

**FILED: March 27, 2013**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

BOBB FOSTVEIT,  
dba Bobb Fostveit Construction,  
Plaintiff-Respondent,

v.

JAMES EDWARD POPLIN,  
DEBRA LYNN POPLIN, CLIFF J. JOHNSON, and RETTA D. JOHNSON,  
Defendants-Appellants.

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JAMES EDWARD POPLIN  
and DEBRA LYNN POPLIN,  
Third-Party Plaintiffs,

v.

CASCADE DESIGN GROUP, INC.,  
Third-Party Defendant.

Lincoln County Circuit Court  
073690

A145352

Sheryl Bachart, Judge.

Argued and submitted on October 26, 2011.

George W. Kelly argued the cause and filed the briefs for appellants.

Robert A. Ford argued the cause for respondent. With him on the brief was Kurtz, Ford & Johnson, LLP.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

ORTEGA, P. J.

Affirmed.

1                   ORTEGA, P. J.

2                   This appeal arises out of a dispute between the owners of a self-storage  
3 facility and the general contractor they hired to construct additional storage units on their  
4 property. Defendants James and Debra Poplin appeal from a judgment awarding plaintiff  
5 Fostveit damages on his claims for foreclosure of a construction lien and breach of  
6 contract.<sup>1</sup> Defendants also appeal a supplemental judgment awarding attorney fees to  
7 plaintiff. On appeal, defendants contend that the trial court committed legal error by  
8 shifting the burden of proof to defendants on the issue of whether plaintiff substantially  
9 performed under the contract. As to the attorney fees award, defendants maintain that  
10 because the underlying judgment must be reversed, so must the supplemental judgment  
11 awarding fees. We affirm, concluding that the trial court did not commit legal error and  
12 that the court's factual findings are supported by evidence in the record.

13                   We state the facts in the light most favorable to plaintiff, who prevailed at  
14 trial. *Fowler v. Cooley*, 239 Or App 338, 340, 245 P3d 155 (2010). Defendants, who  
15 own a self-storage facility in Lincoln County, hired plaintiff, a general contractor, to  
16 construct additional storage units at the facility in the same construction style as the  
17 existing units. The parties executed a contract that provided for the construction of two  
18 one-story buildings and one two-story building that would contain a total of 35 additional

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<sup>1</sup> Plaintiff also named Cliff and Retta Johnson as defendants in his complaint. The Johnsons held a deed of trust on the Poplins' property. Nevertheless, throughout this opinion, for convenience, the term "defendants" refers to the Poplins. In addition, the Poplins filed a third-party claim against Cascade Design Group, Inc., but that claim is not subject to this appeal and Cascade Design Group is not a party to this appeal.

1 storage units. The terms of the contract provided a per-unit price that varied depending  
2 on the size of the unit and a 12 percent "overhead fee" on the total cost of the contract.  
3 The contract also provided that costs for excavation, pavement, gates, and a retaining  
4 wall would be determined at a later date. In addition, the contract contained a clause that  
5 "[a]ll work shall be completed in a workmanship like manner and in compliance with all  
6 codes and other applicable laws." To reduce the total cost to defendants, the parties  
7 agreed that defendants would be responsible for installing the metal roofing, siding,  
8 insulation, and wall partitions and for paving the area surrounding the buildings.<sup>2</sup>

9 Lincoln County later issued a building permit, and plaintiff hired  
10 subcontractors for excavation, concrete work, electrical work, and engineering of the  
11 retaining wall. The retaining wall, as designed by a subcontractor, provided for a  
12 cantilevered wall that reached eight feet at its highest point and abutted the construction  
13 of the two-story building. In construction of the two-story building, plaintiff built the  
14 "flooring system" for the second floor on top of the retaining wall and, because the wall  
15 was not tall enough, backfilled gravel and dirt against approximately 18 vertical inches of  
16 untreated lumber that plaintiff used as part of the flooring system. Defendants later  
17 installed the roofing and siding materials and altered the grade of the gravel driveway that  
18 abutted the two-story building. Defendants did not install gutters as part of the roofing  
19 system.

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<sup>2</sup> Defendants' agreement to perform some of the construction was the subject of a separate oral agreement between the parties that is not at issue on appeal.

