IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NORTHWEST CASCADE, INC., a Washington corporation, Appellant, v. TITANIC INVESTMENTS, INC., a Washington corporation; NORMAN LEHMAN, an individual, and LOUISE LEHMAN, an individual, and their marital community; RANDLES SAND & GRAVEL, a Washington corporation; BUILTWELL STRUCTURES, INC., a Washington corporation; CITY BANK, a Washington state chartered banking institution, and EVERGREEN TITLE COMPANY, INC., a Washington corporation, Respondents.	No. 36482-4-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Northwest Cascade, Inc. (NWC) appeals the trial court's dismissal of its mechanic's and materialman's lien claim against Norman and Louise Lehman (Lehman). NWC also appeals the trial court offsetting its damage award by $10,000 despite the fact that it found the Lehmans failed to wholly meet their burden to prove the amount of damages under their counterclaim and offsetting the attorney fee award under RCW 60.04.081(4). We hold that

substantial evidence does not support the trial court's finding that NWC performed one day of work several months after it stopped work on the construction project solely to revive its lapsed lien claim. We also hold that the trial court's finding that Lehman failed to wholly meet his burden to prove the amount of damages under his counterclaim does not support the trial court's conclusion that Lehman was entitled to a $10,000 offset. Last, because the trial court erred when it found NWC's lien claim invalid, we hold that the trial court also erred when it offset NWC's attorney fees. Accordingly, we reverse the trial court's dismissal of NWC's lien claim and the damage award and attorney fees offsets, and we remand for further proceedings.

FACTS

On August 14, 2001, NWC entered into a contract with Lehman to construct certain infrastructure improvements for a subdivision in Pierce County (the Project). NWC began work on November 5, 2001, and continued until January 2, 2002, when it could not proceed further because necessary water line work had not been awarded to another contractor.

From November 2001 through April 2002, NWC filed reports with the county relating to temporary erosion and sedimentation control (TESC) activities. No reports were required or filed between May and September 2002. As of July 2002, Lehman fell behind on payments to NWC. Nevertheless, NWC performed catch basin maintenance on the Project on July 2. On that day, NWC sent one of its employees to perform "mudding"[1] as required under the contract between the parties and by the TESC regulations to maintain erosion control around the Project site.

On September 27, NWC filed a mechanic's and materialman's lien[2] under chapter 60.04

[1] "Mudding" refers to the process of sealing leaks in concrete products. TESC-related regulations require catch basins to be mudded to stop the entry of silt into the catch basins.

[2] Pierce County Recording Number 200209270432.

RCW. NWC then filed this action in Pierce County Superior Court on April 29, 2003, for breach of contract and lien foreclosure. NWC amended its complaint on May 25, 2004, because the development was subsequently platted to create nine separate lots.[3] Lehman's counterclaim[4] alleged that NWC cost him approximately $16,000 to import material necessary to replace unsuitable soil that NWC had placed on a roadway area of the project site.

Following a bench trial held May 22 to May 26, 2006, the trial court issued an opinion letter summarizing its findings of fact and conclusions of law. The trial court found (1) NWC substantially performed under the contract that Lehman breached; (2) NWC was entitled to $18,222.11 plus interest for work performed; (3) as late as October 24, 2002, evidence showed that NWC was prepared to complete the project, Lehman was solely responsible for both the delay and NWC's inability to complete the work, and NWC was entitled to $8,051.84 for lost profits; (4) Lehman did not base his counterclaim on independent, scientific evidence or environmental testing regarding soil quality and Lehman failed to meet his burden of proof as to damages, nevertheless, NWC's damage award was offset by $10,000; (5) the July 2, 2002 site visit was performed to revive lien rights that had lapsed and, though not frivolous, NWC's lien claim should be dismissed; and (6) attorney fees would be awarded according to the contract or an applicable statute.

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[3] Wells Fargo Bank, N.A. has intervened to respond to NWC's appeal in order to protect a deed of trust granted to Wells Fargo by one of the nine homeowners potentially affected by this action. No other party to the original action, including Lehman, responded to NWC's appeal.

