2011 IL App (2d) 101041-U
Nos. 2-10-1041 & 2-10-1253 cons.
Order filed November 15, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

HALLMARK HOMES, L.L.C.,	)	Appeal from the Circuit Court
	)	of Winnebago County.
Plaintiff and Counterdefendant-Appellee and Cross-Appellant,	)	
	)	
v.	)	Nos. 02-L-464
	)	10-SC-417
NERI CONTRACTORS AND EXCAVATORS, INC.	)	
	)	Honorable
Defendant and Counterplaintiff-Appellant and Cross-Appellee.	)	Janet R. Holmgren, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Bowman and Zenoff concurred in the judgment.

ORDER

Held: (1) The trial court's decision regarding defendant's breach of contract was not against the manifest weight of the evidence where defendant was notified of the unsatisfactory nature of the work it performed and did not act to rectify the work; additionally, the trial court imposed the correct measure of damages for defendant's breach.

(2) Likewise, the trial court correctly determined that defendant was entitled to payment for extras performed under the contract and its damages award to defendant for the extras was not against the manifest weight of the evidence.

(3) The trial court's refusal to award attorney fees to either party pursuant to the contract despite the fact that they were both prevailing parties was not an abuse of discretion.

¶ 1 Plaintiff and counterdefendant, Hallmark Homes, L.L.C., sued defendant and counterplaintiff, Neri Contractors & Excavators, Inc., for breach of contract. Defendant counterclaimed against plaintiff, also alleging a breach of the same contract. Following a bench trial, the circuit court of Winnebago County entered judgment in favor of plaintiff for the full amount of its claim, and entered judgment in favor of defendant on a part of its claim. Defendant appeals and argues that the trial court's rulings in favor of plaintiff on plaintiff's claims of breach of contract and entitlement to and the amount of recovery were against the manifest weight of the evidence. Defendant also argues that the trial court erred in failing to award it the full amount requested in its counterclaim. Defendant further contends that the trial court erred in finding that plaintiff was a prevailing party for the fee-shifting provision of the contract at issue. Plaintiff cross-appeals, arguing that the trial court should not have awarded any damages to defendant on its countercomplaint, and that it is entitled to an award of attorney fees for the trial below as well as for this appeal. We affirm.

¶ 2 I. BACKGROUND

¶ 3 As this case presents what is effectively a challenge to the sufficiency of the evidence supporting the trial court's judgment (for both the appeal and the cross-appeal), we will first present a brief overview of the circumstances of the dispute. Then, as the parties' arguments are fact intensive, we will present a detailed review of the evidence and testimony adduced at trial.

¶ 4 Plaintiff was the owner and developer of a residential real estate project called Parkview Meadows (the project). The project was located on a 40-acre parcel of land in Plainfield, Illinois, and included both multi-family townhomes and single-family residences in its design. Plaintiff hired and oversaw the subcontractors, including defendant, during the project. Defendant has been in the business of providing excavation services since 1975. It operates primarily in the northern part of

Illinois, including DeKalb, Lake, McHenry, Boone, Kendall, and Du Page counties. Defendant has worked on projects ranging from 20-25 single-family homes to more than 5,000 single-family homes, and works on 12-15 projects at once.

¶ 5 Plaintiff contracted with defendant to provide excavation services for the project. These services included moving earth at the site, and bringing the building pads and rights of way to a rough grade generally. The parties' contract called for defendant to compact the building pads' fill "to 100% standard proctor density (95% modified) minimum." This requirement is apparently an industry standard and is equivalent to what reasonably can be achieved in the field with modern compacting equipment.

¶ 6 The dispute in this case arose when, in 2002, plaintiff sought to sell the project to a third party, Summit Development Corporation. During the pendency of the sale, Summit had concerns with the soil compaction on certain lots within the project, and ordered Testing Services Corporation (TSC) to take soil borings from certain specified lots. TSC ultimately completed 18 bore-holes from 16 lots and determined the compaction was not uniform throughout the project. Plaintiff notified defendant about the problem and requested defendant to come back onto the site to fix the problems. Defendant did not return to the project. Plaintiff then undertook to remediate the lots where the soil compaction was questionable. To do this, plaintiff retained TSC to oversee the remediation and hired a related subsidiary to perform the actual excavation work necessary for the remediation. Plaintiff claimed that defendant breached the contract by failing to compact the soil in the project's building pads uniformly throughout the site, and it claimed the amounts spent on redoing the building pads and oversight of the remediation as damages arising from the breach. The trial court ultimately agreed and awarded plaintiff nearly $149,000 for defendant's breach and the remediation.

¶ 7 Defendant also submitted a countercomplaint for breach of contract, noting that plaintiff stopped paying its progress draws under the contract. Defendant claimed that it was owed about $22,000 under the contract that plaintiff had simply not paid. In addition, defendant claimed that plaintiff requested that it perform extra work fixing problems associated with the site's water-retention ponds. One pond had been mistakenly filled in with soil over the winter and plaintiff asked defendant to clean out the fill and to regrade the pond. Similarly, another pond had filled with soil from erosion runoff, as well as with misplaced spoil from the underground utilities, and plaintiff asked defendant to restore the retention pond to specifications. In addition, defendant put up a 2,700-foot-long silt fence to combat soil erosion on the project site. Defendant was not paid for its work restoring the retention ponds or putting up the silt fence, and it claimed it was due its invoiced amounts for these extras. The court determined that defendant was entitled to the extras, totaling nearly $14,500. The court also determined that, because defendant had breached the excavation contract, it was not due the remaining $22,000 under that contract.

¶ 8 Following the trial, and pursuant to a fee shifting provision in the contract that allows either party to seek its attorney fees, both parties submitted petitions seeking its attorney fees. The trial court held that both parties were prevailing parties for purposes of the contract, but, after hearing on the petition, denied each party's petition and held that neither party would be able to recover its attorney fees.

¶ 9 Turning to the evidence presented at trial, Mark Robinson testified for plaintiff that he was a vice president for Hallmark Homes, a position he had held for seven years, and president of Rubloff Development Group, a position he had held for five years. Additionally, Robinson was a licensed attorney in good standing.

¶ 10 Robinson testified that his duties for Hallmark involved working with the president on entitlement of property, contract review, and negotiations. According to Robinson, Hallmark purchases raw ground, gets the ground entitled (apparently meaning that he obtains the necessary local permissions to develop the property in a certain manner), and then either builds out the property or sells the property to another developer. Hallmark operates generally in the northern part of Illinois. Rubloff Development Group is the managing member of Hallmark (which is organized as a limited liability company).

¶ 11 Rubloff Excavation L.L.C. is another Rubloff-related entity and shares its offices with Hallmark and Rubloff Development. Robinson holds the position of vice president in Rubloff Excavation. It generally works for other Rubloff-related entities, but also does some third-party excavation work. Each of the companies, Rubloff Development, Hallmark, and Rubloff Excavation, is separately organized and maintained. When Rubloff Excavation works for a Rubloff-related entity, it bills and is paid as if it were an unrelated entity.

¶ 12 Robinson testified that he was familiar with Parkview Meadows in Plainfield, and that he maintained control over the files. Robinson described Parkview Meadows as a 40-acre parcel that was to be developed with single-family homes and townhomes. In 2002, the project was sold to Summit Development. Before that time, Hallmark entered into a contract with defendant to perform excavation and earth-moving work at the project site. Robinson testified that he did not have any amendments to the contract with defendant or any other contracts with defendant in his file. Robinson testified that he did have a bid proposal from defendant and a response to that proposal in his file, but defendant's proposal was not signed by Hallmark.

¶ 13 The contract with defendant called for defendant to move earth and to bring the building pads to a specified rough grade generally. The contract did not reference defendant's bid proposal. The

contract contained a retainage clause. Robinson explained that "retainage" meant a percentage of the contract amount that the owner or the contractor could hold back from payments until the job was completed to the satisfaction of the parties, which would then be paid out at the end of the job when the contract was completed satisfactorily. Robinson noted that the retainage provision in the contract allowed Hallmark, at its sole discretion, to retain up to 10% of each payment until the work was completed to Hallmark's sole satisfaction. Robinson testified that, to his knowledge, the project was never completed by defendant to Hallmark's satisfaction.

¶ 14 Late in the spring or early in the summer of 2002, Robinson learned, by virtue of his status as an officer of Hallmark, that there may have been a problem with the defendant's excavation work performed at the project. Robinson testified that, at that time, Hallmark had contracted to sell most of the project property to Summit (except the already built townhomes). In June 2002, at Summit's request, the compaction of the earth on a number of lots was reviewed and Hallmark was notified that the contractual compaction standards had not been met. Robinson tried to reach Bill Neri by phone, but was unsuccessful. On July 12, 2002, he sent a letter to Gail Kimmey at defendant's address. Robinson testified that the letter discussed the contract and asserted that Hallmark had found problems related to the compaction of the fill and its failure to meet the compaction standards set out in the contract and the project plans. The letter asked Neri to contact Hallmark to let it know how defendant planned to address the compaction issue. The letter gave defendant until July 22, 2002, to respond.

¶ 15 Robinson testified that there was a sense of urgency regarding the compaction issue because, by virtue of the sales contract with Summit (and pressure by Summit), Hallmark had to get the lots remediated before the sale to Summit could be completed. Robinson testified that he did not know if Neri had responded to the July 12 letter, because he sent letters to defendant after that and had

received two voicemail messages from Gail Kimmey (but could not remember the exact timing of events). Robinson testified that, on July 15, 2002, he received a voicemail from Kimmey and he had the message transcribed by his assistant. Robinson testified that, in the July 15 phone message, defendant conceded that there was some further compaction required on at least some of the lots in the project.

¶ 16 On July 16, 2002, Robinson sent another letter to defendant, which included a copy of the report that Hallmark had received from TSC, outlining the compaction and grading issues TSC identified at the project. Robinson explained that the TSC report was included to give defendant the facts that it could respond to and to determine how defendant measured and kept records of the compaction at the project. Robinson testified that defendant did not provide plaintiff with any records. Robinson also testified that the report included the boring results of TSC's investigation and TSC's recommendations that the excavation work be remediated and that test pits be dug on the lots to confirm the soil compaction.

