STATE OF IDAHO)
County of KOOTENAI)ss

FILED 12/20/2021

AT 1:45 O'Clock P. M
CLERK OF DISTRICT COURT

Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JASON SACKMANN, d/b/a J&S CONSTRUCTION, *Plaintiff,* vs. **SELTICE BAUGH REAL PROPERTY, LLC, an Idaho Limited Liability Company; WASHINGTON TRUST BANK, a foreign corporation; and NWR, INC., an Idaho corporation,** *Defendants.*	Case No. **CV28-19-7564** **MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on a Motion for Partial Summary Judgment brought by plaintiff Jason Sackmann, DBA J&S Construction ("J&S"), filed on November 17, 2021, against defendants Seltice Baugh Real Property, LLC ("Seltice Baugh"); Washington Trust Bank ("WA Trust"); and NWR, Inc. ("NWR") (collectively "defendants"). J&S's motion requests this Court grant its "Motion for Partial Summary Judgment regarding the measure of damages to be applied with respect to Defendant NWR, Inc. ("NWR") and Defendant Seltice Baugh Real Property, LLC's counterclaims." Pl. J&S Consruction's Partial Mot. for Summ. J. (Mot. for Partial Summ. J.) 1. J&S argues "Diminution in value is the proper measure of damages as to the alleged siding defects because the cost to repair the property is disproportionately greater than the loss in value." *Id.*

J&S filed its Complaint on October 23, 2019. J&S is suing defendants for lien foreclosure, breach of contract, and unjust enrichment. On November 19, 2019, the parties stipulated to stay further proceedings pending mediation or arbitration. On May 11, 2020, Seltice Baugh, WA Trust, and NWR jointly filed an Answer, Affirmative Defense and Counterclaims ("Answer"). Defendant's ask "for a trial by jury of all matters so triable" in this matter in their prayer for relief. Answer 9, ¶ 4.7. While this is hardly a "demand" under I.R.C.P. 38(b), it likely prevents a waiver of a jury trial under I.C.R.P. 38(b). On June 17, 2020, J&S filed its Answer to Defendants' Counterclaims.

J&S is a contractor that performs construction work in the State of Idaho. Compl. ¶ 1.1. Seltice Baugh is "an Idaho Limited Liability Company and the owner of the real property where J&S Construction performed the construction work at issue in this lawsuit. *Id.* ¶ 1.2. WA Trust is "the beneficiary of a Deed of Trust granted by Seltice Baugh on August 27, 2019, upon the real property" involved in the present case. *Id.* ¶ 1.3. NWR is a licensed contractor in the State of Idaho. *Id.* In early September 2018, J&S entered into a subcontractor agreement with NWR "to perform construction work, including framing and roofing on the Property." *Id.* ¶ 3.4; Answer, Counterclaims ¶¶ 1.1-1.3. The Property consisted of a "commercial building which included a warehouse and attached two-story office structure on the Subject Property[,]" located at 620 N. Baugh Way, Post Falls, Idaho. Answer, Counterclaims ¶ 1.1, 1.5. J&S "invoiced NWR for the framing, roofing, T&G, and office rear porch construction services," which NWR alleges to have paid for in full. *Id.* ¶ 1.8. On February 4, 2019, J&S entered into an agreement to install the metal siding for $37,903. *Id.* ¶ 1.9. J&S commenced metal siding installation in February 2019. Answer to Def.s' Counterclaims ¶ 1.10. Defendants allege that:

> Sackmann's employee's improperly installed the siding, resulting from among other things, failing to set an initial level line resulting in mismatched siding at intersecting building corners and at window trim alignment, failing to caulk window "J" channel trim, mismatched metal screw alignment, over tightened metal sliding screws, failing to install the required flexible weather seal closure strips at windows, seams, eaves and corners.