[4] The Lehmans based their counterclaim on costs accrued in a subsequent work contract awarded to John J. Sprague "to perform the remaining scope of work on the NWC Contract that could not be completed due to Lehman's failure to timely award or perform the water line work." 2 Clerk's Papers at 391.

NWC filed a motion for reconsideration contesting the $10,000 damage award offset and lien claim dismissal. NWC based both grounds largely on its assertion that no evidence supported Lehman's counterclaim or a finding that NWC performed the mudding work solely to revive its lien claim. On September 8, the trial court denied NWC's reconsideration motion, stating that the motion was not brought under CR 59(a)(7)[5] and that the trial court's findings on both issues were "entirely discretionary with the Trial Court and that the Trial Judge has latitude in making this decision." Clerk's Papers (CP) at 175.

The trial court entered its findings of fact and conclusions of law on May 30, 2007. The relevant findings are as follows:

> 16. . . . Pursuant to the original Contract NWC was required to maintain erosion control and provide inspection work required by the Contract. The work performed on July 2, 2002 was not required to [be] done at the time it was performed. It was performed without notice to [Lehman], more than four months after NWC ceased doing work on the Project. The only reason NWC sent a man out to do some work on July 2, 2002 was to revive NWC's lien rights. Catch basin maintenance work was within the original scope of NWC's work under the Contract. . . . NWC did not submit a separate invoice for that work to Lehman or otherwise bill for it. No reporting was required by Pierce County regulations for this work. The July 2002 work was not performed under a separate contract between NWC and [Lehman].
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> 19. NWC filed a mechanic's and materialman's lien under RCW Chap. 60.04 on September 27, 2002, within 90 days of the July 2, 2002 work, but more than 90 days after the last TESC work reported to the County, and more than 90 days after the work performed in January 2002.
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> 21. NWC's lien rights lapsed before July 2, 2002 as the last day NWC performed work was in January 2002.
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> 22. The Court concludes that the work performed by NWC on July 2, 2002 was done to revive expired lien rights.
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> . . . .

[5] CR 59(a)(7) provides that an aggrieved party may make a motion to vacate a verdict or for new trial if there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or it is contrary to law.

41. In January 2002, NWC left the cut areas in the roadway high and the fill areas low. This was confirmed by the testimony of Mr. Sprague.

. . . .

50. NWC placed some unspecified amount of wet and unsuitable material on the fill area of the roadway in December 2001 when NWC was preparing the foundation for the retaining wall.

51. J.J. Sprague, Inc. imported 1,153 tons or approximately 800 cubic yards of "Sub-base material" for fill in April 2003. The cost of all imported material charged by J.J. Sprague, Inc. to [Lehman] was $16,147.46. A portion of the imported material was necessary to replace the unsuitable soil placed by NWC on the roadway.

52. NWC failed to establish to the Court's satisfaction that the additional import material used by J.J. Sprague was solely attributable to the timing of the work and weather.

53. NWC had no knowledge of the claim of unsuitable soils, and NWC was not asked to remove and replace the unsuitable soils.

54. The Court finds that NWC placed an unspecified amount of unsuitable soils in the roadway area.

55. [Lehman] did not wholly meet his burden of proof to establish the necessity for the quantity of import materials in his counterclaim.

56. The Court finds that NWC is liable for a portion for the costs for importing "Sub-base material" in April 2003 and that $10,000 is a reasonable estimate of the sum appropriate to compensate [Lehman] for having to import "Sub-base material" for the Project.

57. The Court finds that $10,000 is reasonable sum to compensate [Lehman] for having to import soil to replace unsuitable material placed by NWC.

2 CP at 389-92.

The trial court's conclusions of law included:

15. NWC failed to establish to the Court's satisfaction that the additional import material was solely attributable to the timing of the work and weather.

16. Lehman is awarded an offset in the amount of $10,000.00 against the judgment owed NWC. Lehman is not entitled to prejudgment interest on this amount.

17. NWC's lien was invalid as it was filed more than 90 days after last performing work.

18. NWC's lien claim is dismissed with prejudice.

19. NWC's lien claim was neither frivolous, clearly excessive nor made in bad faith under RCW 60.04.081(4). Accordingly, [Lehman is] not entitled to an award of attorneys fees under RCW 60.04.081(4).

