

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

GeoENGINEERS, INC., a corporation,

Respondent,

V.

WAYNE GOLD ESTATES, L.L.C., a  
limited liability company, and JOHN  
DOES 1-10,

Appellants.

---

No. 57940-1-I

UNPUBLISHED OPINION

FILED: July 23, 2007

)

**SCHINDLER, A.C.J.** – Wayne Golf Estates, L.L.C. (WGE) challenges the court’s decision on summary judgment to dismiss its breach of contract counterclaims against GeoEngineers, Inc. (Geo) and enter judgment against WGE for the outstanding amount owed to Geo plus interest, attorney fees and costs. Because there are material issues of fact as to whether Geo breached the agreement with WGE, we reverse, vacate the judgment, and remand for trial.

**FACTS**

Gary Wight owned two undeveloped hillside lots in Bothell, Washington. The lots were comprised of approximately 46 acres and were designated as Valhalla Lots B and C. Valhalla Lots B and C are located southwest and northwest of an existing

development. The two hillside lots contain small streams that flow into the Sammamish River. The City of Bothell (the City) designated the property as a moderate to high risk landslide area. As a result, development on Valhalla Lots B and C was subject to strict requirements, including adequate drainage and dewatering systems.

In January 2001, Wight hired Jon W. Koloski, a principal of GeoEngineers, Inc. (Geo), to evaluate the geologic feasibility of a residential development on Lot C. Koloski had extensive geological experience and knowledge of the site and had done work for the City of Bothell analyzing landslides in the vicinity of the site. Based on Koloski's review of previous explorations on and near the site and his preliminary assessment of the slope stability of Lot C, Geo issued a "Geotechnical Review, Proposed Conceptual Design Plan, Valhalla West End Neighborhood, Bothell, Washington." In the report Geo concluded that with appropriate drainage, residential development on Lot C was feasible.

In 2002, at Wight's request, Koloski met with Greg Ellis to discuss the feasibility of developing Lots B and C, Koloski's knowledge of the site, and his working relationship with the City of Bothell. After meeting with Koloski, Ellis agreed to invest in the project. Ellis and Wight formed Wayne Golf Estates, L.L.C. (WGE) to develop Valhalla Lots B and C. WGE planned to build 38 single family custom homes on Lot B and 47 homes on Lot C. WGE obtained preliminary plat approval for Lot C from the City before contracting with Geo to obtain the geologic and geotechnical

analysis necessary for final plat approval,

On January 30, 2003, WGE and Geo entered into an agreement for a geologic and geotechnical analysis of Lots B and C. As described in the Scope of Services, the purpose of the analysis was to evaluate the soil and ground water conditions for the proposed residential development. Geo agreed to recommend remediation measures based on the City of Bothell code and prepare a written report addressing its conclusions and recommendations supported by field and laboratory data. The deadline for submitting the geotechnical report to the City for final permitting and plat approval of Lot C was July 29, 2003. Geo estimated that its work would cost \$53,500 and anticipated issuing a final report within 60 days.

After contracting with Geo, WGE entered into a purchase and sale agreement for Valhalla Lots B and C. The potential buyer agreed to purchase the property for \$5.4 million contingent on final plat approval. The purchase and sale agreement closing date was March 15, 2004.

On July 1, 2003, Geo submitted a change order to WGE. According to Geo, unanticipated soil conditions on Lot B resulted in additional costs. While WGE expressed concern about Geo's failure to anticipate the soil conditions, because of the July 29 deadline for submitting the geotechnical report for Lot C, WGE agreed to the change order. With the change order, the new estimated cost for Geo's work was \$78,000.

On July 28, one day before the City's deadline, Geo delivered the geotechnical

No. 57940-1-1/4

report for Lot C. On July 29, WGE submitted Geo's report to the City as part of the Lot C plat application.