Answer, Counterclaims ¶ 1.11. J&S invoiced NWR $27,538.05 for siding installation work in March 2019, which NWR paid. *Id.* ¶ 1.12. On April 1, 2019, J&S invoiced NWR for further installation work, with a balance due of $11,663.15. *Id.* ¶ 1.15. On April 2, 2019, NWR notified J&S that "the siding installation work was defective and provided him with a Notice and Opportunity to Repair." *Id.* ¶ 1.17. NWR alleges that, in response, J&S "attempted to correct the misaligned window trim, caused by the initial leveling failure, but the result was not acceptable to NWR. Sackmann repaired random drill holes and corrected sealant issues with the metal siding. Sackmann refused to remediate the other unresolved defective installation issues breaching the Agreement." *Id.* On April 10, 2019, NWR's attorney sent a letter to J&S, indicating, NWR alleges, that "NWR would have to hire additional workers to complete the Siding Contract because Sackmann had missed the March 30, 2019 completion deadline. NWR notified Sackmann that the additional labor charges would be deducted from his invoice." *Id.* ¶ 1.18. J&S recorded a Claim of Lien on the property on April 29, 2019. Compl. ¶ 3.6.

In its Complaint, J&S alleges the following:

> In September 2018, J&S Construction entered into a contract with NWR, Inc. to perform construction work, including framing and roofing on the Property. Pursuant to this contract, J&S Construction has supplied $36,459.36 worth of construction work and materials for the improvement of the Property for which NWR, Inc. has not paid J&S Construction.

Compl. ¶ 3.4. J&S alleges that, despite repeated requests from J&S, NWR has not made any payments to J&S for their work. *Id.* ¶ 3.5. "J&S Construction recorded a Claim of Lien to secure payment for the materials, labor, or equipment it supplied to the Property, in the Kootenai County Recorder's office on April 29, 2019, under recording number 2690050000." *Id.* ¶ 3.6. J&S alleges that "NWR, Inc. has materially breached its contractual duties owed to J&S Construction, as well as the implied duty of good faith and fair dealing. *Id.* ¶ 3.11. Additionally, J&S alleges that "NWR, Inc. bargained for and benefited from J&S Construction's materials, equipment, and labor" and that, "[i]f NWR, Inc. is permitted to continue to enjoy the compensation from J&S Construction's materials, equipment, and labor without wholly compensating J&S Construction, then NWR, Inc. will be unjustly enriched thereby." *Id.* ¶ 3.15-16.

Defendants respond that it has "paid all of the monies due to Jason Sackmann, d/b/a J&S Construction, under the Subcontractor Agreement after allowing for repairs and offsets." Answer 2. Defendants allege that NWR "hired others to complete the siding installation and make temporary repairs. The defects in the construction of the commercial building have not been repaired. The commercial building's value has been diminished due to the poor workmanship and construction defects." Defendants allege that because the Agreement indicated that "final payment to Sackmann would be made when the work had been fully performed[,]" and he "failed in his performance obligations[,]" NWR was justified in withholding final payment pending remediation. Answer, Counterclaims ¶ 1.23. Defendants allege NWR never received any further invoices from J&S during 2019, which J&S denies. *Id.* ¶ 1.24, Answer to Def.s' Counterclaims. On April 18, 2019, J&S "executed a mechanic's lien for the principal amount [of $36,459.36] and indicated in that lien that J&S Construction performed

framing, roofing, and siding work." Answer to Def.s' Counterclaims ¶ 1.25. Defendants allege that the only invoice NWR withheld from J&S was "the April 1 siding invoice for $11,663.15" and that J&S "never sent NWR any other invoices other than the April 1, 2019 invoice[.]" Answer, Counterclaims ¶ 1.26-1.27. Defendants further allege that:

> Sackmann was fully aware his $36,459.36 claim was false and overstated the value of the Claim of Lien, yet he intentionally and fraudulently recorded the Claim of Lien under oath and penalty of perjury.
>
> As a direct result of Sackmann's breaches, Defendants have suffered general and special damages for the construction defects and the materially false claim of lien in an amount to be determined by the Court at trial.
>
> Defendants ask the Court to declare the Sackmann Claim of Lien invalid against the Subject Property, and that the Court enter money judgment for Defendants in a sum to be determined by the Court at trial, including reasonable attorney's fees and costs incurred in the defense of this litigation pursuant to the Agreement and I.C. 12-120, 12-121 and 12-123 along with the I.R.C.P. 54(d)(1) and 54 (d), (3).

Answer, Counterclaims ¶¶ 1.29-1.31. Defendants also bring forth claims of negligence and slander of title for the same allegations. *Id.* ¶¶ 2.1-3.7.