. . . .

> 21. With respect to Lehman's counterclaims, Lehman was awarded an off-set for part of the counterclaim and thus partly prevailed. However, because NWC prevailed in defending against the counterclaims when viewed in their entirety, NWC is the substantially prevailing party on Lehman's counterclaims. Reasonable fees for defending the counterclaim are $10,000.00.

2 CP at 394-95.

The trial court entered judgment in favor of NWC, awarding $18,222.11 for work performed and unpaid, plus interest, $8,051.84 in lost profits, plus interest, $25,000 in attorney fees, $10,000 in attorney fees for defending the counterclaim, and $3,477.70 for half of its costs. NWC's award was then reduced by Lehman's $10,000 offset award and $612 for half of his costs. Last, the trial court denied both parties' attorney fees under chapter 60.04 RCW because it found that each party had prevailed on their lien issues and the fees offset each other.

NWC timely appeals the award offsets and the dismissal of its lien claim with prejudice.

DISCUSSION

Mechanic's Lien Claim

The trial court dismissed NWC's lien claim based on its finding that NWC's July 2, 2002 work was done only to revive its lien claim. We will uphold the trial court's findings of fact if they are supported by substantial evidence. *Intermountain Elec., Inc. v. G-A-T Bros. Constr., Inc.*, 115 Wn. App. 384, 390-91, 62 P.3d 548 (2003) (citing *W.R.P. Lake Union Ltd. P'ship v. Exterior Servs., Inc.*, 85 Wn. App. 744, 750, 934 P.2d 722 (1997)). Substantial evidence exists if the evidence of record is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Brown v. Superior Underwriters*, 30 Wn. App. 303, 306, 632 P.2d 887 (1980). When a trial court bases its findings of fact on conflicting evidence and there is substantial evidence to support the findings entered, we do not substitute our judgment even though we

might have resolved the factual dispute differently. *Superior Underwriters*, 30 Wn. App. at 305-06.

Every person claiming a lien under chapter 60.04 RCW must file a notice of claim of lien for recording in the county where the subject property is located not later than 90 days after the person has ceased to furnish labor, professional services, materials, or equipment.[6] RCW 60.04.091. Generally, the time for filing the lien runs from the last furnishing of labor and material, provided the work is not done for the purpose of prolonging the time for filing a lien or renewing the right to file a lien that had been lost by a lapse of time. *Kirk v. Rohan*, 29 Wn.2d 432, 436-37, 187 P.2d 607 (1947). Thus, if substantial evidence does not support the trial court's finding that the July 2002 work was performed "only" to revive the lien claim, RCW 60.04.091 is satisfied and NWC's valid lien claim is entitled to priority.

Here, the trial court found that "NWC performed catch basic maintenance on the Project on July 2, 2002." 2 CP at 389. NWC recorded its lien on September 27, 2002, 86 days after the "last day of labor" performed on the Project. It is undisputed that both the contract and TESC regulations required NWC to perform erosion maintenance. Initially, we note that the trial court's findings that NWC did not give notice to Lehman or submit a separate invoice for the July 2002 work are irrelevant in evaluating NWC's lien claim validity. Lehman does not assert NWC owed a duty to give notice before performing contractually required work and, as acknowledged by the trial court, NWC would not have submitted a separate invoice for work already included in the

[6] RCW 60.04.021 authorizes "any person furnishing labor, professional services, materials, or equipment for the improvement of real property [to] have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner."

lump sum contract price.

The trial court appears to have relied on the testimony of Lehman's expert, John J. Sprague, whom Lehman hired to perform work that NWC expected to be awarded. It concluded that because county regulations did not require erosion-related reporting in July 2002, NWC could only have performed the work in order to revive its expired lien claim. NWC argues that Sprague's testimony as to this issue was speculative in nature and therefore inadmissible under ER 703.[7] *See Miller v. Likins*, 109 Wn. App. 140, 147, 34 P.3d 835 (2001). Lehman contends that the trial court properly found Sprague to be credible and that its findings are properly based on reasonable inferences from his testimony.

