

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0823, Mark S. Decesare v. Paul E. Skipper, the court on December 14, 2007, issued the following order:

The defendant, Paul E. Skipper, appeals from an order of the superior court after a bench trial awarding the plaintiff, Mark S. Decesare, \$75,000.00 for breach of contract relating to the construction of a log cabin. He argues that the trial court erred by: (1) finding that he breached an obligation to design and construct a foundation meeting the plaintiff's requirements; (2) allowing testimony as to damages estimates prepared by individuals who did not testify; and (3) finding the amount of the plaintiff's damages to be \$75,000.00. We affirm in part, vacate in part, and remand.

We address first the plaintiff's argument that the trial court erred by finding that he breached a contractual duty to design and construct a foundation. Although the interpretation of a contract is a question of law for this court, factual disputes concerning the terms of the contract, and what the parties intended by such terms, are to be resolved by the trier of fact, whose findings we will uphold unless they are unsupported by the record or erroneous as a matter of law. See Syncom Indus. v. Wood, 155 N.H. 73, 82 (2007); Hall v. Claremont Assocs., 143 N.H. 563, 565 (1999). We defer to the trial court on matters such as the credibility of witnesses and the weight of the evidence. See Cook v. Sullivan, 149 N.H. 774, 780 (2003).

Although the parties dispute who bore design responsibility for the foundation, the proposal for the site work, which the parties identify as the contract, shows that the defendant agreed to "lay out" and "engineer" the site, and identified himself as the "architect." Moreover, the plaintiff testified that he told the defendant the property would be used only occasionally as a camp and would not be heated when it was unoccupied, that he was relying upon the defendant to build a foundation that could withstand winter elements without a heat source, and that the defendant represented he would build a foundation that would not require heat. Finally, the plaintiff offered evidence that a foundation could, in fact, have been built that would not have required heat, and that the defendant's failure to build such a foundation caused extensive damage. Accordingly, we cannot conclude that the trial court's finding that the defendant "breached his contract . . . by designing and constructing a foundation and foundation drainage that did not meet the Plaintiff's requirements" was either unsupported by evidence or legally erroneous.

We reject the defendant's contention that the plaintiff was obligated to prove contractual design responsibility through expert evidence. Nor was the trial court compelled to accept the testimony of the defendant's expert, or to find that the defendant was only a "subcontractor" and agreed to build the foundation only in accordance with drawings supplied by the log cabin manufacturer. To the contrary, the trial court was free to reject the defendant's evidence, including expert testimony. See Cook, 149 N.H. at 780.

We next address the defendant's argument that the trial court erred by allowing Richard Geddes, the plaintiff's witness, to testify regarding estimates prepared by contractors who did not testify. At trial, a letter from Geddes, opining that damage to the foundation required the log cabin to be jacked off the foundation and the foundation replaced, was admitted as a full exhibit. Attached to the letter were three estimates: one from Geddes estimating the cost of jacking the cabin off the foundation, and two from other contractors estimating the cost to replace the foundation and to complete other repairs.

The defendant objected to Geddes testifying as to the estimates prepared by the other two contractors upon the basis that such testimony had not been adequately disclosed in response to interrogatories. The plaintiff's counsel countered that he was not asking Geddes to testify as to the other estimates, but to provide his own opinion as to what such costs would be, and represented that he "would remove the other two estimates, because those were, in fact, given to [the plaintiff] directly." The plaintiff's counsel further asserted that "[t]here was never any interrogatory asking anything other than what we've actually disclosed." The trial court allowed Geddes to testify as to the cost of replacing the foundation, finding such testimony to have been adequately disclosed. Geddes then testified as to an amount to replace the foundation that was inconsistent with the estimates, but did not testify as to the other items of damage within the estimates.

The failure to timely disclose the substance of an expert's opinion in discovery should, ordinarily, result in exclusion of the expert's trial testimony. See generally Figlioli v. R.J. Moreau Cos., 151 N.H. 618, 626 (2005). We review the trial court's admission of opinion evidence pursuant to the unsustainable exercise of discretion standard. See id. It is the defendant's burden on appeal to demonstrate that the trial court erred, and to provide an adequate appellate record to demonstrate error. See generally Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004); Canty v. Hopkins, 146 N.H. 151, 153 (2001).

Here, the parties disputed whether the substance of Geddes' testimony had been adequately disclosed in response to interrogatories. The trial court found that Geddes' opinion regarding the cost to replace the foundation had been adequately disclosed, and Geddes testified accordingly. The defendant has not submitted on appeal, however, the interrogatories and the plaintiff's

responses to them. Under these circumstances, we cannot conclude that the trial court's finding that the testimony was adequately disclosed constituted an unsustainable exercise of discretion.

Finally, we address the defendant's argument that the award of \$75,000.00 was unsupported by the record. The purpose of contract damages is to put the plaintiff in the position he would have occupied had the contract been fulfilled. See M. W. Goodell Const. Co., Inc. v. Monadnock Skating Club, Inc., 121 N.H. 320, 322 (1981). Where a contractor has defectively performed, the ordinary measure of damages, absent economic waste, is the cost of remedying the work. See id. Although the method to calculate damages need be no more than an approximation, see Maloof v. Bonser, 145 N.H. 650, 655-56 (2000), the amount awarded must be supported by reasonably certain proof, see Clipper Affiliates v. Checovich, 138 N.H. 271, 274 (1994).

Here, the basis for an award of \$75,000.00 is not clear from the record. The trial court granted a finding of fact that Richard Geddes "concurred . . . that the only possible remedy for this situation would be to jack the house off of the existing foundation and replace the entire foundation and concrete floor at an estimated total cost of \$54,225.00." This amount was the total of the three estimates that had been attached to Geddes' disclosure.

As noted above, however, Geddes' testimony was inconsistent with the written estimates; he estimated the total cost of jacking up the house and replacing the foundation to be between \$32,500.00 and \$42,500.00, an amount greater than the written estimates for those items, and did not testify at all as to several other items of damage contained within the estimates. To the extent \$75,000.00 was intended to represent the amount testified to by Geddes plus compensation for the items within the estimates to which Geddes did not testify, plaintiff's counsel asserted that he would "remove" the two estimates that were not prepared by Geddes. Thus, it is unclear whether the estimates were even in evidence. Moreover, we agree with the defendant that certain of the items within those estimates were implicitly awarded to the plaintiff as credits on the defendant's counterclaim, and could not have been awarded a second time as part of the plaintiff's damages award.

To the extent the plaintiff argues that the \$75,000.00 included compensation to complete a driveway and for loss of use of the cabin, the plaintiff points to no evidence in the record to support any concrete amount of compensation for those items of damage. Because we cannot ascertain a reasonably certain basis in the record to support the award of \$75,000.00, we vacate the trial court's order only to the extent it awarded damages to the plaintiff, and direct the trial court upon remand to reconsider the award of

damages to the plaintiff, and to more fully explain the basis for any award of damages it may make.

Affirmed in part; vacated in part; remanded.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**