On November 17, 2021, J&S filed its Motion for Partial Summary Judgment and Declaration of Jennifer L. Crow in Support of Plaintiff J&S Construction's Motion for Partial Summary Judgment. On December 1, 2021, Seltice Baugh and NWR jointly filed a Notice of Withdrawal and Substitution of Counsel (substituting attorney Richard Wetmore for the withdrawing Ryan Poole, both of the same firm), Response to Plaintiff's Motion for Partial Summary Judgment, Affidavit of Ryan D. Poole in Support of Defendants' Response to Plaintiff's Motion for Partial Summary Judgment, Declaration of Cecil "Butch" Peacock, and Declaration of Rob Kannapien, CCIM. On December 1, 2021, WA Trust submitted its Joinder in Defendants Seltice Baugh Property and NWR, Inc.'s Response to Plaintiff's Motion for Partial Summary Judgment.

On December 2, 2021, Seltice Baugh and NWR jointly submitted an Amended Declaration of Rob Kannapien, CCIM. On December 9, 2021, J&S submitted a Reply in Support of Plaintiff J&S Construction's Motion for Partial Summary Judgment; Motion to Strike Declaration of Rob Kannapien, CCIM; Motion to Exclude Testimony and Business Interruption Report of Scott Carpenter, CPA; and Affidavit of Jennifer L. Crow in Support of Reply in Support of J&S's Motion for Partial Summary Judgment, Motion to Strike, Motion to Exclude, and Response to Defendants' Motion for IRCP(d) Continuance. On December 13, 2021, J&S filed a Motion to Shorten Time for Notices of Hearing on J&S's Motion to Strike and Motion to Exclude.

As a separate matter, which was scheduled to be heard on December, 22, 2021, on December 7, 2021, defendants filed a Motion to Continue Trial and Issue New Scheduling Order ("Motion to Continue") and Declaration of Richard T. Wetmore in Support of Motion to Continue. On December 10, 2021, J&S filed Plaintiff J&S Construction's Response to Defendants' Motion to Continue Trial ("Response to Mot. to Continue") and Declaration of Jennifer L. Crow in Support of Response to Motion to Continue.

A hearing on J&S's Motion for Partial Summary Judgment, Motion to Strike, and Motion to Exclude, (and Motion to Shorten Time on its Motion to Strike and Motion to Exclude) as well as on Defendants' Motion for Rule 56(d) Continuance, was held on December 15, 2021. At that hearing, the Court: granted J&S's Motion to Shorten Time (to hear J&S's Motion to Strike and Motion to Exclude); denied J&S's Motion to Strike and Motion to Exclude); held in abeyance defendants' Motion for Rule 56(d) Continuance (taking it up only if the Court were inclined to grant J&S's motion for partial summary judgment), and the Court denied J&S's Motion for Partial Summary Judgment. Following which, this Court heard argument on defendants' Motion to

Continue Trial, and denied that motion, and vacated the December 22, 2021, hearing originally scheduled for such motion. Due to the amount of motions and the length of argument on December 15, 2021, the Court's reasoning for denying J&S's motion for partial summary judgment was minimal. This Court enters this memorandum decision and order to provide that reasoning and to provide guidance to the parties as they get ready for trial scheduled for April 11, 2022.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to Rule 56, summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Idaho R. Civ. Proc. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.*

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
>
> (1) give an opportunity to properly support or address the fact;
>
> (2) consider the fact undisputed for purposes of the motion;
>
> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
>
> (4) issue any other appropriate order.

Id. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence." *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

The moving party may also meet "the 'genuine issue of material fact' burden. . . by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). "Such an absence of evidence may be established either by

an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick* at 311, 882 P.2d at 478).

> Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under [Rule 56(d)]. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994) (alteration added).

Dunnick at 311, 882 P.2d at 478; *see also Heath* at 712, 8 P.3d at 1255.

III. ANALYSIS

J&S moves for summary judgment "regarding the measure of damages to be applied with respect to" Defendants' counterclaims. Mot. for Partial Summ. J. 1. J&S argues that:

> Defendants cannot recover from J&S because (1) appraisals show that the alleged defects do not diminish the Subject Property's fair market value; (2) estimates show that the cost to repair is substantially greater; and therefore (3), the former must be applied to assess the Subject Property's damages as required under Idaho law. Even assuming that Defendants are entitled to recovery for the alleged siding defects, an alternative measure of damages should be utilized to avoid excessive recovery.