ER 702 permits testimony by a qualified expert where "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Courts generally "'interpret possible helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases.'" *Miller*, 109 Wn. App. at 148 (quoting *Linkstrom v. Golden T. Farms*, 883 F.2d 269, 270 (3rd Cir. 1989)). It is well established that conclusory or speculative expert opinions lacking in adequate foundation will not be admitted. *See* ER 703; *Miller*, 109 Wn. App. at 148 (citing *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991), *review denied*, 118 Wn.2d 1010 (1992)). And an expert's conclusion based on a guess or assumption is not evidence. *See Theonnes v. Hazen*, 37 Wn. App. 644, 648, 681 P.2d

[7] ER 703 provides:

> 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.

1284 (1984) (the opinion of an expert must be based on facts and an expert opinion which is simply a conclusion or based on an assumption is not evidence which will take a case to the fact finder).

Here, Sprague testified that between the time NWC could no longer perform substantial work under the contract and when Sprague was contracted, he believed there was higher priority work that NWC could have performed other than mudding the catch basins. This work included pond excavation, installing storm drain piping, or installing an infiltrating system. Sprague then offered his "opinion" that "guessing from [his] experience," NWC performed the work only to revive its lien claim. 2 Report of Proceedings (RP) at 352-53. But Sprague also testified that NWC, as the contractor on the Project at that time, was under both regulatory and contractual obligations to continue and maintain the erosion control throughout the year even when there was no active work being done on the site. And Sprague acknowledged that the mudding work "would have to be done at some point" ahead of the fall rainy season. 2 RP at 376.

Under these circumstances, substantial evidence does not support a finding that simply because NWC *could* have performed higher priority work in July 2002, it *must* have performed the mudding—a task required by TESC regulations to ensure compliance with the Clean Water Act, 33 U.S.C. §§ 1251-1387—only for the purpose of reviving its lien claim. Sprague's "guess" about NWC's motivation for performing the work was speculative and lacked adequate foundation, and the trial court erred when it admitted the opinion testimony over NWC's

objection and relied on it in making its findings of fact.[8] Accordingly, substantial evidence does not support the trial court's finding that the July 2002 catch basin work was performed "only" to revive the lien claim, and the trial court erred when it concluded that NWC's mechanic's and materialman's lien claim was invalid when recorded in September 2002. NWC satisfied the RCW 60.04.091 requirements, and its lien claim is valid and entitled to priority.

Damage Award Offset

We review a trial court's decision to grant an offset award for abuse of discretion. *Eagle Point Condo. Owner's Ass'n v. Coy*, 102 Wn. App. 697, 701, 9 P.3d 898 (2000) (citing *Robinson v. McReynolds*, 52 Wn. App. 635, 640, 762 P.2d 1166 (1988)). A court abuses its discretion if its decision is not based on tenable grounds or tenable reasons. *Eagle Point*, 102 Wn. App. at 701 (citing *Layne v. Hyde*, 54 Wn. App. 125, 135, 773 P.2d 83 (1989)). A party who has established the fact of damage will not be denied recovery on the basis that the amount of damages cannot be exactly ascertained. *Eagle Point*, 102 Wn. App. at 703-04 (citing *Barnard v. Compugraphic Corp.*, 35 Wn. App. 414, 417, 667 P.2d 117 (1983)). "'Damages must be supported by competent evidence in the record; however, evidence of damage is sufficient if it affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture.'" *Eagle Point*, 102 Wn. App. at 704 (quoting *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 510, 728 P.2d 597 (1986), *review denied*, 107 Wn.2d 1022 (1987)).

Here, the trial court erred when it shifted the burden from Lehman to NWC to prove

[8] It is within the province of the fact finder to accept or reject, in whole or in part, an expert's opinion, and we do not second guess its credibility determinations. Here, however, because Sprague's testimony as to this issue was inadmissible, the trial court's reliance on it was misplaced. *See Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 42, 931 P.2d 911 (1997).

whether NWC caused the soil to be unsuitable. *Eagle Point*, 102 Wn. App. at 703-04. Sprague testified that he found "bad material" in a fill area of a roadway. 2 RP at 406. Sprague relied on a visual inspection only; he did not test the soil, hire an expert to test the soil, or save any samples of the allegedly unsuitable soil. Lehman testified that once Sprague discovered the unsuitable material, Lehman did not contact NWC to discuss the quality of the soil left behind. Lehman also did not test the material or hire an expert to test whether the soil was unsuitable. Instead, Lehman hired Sprague to examine the soil, relied on his statement that it required replacing, and then paid Sprague to replace the soil at a cost of an additional $16,147.46.