¶ 17 Robinson testified that, at this point, Hallmark was hoping to work with defendant to fix the compaction issue. On July 17, 2002, Kimmey left a second voicemail for Robinson, and this was also transcribed. Robinson testified that Kimmey stated that there were at least two lots that defendant had to complete the compaction for, as well as other issues. On July 22, 2002, Robinson sent defendant a responsive letter indicating that Hallmark needed to get going on the compaction issue and asking for any logs or a technical response that defendant had to the TSC report.

¶ 18 Robinson testified that, other than the two voicemail messages, defendant did not respond to Hallmark's inquiries. Further, defendant did not address the compaction issue to Hallmark's satisfaction. After July 22, 2002, Hallmark retained Rubloff Excavation to undertake the remediation of the lots on the project site. Bob Dunning, an engineer with Rubloff Development,

headed the remediation assignment for Rubloff Excavation; TSC was hired to oversee the remediation on the project.

¶ 19 Robinson explained that Hallmark did not open the job to bidding because Summit sent it a cost-estimate for the remediation work totaling nearly $500,000, which Hallmark believed to be high. Because Hallmark needed to fix the problems quickly, Robinson asked that Rubloff Excavation be retained to perform the work on a time-and-material basis. Dunning was directed to work with TSC and Rubloff Excavation to bring the lots to the compaction standard originally planned.

¶ 20 From July 29 to September 3, 2002, Rubloff Excavation worked on remediating the lots. It submitted three invoices to Hallmark, the first totaling $41,397.50, and the next two totaling $93,905. Hallmark paid the first invoice with a check issued by Ticor Title Insurance Company. Robinson explained that this occurred because the closing of the sale of the project property would have been occurring soon, and it was Hallmark's usual practice to use a title company in a closing. Hallmark also paid the full amount for the other two invoices, this time issuing its own check for the payment. Similarly, TSC, which was monitoring the remediation and verifying the compaction of the earth for both Summit and Hallmark, issued invoices for its services. Robinson testified that he was unsure whether Hallmark or Summit paid for the original TSC report. Robinson testified that Hallmark issued a check in the amount of $14,849.64 in full payment of TSC's invoice for its oversight of the remediation. Robinson testified that, all told, the expenses incurred and paid by Hallmark to remediate the project totaled $149,952.14, which is also the amount sought from defendant as damages.

¶ 21 Summit accepted the remediation and eventually purchased the project. Robinson testified that, in addition to the remediation of the building pads, Summit also issued a punch list to Hallmark

consisting of other work to be done, including clean-up work on the sewers in the project. Robinson testified that Hallmark was not seeking damages for that other work. There was also a holdback agreement between Hallmark and Summit, but again, Hallmark was not seeking damages related to that agreement. The only damages sought by Hallmark was for the remediation work.

¶ 22 Robinson testified that the contract between plaintiff and defendant required plaintiff to pay defendant about $339,449. Robinson testified that plaintiff paid defendant about $320,000. Robinson also testified that the terms of the contract authorized written change orders to be placed. However, upon reviewing his file, Robinson did not find any signed change orders.

¶ 23 Robinson also testified that David Mayes was the president of Hallmark at the time the contract with defendant was undertaken. Mayes had been hired in 1999 and was fired in 2001. Robinson testified that Mayes, in his position as president of Hallmark, would have overseen the people who managed the day-to-day activities at the project. Mayes was not, however, still employed by Hallmark when the project was completed or when TSC issued its report to Summit. Robinson testified that Debra Murphy, plaintiff's vice president of sales, served as the interim president after Mayes was terminated and assumed some of his administrative responsibilities. At the time of trial, Dave Branch was Hallmark's president.

¶ 24 Robinson also noted that he did not find any correspondence in his file from defendant that complained about the conditions at the project, asking for a soil tester, or complaining about the uncontrolled dumping of earth at the project.

¶ 25 On cross-examination, Robinson testified that Hallmark was the owner and developer of the project and also served as the general contractor, overseeing all of the subcontractors (like defendant) until the sale of the project to Summit. Robinson testified that, to the best of his

knowledge, Hallmark did not hire a soil engineer before Summit became involved. (We noted that, on the project plans, TSC was listed as the soil engineer.)

¶ 26 Still on cross-examination, Robinson testified that, during the time that Mayes was president of Hallmark, he was vice president. Mayes was also a common employee between Hallmark and Rubloff Excavation. While Robinson handled the entitlement side, getting the permits, approvals, and easements for a project, Mayes handled the contractor's side.

¶ 27 On cross-examination, Robinson testified that he did not recognize defendant's bid proposal. Robinson noted, however, that the first time he would have reviewed the contract between the parties would have been some time after Summit asked Hallmark to remediate the problems with the soil compaction. Robinson agreed that he had nothing to do with drafting the contract and that it was a form contract prepared and used by Hallmark. Robinson also would not have been involved with any change orders that were requested.

¶ 28 Robinson was cross-examined about the contract with Summit. It was initially entered into late in the spring of 2002 and was finally consummated in September or October 2002. Robinson acknowledged that Summit was putting a lot of pressure on Hallmark to close the contract as quickly as possible, and that there were other issues besides the compaction issue that needed to be resolved to accomplish the sale to Summit. Summit purchased nearly all of the project, excepting some presold lots where the construction of townhome units had been completed.

¶ 29 Continuing his cross-examination, Robinson testified that the issue with defendant's work was the compaction of the soil on the building pad and the finished grade regarding the height of the building pad. Robinson testified that he did not have direct knowledge of the issues, but received information from Dunning. Robinson conceded that he did not know if Hallmark had complained

about defendant's work before it entered into the deal with Summit. He also did not know who originally hired TSC, Summit or Hallmark.

¶ 30 Still on cross-examination, Robinson confirmed that Dunning was the person from Hallmark responsible for making sure that the lots were remediated. Dunning also was responsible for making sure that the engineers understood the compaction standard and for working with the engineers.

¶ 31 Robinson was cross-examined about the payment of Rubloff Excavation's first invoice. He testified that Ticor Title held retainage funds, but he did not know whether the check issued by Ticor was from a retainage account.

¶ 32 Next, Robert Dunning testified for plaintiff. Dunning testified that, at the time of trial, he was employed by a company called CES in Sycamore, Illinois, as a civil engineer. He had worked there for about two years and held the title of Branch Office Manager. Dunning testified that CES is a consulting civil engineering firm that performs civil engineering and land surveying in the areas of residential development, subdivision development, and commercial development.

¶ 33 Dunning testified that he was a project manager for residential and commercial developments. In 1980, he became a registered land surveyor, and in 1982, he obtained the designation of professional engineer. Before he worked for CES, Dunning worked for Rubloff Development for five years as vice president in charge of engineering. With Rubloff, Dunning was responsible for being an in-house resource for other Rubloff-related entities and affiliates, as well as working on commercial developments initiated by Rubloff Development itself. Dunning noted that, in March 2000, he started working with Rubloff Development and he left in 2005.

¶ 34 Dunning testified that Parkview Meadows was a residential development consisting of both single-family homes and multi-family townhomes. The project was located on a 40- or 50-acre parcel of land, which Dunning characterized as a small to medium development in the industry.

¶ 35 Dunning described his involvement with Parkview Meadows. Dunning testified that, in the first part of June 2002, Ron Swenson, a partner with Rubloff, asked him to work on the project. Dunning was directed at that time to seek a reduction in a letter of credit. During the latter part of June 2002, the project was offered for sale, and the buyer had issues with the soils on the site. Dunning testified that he saw the July 16, 2002, letter from Robinson to Kimmey with the TSC report attached, which he reviewed. Dunning testified that he also reviewed other TSC reports during the his involvement with the project.

¶ 36 Dunning testified that he remembered receiving and reviewing a TSC report dated July 17, 2002. During the latter part of July 2002, Dunning was directed to work with Summit to determine the costs of remediating the soil problems identified at the project. Dunning testified that both TSC reports were sent to Summit. Summit sent a letter to Dunning dated July 23, 2002, in which Summit described the remediation needed for the soil issues and estimated the cost to be $422,000 for the remediation.

¶ 37 Dunning testified that he believed the Summit estimate was incorrect. He brought in Rubloff Excavation to dig out the problem lots and to replace and compact the building pads so the lots would be suitable for single-family home construction. Dunning testified that, at the end of July, he first visited the project site. At that time, the roads and curbs had been constructed, and the storm sewer, sanitary sewer, and water mains had been emplaced. Dunning testified that, at that time, the site looked like a typical subdivision under construction except for a stockpile of material in the northwest corner of the development, by lots 21 and 23. Dunning testified that there had not been activity at the site for some time before his visit, because he observed weeds growing on the site. Dunning testified that he believed that the stockpile near lots 21 and 23 was located on the back of the lots, and not on the lots' building pads.

¶ 38 Dunning testified that the project called for three retention ponds. The ponds had been excavated, they had weeds growing in them, but they otherwise appeared to be functioning as designed. Dunning testified that he did not see any obvious water issues or trenches dug through the building pads.

¶ 39 Dunning testified that he was not present at the project site on a daily or weekly basis, but was in communication with the workers, including the foreman. Dunning testified that he hired TSC to observe the remediation, perform testing, and to certify to Summit that the remediation had been successfully completed. Dunning testified that the contract with TSC to oversee the remediation was dated July 15, 2002, but was not executed until July 30, 2002.

¶ 40 Dunning testified that Rubloff and TSC and created test pits on certain lots. In addition Rubloff Excavating removed and replaced the fill on lots they already knew about as well as identified other lots for testing and possible remediation. Dunning testified that, at the end of August, the physical remediation work had been completed.