On August 6, Geo submitted a second change order.<sup>1</sup> WGE objected to the additional cost on the ground that the work was part of the original agreement. But because of the plat application deadline for Lot B, WGE agreed to the change order. With the second change order, the resulting cost was \$105,000. While WGE paid Geo's June and July invoices in full, it only made a partial payment for the August invoice, resulting in a balance due of \$24,277.55.

On September 26, Geo issued its report for Lot B. The September 26 report for Lot B recommended a "dewatering system" design that required the installation of several large drainage shafts. According to Koloski, Geo told WGE that the dewatering system was critical to minimize the landslide risk and advised WGE that the retaining walls would cost approximately \$1 million and "the cost of an adequate dewatering system in Parcel B – WGE Division 1 would also cost approximately \$1 million."

As part of the plat application process, the City retained a geotechnical firm, Hart Crowser, Inc., to review Geo's geotechnical reports for the Valhalla plat application for Lots B and C. On December 12, 2003, the City sent WGE a notice of "Determination of Inconsistency." The notice states that the City code required more detailed information to support Geo's geotechnical analysis of the proposed plat.

WGE refused to pay Geo for the September or December invoices. According

---

<sup>1</sup> The proposed change order was based on WGE's request for two separate reports for Lots B and C as opposed to a single, combined report as contemplated in the original agreement. It was also based on Geo's participation in more meetings than the two set forth in the agreement and consultation to install the erosion control measures recommended by the City.

to WGE's comptroller, Chris Boyd, beginning in October 2003, WGE objected to the incomplete geological reports and refused to pay until Geo completed its reports. In January 2004, Geo agreed to provide additional information to the City if WGE paid \$20,000 immediately, with an additional payment of \$20,000 by February 2, another \$20,000 in March, and the remaining balance paid when the sale closed on March 15. When WGE did not make any payments on February 18, Geo filed a lien against WGE for \$69,712.09.

On February 6, 2004, the potential buyer of Valhalla Lots B and C obtained an estimate of the cost to construct the dewatering recommended by Geo for Lot B. The estimated cost was \$6.5 million, more than double the cost to develop Lot B.

On February 25, WGE and Geo met to discuss the geotechnical reports, the amount Geo claimed WGE owed, the status of the pending plat application, and the sale of the property. The potential buyer had expressed concern about purchasing the property because of the cost of the dewatering system. According to one of Geo's engineers who attended the meeting, WGE told Geo that the cost of the dewatering system was "a total deal killer." WGE agreed to pay Geo \$20,000 by the following week and pay the remaining balance if Geo revised the design of the dewatering system and provided information to the City to support the analysis in the geotechnical reports.

On March 9, Geo provided additional information to the City concerning its analysis. But as a result of the cost of the dewatering system, the buyer decided not

to purchase Lots B and C. On March 19, Geo formally notified WGE that it was terminating the agreement until the outstanding invoices were paid. According to Geo, the outstanding balance totaled \$80,898.09.

On August 9, the City sent WGE a "Second Notice of Inconsistency." According to the Notice, the additional information Geo submitted did not support the geotechnical analysis and did not comply with the City code.

On October 1, 2004 Geo filed a "Complaint for Breach of Contract and Foreclosure of the Lien." WGE denied Geo's allegations, asserted a number of affirmative defenses and filed counterclaims against Geo alleging breach of contract, negligence, and tortious interference in designing an economically unfeasible dewatering system.

On May 5, 2005, after the lawsuit was filed, the City sent WGE a "Third Notice of Inconsistency" stating that the geotechnical and hydrotechnical analysis was inadequate. By this time, WGE had withdrawn its plat application for Lot B.

Geo filed three partial summary judgment motions. On Geo's first motion for partial summary judgment, the court ruled that the liability clause in the agreement limited the damages that Geo could recover to either \$20,000 or the fees that Geo charged. After Geo filed a second partial summary judgment motion to dismiss WGE's counterclaims, WGE filed a motion to amend the counterclaims.