1           About seven months after the building permit was issued, Lincoln County  
2 issued a certificate of occupancy and conducted final inspections of the buildings.  
3 Around that time, a dispute arose between plaintiff and defendants over the 12 percent  
4 "overhead fee," and defendants refused to pay plaintiff's final invoice of \$76,097.20.  
5 Around the same time, defendants discovered that there was water intrusion into the two-  
6 story building, which compromised some of the newly constructed storage units.  
7 Defendants' attorney sent plaintiff a letter instructing him to stop work on the site.  
8 Plaintiff testified that he was unaware of the water intrusion until after he received  
9 direction to stop work, but defendants dispute plaintiff's testimony, contending that the  
10 parties had discussed the need to fix the thresholds before plaintiff was directed to stop  
11 work. Less than two months later, plaintiff recorded a construction lien for the unpaid  
12 balance due under the contract.

13           One month after recording the construction lien, plaintiff filed an action  
14 against defendants for foreclosure of the construction lien and breach of contract. Both  
15 claims were based on the same basic theory: that plaintiff performed all conditions  
16 imposed by the contract and defendants failed to pay the full amount due. Defendants  
17 filed an answer generally denying plaintiff's claims, raising affirmative defenses and  
18 counterclaims against plaintiff, and a third-party complaint against the designer of the  
19 retaining wall. As an affirmative defense to both of plaintiff's claims, defendants asserted  
20 that plaintiff failed to perform his obligations under the contract, including his refusal to  
21 finish the job and his failure to perform his work in a "workmanship like" manner.

1 Defendants also asserted a breach-of-contract counterclaim against plaintiff, seeking  
2 \$275,000 in damages related to plaintiff's construction of the storage units.

3           We pause here to provide a general overview of the law that applies to  
4 construction cases such as this, because an understanding of the legal framework helps to  
5 frame the arguments and evidence presented by the parties at trial and illuminates our  
6 analysis on appeal. In general, "[a] construction lien may not be had by one who has  
7 failed to substantially perform his part of a contract." *Welch v. Webb*, 47 Or App 771,  
8 775, 615 P2d 391 (1980). Similarly, "a party to a contract who complains that the other  
9 party has breached the terms of a contract must prove performance of the contract on his  
10 own part, or a valid tender of performance rejected by the other party." *Huzar v.*  
11 *Certified Realty Co.*, 266 Or 614, 620, 512 P2d 982 (1973). "Substantial performance is  
12 accomplished although the contract is not completely performed if the omissions and  
13 deviations from the performance required by the contract are inadvertent and  
14 unintentional, do not impair the structure as a whole, can be easily remedied, and may be  
15 paid for by deductions from the contract price." *Mathis v. Thunderbird Village, Inc.*, 236  
16 Or 425, 438-39, 389 P2d 343 (1964); *see also Edmunds v. Welling*, 57 Or 103, 109, 110 P  
17 533 (1910) (concluding that a contractor who had substantially completed the work was  
18 entitled to recover the contract price, "less such amount as will compensate \* \* \* for the  
19 defects and omissions"). "Whether there has been substantial performance is a question  
20 of fact." *American Petrofina v. D & L Oil Supply*, 283 Or 183, 195, 583 P2d 521 (1978).

21           Accordingly, when the case was tried before the trial court without a jury,

1 the parties focused in large part on the quality of plaintiff's construction. Plaintiff  
2 contended that he substantially performed under the contract, while defendants argued  
3 that plaintiff's construction was substandard, meaning that he could not recover on the  
4 lien or for breach of contract, and that defendants were entitled to prevail on their  
5 counterclaim for breach of contract. The parties presented conflicting evidence and  
6 expert testimony regarding construction of the storage units and the cause of the water  
7 intrusion into the two-story building. As explained in more detail below, \_\_\_ Or App at  
8 \_\_\_ (slip op at 6-7 ), the parties' evidence fell into five general categories of possible  
9 sources of water intrusion: (1) plaintiff's faulty installation of "thresholds,"<sup>3</sup> (2) plaintiff's  
10 faulty installation and "damp proofing"<sup>4</sup> of the concrete foundation, (3) plaintiff's failure  
11 to install a filter membrane around a perforated drain pipe at the base of the two-story  
12 building, (4) defendants' faulty installation of the roof and siding and their failure to  
13 install gutters, and (5) defendants' post-construction change of the driveway grade to  
14 slope toward the two-story building. Defendants also complained that plaintiff's use of  
15 untreated lumber in the flooring system of the two-story building violated the building  
16 code and required repair.

