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**FILED**

**Nov 02, 2015**

Court of Appeals

Division III

State of Washington

**Court of Appeals No. 33232-2-III**

**Supreme Court  
of the State of Washington**

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**Nina Firey,**

Petitioner,

v.

**Nicolassa Orozco, et al.,**

Defendants,

**Tammie Myers, et al.,**

Respondents.

**FILED**  
NOV 16 2015

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
E *CB*

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**Petition for Review**

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## Table of Contents

1. Identity of Petitioner .....	1
2. Court of Appeals Decision.....	1
3. Issues Presented for Review .....	1
4. Statement of the Case.....	2
5. Argument.....	6
5.1 The decision of the Court of Appeals conflicts with decisions of this Court that, on summary judgment, a court cannot weigh evidence or credibility.....	6
5.2 The decision of the Court of Appeals conflicts with Division 2 precedent on the issue of whether a declaration can be disregarded because it conflicts with prior deposition testimony.....	9
5.3 Genuine issues of material fact should have precluded summary judgment.....	11
6. Conclusion.....	14
7. Appendix .....	16

## Table of Authorities

### Table of Cases

<i>Becerra Becerra v. Expert Janitorial, LLC</i> , 176 Wn. App. 694, 309 P.3d 711 (2013) .....	9
<i>Beers v. Ross</i> , 137 Wn.App. 566, 154 P.3d 277 (Div. 2, 2007).....	10
<i>Cotton v. Kronenberg</i> , 111 Wn.App. 258, 44 P.3d 878 (2002).....	8
<i>Fleming v. Smith</i> , 64 Wn.2d 181, 390 P.2d 990 (1964) .....	6
<i>In Re Kelly</i> , 170 Wn.App. 722, 287 P.3d 12 (Div 3, 2012).....	9
<i>In Re Marriage of Katara</i> , 175 Wn.2d 23, 283 P.3d 546 (2012).....	8
<i>Jones v. State</i> , 170 Wn.2d 338, 242 P.3d 825 (2010) .....	6
<i>Miller v. Likins</i> , 109 Wn.App. 140, 34 P.3d 825 (2001) .....	7
<i>No Ka Oi Corp. v. Nat'l 60 Minute Tune</i> , 71 Wn.App. 844, 863 P.2d 79 (1993) .....	7
<i>Robinson v. Avis Rent a Car Sys.</i> , 106 Wn.App. 104, 22 P.3d 818 (Div. 1, 2001) .....	10
<i>Volk v. DeMeerleer</i> , 184 Wn.App. 389, 337 P.3d 372 (2014).....	7
<i>Xiao Ping Chen v. City of Seattle</i> , 153 Wn.App. 890, 223 P.3d 1230 (2009) .....	9, 11

### Statutes and Court Rules

CR 54.....	5
ER 702 .....	5, 11
ER 703 .....	5
ER 704 .....	11
RAP 13.4.....	6

## Secondary Sources

Karl B. Tegland, <i>Washington Handbook on Civil Procedure</i> , 15A Wash. Prac. § 69.14 (2011) .....	10
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## **1. Identity of Petitioner**

Nina Firey, Plaintiff in the trial court and Appellant in the Court of Appeals, petitions this Court to review the Court of Appeals decision specified below.

## **2. Court of Appeals Decision**

*Firey v. Orozco*, No. 33232-2-III (Oct. 1, 2015). A copy of the decision is included in the Appendix at pages 1-18.

## **3. Issues Presented for Review**

1. Whether, on a motion for summary judgment, the court may disregard a witness's declaration that arguably contradicts the witness's prior deposition testimony.

2. Whether, on a motion for summary judgment, the court may disregard expert testimony because the expert relied, in part, on statements from a witness the court finds not credible.

3. Whether the proffered declarations of Vince McClure and Ben Hamilton were admissible as expert opinion testimony under ER 702 and ER 703 when their opinions were based on personal observation of the defective work, photographs of defective work before it was replaced, and other factual evidence of a type reasonably relied on by experts in their fields.

4. Whether there were genuine issues of material fact that should have precluded the trial court from granting summary judgment.

#### 4. Statement of the Case

In this construction defect case, the trial court improperly dismissed Nina Firey's claims on summary judgment, despite evidence in the record supporting the essential elements of her claims. The trial court disregarded the testimony of Firey's expert witnesses. The Court of Appeals affirmed, agreeing with the trial court that the expert opinions were insufficient because they were based on the recollection of Nina Firey, which the courts found not credible.

Nina Firey purchased a foreclosed home in Lewis County in 2011. CP 302. The home was habitable, but a pre-purchase home inspection revealed a number of issues that would need to be addressed. CP 103-24. Firey had a budget of \$25,000 to complete the repairs. CP 302.

Firey hired K & T Construction.<sup>1</sup> *Id.* K & T agreed to work on a time and materials basis but also promised it could complete the work, in a professional and workmanlike manner, within Firey's budget. *Id.* Firey did not direct how the work should be performed, instead relying on K & T, as an experienced contractor, to determine the proper order and performance of needed repairs. *Id.*; CP 203.