On September 30, 2005, the trial court granted WGE's motion to amend its counterclaims against Geo and granted Geo's motion to dismiss the original

counterclaims. On October 13, WGE filed amended counterclaims against Geo alleging fraudulent inducement, breach of contract, and breach of the standard of care in failing to provide the necessary information and data to support the geotechnical reports in compliance with the City code. WGE also alleged that Geo breached the agreement by failing to provide the City with the information it requested to support the analysis in the geotechnical reports. Finally, WGE alleged that Geo's design of the dewatering system and refusal to redesign the dewatering system breached the agreement and the standard of care.

Geo filed a third partial summary judgment motion to dismiss WGE's amended counterclaims. Geo argued that as a matter of law, it did not have a duty to provide information to the City to ensure plat approval or to design an economically feasible dewatering system. In the alternative, Geo claimed it was entitled to terminate the agreement without incurring liability because WGE did not pay the undisputed invoice amounts.

In response, WGE filed a cross motion for partial summary judgment arguing that Geo breached the agreement by not providing field data and laboratory information in support of the geotechnical reports. WGE also argued Geo breached the standard of care by designing an unreasonably expensive dewatering system for Lot B. In addition, WGE asserted that the claimed balance due was in dispute. In support, WGE submitted a number of declarations including declarations from a geotechnical engineering expert, a civil engineer who worked on the project, and the

City's geotechnical peer review expert, Hart Crowser.

The court granted Geo's motion for partial summary judgment and dismissed WGE's counterclaims. The court then entered a judgment against WGE for \$218,667.<sup>2</sup> WGE appeals the trial court's decision dismissing its breach of contract counterclaims and entry of the judgment.

### ANALYSIS

WGE contends the trial court erred in dismissing WGE's breach of contract claims as alleged in the amended counterclaims because there are material issues of fact about whether Geo (1) breached the terms of the agreement by failing to include field data and laboratory information as required by the City code to support the analysis in the geotechnical reports and (2) breached the standard of care by designing an unreasonably expensive dewatering system on Lot B.<sup>3</sup>

#### Standard of Review

We review summary judgment de novo, engaging in the same inquiry as the trial court. St. John Med. Ctr. v. DSHS, 110 Wn. App. 51, 64, 38 P.3d 383 (2002). Summary judgment is appropriate when "there is no genuine issue as to any material fact" and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party has the burden of proving, by uncontroverted facts, that no issue as to any material fact exists. LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975).

---

<sup>2</sup> The judgment included \$82,627.09 in principal; \$31,914.15 in pre-judgment interest; \$90,235.54 in attorney fees; \$4,895.11 in cost; and \$8,996.00 in Geo's staff time.

<sup>3</sup> We disagree with Geo's assertion that WGE raises breach of contract claims for the first time on appeal. Below, WGE argued that Geo breached the terms of the agreement by not providing field data and laboratory information to support the analysis in the reports.

In making this determination, the court must view the evidence and all reasonable inference in favor of the nonmoving party. Wood v. Seattle, 57 Wn.2d 469, 473, 358 P.2d 140 (1960). Where competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact. Hudesman v. Foley, 73 Wn.2d 880, 441 P.2d 532 (1968). A court cannot resolve issues of credibility on summary judgment. Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 626, 818 P.2d 1056 (1991).

When interpreting a contract, our primary goal is to determine the intent of the parties. U.S. Life Credit Life Ins. Co. v. Williams, 129 Wn.2d 565, 569, 919 P.2d 594 (1996). We determine intent by the objective manifestations of the agreement rather than the subjective intent of either party. Wells Trust v. Grand Cent. Sauna and Hot Tub Co., 62 Wn. App. 593, 602, 815 P.2d 284 (1991). The interpretation of a contract is a mixed question of law and fact. Berg v. Hudesman, 115 Wn.2d 657, 668, 801 P.2d 222 (1990). But the question of whether a contract is ambiguous is a question of law that we review de novo. Schwab v. City of Seattle, 64 Wn. App. 742, 826 P.2d 1089 (1992).

