

ORIGINAL

Case Number: 44402-0-II

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

DAY ISLAND YACHT HARBOR, INC
Plaintiff / Respondent

v.

GENERAL CONSTRUCTION COMPANY
Defendant / Appellant

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DIVISION II
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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY

HONORABLE EDMUND MURPHY, JUDGE: #11-2-09340-4

BRIEF OF RESPONDENT
DAY ISLAND YACHT HARBOR, INC.

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A. INTRODUCTION

This appeal is from a jury award of \$1,250,000 in damages caused by General Construction's breach of a written contract to perform marine construction and dredging at a boat-house marina facility owned and operated by Day Island Yacht Harbor, Inc., at Day Island, just south of the Tacoma Narrows Bridge, in the City of University Place, Pierce County, Washington.

In this appeal, General Construction does not dispute that there was substantial evidence upon which the jury could conclude that General Construction breached its contract by failing to dredge the marina to the 10 foot depth required, and by replacing pilings in the wrong location, causing a row of marina boathouses to be shifted up to six feet towards shallow water. There is no suggestion the jury was not properly instructed in every particular, including instructions regarding the appropriate measure of damages, and the weight to be given the evidence.

The evidence regarding breach of contract damages included the testimony of the marina owner that the total cost of this dredging and piling improvement project exceeded \$1,900,000. The owner testified, without objection, that once the replacement pilings were driven, and the boathouses reattached to them, General Construction's breaches could

not be remedied, without tearing the marina apart again, and starting the project over from scratch, because of the physical impossibility of getting heavy equipment, cranes, barges and tugs into the area of the improperly reinstalled pilings and boathouses. The owner further testified, without objection, that tearing the marina apart again would invoke a whole new “nightmare” round of agency permitting and code compliance, such that it was improbable that the project could be done over again without exceeding the original \$1,900,000 project cost. General Construction now premises this appeal solely upon damage testimony regarding the marina owner’s opinion as to how much the contract breaches, which could not be fixed without tearing apart the marina, had diminished the value of his marina property. His opinion was that the value of his marina was reduced by at least 50-70 percent of what he had expended on the intended value-enhancing improvements to the property, such as proper depth, new pilings, docks, and electrical. The property owner’s opinion was that the diminution in his property value was in a range between \$950,000 and \$1,330,000. The jury awarded damages in the amount of \$1,250,000, within the range of the testimony.

B. ASSIGNMENTS OF ERROR / SOLE LEGAL ISSUE ON APPEAL

MAY OWNER TESTIFY TO VALUE OF HIS PROPERTY?

Although General Construction sets forth three Assignments of Error, all three involve the same uniformly applied rule of law, which in the State of Washington can be traced back more than 90 years, to the case of *Wicklund v. Allraum*, 122 Wash.546, 211 P. 760 (1922), where, at page 548 the Supreme Court adopted the following statement of the rule:

‘The general rule that, to qualify a witness to testify as to market value, a proper foundation must be laid showing the witness to have knowledge upon the subject, does not apply to a party who is testifying to the value of property which he owns. The owner of property is presumed, in a way, to be familiar with its value by reason of inquiries, comparisons, purchases, and sales. The weight of such testimony is another question, and may be affected by disclosures made upon cross-examination as to the basis for such knowledge, but this will not disqualify the owner as a witness.’

The above nearly century old rule of law is not a rule with which this Division II of the Court of Appeals lacks familiarity, as recently seen in *State v. McPhee*, 156 Wash App.44, 65, 230 P.3d 284 (2010):

It is longstanding and well-established that a property owner may testify as to the property's market value without being qualified as an expert in this regard. State v. Hammond, 6 Wash.App. 459, 461, 493 P.2d 1249 (1972) (citing McCurdy v. Union Pac. R.R., 68 Wash.2d 457, 413 P.2d 617 (1966)). “The **297 weight of such testimony is another question and may be affected by disclosures made upon cross-examination as to the basis for such knowledge, but this will not disqualify the owner as a witness.” Hammond, 6 Wash.App. at 461, 493 P.2d 1249.