After K & T had been on the job a few weeks, Firey became concerned with the quality of K & T's work and believed she was being overbilled, so she fired K & T. *Id.*; *see* CP 128. Before leaving the job, K & T

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<sup>1</sup> Respondents Kenneth and Doris Bannister and Tammie and Ron Myers are the owners of K & T Construction. Respondent State Farm Fire & Casualty is the bonding company for K & T Construction. These parties will be referred to, collectively, as "K & T."

executed a written warranty. CP 307. Firey later discovered that K & T's work was defective and needed to be redone. CP 138, 153, 303.

After firing K & T, Firey hired Crown Mobile Home Set-up/SVC<sup>2</sup> to complete the project. CP 303. Crown agreed to work on a time and materials basis, promising it could complete the work, in a professional and workmanlike manner, within Firey's budget. *Id.* Crown replaced some, but not all, of K & T's work, which Crown said was defective. *Id.*; CP 32. Crown did other work on the home for about one month, then left to work on other projects. CP 303. Firey later discovered that Crown's work was defective and needed to be redone. CP 138, 153, 303.

Crown referred Firey to Orozco Construction, who she hired to take over for Crown. CP 303. Orozco also brought in AOK Construction and Chris Cook. *Id.* Orozco replaced some, but not all, of K & T and Crown's defective work. *Id.*; CP 144-45. Orozco, AOK, and Cook did additional, defective work and caused damage to the existing house and other property. CP 144-47, 303.

Firey fired Orozco, AOK, and Cook and hired Bar-None Construction to finish the project. CP 138. With the help of Bar-None, Firey discovered the full extent of the defective work and other damages caused by K & T, Crown, Orozco, AOK, and Cook. *Id.*

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<sup>2</sup> Respondents Michael and Joan Lyon are sole proprietors doing business as Crown Mobile Home Set-up/SVC. These parties will be referred to, collectively, as "Crown."

Firey brought this lawsuit against K & T, Crown, Orozco, AOK, and Cook in November 2011. CP 138-39. Firey has settled with Orozco and AOK. In March 2014, K & T moved for summary judgment dismissal of all of Firey's claims, arguing that Firey could not prove the existence of a contract, warranty, or breach. CP 36. Crown also moved for summary judgment, making similar arguments. CP 62.

In response, Firey argued that genuine issues of material fact existed as to all of the elements of her claims. *E.g.*, CP 293-95. In support of this argument, Firey submitted her own declaration (CP 301-07) and the declarations of Vince McClure (CP 308-10), Ben Hamilton (CP 311-24), and Robert Floberg (CP 325-29). Firey's response also called the court's attention to a previously filed declaration of McClure. CP 291.<sup>3</sup>

Firey testified to the existence and terms of the oral contracts she had with K & T and Crown. CP 302-03. She presented a written warranty with K & T and a list of desired work that she had shown to both K & T and Crown at the time they were hired. CP 305-07. McClure testified to industry standards for quality of work and the failure of K & T and Crown to meet those standards. CP 310. Hamilton agreed and further testified, having seen the home prior to any work being done on it, that K & T and Crown caused damage to the existing home. CP 312. McClure also testified, on the basis of multiple site visits and extensive review of discovery, photographs, Firey's testimony, and discussions with Hamilton and the Lewis

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<sup>3</sup> This McClure declaration appears in CP at 1-32. It was also presented by Crown as an exhibit to the declaration of Michael DeLeo. CP at 243-75.

County Building Department, as to the specific breaches by K & T and Crown and the cost of repair. CP 1-12.

K & T's reply brief asked the trial court to strike or disregard the McClure and Hamilton declarations, arguing that they were speculative opinions based on hearsay and were thus inadmissible under ER 702 and ER 703. CP 331. K & T misrepresented to the court that there were no photographs of K & T's work before it was altered by other contractors (CP 332; RP, April 25, 2014, at 8:25-9:13), despite K & T's knowledge that such photographs did, in fact, exist (*see* CP 195-201 (in deposition, Firey used photos to point out defective work in its unaltered condition)). Firey did not have an opportunity to respond except at oral argument. RP, April 25, 2014, at 7-13.

The trial court found there was a dispute of material fact as to the existence and terms of the parties' contract. RP, April 25, 2014, at 21:9-14, 25:16-17. The trial court denied the motion to strike as untimely. *Id.* at 14:1-3. The trial court, nevertheless, disregarded the testimony of Firey's experts, finding their opinions inadmissible to prove "who did what and what was defective" because the trial court believed the opinions were based primarily on Firey's recollection, which the court found not credible. *Id.* at 12:14-13:25, 21:15-22:12.

The trial court certified its summary judgment orders as final judgments under CR 54(b). CP 389-93. Firey appealed the summary judgment orders. The appeal was transferred from Division 2 of the Court of Appeals to Division 3, to relieve a backlog of cases in Division 2.

In an unpublished opinion, the Court of Appeals affirmed. The court held that Firey's declaration could not create an issue of material fact because it contradicted her prior deposition testimony. App. 13-14. The court further held that the declarations of Firey's experts did not create an issue of material fact because the experts relied on "the undocumented recollections of Ms. Firey," and therefore "lacked an adequate factual foundation." App. 16-17. In short, the court found Firey not credible, and on that basis affirmed dismissal.

## **5. Argument**

A petition for review should be accepted when the decision of the Court of Appeals conflicts with a decision of this Court or with another decision of the Court of Appeals. RAP 13.4(b). Firey's petition qualifies.