Id. at 6.

Defendants respond that J&S:

> is fixated on issues involving the beauty of the building while ignoring that the foundation underlying the exterior will rot away over time due to its defective construction. Consequently, Sackmann's motion misapprehends and misstates 1) the nature of the claimed defects and 2) the law regarding the proper measure of damages for breach of a construction contract. . . .
>
> The significance of Sackmann's errors are such that he cannot even be said to have "substantially performed" under the contract. The proper measure of damages when a contractor has failed to substantially

perform under a construction contract is the reasonable cost to complete/repair the defective work. Moreover, even if Sackmann is determined to have substantially performed under the construction contract, despite the errors, the proper measure of damages remains the reasonable repair costs, unless such costs amount to "unreasonable economic waste." If the repair costs amount to unreasonable economic waste, then the diminution in value may be used as an alternate measure of damages. However, these two questions . . . are **both** questions of fact. Moreover, there is conflicting evidence regarding the diminution in value caused by Sackmann's deficient and defective work.

Resp. to Pl.'s Mot. for Part. Summ. J. 2-3. Defendants further argue that:

> use of the "value rule" is **only appropriate if the contractor has substantially performed**. *Stein*, Construction Law, § 11.02[2][a] citing *D. Dobbs,* Handbook on the Law of Remedies § 12.21 (1973). Idaho Courts have adopted the following definition of "substantial performance":
>
> > * * * *There is a substantial performance of a contract to construct a building* ***where the variations from the specifications or contract are inadvertent and unimportant*** *and may be* ***remedied at a relatively small expense and without material change of the building****; but* ***where it is necessary****, in order to make the building comply with the contract,* ***that the structure, in the whole or in material part, must be changed, or there will be damage to parts of the building, or the expense of such repair will be great,*** *then* ***it cannot be said that there has been a substantial performance*** *of the contract.*
>
> *Ervin [Const. Co. v. Van Orden*, 125 Idaho 695,] 702 [(1993)] (emphasis added [by Defendants]). Notably, however, "*[w]hether a contractor has substantially performed a contract* ***is a question of fact****. Id.* (citing *Puget Sound National Bank of Tacoma v. C.B. Launch Construction Co.*, 73 Idaho 68, 75-76 (1952) (emphasis added [by Defendants])).
>
> Thus, the threshold question of whether or not the contractor substantially performed under the contract must first be answered before any determination can be made regarding the potential application of the "value rule". This threshold question is a question of fact to be decided at trial.

Resp. to Pl.'s Mot. for Part. Summ. J. 11-12 (bold and italics in original).

J&S responds that:

> J&S has undoubtedly substantially performed his obligations on the construction contract because he completed his work on the Project. To be clear, J&S's Summary Judgment Motion focuses *only on the siding*

> *instillation of the Subject Property*. As Butch Peacock stated in his declaration, J&S completed his construction work on the Subject Property in April 2019, which includes the siding. See Peacock Decl. ¶ 3. Defendants continued to reside in the Subject Property for two years and had worthwhile use and enjoyment of the Subject Property without material issue as to the siding. Clearly, J&S has substantially performed on its obligations to install the siding on the Subject Property. Furthermore, while Defendants have alleged that they are entitled to damages regarding the roof leak allegations, such damages only amount to $2,500 as shown in their provided report from Custom Roofing, Inc. Crow Aff.
>
> Regardless, the issue of substantial performance is irrelevant to the analyses for damages, cost of repair, and diminution in value. The law in Idaho is clear: an owner in an action for breach of a construction contract cannot recover the reasonable cost to repair the alleged defects if such recovery would produce economic waste. *Ervin Const. Co. v. Van Orden*, 125 Idaho 695, 702 (1993) (citing to Restatement (First) of Contracts § 346); *Gilbert v. City of Caldwell*, 112 Idaho 386, 394-95, 732 P.3d 355, 364-65 (Ct. App. 1987). Nothing in this rule hinges on the substantiality of the contractor's performance on the contract, and Defendants have not cited to any case precedent demonstrating that substantial performance is a threshold issue for the determination of damages.

