider any pertinent factors such as pre and post-construction fair market values, and proof of causation.* Indeed, the sole hint of anything resembling analysis in Mr. McGuire's testimony (at RP 323-324) is when he states his speculation as to diminution in value in terms of a percentage of the total project cost which is, according to *Wilson*, an insufficient basis upon which to establish diminution in value.

A similar exclusion of an owner's testimony of value was upheld in *Port of Seattle v. Equitable Capital*, 127 Wn.2d 202, 210-211, 898 P.2d 275 (1995), holding that an owner's "right to testify concerning the fair market value of their property ... is not absolute" and is to be abrogated

when the owner ignores pertinent factors (he had “done no sort of discounted cash flow or income valuation analysis”) and there was “no basis to know how he came up with his per foot value.”⁸ The court further held:

Thus, it was “apparent that the stricken testimony related only to the numerical value of the property because that value was based on a faulty premise.”

Port of Seattle at 213, citing *State v. Rowley*, 74 Wn.2d 328, 330, 444 P.2d 695 (1968).

So here, Mr. McGuire’s testimony (at RP 323-324) is incompetent, and less than substantial evidence, because it provides “no basis to know how he came up with his” (127 Wn.2d at 210-211) diminution in value opinion and ignores critical factors pertinent to the claimed diminution in value.

4. **THE COURT ERRED PREJUDICIALLY AS A MATTER OF LAW BY ALLOWING MR. MCGUIRE TO TESTIFY AS TO AN OPINION OF DIMINISHED VALUE WHICH REQUIRED EXPERTISE HE LACKED AND CONSIDERATION OF FACTORS HE IGNORED**

Mr. McGuire’s diminution in value testimony was inadmissible as a matter of law because a competent opinion would have required consideration of pertinent factors, which he ignored, and he failed to lay a

⁸ (Emphasis added.)

foundation as to how he was going to utilize any acceptable criteria to proffer an opinion as to diminution in value.

Ashley v. Hall, 138 Wn.2d 151, 155-156, 978 P.2d 1055 (1999)

holds that typically admission of evidence is a matter of discretion:

ER 701 is a rule of discretion and is intended to emphasize what a witness knows rather than how the witness expresses his or her knowledge. Comment 701, WASHINGTON COURT RULES at 131 (1999). The rule assumes a witness will testify to observations but permits the witness to resort to inferences and opinions when such testimony will be helpful to the jury. Washington case law predating the rule has held lay opinion testimony admissible in a variety of cases, including opinions regarding the speed of a car, whether a person was healthy, the value of property, and identification of a person. See, e.g., *Clevenger v. Fonseca*, 55 Wn.2d 25, 345 P.2d 1098 (1959) (lay opinion regarding vehicle's approximate speed admissible), *overruled in part on other grounds by Danley v. Cooper*, 62 Wn.2d 179, 381 P.2d 747 (1963); *Port of Seattle v. Equitable Capital Group, Inc.*, 127 Wn.2d 202, 898 P.2d 275 (1995) (lay opinion regarding property's value admissible).

Here however, as now developed, the Trial Court's allowing Mr. McGuire's opinion as to diminished value was an error of law subject to *de novo* review.

The Trial Court was apparently of the view, as reflected in both its ruling on Day Island's motion in limine (allowing Mr. McGuire to testify to the marina's value), and in overruling General's expertise and foundation objections to the question eliciting Mr. McGuire's diminution in value opinion ("the weight goes to the jury" [RP 323-324]), that an owner could testify as to the value of his property across the board,

including loss in value caused by a construction defect, irrespective of any factors affecting value that involved expertise. That was an error of law. *See, e.g., Wilson, supra.* Consequently, the Trial Court's overruling of General's objection based on insufficient foundation and expertise is subject to the de novo standard of review governing errors of law. *See, e.g., Lyster v. Metzger*, 68 Wn.2d 216, 220, 412 P.2d 340 (1966), which held that where issues pertain to rulings of law "such as those involving the admissibility of evidence or the correctness of an instruction, no element of discretion is involved."

If, after a de novo review of legal issues, this Court concludes that error occurred, it next considers whether it is reasonably probable that the error affected the outcome of the trial. *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 433, 814 P.2d 687 (1991), review denied, 118 Wn.2d 1011 (1992). Mr. McGuire's unfounded and speculative testimony regarding diminution in value was clearly prejudicial because it was the sole basis for the jury verdict.

As earlier noted, an owner may generally testify as to the value of his property. However, more than simply a conclusory opinion is required. As stated in *Port of Seattle, supra*:

In *Larson*, this court recognized that an owner may testify concerning the fair market value of the owner's property without qualifying as an expert, but that testimony may be

properly excluded if "the owner has not used his intimate experience with and knowledge of the land's uses as a basis for determining its fair market value, but has obviously determined it upon the application of an improper formula...

Port of Seattle, 127 Wn.2d at 212, citing *State v. Larson*, 54 Wn.2d 86, 88, 338 P.2d 135 (1959).

The record wholly fails to reveal in any respect the "formula," be it "improper" or otherwise, on the basis of which Mr. McGuire speculated that his property had been reduced in value by 50-70 percent of his total project cost. In short, that testimony is incompetent and less than substantial evidence to support the judgment.