### **5.1 The decision of the Court of Appeals conflicts with decisions of this Court that, on summary judgment, a court cannot weigh evidence or credibility.**

This Court has declared, "the rule is settled that the court does not weigh credibility in deciding a motion for summary judgment." *Jones v. State*, 170 Wn.2d 338, 354 n.7, 242 P.3d 825 (2010). The Court explained that to do so "would usurp the role of the jury" and would make it impossible for plaintiffs to withstand motions for summary judgment because their declarations would be disregarded as "self-serving." *Id.* This has been the rule of this Court on motions for summary judgment since at least *Fleming v. Smith*, 64 Wn.2d 181, 185, 390 P.2d 990 (1964) ("The trial court is not permitted to weigh the evidence in ruling on summary judgment").

In applying this rule, the Court of Appeals has noted, “it is axiomatic that on a motion for summary judgment the trial court has no authority to weigh evidence or testimonial credibility, nor may we do so on appeal.” *No Ka Oi Corp. v Nat’l 60 Minute Tune*, 71 Wn. App. 844, 854 n.11, 863 P.2d 79 (1993). In a more recent case, *Volk v DeMeerleer*, 184 Wn. App. 389, 337 P.3d 372 (2014), the respondent argued that an expert’s declaration should be disregarded as speculative because, among other things, it lacked a factual basis. *Id.* at 430. Division 3 of the Court of Appeals rejected the argument, stating, “[O]ur role is not to weigh the credibility of the witness or the validity of expert opinions. Courts do not weigh the evidence or assess witness credibility on a motion for summary judgment.” *Id.*

Nevertheless, in this case, Division 3 disregarded the expert opinion testimony of Dr. McClure and Mr. Hamilton by weighing the credibility of Ms. Firey to arrive at the conclusion that the experts’ opinions lacked a factual basis. *See* App. 16-17. This decision directly conflicts with the well-settled rule set forth by this Court that on summary judgment a court is not permitted to weigh the evidence.

Although an expert’s opinion can be excluded as speculative when it is not based on the facts of the case, *e.g.*, *Miller v Likins*, 109 Wn. App. 140, 149, 34 P.3d 835 (2001) (the expert had no evidence to establish the location of the victim at the time of impact), such was not the case here. The opinions of Firey’s experts were based on the facts of the case and actual evidence of what each defendant contractor had done. Both McClure and Hamilton personally observed those portions of K & T and Crown’s work

that remained unaltered by subsequent contractors. For those portions of the work that *had* been altered, McClure relied on Firey's recollection of the work, her photographs of the work in progress, other documentation, and discussions with qualified individuals. CP 3, 309. An expert can reasonably rely upon, and accept as true, the facts presented to them by the party for whom the expert testifies. *Cotton v. Kronenberg*, 111 Wn. App. 258, 266-67, 44 P.3d 878 (2002).

There is no question that McClure and Hamilton relied on evidence. Where the court went wrong was in weighing the veracity of that evidence, an exercise that is not permitted on summary judgment. The loaded language of the court's decision reveals that it was, in fact, weighing the evidence:

There is a central deficiency in these experts' declarations:  
It is obvious that both experts rely on the **undocumented recollections** of Ms. Firey as to the scope of work performed by each defendant and the resulting condition of the house after each defendant ceased its work. ... The pictures **supposedly** supporting their opinions are undated.

App. 16-17 (emphasis added).

Where, as here, there is a factual basis for an expert's opinion, the opinion is admissible—and capable of raising a genuine issue of material fact—and any "deficiencies" in the factual basis go only to the weight to be given to the opinion by a jury. *In re Marriage of Katore*, 175 Wn.2d 23, 39, 283 P.3d 546 (2012) ("That an expert's testimony is not based on a personal evaluation of the subject goes to the testimony's weight, not its admissibility.") The opinion of a qualified expert, supported by a basis in the

facts of the case, is sufficient to create a genuine issue of material fact to preclude summary judgment. *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 910-11, 223 P.3d 1230 (2009).

The Court of Appeals could not disregard the declarations of McClure and Hamilton without improperly weighing the evidence—in particular, the credibility of Firey’s recollections and photos. Treating the evidence properly, the court should have denied summary judgment. The decision of the Court of Appeals conflicts with the decisions of this Court and should be reviewed.

**5.2 The decision of the Court of Appeals conflicts with Division 2 precedent on the issue of whether a declaration can be disregarded because it conflicts with prior deposition testimony.**

The Court of Appeals also disregarded the declaration of Ms. Firey, relying on *In re Kelly*, 170 Wn. App. 722, 738, 287 P.3d 12 (Div. 3, 2012). The court reasoned that Firey’s declaration testimony that K & T promised to perform its work in a “workmanlike and professional manner” contradicted her prior deposition testimony, in which she indicated the only terms she could remember were that K & T would be paid on a time and materials basis and would make the house livable.<sup>4</sup> App. 14; *compare* CP 302 *with* CP 203-04.

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<sup>4</sup> This issue was raised for the first time by K & T on appeal. K & T failed to raise any objection to Firey’s declaration in the trial court and should have been barred from raising the issue on appeal. *See Becerra Becerra v. Expert Janitorial, LLC*, 176 Wn. App. 694, 721, 728, 309 P.3d 711 (2013).