Reply in Supp. of Mot. for Part. Summ. J. 2-3 (emphasis in original).

First, this Court addresses the issue of substantial performance. Defendants assert that substantial performance is a threshold question and that the diminution in value rule "is only appropriate if the contractor has substantially performed." Resp. to Mot. for Partial Summ. J. 11. While defendants correctly assert that "'[w]hether a contractor has substantially performed a contract is a question of fact[,]'" *id.*, defendants cite only to Stein's Construction Law for the assertion that substantial performance is a prerequisite for a party to receive diminution in value. Defendants have not provided the Court a copy of this authority, as required by this Court's Scheduling Order. Therefore, the Court agrees with J&S's assertion that "Defendants have not cited to any case precedent demonstrating that substantial performance is a threshold issue for determination of damages." Reply in Supp. of Mot. for Partial Summ. J. 3. While the parties differ on the correct method to determine whether the contract has been

substantially performed, it is not apparent to this Court that substantial performance is a prerequisite factual finding necessary to determine whether the diminution in value rule applies under the laws of Idaho. Thus, the Court will not deny the motion for summary judgment on the question of substantial performance alone.

Next, the Court addresses the measure of damages. As an initial matter, J&S misstates the law when it indicates that *Gilbert v. Tony Russell Constr.*, 115 Idaho 1035, 1039, 772 P.2d 242 (Ct. App. 1989) (*Gilbert II*) stands for the proposition that "The standard measure of damages to property injury is loss-in-value" in regards to construction cases. The Idaho Court of Appeals in *Gilbert II* stated that this is the standard under the Restatement Second of Contracts, not that it is the standard measure of damages that is binding on this Court. The Court of Appeals in *Gilbert II* discussed its prior decision, *Gilbert I*. In *Gilbert I*, the Court of Appeals held that:

> . . . under the FIRST RESTATEMENT the appropriate measure of damages is the cost of repair, *unless such would be an economic waste*, in which case resort may be had to the value of the product contracted for less the value of the product actually constructed. Under the SECOND RESTATEMENT the ordinary measure is the loss in value; but if this loss is not proven . . ., the court should resort to the cost of completion or repairs *unless such would be disproportionate to the "probable" loss in value*.
>
> . . . .
>
> "In an action for breach of contract, only such damages will be allowed as fairly compensate the injured party for his loss." For breach of contract the law of damages seeks to place the aggrieved party in the same economic position he would have had if the contract had been performed. Clearly, the cost of an alternative method of repair resulting in a comparable result may be appropriate where strict conformance with the contract would invite unreasonable economic waste.
>
> . . . .
>
> Ordinarily the correct measure in a contract claim would be the expectation interest, in this case being the cost of repair to comply with the specifications [of the contract]. . . . Therefore, ordinarily the cost-of-

> repair measure of damages should reflect a method of repair that would result in a strict or full compliance with the terms of the contract.
>
> Although a less costly alternative may be appropriate in some cases, we are convinced it should not be the measure of damages unless it has been shown that the ordinary measure would be disproportionate to the loss in value or to the benefits of full repair, i.e. economically wasteful or result in a windfall to the injured party.

Gilbert v. City of Caldwell, 112 Idaho 386, 394-96, 732 P.2d 355, 363-65 (1987) (citations omitted) (emphasis in original). The Court of Appeals also made clear that before awarding a party damages for cost of repair, it must consider evidence of disproportionality or economic waste. *Gilbert II*, 115 Idaho at 1040, 772 P.2d at 247.

Although the Court of Appeals creates confusion by discussing both the First and Second Restatements without determinedly stating which one that Court will follow, the Idaho Supreme Court subsequently makes it quite clear that the Restatement First is the preferred standard. In *Ervin Const. Co. v. Van Orden*, 125 Idaho 695, 874 P.2d 513 (1993), which was decided four years after the Idaho Court of Appeals decided *Gilbert II*, the Idaho Supreme Court stated that "the Court endorsed the following measure of damages discussed in Restatement of Contracts § 346", as it had previously held in its 1973 decision in *Hafer v. Horn,* 95 Idaho 621, 623, 515 P.2d 1013, 1015 (1973). 125 Idaho at 702, 874 P.2d at 513. The Idaho Supreme Court did not make reference to *Gilbert II* or to the Restatement Second of Contracts but merely continued to use the First Restatement. *Id.* According to the Idaho Supreme Court,