What is unfamiliar to Respondent is the premise underlying Appellant's contention that no substantial evidence supports the verdict in this case, notwithstanding the testimony of the owner as to the diminished value of his property. Appellant's appeal appears to be predicated solely upon the notion that although the law is clear that the owner may testify as to the value of his property, subject to cross-examination as to the weight of his opinion to be accorded by the jury; where, as here, the adverse party chooses not to ask a single question on cross-examination as to the basis of the owner's opinion, the admissible and presumed knowledgeable opinion does not constitute substantial evidence to support a verdict, because the opinion is thought to be speculative or conjectural by the opposing party, precisely because of the lack of cross-examination. It is illogical in the extreme to suggest that an owner, without further foundation or qualification, because presumed to be familiar with his own property, may offer his opinion regarding the value of his property, but having so testified and given his opinion, the testimony is not good enough or substantial enough to support a verdict.

C. STATEMENT OF THE CASE

In 2003, Day Island Yacht Harbor Inc. and General Construction entered into a written contract for marine construction including dredging and piling replacement. The contract was admitted into evidence as Plaintiff's Exhibit 1.

[RP 293, 423] The primary contract work required to be performed by General Construction was as follows:

1. Disassemble the entire marina and tow the marina, boathouses, floats and docks to a temporary anchorage in the Tacoma Narrows off of Titlow Beach; [RP 409]
2. Remove all of the old creosote pilings to which the marina boathouses, floats and docks had been attached; [RP 410, 489]
3. Dredge the marina to a uniform depth of 10 feet at normal low tide; [RP 439-443, 473-475]
4. Install, using a pile driver, 56 all new steel pilings in such a way that the boathouses, floats and docks could be returned to the identical and original location, as required by the permitting agencies. [RP 409, 487,496, 697]

Within days of the departure of General Construction's heavy equipment, cranes, tugs and barges, Day Island Yacht Harbor noticed two immediate problems; i.e., the marina did not appear to be 10 feet deep at either the northwest or southeast corners. [RP 307, 368] When General refused requests to return and correct these problems, Day Island Yacht Harbor commissioned an independent underwater, or hydrographical survey, the results of which were never disputed by General, [RP 507,721]. The survey revealed not only the inadequate depths at the northwest and southeast corners, but more problematical, a third problem: General had replaced the old pilings with new pilings on a different axis, swung up to six feet in a south-easterly direction, the effect of which was to move the boathouses into shallower water,

exacerbating the failure to dredge to the required 10 foot depth. [RP 173-181, 355]

Not until trial was the reason for the error in relocating these pilings discovered. General had two giant barge mounted cranes or derricks on the job; the “DB Anchorage,” and the “DB Portland.” General went to great length to explain how the “Anchorage” was equipped with triple GPS devices, a “Hazen guage” and “WINOP” computer software, so that the crane operator on the “Anchorage” knew where the tip of his boom and dredge bucket was at all times. [RP 392-395] General used this equipment to remove the old wooden pilings from the marina, and testified that precise GPS co-ordinates were recorded for the pilings removed. [RP 522] General told Mr. McGuire that their equipment was so accurate, they could ensure that his marina would be relocated “within inches” of where it had been before General towed the marina out to the temporary anchorage in the Tacoma Narrows. [RP 334, 748]

However, when it came time to replace the old pilings and drive the new steel pilings, General testified that they had sent the crane with the triple GPS and WINOPS computer software to another job and used the crane on the old “DB Portland” to drive the new steel pilings. [RP 738-739] Plaintiff was shocked at trial to learn for the first time that the crane and pile driver on the old “DB Portland” had no GPS or location

devices on board at all. [RP 654-655, 713-714] Two General witnesses rather incredulously testified that Mr. McGuire, the owner, was to blame for the misplaced pilings. General's unbelievable testimony was that Mr. McGuire was so qualified about the nature and construction of his marina, based upon his 40 years of ownership, that General relied upon Mr. McGuire, to locate the new steel pilings while bobbing around in the current in a small skiff, apparently by sighting down his thumb. Mr. McGuire testified that this testimony was preposterous. [RP 613-615, 651-662, 701, 758]

Respondent Day Island Yacht Harbor, Inc. agrees that Mr. McGuire is extremely knowledgeable about the nature and value of his marina property, and particularly well-qualified to testify about his marina. He has been the owner of this marina for over 40 years. [RP 266] He bid, had engineered, permitted and hired General Construction to dredge his marina to 10 feet deep on another occasion in 1988.[RP 275-279, 306, 339] After earning his college degree he was a banker with Puget Sound Bank for three years. He worked for several years planning residential subdivisions for United Homes. He held general contractor's licenses in both Washington and California, and had constructed many commercial developments. [RP 266-270] He had contracted for the replacement of "piling after piling" over the 40 years of his ownership and was familiar with the cost to do so. [RP 281, 309-