¶ 41 Dunning testified that test pits were dug to determine whether the lot had shallow or deep fill, and to verify that there would not be any problem with the fill or under the fill for those lots with shallow fill. The test pits also served the purpose of certifying that the fill or ground under the foundations would be able to bear the load that would be normal for the building that would be placed there. If they discovered that the soil conditions were not good, then the lot would be completely excavated to native soil and then the pad wold be replaced, compacted, and brought up to grade. Dunning testified that the deepest fill he observed was 11 feet. On a problem lot, all of the fill within the area where the house would be built would be taken out. The area re-excavated generally was five feet outside of the line of the projected footing. On an exhibit, which depicted the grading plan for the project, Dunning pointed out two handwritten changes, the first revising the

building pad grades generally and the second revising the front and back lots 1 and 57. The changes lowered the grades generally so that less fill would be required because the site was short. The plans nevertheless called for pad fill to be compacted to 100% proctor (95% modified).

¶ 42 Dunning testified that the soil problems generally occurred at or below the level of the footings to be placed for the buildings. Dunning directed TSC to prepare a report following the remediation. TSC's report, dated September 4, 2002, opined that the test results on the indicated lots showed that they could bear footings exerting pressures of 3,000 pounds per square foot. TSC also prepared a second report dated September 24, 2002, which contained similar information and a similar opinion.

¶ 43 Dunning identified the 38 lots that had been remediated. Dunning further testified that, so far as he knew, no fill was brought in during the remediation. Rather, they excavated the fill that was already there and re-compacted it to specification.

¶ 44 Dunning noted that, in a letter dated August 13, 2002, TSC identified the lots that were unsuitable and needed remediation. TSC also sent Dunning a second communication dated September 4, 2002, opining that the remediated lots were now suitable for building

¶ 45 Dunning also testified that Summit wanted the project to be remediated quickly. Accordingly, he did not put the remediation project out for bid, but brought in Rubloff Excavation, an affiliated entity, because plaintiff wanted to sell the project property.

¶ 46 On cross-examination, Dunning testified that he did not work with defendant. Before plaintiff entered into sales negotiations with Summit, Dunning was unaware of any issues impacting the salability of the site. Upon his first visit to the project site, Dunning observed that a couple of townhomes and two or three single-family homes had been built.

¶ 47 Also on cross-examination, Dunning testified that, before beginning the remediation, no bids or proposals were sought from other companies or Rubloff Excavation, no cost estimations were submitted by Rubloff Excavation, and no written contract was generated. Dunning used the construction plans and the TSC report to prepare his own estimates of the costs of the remediation work on the project site. Dunning agreed that the objective of the remediation was to satisfy Summit so that Summit would complete the purchase of the project property.

¶ 48 Continuing on cross-examination, Dunning testified that TSC was the soils engineer or the geo-technical engineer on the project. (The terms apparently mean the same position.) In addition, Dunning noted that TSC had prepared a soils investigation report before the plans were drafted to undertake the development of the project.

¶ 49 Dunning explained, on cross-examination, how the compaction of soil is tested. The contractual standard for compaction for the project was 100% proctor (95% modified). The maximum compaction for a soil sample is determined in the lab by a geo-technical engineer. In order to determine the compaction of a soil sample in the field, one must make a comparison between what has been done in the field and what was determined in the lab. Dunning testified that the proctor method of determining the soil density in the field can be accomplished in a number of ways. Typically, it is done with a nuclear density tester by firms possessing both the equipment and expertise. Ultimately, the field value is compared against the maximum value as determined in the lab to determine whether the required level of compaction has been reached in the field.

¶ 50 Still on cross-examination, Dunning next testified that he believed that the problems with the soil were caused by excess moisture, but TSC would be the entity that could confirm his hypothesis. Dunning also assumed that defendant placed the fill in the lots, but he did not know when the fill was placed in the lots that needed remediation.

¶ 51 Continuing on cross-examination, Dunning explained that the plans, and particularly plaintiff's exhibit No. 2 showed the undisturbed or natural elevation of the project site. At the southern end of the site, the elevation varied by 8–10 feet. The pad elevation shown on plaintiff's exhibit No. 2 is what the mass excavator (*i.e.*, defendant) would leave. Dunning explained that the compaction specification is the same throughout the entire depth of the fill because the model of the home that may be built on the lot is not known at the time the mass grading is completed. Dunning admitted that he did not know what type of home Hallmark or Summit was planning to construct on the individual lots. Dunning also testified about plaintiff's exhibit No. 19, which showed the depth of the excavation needed to remediate the specified lots.

¶ 52 Dunning also testified about the TSC report to Summit on cross-examination. He testified that TSC identified two alternatives for remediating the soil issues, but which Dunning rejected because they were too costly. Dunning also testified that he used a site plan, which he colored and notated, that outlined the sequence of what lots to do first, what lots were going to be sold, what lots had to be remediated, and what the size of the excavation was needed. Dunning testified that he had given the document to the construction crew and, since August or September, the document had not been seen again. Dunning testified that this was the only document that detailed what was to happen in the remediation and how it was to be completed. Dunning testified that some of the information was available in other documents, such as the sequence of the lots undergoing remediation, and the sequence of certifications.

¶ 53 During further cross-examination, Dunning testified that TSC submitted a proposal for the services they would provide during remediation. They proposed to provide the services of a soils engineer on the site and to report their findings as directed by Rubloff Development. Dunning testified that, before he signed the TSC proposal, he had reviewed two TSC reports, dated June 27,

2002, and July 17, 2002, which formed the extent of his knowledge of the fill at the project site before he was fully involved in the remediation. Dunning testified that the reports indicated that some of the fill was questionable and TSC understood that plaintiff agreed to have the fill removed and then re-compacted. Dunning testified about a certification sent to him by TSC, which included the TSC opinion, based on its engineer's engineering judgment, that the fill now in place was suitable for building. Dunning testified that he gave the certification to Robinson, who would have sent it along to Summit.

¶ 54 Dunning also testified on redirect examination that the costs of the remediation that plaintiff actually incurred were very much less than the costs that Summit had estimated for the remediation. Dunning explained that he selected the remediation method actually used based on the time it would take and the cost it would incur.

¶ 55 Mike Machalinski next testified for plaintiff. Machalinski testified that he is a geo-technical engineer for TSC. He managed the geo-technical department, which is the part of TSC that does soil investigations, takes soil borings, and prepares reports from its investigations. According to Machalinski, TSC did a lot of work on residential home development sites.

¶ 56 Machalinski testified that he was responsible for all of the work done by the drillers who get the samples from the field, the testing of the samples, and the engineers who take the data, compile it, and prepare reports. Machalinski was a registered engineer in the State of Illinois and he testified that he had conducted testing on a mid-size residential project hundreds, if not thousands, of times.

¶ 57 Machalinski acknowledged that he was testifying as an expert witness for plaintiff, and that he was to discuss the testing done at the Parkview Meadows project in Plainfield.

¶ 58 Machalinski testified that, sometime in mid-2002, TSC was hired by Summit to perform testing at the project site. TSC prepared a geo-technical report dated June 27, 2002, which included

a map of the location of its bore-holes. Machalinski testified that he believed that Summit wanted to check the suitability of the building pads to provide proper support for the foundations of the buildings planned to be built. Machalinski testified that he did not actually write the report, but that Pam Mans of TSC did so. Machalinski reviewed the report and its conclusions, signed it, and adopted it as his opinion in this matter.

¶ 59 Machalinski testified that Summit picked the lots that they wanted TSC to check, and TSC went out to the site and took soil borings on what they believed to be the building pads. They drilled at 14 locations and the samples were taken on a continuous basis to depths of 11 to 13 feet below the existing grade. The samples were brought to TSC's lab where they were tested for moisture content, unconfined present strength, and binding weight strength. The tests provided the information used to create the boring logs that were included in TSC's report. TSC then prepared a report setting forth its opinions.

¶ 60 Machalinski testified that the boring logs are generated from a plan that set forth the location of the bore-holes. The boring log also lists the various soil strata that were found as they drilled down into the earth. In addition to noting the strata, observations on ground water were also recorded from the field, as well as the results of the lab testing. In the report, TSC included text describing its field procedures and observations, the testing results, and its analysis and the recommendations to come out of that analysis.

¶ 61 In addition to the original testing, Summit also request that TSC do four more borings, using the same procedures. From this additional drilling, which used the same procedures as in the original drilling, TSC prepared an addendum report.

¶ 62 Machalinski testified that the original site plan was essentially a master grading and drainage plan because it showed the layout of the streets and the lots, the designated building lots, the top of

each building's foundation, and a top-of-foundation elevation. TSC used the site plan and converted it into a boring plan for purposes of its testing. Machalinski marked the locations of the borings for the court.

¶ 63 Machalinski testified that, from the initial round of 14 borings, TSC found that some fill material had been placed on the majority of the building pads. Further, each boring penetrated the fill down to at least the native soil.

¶ 64 Machalinski testified about lot 48 as being representative of all of the boring done on the site. In the lot 48 bore-hole, TSC encountered fill material through a depth of nine feet. Testing revealed that the fill had a moisture content of between 10 and 28%, and the fill had a dry unit weight ranging from 96 to 132 pounds per cubic foot, and, at a depth greater than nine feet, TSC encountered the native soil, which was also granular and it was saturated with water at that depth.

¶ 65 Machalinski explained that, when TSC was drilling a bore-hole through the fill, it was looking for a certain level of compaction to determine whether the fill and the underlying soils are suitable to support a building's foundation. TSC typically applied the 95% modified proctor density to determine this suitability. In reviewing the TSC report, Machalinski formed the opinion that the fill material did not meet the necessary standards for supporting the foundations of buildings built on the pads tested.

¶ 66 Returning to his analysis of the boring from lot 48, Machalinski testified that the moisture content of the first sample from the boring was higher than he would have expected for fill that meets the 95% modified proctor density standard. The sample also had a very low dry unit weight of 96 pounds per cubic foot. The next couple of samples were better, but they still did not meet the 95% modified proctor density standard. The pocket penetrometer (a device that measures the density of the compacted soil) tests for the second and third samples also did not meet the 95%

modified proctor density standard. The boring was 11 feet deep; the fourth sample, from seven to nine feet, did meet the 95% modified proctor standard.

¶ 67 Machalinski testified that the fill in all of the boring samples varied. Further, in some of the borings, there was no fill at all. Machalinski testified that his review of the report showed that there were problems with the fill in lots 10, 43 (second bore-hole), 61, 13, 36, 38, and 46. The fill in lots 15, 32 (first bore-hole), and 51 appeared relatively well-compacted.