17           At trial, plaintiff elicited expert testimony from building inspectors,  
18 building code officials, and contractors that he performed his contractual duties in a

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<sup>3</sup> A threshold is the "plank, stone, or piece of timber or metal that lies under a door." *Webster's Third New Int'l Dictionary* 2383 (unabridged ed 2002).

<sup>4</sup> According to the parties, "damp proofing" is the application of material to concrete to prevent moisture from "traveling" through the concrete.

1 workmanlike manner--focusing on the areas of construction identified by defendants as  
2 substandard. Defendants countered that evidence with expert testimony of their own.

3           After trial, the court entered extensive findings of fact and conclusions of  
4 law, ultimately ruling in plaintiff's favor on both of his claims and determining that  
5 plaintiff substantially performed under the contract and that the defects in plaintiff's  
6 workmanship could easily be remedied and paid for by deductions in the contract price.

7           The court recounted in detail the evidence and testimony presented by the  
8 parties about plaintiff's workmanship and the possible causes of water intrusion. As to  
9 the causes of water intrusion potentially attributable to plaintiff, the court noted that  
10 plaintiff conceded that the thresholds were improperly installed and needed repair. In  
11 addition, the court found that plaintiff's failure to install a filter membrane around the  
12 perforated drain pipe at the base of the two-story building was a violation of the building  
13 code; nevertheless, the court concluded that the evidence established that a filter  
14 membrane was not a "critical feature of [the] drainage system" and that there was no  
15 evidence that the lack of the membrane contributed to the water intrusion. Similarly, the  
16 court concluded that plaintiff's use of untreated lumber to build the flooring system in the  
17 two-story building violated the building code and necessitated repairs, but that it did not  
18 contribute to the water intrusion.

19           Nevertheless, the court also determined that the construction performed by  
20 defendants, particularly the installation of the roof and siding, resulted in water intrusion  
21 into the units. The court also opined that expert testimony supported a finding that

1 defendants' alteration of the grade of the driveway directed water into the units and  
2 contributed to water intrusion, and that a lack of gutters on the building also could have  
3 contributed to the water problems. Because the court concluded that defendants' work  
4 contributed to, and was just as likely a cause of, the water intrusion, the court noted that it  
5 was unclear from the evidence if plaintiff's damp proofing contributed to the water  
6 problem. The court ultimately stated that, based on its other findings, there was no  
7 evidence or testimony from which the court could conclude that a "better" application of  
8 damp proofing would have prevented water intrusion.

9           Based on its findings of fact, and in spite of the identified deficiencies in  
10 plaintiff's work (*i.e.*, the thresholds, filter membrane, and flooring system), the court  
11 determined that plaintiff substantially performed under the contract, and that he was  
12 entitled to foreclose his construction lien and prevail on his breach-of-contract claim. In  
13 so concluding, however, the court reduced plaintiff's recovery to account for the  
14 identified deficiencies. The court credited defendants with \$1,160 to cover repairs to the  
15 thresholds and \$5,000 to replace the untreated lumber in the flooring system of the two-  
16 story building.<sup>5</sup>

17           Defendants appeal from the subsequent judgment and a supplemental  
18 judgment awarding attorney fees. On appeal, defendants contend that the trial court

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<sup>5</sup> The court also concluded that \$12,545.47 was not recoverable on foreclosure of the lien because \$7,265.19 was for materials that were subject to a separate lien by a lumber yard, and \$5,280.28 charged by plaintiff for electrical costs was covered by the per-unit price in the contract.