312] Mr. McGuire testified, without objection, that there was no way to repair the above three problems without starting over from scratch, disassembling and towing all the docks and boat houses again to a temporary anchorage in the Narrows, removing the steel pilings improperly installed by General, and replacing them in their correct locations. [RP 318-321] Although General mentions the fact the actual dredging portion of the contract, providing for payment on a per-yard-dredged basis, only amounted to \$600,000, Mr. McGuire testified that the total cost of the entire project came to \$1.9 Million Dollars, including \$491,000 for permitting and engineering, and \$240,000 for electrical reconnection of the boat houses. [RP 369, 752] General proposed a contract attempting to limit damages to the amount of the contract, but Mr. McGuire insisted on removing that provision, based upon a well-founded fear that damages from delay or weather in the temporary anchorage in the Narrows could cause damages in excess of the contract. [RP 294-295, 469] Mr. McGuire further testified, again without objection, that because starting over would mean a “nightmare” of new permitting and potential new expensive code compliance requirements, such as new fire equipment, he did not think he could do the project over again without spending more than the \$1.9 Million he spent with General construction on the project. [RP 320-323]

This testimony regarding the cost to remedy the inadequate dredging at the northwest and southeast corners, and to relocate the improperly placed pilings, which would necessitate tearing apart the marina and starting over, at a cost of \$1.9 Million or more, is substantial evidence of one way to measure damages; i.e., the cost of repair.

Plaintiff argued to the jury that the cost of repair by starting over, the full \$1.9 Million cost of the project, would be consistent with Jury Instruction No 10 that the amount of damages should be the amount necessary to put the plaintiff in as good a position as had Defendant performed all its promises. [RP 896] However, Mr. McGuire did not want the “nightmare” of starting over. His primary objective, from the filing of the complaint throughout the trial was “specific performance”; i.e., for General to come back and finish correctly what they had started.

At trial, he testified:

Q In 2008, long before any lawyers were involved in this case, did you tell General that you didn't want a penny from them, you wanted them to come fix your marina?

A Yes, still do today. I would walk out here today if they would shake my hand and tell me, "I'll come and fix it, it is all done." [RP 311]

The question of how to handle the legal issue of specific performance, to be determined by the Court, as opposed to the

alternative request for damages to be determined by the jury, was briefed and resolved before trial, and without any error alleged in this appeal.

[RP 6-14]

Contrary to Appellant's assertion in its opening brief that a motion *in limine* was made with regard to a property owner's right to express an opinion on the value of his own property, the record is that only one motion *in limine* was ever made, relating to exclusion of any mention of mediation or settlement discussions. On the other hand, Plaintiff Day Island Yacht harbor Inc. did file a pre-trial memorandum, alerting the Court and counsel that Plaintiff intended to offer the owner's opinion as to the diminished value of his property as a result of General Construction's breach, based upon the cases cited. [RP 24-25]

D. ARGUMENT

1. MEASURE OF DAMAGES

Appellant and Respondent agreed at trial and agree on appeal that the seminal case regarding damages from defective construction appears to be *Eastlake Construction v. Hess*, 102 Wash.2d 30, 686 P.2d 465 (1984), where the Court reiterated the general rule regarding damages for breach of contract, at page 39, as follows:

The general measure of damages for breach of contract is that the injured party is entitled (1) to recovery of all damages that accrue naturally from the breach, and (2) to be put into as good a pecuniary position as he would have had if the contract had been performed. *Diedrick v. School Dist.* 81, 87 Wash.2d 598, 610, 555 P.2d 825 (1976).

In the very next sentence, the Court went on to observe that in the case of construction contracts, like the instant case:

“...special problems have been encountered in putting the injured party in the pecuniary position he would have enjoyed had the contract been properly performed by the builder. These special problems have led to the creation of special rules for measuring damages in such cases.”

To provide guidance with regard to such “special problems” and/or “special rules” the Court adopted Restatement (Second) of Contracts §348(2):

(2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved 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.

The Court in *Eastlake* found the comments to Restatement §348 to be helpful, and the following three comments, starting at page 47 of the opinion, are particularly apt here:

“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 than to prove the difference between the values to him of the finished and the unfinished performance.....” [Emphasis added]

“Sometimes, however, such a large part of the cost to remedy the defects consists of the cost to undo what has been improperly done that the cost to remedy the defects will be clearly disproportionate to the probable loss in value to the injured party.....”