> *Hafer* afforded the trial court two alternative measures of damages. In order for Ervin to have substantially performed, the court had to find that any variations from the contract were inadvertent and unimportant and could be remedied at relatively little expense. The trial court then could have awarded the Van Ordens the cost to repair the defects in their home if repair were possible and would not involved economic waste. In the alternative, if the trial court found that the cost to repair would involve unreasonable economic waste, the correct measure of damages would be

> the difference between the value of the house as contracted and the value of the performance received.

125 Idaho at 703, 874 P.2d at 514.

Although no Idaho court has definitively held that whether unreasonable economic waste would exist is a question of fact or of law, the majority of jurisdictions and scholars hold that it is a question of fact because the question of "reasonableness" is a question of fact for the jury to decide. The Court agrees with defendants' argument on this point:

> *Eastlake Const. Co. v. Hess*, 102 Wash. 2d 30, 42, 686 P.2d 465, 472 (1984) (citing Corbin on Contracts and finding the Court of Appeals erred in holding that unreasonable economic waste was a question of law); *Whitman v. Lakeside Builders & Devs.*, 99 A.D.2d 679, 472 N.Y.S.2d 51, 52 (1984) (whether demolition and reconstruction of one half of a house was economic waste is a question of fact); *Am. Pest Control. Inc. v. Pritchett*, 201 Ga. App. 808, 809, 412 S.E.2d 590, 592 (1991) (whether cost to repair was absurd was a question of fact for the jury). This is also consistent with the more general principal that **"reasonableness" is a question of fact.** *See Thiel v. Stradley*, 118 Idaho 86, 88 (1990) ("The question of reasonableness is ordinarily a question of fact to be resolved by the trier of fact after both parties have had an opportunity to try this issue."); *Young v. State Farm Mut. Auto. Ins. Co.*, 127 Idaho 122, 126 (1995) ("The reasonableness of the insured's reliance presents a question of fact for the jury."); *Chavez v. Stokes*, 158 Idaho 793, 797 (2015) (Reasonableness of medical treatments is a question of fact).

Resp. to Mot. for Partial Summ. J. 14 (emphasis in original).

J&S relies heavily upon Terry Savage's appraisal in making its argument for diminution of value. *See* Mot. for Part. Summ. J. 6-7. In his appraisal, Mr. Savage makes findings that:

> This appraiser and assistance did not observe in their visual inspection of the subject building any obvious siding misalignment nor inconsistent windowsill elevations, even after being told to look for them. I very much doubt weather a typical buyer in the market would notice them and thus the market does not recognize them value wise.
>
> The Bellyband does display some noticeable waving that may vary with seasons or temperatures. This is the most noticeable of the alleged

defects. It is my understanding that who is responsible for the bellyband is in dispute. Nevertheless, it is my opinion that the market is not refined enough to recognize this alleged minor defect and it will not impact any sale.

The unsightly touch up attempts is the next for noticeability. Again, it appears that there is a dispute as to who is responsible. Again nevertheless, it is my opinion that the market is not refined enough to recognize this alleged minor defect and it will not impact any sale. Even if it does impact any single prospective buyer, the market has enough depth that it will not impact the next buyer. Most buyers will accept the minor responsibility of correcting the paint themselves or letting it just go as it has no impact on the functionality of the building.

Missing foam closure strips: most buyers will most likely not notice this item. MC concludes that any missing foam closure plugs need to be installed. They are a friction fit and can be installed without removing the siding. However, it is my opinion that it will not impact any sale.

Sill flashing butt joints details at masonry wainscot: This was not observed during our inspection and most buyers will not observe it either and it is my opinion it will not impact any sale of the subject property.

Improper installation of building wrap refers to the cut or torn Tyvek Home Wrap. I did not personally see this upon our inspection and no buyer will see it either. Even if informed of this alleged defect, it is my opinion that most will not care. One broker I interviewed for this report, stated to the effect that he has been selling real estate for over 40 years and never had a prospective buyer ask about the home wrap. That is my experience also and it is my opinion that this alleged defect will not impact the sale of the subject.