1 committed legal error by impermissibly shifting the burden of proof<sup>6</sup> to defendants on the  
2 issue of plaintiff's performance under the contract. The most cogent explanation of  
3 defendants' argument on appeal appears in their reply brief:

4 "Defendants' assignment [of error] is less about the legal sufficiency of the  
5 evidence and more about a misapplication of the law and the burden of  
6 proof. The analysis set out in plaintiff's opening brief was this: (1) plaintiff  
7 admitted, and the trial court found, that a portion of plaintiff's work was not  
8 to code and/or not workmanlike (*e.g.*, the defective thresholds); (2) the trial  
9 court found that, separate from the above problem, there was additional  
10 leaking whose cause could not be determined (*i.e.*, the leaking could have  
11 been caused by either party); (3) the trial court ruled that defendants had the  
12 burden of proving that plaintiff was responsible for the additional leaking;  
13 (4) because defendants had not met this supposed burden, the court treated  
14 all of the additional leaking as if caused by defendants; (5) in fact, the  
15 burden of proof was on plaintiff, and because he failed to prove that he was  
16 not the cause of the additional leaking, he also failed to prove that he had  
17 completed performance of his contractual duties; and (6) because plaintiff  
18 failed to prove his performance, the only judgment possible, as a matter of  
19 law, is a judgment in favor of defendants."

20 We reject defendants' assignment of error. First and foremost, defendants'  
21 argument relies on the premise that the trial court found that, separate from the leaking  
22 thresholds, there was additional water intrusion the cause of which could not be  
23 determined. Defendants argue from that premise that the court "treated all of the  
24 additional leaking as if caused by defendants" when it should have concluded that  
25 plaintiff failed to prove that he was not the cause of the additional leaking, and therefore  
26 did not perform under the contract. We conclude that defendants' basic premise is faulty

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<sup>6</sup> See *State v. James*, 339 Or 476, 484, 123 P3d 251 (2005) (noting that "burden of proof" is an inexact phrase, which combines the distinct concepts of "burden of persuasion" and "burden of production"); see also OEC 305 (allocation of the burden of persuasion), and OEC 307 (allocation of the burden of producing evidence).

1 and that, as a result, their argument fails.

2           As is evident in our recitation of the trial court's findings--giving plaintiff  
3 the benefit of every reasonable inference and presuming that in the absence of explicit  
4 findings, the trial court decided the facts in a manner consistent with its ultimate  
5 conclusion--the trial court found that the water intrusion was attributable to defendants'  
6 work. In this case, despite some imprecise language in the trial court's written findings  
7 and conclusions, when considered as a whole, the trial court's findings reveal that the  
8 court found that defendants' installation of the roof and siding was deficient and led to  
9 water intrusion. Further, the court accepted testimony that defendants' change of the  
10 driveway grade directed water into the compromised storage units. In explaining its  
11 conclusion that plaintiff did not breach the contract, the court stated that "what  
12 complicates the court's analysis is the fact that certain sources of water intrusion are  
13 portions of construction that were not provided for in the contract, for example, the  
14 installation of the siding and roofing." Accordingly, we disagree that the court found that  
15 the cause of the additional leaking could not be determined; rather, the court weighed the  
16 evidence and decided that defendants' actions contributed to the water intrusion.

17           In the end, therefore, the trial court found that there were multiple potential  
18 sources of water intrusion, including the thresholds, the damp proofing, the change in  
19 grade to the driveway, and the roofing and siding installation. The court, however,  
20 limited its evaluation of plaintiff's performance to those duties assigned to plaintiff under  
21 the contract. It determined that, particularly in light of the problems caused by

1 defendants, plaintiff substantially performed its portion of the work because the  
2 thresholds could be easily fixed, the lack of a filter membrane on the perforated drain  
3 pipe did not compromise the function of the drain, and the court could not determine that  
4 better damp proofing would have prevented water intrusion. The trial court's findings of  
5 fact are reviewed for any evidence, and there is evidence in the record to support those  
6 findings in this case. *See Hawkins v. Teeples and Thatcher*, 267 Or 151, 157, 515 P2d  
7 927 (1973) ("[A] general finding of fact by a trial judge \* \* \* is the equivalent of a jury  
8 verdict and cannot be set aside \* \* \* when supported by any substantial evidence.").

9           Therefore, the trial court's findings and conclusions reveal that plaintiff put  
10 forth *prima facie* evidence, mostly in the form of expert testimony, that he substantially  
11 performed his duties under the contract. The trial court weighed plaintiff's evidence  
12 against defendants' contradictory evidence and concluded that plaintiff substantially  
13 performed. That determination is supported by evidence in the record. To the extent that  
14 the trial court's findings and conclusions include statements that may contradict its  
15 determination that plaintiff substantially performed, we understand those statements to  
16 refer to defendants' counterclaim for breach of contract. Accordingly, the trial court did  
17 not err.

18           Affirmed.