¶ 68 Machalinski testified that his opinion, based on the testing, was that the compaction of the fill was erratic throughout the borings. TSC recommended that the foundation excavations be extended through the fill to the native soil due to its determination that the fill was of variable consistency. TSC also recommended that no foundations be built on the fill material if the builder did not want to take any risk of having foundation problems for its buildings.

¶ 69 Machalinski testified that most of the bore-holes were drilled in the middle of the building pad. Further, TSC did not encounter any questionable fill material; rather, the fill was proper to use to compact building pads. The problem was not the soil itself, but the compaction and the variability of the compaction throughout the depth of the fill.

¶ 70 Machalinski testified that one way to remediate the problems with the compaction would be to dig out the soil, dry it, and recompact it. This method was used to remediate the project site.

¶ 71 Machalinski testified that he did not encounter any water levels on the site that should have caused a problem for an excavator to reach the necessary compaction. He believed that the soil conditions at the site were fairly typical for the area for someone working on a site like this.

¶ 72 Machalinski testified that TSC was hired by either Hallmark or Rubloff to come to the site and test the remediation efforts. It was decided to remediate the site by digging up the fill on certain pads, place it back on the pads, and to recompact it. When that work was done, Rubloff hired TSC

to have a soils technician present who could measure the dry weight and the moisture content of the recompacted fill materials so the technician could determine the density of the recompacted fill material. TSC also took samples of the fill and performed the modified proctor test on them to determine compaction values and learn whether the necessary compaction had been achieved. Machalinski testified that TSC also dug test pits to identify where fill was present and where it was deepest so that the pads with the deepest fill could be remediated. Machalinski testified that the lots with the deeper fill levels were the ones that were remediated.

¶ 73 Machalinski testified that a modified proctor test is run in a lab and involves determining the maximum dry weight and optimum moisture content for a certain fill material which is going to be compacted in the field. Machalinski also described how the test was actually performed in the lab.

¶ 74 TSC also prepared reports based on their field technician services. The reports all showed that, for the lots that were remediated, the fill was recompacted and it met the 95% modified proctor standard. As regards the remediation, TSC invoiced plaintiff for the work it performed and the invoices were paid.

¶ 75 On cross-examination, Machalinski read a note on the master grading plan that stated "Suitable pad fill will be determined by the project soils engineer in the field based on field conditions encountered." Machalinski testified that he had never read a note worded like the one on the master grading plan, and he was not sure what it meant. Machalinski did not believe that TSC conducted any soil tests when defendant was working on the project site. TSC did not investigate any of the fill during the work performed by defendant.

¶ 76 Continuing on cross-examination, Machalinski testified that, when TSC was hired by Summit, the mass grading had been completed and the building pads had been constructed as part of that work, and Summit wanted TSC to verify the soil conditions of the building pads. Later, TSC

was hired by Rubloff Development, and it billed Rubloff Development for its work during the remediation. Machalinski testified that he had no knowledge of the contract between plaintiff and defendant relating to the project.

¶ 77 On cross-examination, Machalinski testified that, in 1997, TSC did soil borings on the site to look for soil and ground-water problems that could impact the feasibility or cost of developing the site. Machalinski did not believe that TSC was hired by plaintiff or defendant in 1997; it was a different entity. Machalinski testified that it appeared that the site plan for the project was prepared by Continental Engineers & Associates, and he would expect that Continental would have had a soils investigation report (such as the one completed by TSC in 1997) before preparing the site plans and pad elevations.

¶ 78 Still on cross-examination, Machalinski testified that he had never been to the project site or even seen the project. He did not know how Summit selected the lots to have soil bore samples extracted from them. He also did not know how many lots were remediated.

¶ 79 On further cross-examination, Machalinski testified about what his firm might do in a situation in which it was hired to provide a soils engineer to a project. He testified that, when TSC is first retained to provide a soils engineer, the engineer would be at the site when the excavator begins stripping the topsoil in the building pad and pavement areas to obtain samples of the uppermost soils to verify that they were suitable load-bearing materials. Assuming that the revealed soils were suitable, and assuming that the excavator has to place fill on the building pad locations and on the areas to be paved to build them up, TSC would be present running density or compaction tests on the fill as it is placed and compacted. As part of the testing, TSC would take samples back to the lab so they could run tests on them, so that the field testing of the density could be compared

to the lab result to determine if the compaction complied with the required standard. TSC would also report its findings to the owner or developer.

¶ 80 On cross-examination, Machalinski testified that he believed that the contract called for the fill in the building pad and pavement areas was to be compacted to 100% proctor density or 95% modified proctor. Machalinski explained that the 95% modified proctor determination is based up lab testing the maximum soil density, so the compacted density in the field should be within 95% of the value of the maximum density value calculated in the lab. To reach that standard with the soils appearing at the project site, a sheep's-foot roller could be used. As for taking soil borings, they would be taken at the beginning of the project, but not in the middle of the grading work.

¶ 81 Machalinski was cross-examined about the testing TSC performed on site. He testified that he did not have a proctor to compare the original compaction to, but he believed, based on the borings taken from the building pads, that the fill was not uniformly well-compacted. In other words, the compaction of the fill varied in each building pad instead of being uniform and acceptable.

¶ 82 Machalinski testified on cross-examination that, when he got involved in the project in June 2002, he did not know how long the fill had been in place or who placed it. He testified that, nevertheless, the characteristics of the fill at a depth of one or two feet below the upper zone of it should not have changed from when it was placed.

¶ 83 Machalinski testified that the water table at the project site was pretty consistently found at an elevation of 591 or 592 (feet above sea level) in all of the borings that were taken. Machalinski testified on cross-examination that the lots that were remediated were listed in the summary report. Machalinski believed that the intent was to identify the lots that had fill present that was relatively thick. No effort was undertaken through laboratory testing to make sure that, in the lots with thick

fill, whether the fill also exhibited the variable nature of compaction as had been shown in the soil boring samples. Machalinski also testified that TSC was listed on the plans for the project as the soils engineer, but TSC did not act in that capacity.

¶ 84 Next, Gail Kimmey testified on defendant's behalf. She testified that she was the secretary/treasurer of defendant. She had been with defendant since it was founded in the 1970s, and her duties included managing the office, bid work, and overseeing the bid work completed by her assistants.

¶ 85 Kimmey testified that she is familiar with the project. She performed the earth take-off calculations and the calculations of the quantities of earth in the areas they had to work in and prepared defendant's bid proposal. She explained that the take-off is prepared by digitizing the engineer's plans showing the earthwork. A computer program calculates, based on the difference between the existing and the proposed values of the elevations, the quantities of earth that the company will be dealing with. She begins using the program by entering all of the existing contours. All of the existing ground is assumed to have topsoil, and a soils report gives an indication of the topsoil thickness throughout the site. The amount of topsoil needing to be shipped would be calculated by comparing the existing to the proposed elevations of the streets, building pads, and where the buildings are to be placed. Another surface, the proposed, consisting of final grade elevations and pad elevations, is also entered. All of the information is entered, and the program compares the two surfaces. Kimmey testified that, based on her calculations, the site was short of dirt, meaning that fill material would need to be imported in order to bring all of the project to the proposed final grade.

¶ 86 Kimmey testified that she then prepared a bid proposal, reviewed it with Bill Neri, and then submitted it to plaintiff. Kimmey testified that plaintiff accepted the proposal and returned it, attached to the contractor agreement between the parties.

¶ 87 Kimmey testified that, in the proposal, there were "alternates" listed with monetary values assigned to them. The base contract amount was $339,449, and this amount did not include any of the alternates. The proposal also listed "exclusions." Kimmey explained that the exclusions were items set forth to call the customer's attention to the fact that they are not included in the base contract amount. The bid proposal also included "job specifications" which clearly spelled out the scope of the work contemplated.

¶ 88 After defendant received the returned bid proposal, it began work at the project site. Kimmey testified that she prepared draws 1 through 4 based on the progress of the job, and that plaintiff paid them in full without retaining any amount from them. Kimmey testified that draw No. 5 had never been paid by plaintiff. Likewise, the draw dated October 26 had never been paid. Kimmey created a chart to track the amounts paid and not paid. According to Kimmey, plaintiff paid defendant $311,940.70, and $22,319.30 remained unpaid. These amounts were based on the base contract price.

¶ 89 Kimmey testified that defendant installed a silt fence. She testified that defendant billed plaintiff $5,400 for installing the silt fence because the installation of a silt fence was under the "exclusions" section of defendant's bid proposal.

¶ 90 The next extra, according to Kimmey, was for the removal of trees on the site. Removal was listed as an exclusion. Mayes asked defendant to remove the trees. Defendant sent an invoice to plaintiff, and plaintiff paid it.

¶ 91 Kimmey testified that the next extra was for removing fill that had been mistakenly placed in a retention pond. P.T. Terro apparently placed the fill into the retention pond over the winter. The final extra defendant undertook was regrading occasioned by the activities of the utilities contractor. Defendant submitted invoices for both extras, but plaintiff did not pay on them.

¶ 92 Kimmey testified that the total amount for the unpaid extras totaled $14,470.50. On November 9, 2001, Kimmey sent a letter to plaintiff regarding the amounts that had not been paid, both on the draws and on the extras. The letter further advised plaintiff that defendant would pull its crews off the project until plaintiff responded. Plaintiff sent a response that it would check the site and advise defendant of its findings Kimmey testified that, on November 30, 2001, she sent a second letter to follow up on plaintiff's response. Kimmey testified that the total amount for extras and for the unpaid balance on the contract between the parties totaled $36,789.80.

¶ 93 David Mayes testified pursuant to defendant's subpoena. He testified that, at the time of trial he was working for Church Street Construction, a concrete and excavating company. Mayes testified that, from September 1999 to October 2001, he was president of Hallmark. Before he began working for plaintiff, he worked for U.S. Homes as the land developer superintendent, along with other positions in the industry.