Here, neither WGE nor Geo claim the language of the agreement is ambiguous. And where, as here, the parties indicate in writing that the agreement “represents the entire and integrated agreement,”<sup>4</sup> we must discern the parties’ intent

---

<sup>4</sup> INTEGRATED WRITTEN AGREEMENT

This Agreement represents the entire and integrated agreement between Client and GeoEngineers and supersedes all prior communications, negotiations, representations or agreements, either written or oral between the parties. No agreement or understanding varying or extending this Agreement shall bind

from the language of the written agreement. Berg, 115 Wn.2d at 670.

The Geologic and Geotechnical Services Agreement

The Scope of Services provision in the geologic and technical services agreement between Geo and WGE describes the services Geo agreed to perform for the proposed residential development of Valhalla Lots B and C.<sup>5</sup> The Scope of Services describes the purpose of the geologic and geotechnical analysis as follows:

The purpose of our service is to evaluate soil and groundwater conditions as a basis for developing design criteria for geotechnical aspects of the proposed development at Lots B and C. Our proposed scope of services includes completion of subsurface explorations at Lot B, review of the extensive previously completed explorations at Lot C, and limited additional explorations at Lot C. Our scope of services also includes identification and evaluation of geologic hazards present at the site in accordance with appropriate City of Bothell codes.

The Scope of Services then specifically identifies the work Geo agreed to perform:

4. Perform laboratory tests on selected soil samples obtained from the explorations . . . .
5. Evaluate slope stability. . . . Our evaluations will include engineering analyses . . . .
6. Provide recommendations for remediation of landslide

---

either party, other than by a subsequent written agreement, signed by Client and GeoEngineers.

<sup>5</sup> The "Scope of Services and Excluded Services" provides that: Our engagement under this Agreement includes only those services specified in the Scope of Services. Client agrees it will not hold us liable for not performing additional services that Client has instructed us not to perform, and our Client expressly waives any claim against GeoEngineers resulting from our failure to perform recommended additional services that Client has not authorized us to perform.

hazards, if identified, and appropriate building setbacks based on City of Bothell code and best available science.

...

17. Prepare a written report presenting our conclusions and recommendations together with supporting field and laboratory information for incorporation into design of the projects.

In addition, Geo agreed to “provide verbal progress reports during the course of our work so that other project team members can perform concurrent designs” and meet the standard of care exercised by geotechnical consultants.

#### STANDARD OF CARE AND WARRANTY DISCLAIMER

GeoEngineers will endeavor to perform its professional services with that degree of care and skill ordinarily exercised under similar conditions by professional consultants practicing in the same discipline at the same time and location. No warranty or guarantee, either express or implied, is made or intended by this Agreement or by any report, opinion, or other Instrument of Service provided pursuant to this Agreement.

The uncontroverted report of the City’s peer review expert, Hart Crowser, and the uncontroverted testimony of WGE’s civil engineer, Ron Guest, and WGE’s geotechnical engineering expert, George Lamb, present material issues of fact as to whether Geo provided the field data and laboratory information required by the express terms of the agreement. Hart Crowser’s analysis of WGE’s plat application states Geo’s “reports do not provide sufficient information, measurements or analyses to address the important slope stability concerns identified in the earlier (1969) report.” WGE’s civil engineer, Ron Guest, testified that Geo’s reports for Lots B and C were “incomplete, inadequate, and unacceptable to submit to the City without field data and laboratory information to defend GeoEngineer’s conclusions.” And George

Lamb, WGE's geotechnical engineering expert, states that the standard of care for a geotechnical engineer requires the engineer to provide field and lab data to support his conclusions. According to Lamb, Geo's July 25 and September 26 geotechnical reports "do not contain this necessary data and analysis."

Below and on appeal, Geo does not address WGE's evidence that the reports did not contain the data necessary to support its analysis and conclusions. Instead, Geo contends that the breach of contract counterclaims only allege that Geo failed to provide data to the City to ensure permit and plat approval. We disagree with Geo's characterization of paragraph 4.2 of the amended breach of contract counterclaims.