“If an award based on the cost to remedy the defects would clearly be excessive and the injured party does not prove the actual loss in value to him, damages will be based instead on *the difference between the market price that the property would have had without the defects and the market price of the property with the defects.....*”
[Emphasis added]

As noted in the first comment above, Plaintiff in this case was not the “usual” injured party finding it easy to prove the cost of repair. On the contrary, starting at page 319 of the Transcript, Plaintiff testified without objection that it was not possible for him to find any other contractor who could or would complete the unfinished performance without starting over:

Q Using that as a definition of what the problems that you are now complaining about at your marina, have you tried to draw upon the 40 years of experience that you have in

the construction business, as a businessman, a marina owner, a builder, banker, the years of experience you have, have you tried to draw on all that experience to find somebody that will tell you they'll come in there and fix your marina?

A I have tried to find somebody to come and fix the marina. I have been unable to find anybody that can come in and fix the marina without taking it apart, starting over again, because they can't get their equipment in and out to the south end, the southeast corner of it. They can get to the north end, but they can't get to the south. Nobody wants to give a price.

Q How do you feel about having to have your boathouses all drug back out there to Titlow Beach?

A Oh, it is a maze. It is unbelievable.

Q This has been a nightmare?

A It is a nightmare.

It is precisely in situations where proving the cost of repair is impossible, a "nightmare," or where:

"such a large part of the cost to remedy the defects consists of the cost to undo what has been improperly done that the cost to remedy the defects will be clearly disproportionate to the probable loss in value to the injured party,"

that the law on damages provides for, as an alternative measure of damages, the recovery of the "diminution in the market price of the property caused by the breach."

[*Eastlake, supra*, at pages 47-48.]

Mr. McGuire testified, again without objection, at page 323, as follows:

Q: Do you know what it would cost to fix these three problems we have talked about?

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. I spent \$1.9 million this last time. I don't know if I could get away with that if I had to take the marina apart and put it back together if it would fall within all the jurisdictions' compliance.

Here, with the cost of "starting over" or, as the *Eastlake* Court put it, "the cost to undo what has been improperly done" equal to or greater than the original \$1.9 Million Dollar cost of the project, it was appropriate for Mr. McGuire to candidly admit, as he did, that he had received some value from the Defendant's performance, in that some areas of his marina were in fact made deeper, and his docks and electrical were improved, such that it was proper for him to prove not only the cost to start over; i.e., "to undo what has been improperly done;" but also to prove that in his opinion, as owner of the property, Plaintiff believed that because of Defendant's breach, he had sustained damages measured by a "lesser" measure of damages; i.e., a reduction or diminution in the value his property would have had without the defects and the value of the property with the defects.

His precise testimony was as follows:

Q Because of your difficulty in finding someone to fix your marina, have you thought about what that kind of problem at your marina does to the value of your marina?

A Horrendous.

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 --

BY MR. NELSON:

Q That would be the range?

A That would be the range.

[Transcript at page 324]

The property owner's opinion was thus expressed absolutely consistent with Restatement §338 and the comments adopted by the Court in *Eastlake, supra*; that is, that the diminution in his property value was in a range between \$950,000 and \$1,330,000. The jury awarded damages in the amount of \$1,250,000, within the range of the testimony.

2. JURY INSTRUCTIONS

Having heard testimony both as to the \$1.9 Million dollar cost to repair, by starting over, and as to the diminution in property value caused by Defendant General's breaches of the contract, in settling the jury

instructions prior to deliberations, the Court made the following observation with regard to the need in this case for any special jury instructions “cobbled” together from case law:

THE COURT: I did have an opportunity to look at those, look at the cases that were provided by counsel. I think you are right, they aren't WPI. I don't think they are necessary in this case. I think there is sufficient material in the instructions that the Court is giving for you to make the argument. I am going to decline to give the instructions that you propose that were not the WPI instructions.

[RP 783]

Accordingly, with no exception heard from any party, the court decided not to give any special construction defect jury instructions, from either case law or the comments to Restatement § 338; but rather chose to instruct the jury in accordance with the *Eastlake* “general rule of damages”, as set forth in Jury Instruction No. 10, Washington Pattern Jury instruction 303.01, which provides, *inter alia*:

In calculating the plaintiff's actual damages, you should determine the sum of money that will put the plaintiff in as good a position as it would have been if both plaintiff and defendant had performed all of their promises under the contract.