¶ 94 Mayes testified that, while he was president of plaintiff, it was engaged in residential home building. Mayes testified that, on certain projects, he was involved in the entitlement process. For the Parkview Meadows project, however, he was not involved in the entitlement process, but he was involved in the contracting process. Mayes explained that, generally, the land development portion of a residential subdivision project involved taking new land that had been entitled and developing it to a point where the owner can start building homes on it. For example, sewer and water must be installed in the project territory, along with roads, curbs, mass grading, and storm sewer.

¶ 95 Mayes testified that he was involved in contracting all of the various subprojects required to get the project site in shape to build homes on it, including contracting with defendant. He solicited a proposal from defendant. Mayes testified that he considered defendant's bid proposal to set forth details of the work to be performed. Before this contract and project, Mayes did not know Neri.

¶ 96 Mayes testified that the project was extremely short on dirt. Mayes testified that the engineers who designed the subdivision made it very clear to him that the job was at least tens of thousands of yards short of dirt. Plaintiff attempted to sell the project site in its undeveloped state, but was unable to find a buyer due to lack of dirt. Instead, plaintiff decided to go ahead and develop the project and to see if it could make up the shortfall in dirt either by importing it from other nearby developments, or by digging a borrow pit.

¶ 97 Mayes testified that, one way to address a shortage of dirt, is to import it. He explained that a project is termed "balanced" when the cuts and fills are equal and dirt does not need to be imported or exported.

¶ 98 Mayes testified that plaintiff interviewed many mass excavators and the predominant issue in the negotiations was where to get the dirt. Mayes testified that the engineer's estimates of the shortage of dirt were nowhere near to being accurate. Eventually, to accommodate the shortage of dirt, plaintiff divided the project into phases when it became apparent that there was insufficient dirt to bring all of the property up to the appropriate grade. Mayes testified that the phases were chosen so plaintiff could first complete the multifamily homes and get the roads and road rights-of-way up to the appropriate subgrade to allow plaintiff to install storm sewer, sewer, and water. The house pads were relegated to a secondary priority. Mayes testified that phasing the project allowed

plaintiff to find sufficient dirt to complete the first phase (which was about halfway through the mass earth process). The building pads were not completed in phase 2.

¶ 99 Mayes testified that, about midway through the mass earth process, he and Bill Neri decided to adjust the grading of the building pads in phase 2. They agreed to work from the front of the pads to the back as dirt became available. According to Mayes, the changes did not affect the elevations of the pad or the contract process.

¶ 100 Mayes explained that, on plaintiff's behalf, he directed a change in the building pad detail because they had no dirt. The change could be called a step pad, where the back of the lot was lower than the front and could allow a walkout or a lookout basement. The changes saved time for plaintiff because they were able to start marketing the lots and building on them. All of the homes were designed with full basements. This would generate dirt to try to help balance the shortfall because the excavation of the basement would generate dirt that could be used elsewhere.

¶ 101 Mayes testified that lot 44 provided an example. As it was originally drawn, the entire building pad was to be level and at an elevation of 604 feet above sea level. However, as modified, lot 44 was provided with a step pad instead of a flat pad. If it had a flat pad, then when it came time to build the home on it, the basement excavator (not defendant) would dig out the entire pad for the basement, and pour the footings and the foundation walls of the basement.

¶ 102 Mayes testified that a borrow pit was used on the project site. A borrow pit is a hole that is dug to take out the good soil and use it for fill for the roads or building pads. Mayes testified that he told defendant to dig a borrow pit to help with the shortfall of dirt. Defendant used the soil from the borrow pit elsewhere on the project site where it was needed. Additionally, Mayes had a sign stating "fill needed" placed on the site. Despite these efforts, Mayes was unable to resolve the shortage of dirt, but they helped to make up some of the shortfall.

¶ 103 Mayes also testified about the issue of fill arriving on site. He testified that, when others came onto the site dump loads of fill, this led to questions about the suitability and the placement of the fill at the site. According to Mayes, plaintiff's people were not always at the site to supervise the placement of the arriving fill. If the fill was being delivered by outside (*i.e.*, not plaintiff or defendant) sources and defendant's workers were on the site, they would supervise where to place the fill. Mayes testified that, as long as someone from defendant was present, no issues or concerns arose when fill was delivered from an outside source.

¶ 104 An example of the problem was fill delivered by P.T. Ferro. Ferro was a contractor responsible for installing the streets and curbs of the project. During the course of its work on the project, P.T. Ferro mistakenly placed its loads of fill in the retention pond located in the northwest corner of the project property. The fill was dumped into the retention pond after defendant had completed its grading of the pond. As a result of this mistake, defendant was required to remove the mistakenly placed fill and to redo the grading for the retention pond. Mayes testified that he directed defendant to do this work and expected that plaintiff would pay defendant for doing the work.

¶ 105 Mayes testified that, as plaintiff's president, he dealt with any change orders submitted by the subcontractors working at the site. Mayes explained that a change order is an authorization for a subcontractor to do additional or different work than that called for in the contract. Mayes testified that he had the authority to approve the change orders submitted to plaintiff and he did not have to seek any additional approval.

¶ 106 Mayes testified that the soil at the site was pure pit run gravel, a type of soil that he had worked with many times before. Mayes testified that, once all the water had been removed, it was easy to work with because it compacted fairly well. However, the water table a the project site was

high. Mayes testified that the city mandated that the basement floor elevation be higher than the water table. Mayes testified that this was why the building pads were so high out of the ground and also helped to explain why the site was so short of dirt. Mayes testified that he had two dewatering contractors give him proposals as the sanitary sewer was being installed. The dewatering contractors told him that there was nothing they could do. Because of the high water table, the sewer and water contractors had a difficult time installing the sewer and water systems.

¶ 107 Mayes testified that the only time he would hire someone to perform a soils compaction test would be when he had an issue with the soil or the compaction. On this project, Mayes did not have an issue in either regard.

¶ 108 Mayes testified that he was already employed by plaintiff when Rubloff Excavation was started in 2000. Ron Swenson started the business and asked Mayes if he wanted to go into the excavating business. Mayes declined the offer.

¶ 109 Mayes recounted that Rubloff Excavation did work on the utility rights of way while he was on vacation. When he returned from vacation, he found that Rubloff Excavation had placed too much dirt in the utility rights of way and had used the wrong sort of soil to begin with. Mayes testified that he had to hire another contractor to correct the work that Rubloff Excavation had performed.

¶ 110 Mayes testified that the sewer and water contractor had to face the issues on the project site caused by the high water table when the dewatering contractors declined. Wagner Sewer and Water was the sewer and water contractor for the project. Mayes testified that, as Wagner was digging to emplace the sewer and water system pipe by pipe, it had two six-inch water pumps in operation continuously to pump the water out of the trench. This did little good, though, because the water was just recirculated around the project property.

¶ 111 Mayes testified that, after it was discovered that P.T. Ferro had mistakenly filled in the retention pond, he received a phone call from Bill Neri. Neri advised that plaintiff had to remove the misplaced fill from the pond and that it would cost plaintiff money. Mayes testified that he agreed it needed to be done and directed Neri to have defendant do it. Mayes also testified that defendant accomplished that work to his satisfaction.

¶ 112 Mayes testified that, before he left plaintiff's employ, the townhomes on lots 67 and 68 were under construction, and the one on lot 60 may also have been under construction. In addition, the buildings on lots 54, 55, and 56 were being constructed, as well, perhaps, as a few others.

¶ 113 Summing up, Mayes testified that all of the actions and decisions he undertook regarding the project were in his capacity as plaintiff's president. He also testified that all of the work that defendant performed on the project while he was president was to his satisfaction.

¶ 114 On cross-examination, Mayes was directed to review the contract between the parties and acknowledged that defendant's bid proposal was not identified as a contractual document. Mayes testified that the form of the parties' contract was not a standard one, but was one that had been prepared by Robinson and others at Rubloff. Mayes acknowledged that contracts generally had an attachment that described the scope of the work to be performed. Mayes acknowledged that Exhibit B to the contract stated that defendant was required to import soil to the project site if necessary, and that, in fact, defendant did import soil to the project site.

¶ 115 Mayes testified, on cross-examination, that he had no recollection whether there were any changer order entered between plaintiff and defendant. He further could not recall whether he executed any change orders.

¶ 116 Continuing on cross-examination, May testified that, in October 2001, he left plaintiff, and there was still work that needed to be completed by defendant. He agreed that he had no idea of the

discussions between the parties about the completion of the work that occurred after he left plaintiff, and he was not at the project site any time after October 2001. When he left plaintiff, the front parts of the lots were buildable (because fill had been deposited to specification), but the back parts of the lots were not buildable because there was not enough fill present. Upon his departure from plaintiff, Mayes deemed the building pads to have been completed to his satisfaction by defendant. Mayes thought that they would have been buildable at that time. In fact, he believed they were buildable because plaintiff was building on them. For example, townhomes were under construction, some single-family residences were under construction, several specs (speculative homes being built to sell without a contract-buyer already in place) were under construction, as well as sold homes that were getting ready to start construction.

¶ 117 Mayes explained on cross-examination that lots 60, 67, and 68 pertained to townhomes. He was not sure what was to be build on lots 54, 55, and 56. In those building areas, however, structures were being framed.

¶ 118 On cross-examination, Mayes testified that the lots he adjusted with defendant were lots 36 through 47. To the best of Mayes' knowledge, no soil testing had been done on the project while he was involved. Mayes explained that, whether the building pads were compacted to 100% standard proctor (95% modified minimum) was a moot point because when the house excavator went in and dug a foundation for a full basement, all the fill was removed and it was gone. According to Mayes, the contract language regarding the compaction standard was nothing more than boilerplate and it meant nothing in the Parkview Meadows project.

¶ 119 Continuing on cross-examination, Mayes testified that there were significant areas of fill needed on the project because it was short on dirt, and defendant was aware of the shortfall and discussed it coming into the project. Mayes explained that, because the project was so short on dirt,

he decided to concentrate on the roadways because the fill for the building pads would be a moot point once the basement was dug out. Whenever there was enough dirt, defendant would create a pad and bring it up as far as he could. According to Mayes, the front parts of the pads in phase 2 were up to the specified grade, but the back parts of the pad were not because of the lack of fill.