5. **A NEW TRIAL SHOULD HAVE BEEN GRANTED UNDER CR 59 BECAUSE THE VERDICT WAS UNSUPPORTED BY SUBSANTIAL EVIDENCE AND CONTRARY TO WASHINGTON LAW, AND DID NOT PROVIDE SUBSTANTIAL JUSTICE**

The Court erred in denying General's motion for a new trial. The standard of review is abuse of discretion (*see, e.g., Ma'ele v. Arrington*, 111 Wn. App. 557, 561, 45 P.3d 557 (2002)), except for new trial motions turning on questions of law which entail a de novo standard of review (*see, e.g., Cox v. General Motors Corp.*, 64 Wn. App. 823, 826, 827 P.2d 1052 (1992)).

a. **No Evidence or Inference Supports the Verdict Which is Contrary to Law**

The Court erred when it failed to grant a new trial under CR 59(a)(7), which requires a new trial when:

That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law

A new trial is required under CR 59(a)(7) because there is no competent evidence or inference to support the \$1.25 million damage jury verdict. *See* prior argument.

WPI 303.01 correctly instructed that plaintiff could recover all “reasonably foreseeable” and “actual economic damages [suffered] as a result of breach” by proving “the amount of those damages,” so as to put it “in as good a position as it would have been in if both plaintiff and defendant had performed all of their promises under the contract.” The evidence provided, under the given WPI 303.01, is insufficient as a matter of law to support the jury verdict, thus fulfilling the first CR 59(a)(7) basis for a new trial (no sufficient evidence or inference).

Additionally, the jury verdict is contrary to law which is reviewable de novo. *See* prior argument.

b. Error of Law

CR 59(a)(8) provides for a new trial when there has been an “[e]rror of law occurring at trial and objected to at the time by the party making the application.” As developed above, Mr. McGuire’s diminution in value testimony was incompetent and inadmissible, and was admitted over General’s foundation and expertise objections. Pertinent here is the rule stated in *Jazbec v. Dobbs*, 55 Wn.2d 3732, 375, 347 P.2d 1054 (1960), that there “is no element of discretion involved, when a new trial is granted on ground of an error of law.” (Citations omitted.). When a trial court admits legally inadmissible evidence and it is reasonably probable that evidence affected the outcome of the trial, such error is prejudicial and a new trial is necessary. *Smith v. Ernst Hardware Co.*, 61 Wn.2d 75,377 P.2d 258 (1962).

c. No Substantial Justice

CR 59(a)(9) “is a catch-all provision allowing a new trial on the basis that ‘substantial justice has not been done.’” *15 Wash. Prac. Series* § 38.19. This verdict does not do substantial justice. *See* prior argument.

6. GENERAL DID NOT WAIVE ITS RIGHT TO RELIEF ON APPEAL OR BY NEW TRIAL

There were two waiver issues identified by the Trial Court sua sponte (no such arguments were raised by Day Island) during oral

argument of the motion for new trial. First, the Trial Court concluded that an additional objection to Mr. McGuire's substantive diminution in value opinion testimony was required. However at trial, the Trial Court ruled that Mr. McGuire could give his opinion on diminution in value despite General's foundation and expertise objections, stating that the objections went to the "weight." RP 932. (This evidentiary ruling is consistent with its earlier ruling granting Day Island's motion in limine allowing Mr. McGuire to testify to the marina's value, which the Trial Court treated as the same thing as diminution in value caused by a construction defect). Because the Trial Court had already ruled that Mr. McGuire could answer the question, there was no waiver of General's timely interposed objection based on lack of foundation and required expertise (RP 323).

Second, the Trial Court indicated that there was a waiver because General failed to file a motion to strike and/or to make a CR 50 motion for directed verdict. RP 932. But there is no CR or RAP (or any other) requirement, for purposes of seeking either a new trial or reversal on appeal based on lack of substantial evidence and/or a prejudicial admission of evidence, that a litigant either (1) move to strike the incompetent evidence admitted over its timely interposed objection or (2) move for a CR 50 directed verdict. There has been no waiver by General.

E. CONCLUSION AND NECESSITY FOR A NEW TRIAL AS TO BOTH DAMAGES AND LIABILITY

The verdict should be overturned and a new trial ordered as to both damages and liability. Determining the cost to complete and/or repair requires a determination of the precise scope of incomplete and/or defective work. That scope—at two separate ends of the project and with respect to the allegedly mis-located pilings—was thus a thrice-disputed issue. Because the verdict form does not define the scope of incomplete or defective work found by the jury at either end of the project, or at the pilings, a new fact-finder would have to decide such disputed liability issues itself. That is to say, there is no way to determine whether the jury considered General’s breach to have occurred solely at one end of the project, or solely at the other end of the project, or solely in connection with the piling, or instead in some combination of the three. Consequently, intertwined damage and liability issues preclude a trial limited to damages. As stated in 15 Wash. Prac. Series § 38:26: “Even when the verdict is other than a general verdict, the issues may be so intertwined that a jury could not fairly decide one in isolation.”

At a minimum, and in the alternative, the jury verdict should be set aside with the final judgment, and the case should be remanded for a new trial on damages. A damage award may be vacated for a new trial solely

on damages. *See, e.g., Fuller v. Rosinski*, 79 Wn.2d 719, 724, 488 P.2d 1061 (1971) (where there is substantial evidence of damages, but the evidence does not support a finding based on the proper measure of damages due to trial court error, we may remand the case and give the parties an opportunity to present further evidence), *overruled on other grounds by Eastlake, supra*, 102 Wn.2d at 43-48.

SUBMITTED this 5th day June, 2013.

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DECLARATION OF SERVICE

I, INGA SHIGETANI, declare under penalty of perjury under the laws of the State of Washington, that on June 5, 2013, I caused to be served on the person(s) listed below in the manner shown:

BRIEF OF APPELLANT GENERAL CONSTRUCTION COMPANY

DATED this 5th day of June, 2013.

FERRING & DELUE LLP

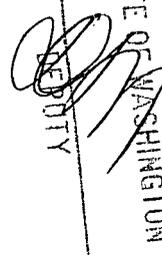

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