The court cited *In re Kelly* for a bright-line rule, “that a party resisting summary judgment cannot create a genuine issue of material fact by contradicting clear deposition answers.” App. 13. The same bright-line rule is followed by Division 1 of the Court of Appeals. *Robinson v. Avis Rent a Car Sys.*, 106 Wn. App. 104, 121, 22 P.3d 818 (Div. 1, 2001).

However, Division 2, in which this case originated, has rejected the bright-line rule. Rather, Division 2 has held, “on summary judgment, a later declaration **should be considered** in light of other evidence presented in the case to determine whether sufficient evidence raises a factual issue.” *Beers v. Ross*, 137 Wn. App. 566, 571-72, 154 P.3d 277 (Div 2, 2007). This conflict has been noted in Karl B. Tegland, *Washington Handbook on Civil Procedure*, 15A Wash. Prac. § 69.14 (2011).

In disregarding Firey’s declaration, Division 3 followed its own precedent but conflicted with the precedent of the Division in which the case originated. Had the court followed the rule of Division 2 in *Beers v. Ross*, and considered Firey’s declaration in the light of other evidence, it would have found that McClure testified that there are basic, minimum industry standards for quality of work, which standards would be implied in any construction contract. CP 310. In light of this evidence, Firey’s declaration raises a factual issue as to whether the contracts included a promise, express or implied, that the work would be completed in a “workmanlike and professional manner.” The court’s decision to apply the bright-line rule conflicted with binding precedent in Division 2.

Moreover, the court leveraged its disregard of Firey's declaration into its improper credibility determination. Reading between the lines, the court must have reasoned that if Firey's declaration could not be trusted, then neither could her recollection communicated to her experts. The court is not permitted to engage in such reasoning on summary judgment. Rather, the court is required to view the facts and all reasonable inferences in a light favorable to Firey, the nonmoving party. This Court should accept review and bring the trial court and Court of Appeals in line with the proper mode of analysis on summary judgment.

### **5.3 Genuine issues of material fact should have precluded summary judgment.**

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

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

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

CP 312.

Dr. McClure was more specific to each defendant:

Aside from the some kitchen interior wall sheathing, all of K&T's work has been or needs to be redone. In addition, their work damaged the porch, the kitchen cabinets, and the costs of doing so exceed what they were paid. This contractor caused property and consequential damages beyond the scope of their work.

...

Effectively, all of Crown Mobile's work was redone by Orozco or still needs to be corrected. In addition to the defective work, Crown Mobile damaged wall finishes and insulation on the second story, resulting in property and consequential damages.

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

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

- K & T removed kitchen cabinets without authorization, CP 7;
- K & T removed half of the front porch after being explicitly told not to do so, CP 7;
- K & T failed to obtain permits and did electrical and plumbing work without proper state licenses, CP 7;

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

- Crown failed to obtain permits and did electrical and plumbing work without proper state licenses, CP 8;
- Crown improperly installed insulation in the attic, CP 8;
- Crown's reinstallation of the water heater failed to meet building code requirements. It was not strapped, was in a closet that did not have access, and was not properly wired, CP 8;
- Crown damaged the finish flooring in the utility room, CP 8; and
- Crown installed crawl space insulation upside down, which had to be replaced, CP 8.

McClure also testified to the costs of repairing or replacing all of this defective work. CP 11. The McClure and Hamilton declarations, based on the facts of the case as related to them and discovered through independent investigation, presented specific facts establishing the elements of breach and damages. These specific facts created a genuine issue of material fact that should have precluded summary judgment.

## **6. Conclusion**

The McClure and Hamilton declarations set forth specific facts that would have precluded summary judgment, had the trial court and the Court of Appeals not engaged in improper weighing of evidence and credibility. The decision of the Court of Appeals was error and conflicted with long-standing authority of this Court and with precedent in Division 2, where this case originated. This Court should accept review and bring the trial court and Court of Appeals in line with the proper mode of analysis on summary judgment.

Respectfully submitted this 2<sup>nd</sup> day of November, 2015.

/s/ Kevin Hochhalter

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**7. Appendix**

*Firey v. Orozco*, No. 33232-2 (Oct. 1, 2015) .....App 1-18

**CERTIFICATE OF SERVICE**

The undersigned declares under penalty of perjury as follows:

On November 2, 2015, I filed the foregoing document with the Court and served a copy on the undersigned in the manner indicated:

Court of Appeals, Div. III 500 N. Cedar Street Spokane, WA 99201-1905	<input type="checkbox"/> U. S. Mail <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Filing <input type="checkbox"/> Hand Delivery
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WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION THREE**

**NINA M. FIREY, a single woman,**

**Appellant,**

**v.**

**NICOLASSA OROZCO and MIGUEL OROZCO, wife and husband and the marital community composed thereof, d/b/a OROZCO CONSTRUCTION; and UNITED STATES FIRE INSURANCE COMPANY; CHRISTOPHER COOK and "JANE DOE" COOK, husband and wife and the marital community composed thereof; ALBERT OTTERNESS and "JANE DOE" OTTERNESS, husband and wife and the marital community composed thereof, d/b/a AOK CONSTRUCTION, and AMERICAN CONTRACTORS INDEMNITY COMPANY,**

**Defendants,**

**TAMMIE MYERS and RON MYERS, husband and wife, and the marital community composed thereof; KENNETH BANNISTER and DORIS BANNISTER, husband and wife and the marital community composed thereof;**