¶ 120 Mayes explained on cross-examination that the project property was short of dirt far beyond the engineer's estimates. When Mayes started with plaintiff, he raised the question of why plaintiff was engaged in developing the project when it was 50 miles away from plaintiff's headquarters and was so short on dirt. Despite the shortage, Mayes expected the defendant would perform the fill and excavation in conformance with the contract between the parties.

¶ 121 On cross-examination, Mayes testified that the water problems on the project site were not known or appreciated at the outset of the project, but they were encountered and discussed during the construction of the sewer and water lines. Mayes agreed that there could have been a geo-technician's report completed by TSC.

¶ 122 According to Mayes, defendant did register some written complaints during the course of its work. Plaintiff should have retained copies of the written complaints in its files.

¶ 123 Mayes allowed on cross-examination that it could have been defendant's responsibility to hire a soils tester. If there were areas of significant fill in a portion of the project site, it was defendant's responsibility to place it. Moreover, if there were a fill of a certain depth, say 10 or even 7 feet, defendant would have been required to compact it to the contractual standard, namely 100% standard proctor density, 95% modified minimum.

¶ 124 Winding up his cross-examination, Mayes testified that he did not know whether fill was brought into the phase 2 area. Mays also confirmed that, in October 2001, he was fired by plaintiff, and his departure from plaintiff's employ was not amicable.

¶ 125 On redirect examination, Mayes confirmed that defendant's bid proposal and the contract between the parties called for payment to defendant of $339,449. Mayes explained that payments to the mass excavator are typically made as progress draws and made when the excavator invoiced them. Mayes testified that, when he received invoices from defendant, he would look to the bid proposal to determine whether plaintiff should make the payments.

¶ 126 Mayes clarified that the borrow pit was not part of the original site design. Instead, it was something Mayes developed in conjunction with defendant to generate dirt for use on the project site. Mayes also testified that there was no determination by a soils engineer regarding the suitability of the fill used in the building pads during the course of the project.

¶ 127 William Neri next testified on defendant's behalf. Neri is president of defendant, a mass excavation contractor handling commercial and residential site excavations, located in Lake in the Hills, Illinois. Neri described mass excavation work as taking a piece of raw land and turning it into a subdivision for housing, or a commercial site for warehousing, office buildings, or retail ventures. Neri testified that he represents the third generation of his family to run defendant, and he has been involved in defendant's endeavors since 1975.

¶ 128 Neri testified that defendant has 60 to 65 employees. Its book of business generally runs about 70% residential and 30% commercial, although it may vary with the economic conditions at the time. Defendant usually works within an 80 mile radius of its headquarters, and this area includes DeKalb, Lake, McHenry, Boone, Kendall, and Du Page counties. The residential projects range in size from 20-25 unit subdivisions to a Plano subdivision that is in excess of 5,000 single-family homes. At the time of trial, defendant had between 12 and 15 projects underway, in varying stages of progress.

¶ 129 Neri testified that defendant enters a project and will rough it in, meaning that it will do mass grading first. It then waits for the underground contractors to come in and emplace their structures (like water, sanitary sewer, storm sewer, and other utilities). Once the underground contractors are finished, defendant will return to the project and complete a finish subgrade, which means prepare the streets for the asphalt contractor, and complete the grading regarding parkways and backfilling the curbs. This means that there is usually a large lapse in time between doing the mass grading and the finish grading.

¶ 130 Neri testified that he oversees defendant's operations in the field during a typical residential project. He will be at the project site every day. Neri testified that Gail Kimmey is the other officer in the company, and she is the secretary/treasurer of defendant. Neri testified that he is familiar with the project at issue, because defendant did the mass grading so far as stripping the topsoil, excavating the retention ponds, building the roadway structures, and grading the lots. Neri was the job superintendent for the project and recalled that he was on the project site between 70 and 80% of the time.

¶ 131 Neri explained that stripping the topsoil meant taking off a foot to two feet of the uppermost black dirt and piling in a location so it can be re-spread around the homes or for use in other, nonstructural areas. On the project at issue, the topsoil strip was to a depth of about a foot. Excavation of the retention ponds involved digging them out and grading them. Building the roadway structures meant creating a subbase underneath the asphalt and curb. It is below the grade for the existing ground after the topsoil is stripped and encompasses a compacted fill surface on which the stone base for the roadway would be laid, followed by the asphalt and the curb and gutter.

¶ 132 Neri testified that, on the project, defendant was requested to complete phase 1 and to go into the phase 2 area and create just the roadways. The work on the project began during the first week of May 2000. Neri testified that the project site was substantially short of dirt.

¶ 133 Neri testified that he dealt with Dave Mayes from plaintiff. The contract between the parties called for the dirt for the building pads and other areas to be compacted to a 95% modified proctor standard. Neri testified that defendant's compaction efforts reached that standard. Defendant achieved and confirmed the standard by employing visual proof rolling with sheep's-foot equipment. After compacting the soil using the sheep's-foot roller, Neri tested the compaction with a proof roll using a loaded, rubber-tired machine and watching the deflection of the earth underneath the tires. Neri testified that the least amount of deflection is needed to achieve the contractual 95% density. Neri used his heavy equipment to conduct the proof roll.

¶ 134 Neri testified that TSC provided the soils engineer for the project. Neri testified that he never saw anyone from TSC perform any testing on the compactions defendant performed; likewise, he did not see anyone from TSC test the suitability of any of the incoming fill. Neri testified that, in the sites he had been involved with since 1975, the mass earth excavator had never hired the soils engineer.

¶ 135 Neri testified that a term pad detail is something an engineer draws before laying out the subdivision. It provides for the earth-moving contractor a design to follow when creating the building pads. Neri noted that, on the site plan he used, there was no pad detail, only a verbal description that the top of the foundation should be at minus three feet relative to the pad.

¶ 136 Neri emphasized that, because the project was short of dirt, it was divided into two phases. The idea was to get the right of way, which would be property line to property line in the street area to the specified grade so that the underground contractors could bury their sanitary sewer lines and

the water and gas mains. Neri and plaintiff decided to break the project into phases with Lots 50 and 8 establishing a boundary line, because there were some specially made culverts that would be placed near there for drainage from the retention ponds. The culverts had not yet been fabricated, so Neri decided that defendant would stop with phase 1 and transfer its equipment to the phase 2 area so it could complete the roadway structures. Neri testified that he wished to establish the subgrades for the lots in phase 2. In the process of constructing the roadway structures in the phase 2 locations, defendant needed to bring in fill for those areas.

¶ 137 Neri testified that defendant was to handle incoming fill which was being imported to the project site. Defendant was to place and compact it as it was brought in. When defendant excavated the retention ponds, the site remained substantially short of fill material. As a result Neri and Mayes agreed to dig a borrow pit that defendant used to complete the roadway structures. Neri and Mayes also agreed to changing the pad detail in order to generate more fill (actually, to use less fill in creating the building pads, leaving more fill available) to be used on the site. Neri and Mayes also discussed by how many thousands of yards short that the job was, and they looked for any available source of fill to expedite the construction. According to Neri, Mayes emphasized that all of the proposed homes to be built on the project site had full basements, so he and Neri decided to adopt a pad design where they would build up the front part of the building pad and taper it to the back of the lot on those lots where the building pad was high. Defendant would also take soil from those lots and partially excavate the basement areas, so it could use the fill generated in this manner and the basement excavator would have less earth to dig out and haul off the site.

¶ 138 Neri also testified about a berm area on the project site located along Highway 59. Because the fill did not need to be high quality, they decided to use lower quality fill and reserve the higher quality fill for the streets.

¶ 139 Neri testified about the retention pond in the northwest area of the project site. He testified that defendant had finished the pond and replaced the topsoil after the underground contractor had come in and buried the piping that drained storm water into the retention pond. During the winter, plaintiff elected to have fill brought onto the project site. The entity bringing in the fill mistakenly filled in the retention pond with four or five feet of fill, bringing it to the level of the nearby playground area. Neri testified that, as a result of this mistake, the fill needed to be removed to restore the area and bring it in conformity with the site plan. Defendant performed the work of removing the fill, and repaired the retention pond, regrading it, and replacing the topsoil.

¶ 140 Another of the site's retention ponds was initially excavated by defendant, and it was required to return to it later and perform additional work. Because of the high water table at the site, the underground contractor ran pumps continuously to allow it to continue its work, resulting in erosion at the site from the water running across the lots and into the retention pond. The water also caused the formation of crevices in the retention pond that were one or two feet deep. In addition, the underground contractor disposed of the spoils from digging trenches and emplacing the various utility lines into the second retention pond. Defendant repaired the second retention pond in a manner similar to the way it repaired the first one.

¶ 141 Neri testified that, when defendant had workers at the project site, they supervised the placement of the incoming fill by showing the drivers the areas to place it, and also by judging what the fill could be used for. If the fill was determined to be for structural areas, defendant would place it and compact it. If defendant's workers were not present at the site (and after defendant had ceased working on the job), then the fill was not inspected, tested or compacted by defendant.

¶ 142 Neri testified that he agreed with Machalinski's conclusion that the soil borings showed a high moisture content, but he disagreed with the conclusion that some of the fill was not suitable.

Neri testified that it was his opinion that the fill was suitable, but it was just high in moisture. Neri testified that, on lot 48, he observed the excavation of a basement, which filled with water, sat for two months without a foundation ever being poured, after which the hole was backfilled with loose soil. Neri testified that he believed it was backfilled because the buyer backed out of the sale, and plaintiff elected not to go ahead with constructing the house. Neri also testified that the underground contractor ran six-inch pumps all the time while it was working at the project site. Neri noted that a six-inch pump will move 1,700 gallons of water a minute.

¶ 143 Neri testified that an undercut means stripping the topsoil off of a site to the bearing soil. This generates a ton to a ton-and-a-half of material depending on the amount of fill going in. In addition, the city or the soils engineer may require an additional six to eight inches of soil to be removed and replaced with stone. Neri testified that defendant did not perform any undercuts because the budget did not support that work, and defendant did not agree in the contract with plaintiff to perform any undercuts. Instead, Neri included undercutting as an alternative in his bid proposal.