Paragraph 4.2 alleges that:

4.2 GeoEngineers Inc. breached the Agreement by failing to obtain and provide in its report for Lot C the information, data and detail reasonably required to complete permitting and plat approval by the City of Bothell; . . .

In support of its characterization of paragraph 4.2, Geo only focuses on the language "reasonably required to complete permitting and plat approval" and ignores the allegation that Geo breached the agreement by failing to provide the "required information, data and detail." We conclude that paragraph 4.2 alleges that the July 25 and September 26 reports did not comply with the terms of the agreement by failing to provide the necessary information to support the conclusions and requirements in the reports.

In the amended counterclaims, WGE also alleges that Geo breached the standard of care provision in the agreement by designing a \$6.5 million dewatering

system for Lot B. Viewing the evidence in the light most favorable to WGE, we conclude there are material issues of fact about whether Geo breached the standard of care by failing to “provide verbal progress reports during the course of our work so that other project team members can perform concurrent designs.”

In his declaration, Koloski states that Geo advised WGE that because of the conditions of the site, “the cost of an adequate dewatering system in Parcel B . . . would also cost approximately \$1 million.” But WGE did not learn the dewatering system, as recommended in Geo’s September 26 report, would actually cost more than \$1 million until after the potential buyer’s realtor obtained a bid. According to the bid, the cost to install the dewatering system as designed by Geo was more than \$6 million. In addition, WGE’s geotechnical expert, George Lamb, testified that Geo breached the standard of care of a reasonable geotechnical engineer by failing to advise WGE of the potentially prohibitive costs of its proposed dewatering design.<sup>6</sup>

In the alternative, Geo contends that as a matter of law, it has no liability for breach of the agreement because WGE failed to pay past due invoices. In support of its argument, Geo relies on the billing and payment provision that provides:

Without incurring any liability to Client, we may either suspend or terminate this Agreement if Client fails to pay any undisputed invoice amounts within 60 calendar days of the invoice date, or if Client states its intention not to pay forthcoming invoices. Such suspension or termination will not waive any other claim against Client.

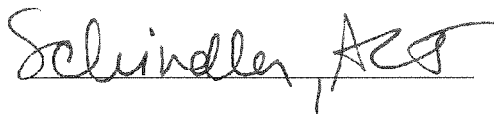
---

<sup>6</sup> In addition, Lamb testified that Geo’s actions fell below the standard of care of a reasonable geotechnical engineer when it failed to design an economically feasible dewatering system. But there are material issues of fact about whether a less expensive dewatering system was feasible.

But because WGE contends Geo breached the agreement when it issued the July 25 and September 26 reports, there are questions of fact about whether the bill and payment provision applies. There is no dispute that WGE paid Geo's invoice for July 2003 and that WGE made a partial payment for the August 2003 invoice. Viewing the evidence in the light most favorable to WGE, there are also material issues of fact about whether and when the invoice amounts were in dispute. WGE's comptroller, Chris Boyd, testified that starting in October 2003, he informed Geo on several occasions that WGE refused to pay Geo's invoices until the geotechnical reports were corrected and completed. In addition, while the provision allows Geo to suspend or terminate its services, there is no dispute that Geo did not do so until March 2004. On this record, material issues of fact preclude summary judgment.<sup>7</sup>

CONCLUSION

Because there are material issues of fact on WGE's breach of contract claims, we reverse the trial court's decision to dismiss the amended breach of contract counterclaims, vacate entry of the judgment, and remand for trial.<sup>8</sup>



W

E CONCUR:





As a result, we need not consider WGE's alternative arguments that the court erred in entering judgment without addressing WGE's affirmative defenses and that the court abused its discretion in awarding 18% pre-judgment interest on Geo's lien claim.

<sup>8</sup> Because we remand, WGE is not entitled to attorneys fees under the agreement. The Agreement states: "[t]he prevailing party in any arbitration or litigation will be entitled to recover reasonable attorneys' fees, legal costs, arbitration fees and other claim-related expenses, including reasonable fees for the time of its personnel."