**No. 33232-2-III**

**UNPUBLISHED OPINION**

No. 33232-2-III  
*Firey v. Orozco*

K & T CONSTRUCTION, a partnership; )  
STATE FARM FIRE & CASUALTY, )  
MICHAEL F. LYON and JOAN D. )  
LYON, husband and wife and the marital )  
community composed thereof, d/b/a )  
CROWN MOBILE HOME SET-UP/SVC; )  
RLI INSURANCE COMPANY, )  
Respondents, )

LAWRENCE-BERREY, J. — We are asked to decide whether the trial court properly granted summary judgment to K&T Construction and Crown Mobile Homes. In this lawsuit, Nina Firey claims breach of contract against the first five of several contractors she hired to make livable a house that she purchased from a foreclosure sale. The central issue on appeal is whether the trial court erred in determining that the opinions of Ms. Firey's two experts lacked a sufficient factual basis to withstand summary judgment. We hold that the trial court did not err and affirm the summary judgment dismissals.

#### FACTS

Nina Firey purchased a vacant, foreclosed home in Centralia, Washington, in 2011. The purchase price was \$75,000. The home was in significant disrepair. Ms. Firey obtained a prepurchase home inspection that revealed a number of issues that needed to be addressed to rehabilitate the home. Ms. Firey had a budget of \$25,000 to complete the necessary repairs.

Ms. Firey first hired K&T Construction to perform work on the home. K&T Construction is owned by Kenneth Bannister. Mr. Bannister said he would work for an

No. 33232-2-III  
*Firey v. Orozco*

hourly rate plus cost of materials. Invoices submitted for each week's work show that K&T Construction worked on the house during the latter half of May 2011. Ms. Firey fired K&T Construction because she believed its hourly rate of \$100 was excessive.

After firing K&T Construction, Ms. Firey hired Michael Lyon, d/b/a Crown Mobile Homes Set-Up, on a time and materials basis. Crown Mobile did not have a written contract identifying the scope of work to be performed, nor were there written estimates, quotes, plans, or specifications. With the exception of the final contractor, none of the contractors who worked on Ms. Firey's house had written contracts, plans, bids, or estimates. Crown Mobile worked on the project for approximately 10 days in late May and June 2011. It charged Ms. Firey \$6,540. Crown Mobile persuaded Ms. Firey that it was too busy to continue the project and assisted Ms. Firey in hiring her third contractor.

Over the next few months, Ms. Firey went through several other contractors and a friend to continue repairs to the house.<sup>1</sup> In August or September 2011, Ms. Firey hired her last contractor, Bar-None Construction.

Bar-None began a series of repairs. Eventually, Bar-None advised Ms. Firey that additional repairs should not be done until the house was re-leveled. Ms. Firey directed

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<sup>1</sup> Respondents contend that Ms. Firey hired a total of 12 contractors. The record shows at least 10 contractors worked on the project, but we are unable to determine how many contractors performed general repairs and how many performed specific projects.

No. 33232-2-III  
*Firey v. Orozco*

Bar-None to re-level the house. This caused structural damage throughout the house, requiring Bar-None to repair some of its own work in the process. Around February 2012, Bar-None prepared a scope of work document, setting forth the work it had performed, the amounts charged, and the scope and charges to complete necessary repairs. The total cost of completed and remaining repairs exceeded \$100,000.

In July 2012, Ms. Firey filed a single complaint against the first five contractors and their insurance companies. She asserted a breach of contract claim against the contractors. Ms. Firey settled with two of the contractors. This action proceeded against K&T Construction and Crown Mobile and their respective insurance companies. The remaining contractor is not a party to this appeal.

K&T Construction and Crown Mobile filed separate summary judgment motions. Each construction company presented its own argument and documents to support its motion. The trial court reviewed the summary judgment motions independently from each other.

K&T Construction. In its summary judgment motion, K&T Construction argued that Ms. Firey could not bring a claim for breach of contract based on work not performed or left uncompleted because she terminated the contract when she fired it and would not let it finish the project.

Attached to K&T Construction's summary judgment motion were portions of Ms. Firey's deposition. In her deposition, Ms. Firey admitted that she was paying K&T

No. 33232-2-III  
*Firey v. Orazco*

Construction an hourly rate for the time that it spent working on the home and that she kept track of its hours. As for the scope of the project, Ms. Firey told K&T Construction that she had a very limited budget of \$25,000 and wanted a "fully functional house." Clerk's Papers (CP) at 52. In her deposition, Ms. Firey stated that she did not tell K&T what work to perform, except not to touch the front porch. When asked if there were other terms discussed between her and K&T Construction, Ms. Firey responded, "There were probably little things here and there, but not on the big picture, no." CP at 52. She also stated that she fired K&T Construction because she was angry about the hourly rate she was paying. Later in her deposition, she explained that after she fired K&T Construction, she noticed workmanship problems.

In a declaration submitted after her deposition, Ms. Firey said that she compiled a list of projects that she wanted completed, but did not direct how the work would be performed. There is no indication that she provided her list to K&T Construction. Ms. Firey said in her declaration that she was concerned that the work was not being done properly, "including electrical and plumbing work that [Ms. Firey] later realized K&T was not authorized to do." CP at 302. She said that K&T Construction damaged existing structures, including the front porch and kitchen cabinets.