With regard to the Trial Court's decision to instruct the jury regarding the general rule of breach of contract damages, rather than the comments of the drafters of Restatement §338, it may be noted that damages are not precluded simply because they fail to fit some precise formula for measuring them. *Pugel v. Monheimer*, 83 Wash.App. 688, 922 P.2d 1377 (1996), citing *Massey v. Tube Art Display, Inc.*, 15 Wash.App. 782, 791, 551 P.2d 1387 (1976). The Supreme Court has attempted to concisely define the difference between speculative or uncertain damages and damages proven with the requisite degree of evidence, as follows:

There is a clear distinction between the measure of proof necessary to establish the fact that the plaintiff has sustained some damage and the measure of proof necessary to enable the jury to fix the amount. Formerly, the tendency was to restrict the recovery to such matters as were susceptible of having attached to them an exact pecuniary value, but it is now generally held that the uncertainty which prevents a recovery is *uncertainty as to the fact of the damage and not as to its amount and that where it is certain that damage has resulted mere uncertainty as to the amount will not preclude the right of recovery.*

[*Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 42 Wash.2d 705, 713, 257 P.2d 784(1953)]

The Court in *Gaasland, supra*, at page 713, specifically held that reference to a standard *such as market value, or established experience,*

is an appropriate way to ascertain damages that does not involve mere speculation, conjecture, or surmise.

In the absence of any exception from Defendant to the measure of damage jury instructions, the only question regarding this appeal should be whether there is substantial evidence to sustain the verdict under the instructions given. Determination of the amount of damages is uniquely within the province of the jury, and all courts must be reluctant to interfere with a jury's damage award when fairly made. Palmer v. Jensen, 32 Wash.2d 193, 197, 937 P.2d 597 (1997). A jury verdict must be upheld unless a reviewing court finds from the record that the damages are outside the range of substantial evidence in the record, shock the court's conscience, or appear to have been arrived at as the result of passion or prejudice. RCW 4.76.030; Green v. McAllister, 103 Wash.App. 452, 462, 14 P.3d 795 (2000). Here, no argument is advanced that this jury verdict was based upon either passion or prejudice. Regardless of the court's assessment of the damages, a court may not, after a fair trial, substitute its conclusions for that of the jury on the amount of damages. *Green, supra*, 103 Wash.App. at 462, 14 P.3d 795.

3. STANDARD OF REVIEW

One standard of appellate review applicable to the instant case

is that a Court of Appeals should reverse a trial court's denial of a motion for new trial only upon showing that the trial court abused its discretion by basing its decision on untenable grounds or acted for untenable reasons. McCluskey v. Handorff-Sherman, 68 Wash.App. 96, 841 P.2d 1300 (1992).; State v. Balisok, 123 Wash. 2d 114, 866 P.2d 631 (1994).

The other applicable standard of review in this case is the well-known sufficiency of the evidence standard. Winbun v. Moore, 143 Wash.2d 206, 213, 18 P.3d 576 (2001). The sole argument advanced in Appellant's Motion for New Trial, and in this appeal, is that there was not sufficient evidence to support the verdict. For evidence to be sufficient, the law is that the record must contain a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question. Canron, Inc. v. Fed. Ins. Co., 82 Wash.App. 480, 486, 918 P.2d 937 (1996) (citing Bering v. Share, 106 Wash.2d 212, 220, 721 P.2d 918 (1986)). A party challenging the sufficiency of the evidence admits the truth of the opposing party's evidence and all inferences that can be reasonably drawn therefrom. Holland v. Columbia Irr. Dist., 75 Wash.2d 302, 304, 450 P.2d 488 (1969). Such a challenge requires that the "evidence be interpreted most strongly against the moving party and in the light most favorable to the party against whom the motion is made." Holland, supra.

Applying the sufficiency of the evidence test in the instant case, it must be said that 12 jurors, considering the evidence without passion or prejudice, were entitled to and did believe the testimony of Mr. McGuire, the owner of the property. He testified, without objection, that the damage caused by Defendant General Construction's failure to dredge to the required depth, and replacement of the marina pilings in the wrong location, towards shallow water, could not be repaired without starting the entire dredging project over, including removal of the misplaced pilings and tearing apart his boathouses and docks to be towed for the second time out to an anchorage in the Tacoma Narrows, at a cost he believed, based upon his 40 years of ownership experience would equal or exceed the original \$1.9 Million dollar cost of the project.