¶ 144 Neri testified that defendant invoiced plaintiff for the installation of 2,700 lineal feet of a silt fence, totaling $5,400. Defendant also invoiced plaintiff for the rework of the second pond for a total of $6,418 to fix the problems associated with the erosion and misplaced utility spoil. Defendant sent two invoices for its additional work at the northwest retention pond. The first invoice, totaling $5,800, covered the work due to re-excavate the pond due to the mistaken placement of the fill, and the second invoice, totaling $2,252.50, covered the regrading and replacement of the topsoil.

¶ 145 Neri testified that Gail Kimmey, at his direction, executed the contract between the parties. Neri described the contract as "boilerplate," and stated that defendant's bid proposal showed exactly

what it planned to do on the project site. Neri noted that the bid proposal had defendant placing imported soils to structural fill, but it did not mention that defendant would be responsible for hauling the imported soils to the project site. Neri also pointed out that clay import was to be placed as structural fill in the proposal, and as an alternate, defendant would use "clay borrow in lieu of clay import." Neri testified that the alternate was actually executed because defendant dug borrow pits and stepped the pads.

¶ 146 On cross-examination, Neri testified that the parties' contract required written change orders, but such a provision was not a standard provision. Instead, change orders in the field generally did not require a signature, especially when Neri was dealing directly with plaintiff's president. The "scope of work" section of the contract stated that defendant was responsible for structural fill and placement of imported materials, as well as exporting materials if necessary. Neri characterized this section as "boilerplate."

¶ 147 Still on cross-examination, Neri testified that defendant did not import any soils with its equipment; rather, defendant supervised the placement and performed the compacting of the imported material. Neri believed that 20,000 to 30,000 yards of material, including that brought in during the winter (and mistakenly placed in the retention pond), were imported into the project site. Neri testified on cross-examination that some of the lots required only a little amount of fill, and very few lots had fill extending below the footing level. Neri illustrated his point by noting that Mayes had proposed foundations with 9½-foot walls. If the top of the foundation is at the grade set forth on the site plan and one subtracts 9½ feet plus another foot (representing the topsoil) from the contour lines, this will place the footing of the foundation below the existing grade in most cases, leaving only three or four lots that will have fill below the footing. Additionally, Neri disagreed with TSC's conclusion that the fill was not suitable to support the foundations for the homes.

¶ 148 Neri also testified on cross-examination that he asked Mayes to hire a tester numerous times, but Neri would not hire a tester on the project (perhaps because that would place the tester into a conflict of interest). Neri believed that defendant satisfactorily completed the project. Regarding lots 46 and 47 (which Kimmey had deemed incomplete), Neri observed that they were short of fill on the back property line to bring that part of the lot up to the easement grade for the utilities and storm sewer. He also observed that the actual pad grades met the basement footing elevation.

¶ 149 Continuing on cross-examination, Neri testified that the changes in the grade of the building pads were discussed in plaintiff's office before the contract was signed. The parties agreed to get the pad to the basement footing grades (although this amendment does not appear to have been reduced to writing). After that point, plaintiff would take it from there. Neri believed that, if plaintiff had called to finish the pads beyond basement grade, it would have been an extra to the contract.

¶ 150 Neri attempted to explain Mayes's testimony that defendant would be called out to the project again when dirt became available. Neri interpreted the testimony to mean that defendant would come and backfill the streets and parkways because the material to do the backfill had become available. Neri testified on cross-examination that he and Mayes discussed that, if defendant were on-site at the time the backfill became available, defendant, as a favor, would level the fill. However, plaintiff placed the fill and leveled it, and Neri did not know if plaintiff compacted it.

¶ 151 Neri was cross-examined about a message from defendant to plaintiff admitting that defendant still had work to do on the project site, including completing grading and compaction. Neri testified that the message was conveyed by an April 8, 2002, fax from Sherry Doseman to Deb Murphy of plaintiff. Neri testified that he did not authorize Doseman to send the message and noted

that she was a clerical secretary without the responsibility to make policy for defendant. Another portion of the fax stated that defendant had, over the 2001-2002 winter, placed more fill on lots 45, 46, and 47. Neri admitted that he excavated fill from one of the retention ponds, at the request of the village, and took it to lots 45, 46, and 47.

¶ 152 Neri was cross-examined about his opinion that defendant had fulfilled the compaction requirements. Neri testified that his opinion was based solely upon the use of the equipment. Neri was very familiar how TSC would determine how a site had reached it compaction requirement. Neri testified that, because he had been in the industry long enough, he could tell the deflection on the equipment doing the proof rolling, and so he used no other method to determine compaction. Neri possessed a penetrometer which checks force required to penetrate the earth to a certain depth, but the device is not the same as a nuclear tester, and Neri did not use in on the Plainview Meadows project.

¶ 153 During cross-examination, Neri was challenged about his assertion that TSC was to be the soils engineer on the project. Neri was unable to find in the parties' contract a provision making that designation. He explained that he bid proposal referenced 1998 report by TSC, and he just assumed that TSC would be the soils engineer. On redirect examination, he was directed to the site plans, where, on the last page it stated that TSC was the soils engineer.

¶ 154 Still on cross-examination, Neri testified that Mayes told him that the fill at the site was all pit run gravel. The job was on an extremely tight budget. There was to be no undercutting. The pit run gravel was put in under all of the streets, and all of the streets passed compaction requirements. Likewise, the building pads all passed compaction requirements until they ran out of soil. When Neri suggested to plaintiff that TSC come out to the site and test the compaction, Mayes told him there was no need for plaintiff to spend the money for such testing when there was zero

deflection under the earthmoving equipment. Neri admitted, however, that he did not send a letter to plaintiff or otherwise put them on notice about his discomfort in performing the excavation work without a soil tester.

¶ 155 Neri confirmed on cross-examination that grading the utility spoils was part of defendant's allowance included in the contract.

¶ 156 Neri admitted that he had seen plaintiff's letter demanding that defendant return to work at the project site. Neri testified, however, that defendant never returned to the project site to perform any services in response to plaintiff's letter because plaintiff owed defendant a substantial amount of money. Neri noted that he did return to the site several times, but not to work or to perform testing. Regarding the testing result, Neri asserted the problems arose from fill placed by others and not defendant.

¶ 157 On cross-examination, Neri testified that defendant encountered severe water problems on the project. But he criticized the TSC report because it noted the location of the water table two years after the job had been completed. Neri agreed that the water content of the on-site soil was high and the TSC soil borings also indicated a high moisture content. Neri also testified that he believed that the borings were bored into virgin soils, so the basement footing grade should have been at the level of the virgin soil. Neri did not think that the entire building pad could or should be condemned on the basis of a single three-inch bore-hole. Additionally, according to Neri, the problem fill was placed by plaintiff, not defendant.

¶ 158 Continuing on cross-examination, Neri described the work defendant performed as a result of the changes required by the project site's shortfall of fill. Neri testified that on lots 57 through 50 and 1 through 8, fill was borrowed from the backside of the pads for use elsewhere. On lots 64

through 58 and 65 through 68, he pre-excavated the basement areas and used the material to build the roadway rights of way in phase 2. Defendant did the same thing in several other lots.

¶ 159 Neri maintained on cross-examination that he and Mayes had agreed on a plan to handle at least 30 lots in the subdivision by creating step pads, with the grade of the lot tapering from the front to the back. Neri testified that, with the 9½-foot height of the basement walls, the footings for the basement foundation would be at the same grade as the existing soil of the site. Neri noted that he and Mayes planned to gather fill material by using stepped pads and tapering the grade of the lots from front to back. Neri concluded that the fill that was unevenly compacted was simply material that had been placed by another (not defendant) to be used for backfill around the foundations and help manage drainage at the project site. Neri discussed that he and Mayes intended for defendant to complete the heavy part of the mass excavation, complete the roadways to allow the utilities to be put in. If defendant did this, then, according to Neri's conception of his and Mayes' plan, plaintiff would deal with the soils it encountered when it was building out each lot. According to Neri, their plan called for defendant to bring the property line to grade, the parkway to the sidewalk, and the sidewalk line to grade. Thereafter, the lot could be tapered to the rear property line.

¶ 160 Following the presentation of the evidence at trial, the trial court eventually issued its ruling. The court determined that defendant breached its contract with plaintiff, primarily based on Machalinski's testimony about the deficiencies of the compaction. The trial court noted that there was not expert testimony to controvert Machalinski's testimony and apparently chose to credit this testimony above Neri's and Mayes' testimony that defendant complied with the contractual standards. The court then found that the cost of the remediation was the proper measure of damages for plaintiff's damages. The court also considered defendant's countercomplaint and held that, although it was not entitled to the money withheld from payment on the base contract, it was entitled

to the extras it invoiced plaintiff for. From this judgment, defendant timely appeals and plaintiff timely cross-appeals.

¶ 161 II. ANALYSIS

¶ 162 We turn first to defendant's appeal. Defendant first argues that the trial court's judgment, that defendant breached the parties' contract by failing to meet the compaction standard required by the contract, was against the manifest weight of the evidence. We review the trial court's judgment in a bench trial to see if it was against the manifest weight of the evidence. *Kunkel v. P.K. Dependable Construction, LLC*, 387 Ill. App. 3d 1153, 1157 (2009). A trial court's judgment is against the manifest weight of the evidence when the opposite conclusion is apparent or when its findings appear to be unreasonable, arbitrary, or not based on the evidence. *Kunkel*, 387 Ill. App. 3d at 1157. The trial court, acting as the trier of fact, was in a superior position to gauge the credibility of the witnesses and to determine the weight to be given to their testimony. *Kunkel*, 387 Ill. App. 3d at 1158. When contradictory evidence that could support different conclusions is presented at a bench trial, the reviewing court will not disturb the trial court's findings unless a contrary determination is clearly apparent. *Kunkel*, 387 Ill. App. 3d at 1158.