Curiously, the name of the second contractor, "Crown," appears on this list. The list contains dates by some of the projects, but the dates do not correspond with K&T Construction's work on the house. For example, K&T Construction's last invoice was

No. 33232-2-III  
*Firey v. Orozco*

dated June 3, 2011, whereas the dates on Ms. Firey's list start with June 16, 2011. Ms. Firey checked off some of the projects as completed, but did not attribute the work to any particular contractor. There was no other evidence to establish the scope of K&T Construction's work on Ms. Firey's home.

Ms. Firey retained expert Vincent McClure, who created a report that estimated the cost impacts to the Firey house caused by the various contractors who worked on the project. In addition, he filed a supplementary declaration to his report to detail the scope of the work done by each contractor and to identify the repairs necessitated by each of the various contractors. Mr. McClure based his report on his visits to the house on September 20, 2012, and July 24, 2013, and on materials provided by Ms. Firey, including undated photographs she took of the house and her defect list. He also reviewed various statements and declarations in the record, the home inspection report written before construction started, and the Lewis County Building Department file.

Mr. McClure's initial report noted that he first observed the house after the leveling was completed by the twelfth contractor. This would have been several months after K&T Construction and Crown Mobile ceased working on the project, and after several other contractors made repairs and alterations. Mr. McClure noted 16 areas where he viewed defects and/or code violations. He attributed some of the violations to the work of Orozco Construction and AOK Construction. However, other subsections contained general observations and/or defects regarding the proper installation and

No. 33232-2-III  
*Firey v. Orozco*

placement of windows, defects in the waterproofing, flooring levels, attic rafters, connection of the shed roof to the house, and more. Mr. McClure concludes "Much of the work done by K&T Construction, Crown Mobile, Orozco Construction, Chris Cook, and AOK Construction is grossly below the standards of the industry and is unacceptable. The exterior wall siding, the building wrap, the windows, some of the roofing, the floor underlayment, and all of the other items discussed above are unacceptable and need to be removed and replaced or, in a few cases, repaired." CP at 20.

In his supplemental declaration, Mr. McClure sought to detail the defective work completed by each defendant contractor. For K&T Construction, Mr. McClure listed 13 instances of work that was defective or completed in the wrong order. For example, he stated that K&T Construction: "Failed to obtain permits and did both electrical and plumbing work with out proper state licenscs," "Attempted to level one corner of the kitchen after installing the kitchen window," "Failed to remove and replace dry rotted wood before attempting to level the kitchen. As a result, most of their leveling efforts were ineffective," "[I]nstalled underlayment over rotted and moldy floor. Ms. Firey is allergic to mold. Also, covering moldy floor and rotted wood just hides the problem and leads to future problems," plus more. CP at 7-8. Mr. McClure did not claim to have personal knowledge of these defects.

In addition to Mr. McClure's declarations, Ms. Firey also presented two declarations from Mr. Hamilton of Bar-None, who was the last contractor to perform

No. 33232-2-III  
*Firey v. Orazco*

work on the home. Mr. Hamilton maintained that part of his work on the home included repairing work of the prior contractors. He maintained that the repairs were needed due to defective work and due to the damage caused by the re-leveling. However, Mr. Hamilton's declaration did not document specific defects. Nor did he identify work attributed to any specific defendant.

Crown Mobile. Crown Mobile contended on summary judgment that Ms. Firey did not and could not produce evidence that Crown Mobile failed to complete the work under the time and materials contract. Crown Mobile maintained that Ms. Firey could not produce evidence of defective work because the majority of the work was demolished or replaced. "This litigation has been going on for over a year and [Ms. Firey] has yet to furnish any documentary, photographic or physical evidence to support the elements of her breach of contract claim." CP at 73-74. Crown contended that Ms. Firey's approach to the remodel was flawed from the outset and caused the problems that she was imposing on the defendant contractors.

Mr. Lyon stated in his declaration in support of summary judgment that the bulk of Crown Mobile's work consisted of digging out the foundation by hand to create a crawl space and hauling away the dirt and debris. He said Crown Mobile also removed wall coverings, installed some insulation in the crawl space and attic, and built a closet around the hot water heater. Mr. Lyon maintained that all of Crown Mobile's work was completed at the direction of Ms. Firey. He also maintained that Crown Mobile did not

No. 33232-2-III  
*Firey v. Orazco*

install any underlayment for flooring, did not do electrical work, and did not work on plumbing. Mr. Lyon maintained that had his company performed electrical and plumbing, he would have charged Ms. Firey for the work, and the work would have appeared on its invoices.

Crown Mobile also submitted a declaration from Construction Dispute Resolution Vice President Bryce Given. Mr. Given stated that he visited Ms. Firey's home and reviewed the record associated with the case. He found that none of Ms. Firey's experts or other evidence identified work performed by Crown Mobile that was allegedly defective, especially considering that both of Ms. Firey's experts admit that Crown Mobile's work was altered. As such, Mr. Bryce opined that it was impossible to conclude Crown Mobile caused any of the damage claimed by Ms. Firey.

Mr. McClure's and Mr. Hamilton's declarations were not specific to any one defendant. The same declarations applied to K&T Construction as well as Crown Mobile. As stated, Mr. McClure's initial report made general observations on defects. He made no connection between the work Ms. Firey contended that Crown Mobile completed and the defects identified by Mr. McClure.