The only damages testimony at to which Appellant General Construction made an objection was the testimony, obviously believed by the jury, that as a result of the improper dredging and piling replacement, the value of the marina had sustained a "horrendous" drop in value ranging between \$950, 000 and \$1,330,000. If the jury was entitled to hear this testimony from the owner of the marina regarding the drop in value of his property, it simply cannot be said that such testimony, while admissible, would not constitute substantial evidence.

4. OWNER'S TESTIMONY AS TO VALUE

Respondent finds it difficult to more concisely state the law applicable to an owner's testimony as to his property than the following excerpt from Plaintiff's pre-trial memorandum:

In this case Brian P. McGuire is the controlling owner of Day Island Yacht Harbor, and the following cases set forth the longstanding and well-established law that an owner is qualified to testify to the value of his property—no further expertise is required: See *McCurdy v. Union Pac. R.R. Co.*, 68 Wash.2d 457, 468–69, 413 P.2d 617 (1966); *Wicklund v. Allraum*, 122 Wash. 546, 547–48, 211 P. 760 (1922); *State v. Hammond*, 6 Wash.App. 459, 462, 493 P.2d 1249 (1972). An owner's knowledge about the value of his property may come from many sources, including inquiries and comparisons. *Wicklund*, 122 Wash. at 547, 211 P. 760. The source of an owner's knowledge may affect the weight of his testimony but not its admissibility. *Wicklund*, 122 Wash. at 547, 211 P. 760; *McInnis & Co. v. W. Tractor & Equip. Co.*, 67 Wash.2d 965, 969–70, 410 P.2d 908 (1966).

The above rules apply to Brian McGuire, as President and controlling shareholder of Day Island Yacht Harbor, Inc. *Weber v. West Seattle Land Company*, 188 Wash. 512, 63 P.2d 418 (1936). [Emphasis added re "no further expertise is required"]

This Court also concisely stated this rule as follows in *State v. McPhee*, 156 Wash App.44, 65, 230 P.3d 284 (2010):

It is longstanding and well-established that a property owner may testify as to the property's market value without being qualified as an expert in this regard. State v. Hammond, 6 Wash.App. 459, 461, 493 P.2d 1249 (1972) (citing McCurdy v. Union Pac. R.R., 68 Wash.2d 457, 413 P.2d 617 (1966)). “The **297 weight of such

testimony is another question and may be affected by disclosures made upon cross-examination as to the basis for such knowledge, but this will not disqualify the owner as a witness.” Hammond, 6 Wash.App. at 461, 493 P.2d 1249.

In this case, when Mr. McGuire was asked whether General’s breaches of contract had caused a drop or diminution in the property value at the marina, the objection was: “MR. FERRING: Objection, foundation. Lack of expertise.” [RP 324] As to foundation, that objection has been swept away since Wicklund v Allraum, *supra*, where the Supreme Court discussed foundation at page 547 as follows:

The general rule that, to qualify a witness to testify as to market value, a proper foundation must be laid showing the witness to have knowledge upon the subject, does not apply to a party who is testifying to the value of property which he owns. The owner of property is presumed, in a way, to be familiar with its value by reason of inquiries, comparisons, purchases, and sales.

As to the need for a showing of special expertise, that objection was similarly swept away in McInnis & Co. v. Western Tractor & Equipment Company. 67 Wash.2d 965, 410 P.2d 908 (1966), involving an owner of a tractor the owner had never operated, and as to which the owner “lacked expert knowledge on the subject.” At page 970, the Court held:

...the law assumes that as an owner he has sufficient familiarity with the chattel to know its worth. Cunningham v. Town of Tieton, 60 Wash.2d 434, 374 P.2d 375 (1962); Abbott Corp., Ltd. v. Warren, 56 Wash.2d 606, 354 P.2d 926 (1960); Wicklund v. Allraum, 122 Wash. 546, 211 P. 760 (1922). Mr. McInnis met the

minimal requirements of this rule, and his opinion on value was properly received.

The Court in *McInnis* also observed that ordinarily, the opinion of an owner as to the market value of his property, even standing alone without supporting evidence, is sufficient to support a jury verdict.