The trial court found that an unspecified portion of the additional material was necessary to replace the unsuitable soil. Lehman failed to "wholly meet his burden of proof to establish the necessity for the quantity of import materials in his counterclaim." 2 CP at 392. But Lehman also had the burden to prove that NWC *caused* the soil's unsuitability as discovered in April 2003. The record, which indicates that the soil was unsuitable because it was "saturated" after sitting on the site for over 16 months and an entire winter season, does not support a finding that the Lehmans proved causation.

Moreover, even if Lehman met his burden to prove causation, which on this record he did not, there is no reasonable basis for the $10,000 offset amount. Sprague imported approximately 800 cubic yards, or 1,153 tons, of suitable material for use in the Project. NWC had removed the soil at issue from the site at the base of a retaining wall and placed it in the fill areas in accordance with its contract which provided that "site bid to balance *with no [soil] import or export*," meaning no fill material was to be imported to or removed from the site by NWC. Ex. P1. The area surrounding the base of the retaining wall was approximately 20 cubic yards in size. Both

Sprague's and Lehman's testimony show neither knew what percentage of the 800 cubic yards of material was used to replace the allegedly unsuitable material.

Using the only calculable numbers in the record, 20 of 800 cubic yards is 2.5 percent of the total imported material necessary to replace the unsuitable soil. Two and a half percent of $16,147.46 is $403.69—far below the trial court's $10,000 offset which is approximately 62 percent of Sprague's charge to Lehman and, presumably, included labor and other costs. The trial court offers no findings of fact or explanation as to how it arrived at the $10,000 offset and no reasonable basis for estimating the loss at that amount appears on our review of the record.

The trial court's bald finding that $10,000 was a "reasonable sum to compensate Mr. Lehman for having to import soil to replace unsuitable material placed by NWC" is unsupported by substantial evidence and, thus, amounts to mere speculation by the trial court. 2 CP at 392. *See Eagle Point*, 102 Wn. App. at 703-06 (the trial court's estimation of damages all reasonably fell within ranges for which evidence provided a reasonable basis). Accordingly, because Lehman failed to prove that NWC caused the soil's saturation and the trial court did not know what portion of the imported material Sprague used to replace the unsuitable soil, we hold that the record contains no tenable grounds supporting the trial court's award of the $10,000 offset award and reverse.

Attorney Fees Offset Under Chapter 60.04 RCW

RCW 60.04.081(4) provides that "[i]f the court determines that the lien is not frivolous and was made with reasonable cause, and is not clearly excessive, the court shall issue an order so stating and awarding costs and reasonable attorneys' fees to the lien claimant to be paid by the applicant." Here, the trial court found that NWC's lien claim was not frivolous or clearly

excessive and that it was made with reasonable cause. But because the trial court erroneously found that NWC's lien claim was invalid, it also erred when it found that Lehman was a prevailing party. Accordingly, we reverse the offset of NWC's attorney fees.

Attorney Fees on Appeal

Wells Fargo requests attorney fees pursuant to RAP 18.1 and MAR 7.3.[9] NWC requests attorney fees under the parties' contract, RCW 60.04.081(4), and RAP 18.1. We decline to award attorney fees to either party pursuant to RAP 18.1. But because we hold that NWC has a valid lien claim and reverse the award offsets, NWC is the prevailing party on appeal and is entitled to attorney fees from Lehman both as provided for in their contract and pursuant to RCW 60.04.081(4).

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

QUINN-BRINTNALL, J.

We concur:

PENOYAR, C.J.

JOHANSON, J.

[9] MAR 7.3 states, "The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. . . . 'Costs' means those costs provided for by statute or court rule. Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule." The mandatory arbitration rules apply only to mandatory arbitration in civil actions under chapter 7.06 RCW and do not apply to the instant case.