In his second declaration, Mr. McClure stated that Crown Mobile "[i]mproperly leveled the house; the house wasn't level when they quit," "improperly installed insulation in the attic," "failed [t]o replace the insulation and sheetrock they removed on the second floor," "replaced hot water heater installed by K&T [and] failed to meet the

No. 33232-2-III  
*Firey v. Orazco*

various code requirements," "installed flooring in the utility room and then ripped it when installing the washer," plus other allegations, totaling eight defects. CP at 8. He did not claim to have personal knowledge of what Crown Mobile did on the project.

Mr. Hamilton's declarations provided the same information for Crown Mobile as for K&T Construction. Mr. Hamilton's declarations did not document specific defects or identify work attributed to an individual defendant. However, Crown Mobile presented an additional letter from Mr. Hamilton filed early in the litigation. In this letter, Mr. Hamilton stated that he could not say who did which incorrect work.

Based on the evidence presented on each motion, the trial court granted both K&T Construction's and Crown Mobile's motions for summary judgment. The trial court considered the declarations from Mr. McClure and Mr. Hamilton, but concluded that these declarations relied on impermissible hearsay from Ms. Firey as to what work was done by whom and whether proper construction techniques were used. The trial court reasoned that Ms. Firey was not qualified to determine whether the work that was destroyed was defective, so the experts could not rely on Ms. Firey's statements to form a conclusion. In granting summary judgment, the court concluded that there was no admissible evidence as to the work the first and second contractors performed and whether it was defective because the actual evidence was either destroyed by subsequent contractors or was not preserved. The court also concluded that Ms. Firey could not bring a claim for unjust enrichment.

No. 33232-2-III  
*Firey v. Orazco*

Ms. Firey appeals. She contends that the trial court erred in granting summary judgment because a genuine issue of material fact remains as to whether K&T Construction and Crown Mobile breached their contracts to repair her home. She also contends that the trial court prematurely dismissed her unjust enrichment claim.

#### ANALYSIS

1. *Whether Ms. Firey presented material facts sufficient to withstand summary judgment against the first and second contractors*

Summary judgment orders are reviewed de novo on appeal. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). When reviewing a summary judgment order, the appellate court engages in the same inquiry as the trial court. Summary judgment is proper only if the pleadings, depositions, answers, and admissions, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The court must consider the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, and the motion should be granted only if reasonable persons could reach but one conclusion from all the evidence. *Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 445, 711 P.2d 1090 (1985). Once the moving party has met its burden of presenting factual evidence showing that it is entitled to judgment as a matter of law, the burden shifts to the nonmoving party to set forth specific facts showing that a genuine issue exists for trial. *Graves v. P.J. Taggares Co.*, 94 Wn.2d

No. 33232-2-III  
*Firey v. Orozco*

298, 302, 616 P.2d 1223 (1980) (quoting *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975)).

“A material fact is one upon which the outcome of the litigation depends in whole or in part.” *Atherton Condo. Apartment-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The facts presented must be more than speculative and argumentative assertions. *Adams v. King County*, 164 Wn.2d 640, 647, 192 P.3d 891 (2008). A party may not rely on allegations, denials, opinions, or conclusory statements, but must set forth specific material facts for trial. *Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004).

“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” CR 56(e). While the party who moves for summary judgment bears the burden of showing that there is no genuine issue of material fact, once he has so done, the other party cannot rely on pleadings that are unsupported by evidentiary facts. *State v. Yard Birds, Inc.*, 9 Wn. App. 514, 520, 513 P.2d 1030 (1973) (quoting *Tait v. KING Broad. Co.*, 1 Wn. App. 250, 255, 460 P.2d 307 (1969)).

Ms. Firey contends that the trial court erred in granting summary judgment to K&T Construction and Crown Mobile because a genuine issue of material fact remained on the breach and damages elements of her breach of contract claims. Ms. Firey

No. 33232-2-III  
*Firey v. Orozco*

maintains that the declarations of Mr. McClure and Mr. Hamilton provide a basis to conclude that the work of K&T Construction and Crown Mobile was defective. Ms. Firey also maintains that the trial court erred by disregarding these declarations when Mr. McClure and Mr. Hamilton had a factual basis for their opinions.

To prevail on a breach of contract claim, a plaintiff must establish (1) the existence of a contractual duty, (2) defendant's breach of that duty, and (3) the defendant's breach of that duty caused damages to the plaintiff whom the duty is owed. *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995).

Here, Ms. Firey argues that both defendants breached their contractual duties by not performing the work in "a workmanlike and professional manner." CP at 302. She asserts that they each promised her that they would perform work at this standard. She also asserts numerous aspects of K&T Construction's work which were deficient. She does not state that any of Crown Mobile's work was deficient. Rather, she simply states: "After working for a short period of time, [Crown Mobile] informed me that [its] schedule was too busy, and [it] could no longer dedicate time on my project. At the insistence of [Crown Mobile], Orozco Construction took over the scope of work." CP at 303.

It is well settled that a party resisting summary judgment cannot create a genuine issue of material fact by contradicting clear deposition answers. *In re Kelly*, 170 Wn.

No. 33232-2-III  
*Firey v. Orozco*

App. 722, 738, 287 P.3d 12 (2012). Here, Ms. Firey's claim that K&T promised to perform its work in a "workmanlike and professional manner" contradicts her clear deposition answers where she described her agreement with K&T Construction as time and materials and to make the house livable for \$25,000; she denied any further material terms.