We interviewed all the buyers and or sellers and or brokers of the comparables used in this appraisal. We also interviewed other appraisers and industrial contractors; a few we showed the subject pictures to. Unanimously, they agreed that the issues we discussed were minor and would not affect a potential sale of the subject.

Based on the above, it is judged that the After Value is the same as the Before Value.

Decl. Jennifer L. Crow in Supp. of Mot. for Part. Summ. J. Ex. 5, 61-62 [page 117 of the declaration]. J&S further claims that:

> Defendants have not presented any evidence showing diminution in value to the Subject Property that would contend with Mr. Savage's appraisal. Therefore, based on the evidence in the record, the diminution in value calculated in Mr. Savage's report must be used to assess the Subject

> Property – and consequently, must be used when comparing to the cost to repair the Subject Property.

Mot. for Part. Summ. J. 7.

This Court disagrees with counsel for J&S's argument for three reasons. First, counsel for J&S assumes *Gilbert II* sets forth the appropriate standard, when in fact and in law *Ervin Const. Co.* provides the correct standard. Second, counsel for J&S would have to have this Court find as a matter of law that it is acceptable to conceal known construction defects from future buyers, which this Court is not at all inclined to do. This is discussed in regard to the next reason. Third, it appears that counsel for J&S based its argument solely on the premise that this Court would grant its Motion to Strike Mr. Kannapien's declaration, which the Court denied and addressed in detail in its December 15, 2021, hearing. Defendants submitted an appraisal by Rob Kannapien, which controverts Mr. Savage's opinion. Specifically,

> Kannapien's opinion is that the diminished value of the Project is equal to **no less than the cost to cure** the defects and **repair the damage** as described in the Clark report. He identifies that a top priority of prospective purchasers is the integrity and functionality of the building envelope, and specifically concerns regarding water intrusion. Moreover, Kannapien correctly identifies that Defendants **cannot conceal** and **must disclose** to prospective buyers the issues identified in the JRS and Clark reports.

Resp. to Pl.'s Mot. for Part. Summ. J. 15 (citations omitted) (emphasis in original). Mr. Kannapien's appraisal asserts the loss of value to be at least $300,000.00. Am. Decl. of Rob Kannapien, CCIM 3, ¶ 8.

J&S's responds:

> Mr. Kannapien's declaration is inadmissible for both procedural and substantive reasons. . . .
>
> Because Mr. Kannapien's declaration is inadmissible, it cannot be used for consideration on J&S's Summary Judgment Motion. Furthermore, J&S has already met its burden to prove that no diminution in value is attributed to the alleged defects through Mr. Savage's appraisal. See *W.L. Scott v. Madras*

Aerotech, 103 Idaho 736, 742, 653 P.2d 791 (1982) (discussing burden of proof). Mr. Savage reviewed the alleged defects identified by Defendants and conducted a thorough review and market analysis of the Subject Property and the expert files from both Parties. See Crow Decl. Ex. 5. Furthermore, his report clearly proves the diminution in value based on the standards set forth under Idaho case law that would help a trier of fact comprehend the evidence on the record. See *Gilbert,* 112 Idaho at 394 (quoting Restatement (First) of Contracts § 346(a)(2)(ii)).

Reply in Supp. Mot. Partial Summ. J. 6. J&S further argues:

> Defendants also argue that a determination of whether an award of cost of repair damages would produce economic waste is a question of fact. It is clear based on the expert reports that no dispute of material fact exists that would preclude a trier of fact from determining that Defendants' requested damages would produce economic waste.
>
> The record makes clear that the amount of damages claimed by Defendants' experts is disproportionate and excessive in comparison to the fair market value of the Subject Property. The only siding defects identified by Defendants' experts involve slight misalignment, which is easy to repair, and other minor aesthetical issues. See Crow Decl. Ex. 1(B). However, despite the small scale of these issues, Defendants' experts Tom Clark and Scott Croasdale have respectively brought forth a repair estimate of $303,000 and a business interruption report with an estimate of $376,820, totaling $679,820. See Crow Decl. Exs. 1(A)-(D), 2. Clearly, no reasonable jury could find that these damages are not economically wasteful given the insignificant degree of the alleged defects.
>
> Defendants' supposed business interruption claim makes no logical sense because there is no reason why the Defendants would have to completely move out of their facilities and rent a replacement facility to operate their business while exterior siding work is performed. Siding work is commonly done on buildings, which does not require the complete abandonment of the interior of the building. Defendants' expert witness Rob Kannapien obviously does not put much consideration in the business interruption claim as he does not even reference the business interruption amount of $376,820 when considering the cost to repair the building, and his supposed opinion regarding the diminution in value.