Citing Ingersol v. Seattle-First Nat. Bank, 63 Wash.2d 354, 387 P.2d 538 (1963)

5. OWNER'S TESTIMONY NO BASIS FOR APPEAL

Here Appellant advances no legal reason why the Court did not properly over-rule Defendant's objection, upon lack of foundation or expertise, to a question asking for the opinion testimony of the marina owner regarding the diminution in value to his property due to General's breach, in accordance with the longstanding owner's testimony rule first announced in *Wicklund v. Allraum, supra*. Respondent submits that Mr. McGuire's answer to the question was totally consistent with the measure of damages set forth in Restatement §348 and the comments thereto discussed above. According to the Restatement, Plaintiff in this case was tasked with the burden of proving "the difference between the market price his property would have had without the defects and the market price of the property with the defects." Respondent submits that there is nothing illogical, speculative or conjectural about Mr. McGuire's

opinion that the value of his property, with the defects caused by General, was less than, or “dropped,” by a percentage of the amount he spent for improvements; a percentage of which improvements he did not receive because General construction missed the 10 foot depth that was promised, and misaligned his replacement pilings.

However, if Appellants, after the court ruled the owner was entitled to testify regarding the drop in his property value caused by the breach, believed that the owner’s answer was non-responsive, or in any other manner inadmissible as speculative, conjectural, or improperly based upon the owner’s opinion that there was a logical percentage relationship between the amount he spent intending to improve his marina and the value his property would have had if General Construction had not breached the contract; then, Appellant was required, at the time of Mr. McGuire’s testimony and during trial, to do one of two things. First, Appellant had a legal duty to either object to the answer, move to strike it, or in some way otherwise provide both the Court and the Plaintiff with the nature of Appellant’s objection, and an opportunity to correct an error, if any. Upon proper objection, questions can be rephrased to eliminate objection, and / or answers may be stricken. Second, the law is that the owner is “presumed” to know the value of his property, his testimony is admissible, and the “weight” of

his testimony “is another question and may be affected by disclosures made upon cross-examination as to the basis for such knowledge...”

State v. McPhee, supra. Here there was no cross-examination of Mr.

McGuire whatsoever as to the basis of his opinion regarding the diminution in his property value, and no challenge to the basis of his opinion or Plaintiff’s theory of damages until after the jury chose to believe Mr. McGuire rather than Appellant’s witness on damages.

Moreover, Appellant, at page 14 of its brief, concedes that diminution of value damages was the basis of Plaintiff’s closing argument:

“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”

There was no objection to Plaintiff’s closing argument regarding either its theory of damages or summary of the evidence in support of the theory.

Under these circumstances, pursuant to Evidence Rule 103 and Rule on Appeal 2.5(a)(3), Appellant is not entitled to await the jury verdict, and only upon an adverse outcome, after the trial, raise for the first time a complaint about the basis of Mr. McGuire’s opinion as to the diminution in value of his marina caused by General Construction’s breaches of contract. *Faust v. Albertson*, 167 Wash.2d 531, 547, 222 P.3d 1208 (2009); *See Teglund*, 15 Washington Practice§38:5; *Necessity of Objection During Trial* (2d ed., 2012).

E. CONCLUSION

There is no basis upon which this Court should set aside the jury
verdict in favor of Day Island Yacht harbor, Inc.

Respectfully submitted this 18th day of July

/s Robert D. Nelson WSBA #5298

Attorney for Respondent

A handwritten signature in black ink, appearing to be "Robert D. Nelson", written over a horizontal line.

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PROOF OF SERVICE

I, Robert D. Nelson, declare:

I am employed in the County of Sacramento. My business address is 4008 Cayente Way, Sacramento, California 95864. I am over the age of 18 years and not a party to the foregoing action. On July 18, 2013, I served the attached document(s):

BRIEF OF RESPONDENT DAY ISLAND YACHT HARBOR

_____ (by mail) on all parties in said action, by depositing a true copy thereof, enclosed in a sealed envelope addressed as set forth below, with the United States Postal Service, with the postage fully prepaid.

_____ (by personal delivery) by personally delivering a true copy thereof to the person and at the address set forth below.

_____ (by Federal Express) by depositing a true copy thereof in a sealed packet for overnight mail delivery, with charges thereon fully prepaid, in a Federal Express collection box, at San Francisco, California, and addressed as set forth below.

_____ (by facsimile transmission) by transmitting said document(s) from my office facsimile machine (916-244-2775), to facsimile machine number(s) shown below. Following transmission, I received a "Transmission Report" from my fax machine indicating that the transmission had been transmitted without error.

X _____ (by E-Mail) in accordance with the agreement of the parties

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