As for her claim that K&T Construction's work was deficient, Ms. Firey provides no foundational basis for which to offer such an opinion. ER 703. The trial court properly ruled that Ms. Firey lacked the proper foundation to provide such technical opinions.

We now turn to the declarations of Ms. Firey's two experts, Mr. Hamilton and Mr. McClure. "In general, an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment." *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994). However, an expert opinion that is only a conclusion or that is based on assumptions does not satisfy the summary judgment standard. *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 787, 819 P.2d 370 (1991). "Expert opinions must be based on the facts of the case and will be disregarded entirely where the factual basis for the opinion is found to be inadequate." *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 49 Wn. App. 130, 135, 741 P.2d 584 (1987), *aff'd*, 110 Wn.2d 912, 757 P.2d 507 (1988).

No. 33232-2-III  
*Firey v. Orozco*

“In the context of a summary judgment motion, an expert must back up his or her opinion with specific facts.” *Id.*

A qualified expert can testify to his or her opinion if the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue. ER 702. “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.” ER 703.

While under ER 703, an expert can rely on inadmissible facts for the limited purpose of explaining the basis for an opinion, those facts cannot be considered as substantive evidence. See *Allen v. Asbestos Corp.*, 138 Wn. App. 564, 581, 157 P.3d 406 (2007). “[I]f an expert states the ground upon which his opinion is based, his explanation is not proof of the facts which he says he took into consideration. His explanation merely discloses the basis of his opinion in substantially the same manner as if he had answered a hypothetical question.” *Allen*, 138 Wn. App. at 579-80 (alteration in original) (citation and internal quotation marks omitted) (quoting *Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wn.2d 391, 399-400, 722 P.2d 787 (1986)).

In *Miller v. Likins*, 109 Wn. App. 140, 149, 34 P.3d 835 (2001), an accident reconstructionist offered an opinion that Patricia Miller's minor son was on the shoulder of the road when he was struck by Ralph Likins's car. The expert admitted that there was no physical evidence to establish the location of the victim when the impact occurred and that he did not perform a quantitative analysis to support his version of the facts of the accident. *Id.* In affirming the trial court's summary judgment dismissal, the *Miller* court agreed with the trial court that the expert's opinion was speculative and lacked an adequate factual basis. *Id.*<sup>2</sup>

Here, the trial court considered the experts' declarations, but determined that the facts underlying the opinions were too speculative and therefore the opinions were insufficient to create a genuine issue of material fact. We agree. There is a central deficiency in these experts' declarations: It is obvious that both experts rely on the undocumented recollections of Ms. Firey as to the scope of work performed by each defendant and the resulting condition of the house after each defendant ceased its work. Neither expert saw the house immediately after Ms. Firey fired K&T Construction or after Crown Mobile ceased working. The pictures supposedly supporting their opinions are undated. The inadequacies of the two experts' factual foundations are further

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<sup>2</sup> The *Miller* court also held that its review of the trial court's evidentiary ruling was an abuse of discretion. To this extent, we disagree with *Miller*. The proper standard of review of summary judgment evidentiary rulings is *de novo*. See *Keck v. Collins*, 181 Wn. App. 67, 80, 325 P.3d 306, *review granted*, 181 Wn.2d 1007, 335 P.3d 941 (2014).

No. 33232-2-III  
*Firey v. Orozco*

heightened by the undisputed fact that the two experts did not make any personal observations concerning either defendant's work until after several other contractors performed work, resulting in the likely alteration of K&T Construction's and Crown Mobile's work. Similar to *Miller*, we hold that the trial court properly determined that the experts' opinions were speculative because they lacked an adequate factual foundation and were, therefore, insufficient to create a genuine issue of material fact.

2. *Whether the trial court erred in dismissing Ms. Firey's claim for unjust enrichment*

Ms. Firey contends that the trial court erred in dismissing her unjust enrichment claim. While she admits that the claim is not available to parties who enter into a contract, she contends that whether a contract existed is yet to be determined. Thus, she maintains that it was premature for the court to dismiss her alternative claim of unjust enrichment.

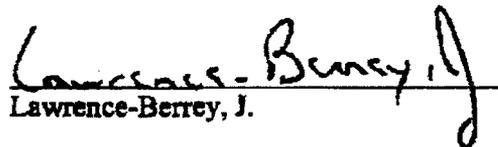
"Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). Where a valid contract governs the rights and obligations of the parties, unjust enrichment does not apply. See *Mastaba, Inc. v. Lamb Weston Sales, Inc.*, 23 F. Supp. 3d 1283, 1295-96 (E.D. Wash. 2014).

No. 33232-2-III  
*Firey v. Orazco*

Here, all parties agree that Ms. Firey entered into a time and materials contract with both K&T Construction and Crown Mobile. No genuine issue of material fact remains. Consequently, Ms. Firey has an adequate legal remedy for breach of contract. The fact that she cannot prove her breach of contract claim does not permit her to raise unjust enrichment.

Affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
Lawrence-Berrey, J.

WE CONCUR:

  
Brown, A.C.J.

  
Korsmo, J.

**CUSHMAN LAW OFFICES PS**

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No Comments were entered.

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