Reply in Supp. Mot. for Part. Summ. J. 3-5 (emphasis in original).

While, as J&S claims, it did meet its initial burden by producing Mr. Savage's appraisal, the non-moving party, the defendants, also met their burden by submitting the declaration of Mr. Kannapien. That declaration contradicts the evidence submitted by J&S, the moving party, and establishes the existence of a material issue of disputed

fact, by identifying a different value under the diminution of value theory. Values of $300,000.00 per defendants, and $0 per J&S, are clearly very different versions of the claimed facts, creating a material issue of disputed fact, precluding J&S's Motion for Partial Summary Judgment. J&S has submitted no further response to show the lack of an issue of material fact. This Court finds that a jury could find in favor that the damages are not economically wasteful, and it is the jury's duty to determine the credibility of the expert witnesses and whether the damage to the property is significant or merely aesthetic. *See Gilbert I*, 112 Idaho at 392, 732 P.2d at 361. Accordingly, there is a genuine issue of material fact pertaining to the amount of loss of value of the property, and the Motion for Summary Judgment must be denied.

Additionally, and for guidance at trial, this Court finds that the First Restatement measure of damages will be given by this Court to be used by the trier of fact, the jury. This creates additional issues of material fact in dispute. There is a big difference between the loss in Second Restatement measure of damages and the First Restatement measure of damages. The difference is in the *sequence* that the jury must analyze and answer questions and which party bears the *burden of proof* on those questions. As mentioned above, under the Second Restatement, the ordinary measure of damages is the loss in value, but if that loss in value is not proven, then the court should resort to the cost of completion or repairs, unless such would be disproportionate to the "probable" loss in value. *Gilbert I*, 112 Idaho at 363-65, 732 P.2d at 394-96. Given that the burden of proof in a civil case is on a more probable than not basis, this Court wonders how the loss in value could be "not proven" to the jury (not meeting the burden of proof), but then the "probable" (meeting the burden of proof) loss in value would be compared to the cost of completion or repairs? This Court need not be concerned about such inconsistency, as this Court finds the Second

Restatement test will not be applied. And as mentioned above, under the First Restatement, the measure of damages will be the cost of repair, *unless* such cost of repair would constitute economic waste; *and if* economic waste is proven, *then* (and only then) resort *may* be made to loss in value. This Court finds that under *Ervin Const. Co.*, which uses the First Restatement method, the trier of fact must first determine the cost of the repair. Then, the trier of fact determines if there was substantial performance of the contract. If no substantial performance of the contract is found by the trier of fact, then the measure of damages is the cost of repair. If the trier of fact finds that there was substantial performance of the contract, then the trier of fact must determine the loss in value. Then, the trier of fact must compare the two, the cost of repair to the loss of value, and determine if it would constitute economic waste to repair. Economic waste does not necessarily occur just because the cost of repair is greater than the loss in value—the cost of repair must be so much greater or "disproportionate" to the loss of value that it would be "economically wasteful or result in a windfall to the injured party." *Gilbert I*, 112 Idaho at 396, 732 P.2d at 365. *See generally, Ervin Const. Co.* 124 Idaho 701-04, 874 P.2d at 512-15.

IV. CONCLUSION AND ORDER.

For the foregoing reasons, IT IS HEREBY ORDERED Plaintiff's Motion for Partial Summary Judgment is DENIED.

Entered this 20th day of December, 2021.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 20th day of December, 2021, a true copy was emailed to:

Lawyer	email	Lawyer	email
Matthew Ries	mries@stamperlaw.com	Gregory Willson	greg@wilsonlaw.us
Richard Wetmore	rwetmore@dunnandblack.com	Jennifer Crow	jen@scheer.law
John Black	jblack@dunnandblack.com		

Jeanne Clausen, Deputy Clerk