¶ 163 Defendant initially contends that the trial court's determination, that defendant breached the parties' agreement because its efforts at the project site failed to meet the compaction standard in the agreement, is against the manifest weight of the evidence. In particular, defendant argues that the expert testimony showed that it used the appropriate standards and equipment for conducting field compaction of the fill material, challenges the unfavorable testimony of the expert, maintains that plaintiff breached the contract so defendant pulled its crew off the site before any testing of the compaction of the fill was performed, and contends that the issue of defendant's compaction arose only after plaintiff decided to sell the project (and well after plaintiff had stopped paying out on the

contracts). These contentions, according to defendant, demonstrate that the trial court's determination that defendant breached the contract was against the manifest weight of the evidence. We disagree.

¶ 164 We consider each of defendant's contentions on this point in turn. Defendant first claims that Machalinski's testimony showed that it used the appropriate equipment to achieve the contractually mandated standard of compaction of the fill material in the building pads. Because it used the equipment purportedly vouchsafed by Machalinski, defendant appears to infer proper equipment means proper result. Defendant's reasoning does not track, especially in light of Machalinski's actual opinions regarding defendant's work at the project site. First, the use of the equipment does not necessarily guarantee success. Second, Machalinski repeatedly testified that the compaction of the fill that was tested was variable, meaning in some places it appeared to be well-compacted, and in other places it was not. Moreover, the variability often occurred within a single 11- to 13-foot sample (*e.g.*, Machalinski's testimony about the sample from lot 48, describing the variation in compaction among the different two-foot bands of the sample). Thus, while Machalinski agreed that defendant used the proper equipment which, if properly used, could reach the contractual compaction standard, he also testified that the standard was not met based on the testing he undertook which showed variable compaction levels, both throughout the project site as well as in some of the individual samples themselves. Machalinski's testimony, then, contradicts and refutes defendant's inference that the right tood for the job will result in the satisfactory completion of the job. Accordingly, we reject defendant's initial contention.

¶ 165 Defendant next challenges the conclusions of Machalinski and the trial court's understanding of those conclusions. Defendant notes that the trial court held that Machalinski's opinion was "that the fill did not meet the required compaction standard across the site." Defendant complains that

the trial court did not provide a cite to where in his testimony Machalinski offered this opinion. Defendant then notes that, when asked about his opinion, Machalinski testified that he did not "believe we got that specific." Defendant argues that the opinion regarding defendant's failure to meet the compaction standard across the site was unsupported by the other testimony, particularly that offered in support of defendant's case. We disagree.

¶ 166 As an initial observation, defendant truncates the trial court's actual version of Machalinski's opinion. The trial court held that Machalinski's opined "that the fill did not meet the required compaction standard across the site and that there was no uniformity in the soil failure." Defendant's complaint that the trial court did not provide a citation for this opinion is without merit. We have carefully reviewed the record and Machalinski's testimony, and we hold that the trial court's statement was a fair summary of Machalinski's opinion. We base this on, among other testimony, Machalinski's own words. For example, when testifying about the testing of lot 48, Machalinski testified: "I don't feel that the fill uniformly met that criteri[on] [the 95% modified proctor density standard]." In testifying about the project as a whole, Machalinski testified, "I would say the fill looked relatively well-compacted in some of the borings but less so in others." Finally, in testifying about his opinion concerning the entire project site, he stated:

> "We recommended that consideration be given to extending foundation excavations through the fill material. *** [I]t would be our recommendation and opinion that I would not rely upon the existing fill to support foundations."
>
> ***
>
> [I]t was my opinion that the borings were erratic [regarding compaction] and I thought that was the trend that was out there [throughout the site]. *** [I]t appears that the fill was of variable inconsistency."

Viewing this specific testimony as well as the entirety of Machalinski's testimony and the record as a whole, we conclude that it all supports the trial court's determination regarding the content of Machalinski's opinion.

¶ 167 As to defendant's contention regarding the support for that opinion, we note that Machalinski testified that it was standard in his industry to evaluate the compaction of fill across a site by taking bore-holes of a number of lots and evaluating the soil compaction and other properties in the sample. Thus, there was testimony to support Machalinski's opinion. Defendant's concern that testimony from its witnesses did not support Machalinski's opinion only states the obvious because Machalinski's opinion is unfavorable to defendant and supports plaintiff, just as defendant's witnesses' testimony is unfavorable to plaintiff and supports defendant. Accordingly, we do not believe that the trial court's view of Machalinski's opinion was against the manifest weight of the evidence or was otherwise unsupported. We reject defendant's contention on this point.

¶ 168 Next, defendant, in supporting its contention that the trial court relied on an unreliable opinion delivered by Machalinski, suggests that it was plaintiff that first breached the parties' contract, not defendant. Defendant points to testimony delivered on its behalf that it had largely completed its duties under the contract by the end of the 2000 building season. Defendant also looks to Kimmey's testimony that its outstanding obligation under the contract was limited to only two lots, where much of the soil compaction issues were located. But defendant minimizes this by arguing that, because plaintiff did not pay it for any work after October 2000, defendant was justified in not completing its obligations under the contract.

¶ 169 We note that plaintiff presented evidence that it was authorized under the contract to retain up to 10% of the amounts due on each progress payment as retainage, to be paid to defendant upon the completion of the contract. About $22,000 of the roughly $340,000 contract was not paid to

defendant, even though plaintiff had been making the progress payments in full. We believe that the $22,000 reasonably could have been deemed to be retainage by the trial court based on the evidence presented and the terms of the contract between the parties. In addition, defendant sent a letter, albeit Kimmey and Neri testified that it was without authorization, acknowledging that it had not finished its work on the project site. Likewise, Kimmey testified that defendant had work left on the project site even after completing the bulk of its work at the project site. Thus, there is evidence from which the trial court reasonably could conclude that defendant had not completed its obligations under the contract. Therefore, such a holding is not against the manifest weight of the evidence.

¶ 170 Coupled with the holding that defendant had not completed its work and that plaintiff had not breached by withholding a retainage, is the fact that plaintiff, upon learning of the problem with the soil compaction at the project site, sent letters to defendant demanding that defendant remediate the problem. Defendant acknowledged receipt of plaintiff's letters and also acknowledged that it did nothing in response to them. Thus, there is evidence in the record controverting defendant's position and supporting plaintiff's so that the trial court's judgment was not against the manifest weight of the evidence.

¶ 171 Defendant's final sub-contention, that plaintiff did not notice any problems with compaction until it wanted to sell the project property to Summit, is simply a nonstarter. While it appears true that plaintiff discovered the problems with soil compaction in conjunction with a desire to sell the project property, that timing does not have any impact on the evidence that the contract called for a particular compaction standard, testing revealed that the compaction was suspect throughout the property, plaintiff informed defendant of the problem, and defendant did not act to remedy the

problem. Plaintiff's motivation, if any, then, has no bearing on the trial court's determination that defendant breached its obligations under the contract. Therefore, we reject the argument.

¶ 172 Defendant next argues that the trial court's determination that plaintiff was entitled to damages incurred in remediating 36 lots was against the manifest weight of the evidence. Defendant argues that the TSC testing supervised by Machalinski dealt with only 16 lots, and Machalinski's testimony showed that some of those lots were satisfactorily compacted. Defendant contends that evidence was not introduced showing that each of the 36 lots that were remediated required remediation. Defendant concludes that the award of damages for all 36 of the remediated lots was against the manifest weight of the evidence.

¶ 173 We disagree. Dunning and Machalinski both testified about the remediation efforts. Machalinski identified the problem with the fill as uneven compaction throughout each sample (that had a problem) as well as throughout the project property. Machalinski also noted that the lots that were tested with shallow amounts of fill were generally satisfactorily compacted. (Indeed, defendant noted the lots that Machalinski testified were acceptably compacted in trying to demonstrate that plaintiff should recover for only eight or so lots demonstrated to have problems with compaction.) Dunning testified that the decision was made, based on the testing, to remediate the lots with deeper amounts of fill. Additionally, test pits were dug on the lots to be remediated, and these pits also indicated whether there were problems with the fill. We deem the choice to concentrate on lots with deeper fill in conjunction with test pits to be a reasonable choice based on the evidence. The evidence also indicated that time was of the essence, so testing each lot in the fashion that TSC tested the original 16 lots may not have been an acceptable option; in any event, the test pits dug in the lots ameliorated any concerns over testing, as the test pit would provide a quick check of whether the lot required remediation. The trial court credited the testimony of Dunning and Machalinski in

determining that plaintiff was entitled to recover damages for each lot's remediation. We cannot say, based on the evidence in the record, that this determination was against the manifest weight of the evidence.

¶ 174 Next, defendant challenges $41,397.50 of the damages award on the basis that plaintiff was not clear as to the source of this payment from plaintiff to Rubloff Excavation. Defendant appears to be attempting to insinuate that plaintiff did not pay the amount, which corresponded to an invoice sent to plaintiff from Rubloff Excavation. Additionally, defendant notes that Robinson's testimony about the payment to Rubloff Excavation being drawn from monies held by Ticor Title on plaintiff's behalf for the closing with Summit, was unclear and imprecise, and raises doubt as to whether plaintiff, instead of Summit or some other entity, paid the funds, thereby incurring damages in that amount. We disagree.

¶ 175 Robinson testified that the funds were paid from Ticor Title, the company that was holding funds on plaintiff's behalf in anticipation of the closing between plaintiff and Summit. We note that the invoice submitted by Rubloff excavation jibes completely with the Ticor-drawn check in payment of the invoice. Robinson explained that plaintiff directed Ticor to pay Rubloff Excavation out of funds Ticor was holding for the close. Defendant presented no evidence to demonstrate that the transaction did not occur as Robinson represented. Additionally, that Robinson was unable to state how Ticor released the funds from its holdings does nothing to invalidate the inference that plaintiff deposited money with Ticor and used some of that deposit to pay the invoice to Rubloff Excavation. Accordingly, we reject defendant's argument on this point.

¶ 176 Next, defendant argues that the trial court erred in failing to award it the full amount of damages claimed, both for the extras and the remainder due under the contract. Defendant reasons that, because the trial court erred in finding that it breached the contract when the evidence showed

that plaintiff breached, it is entitled to the roughly $22,000 unpaid to it under the contract. Defendant's contention fails, however, because we do not overturn the trial court's judgment on the breach of contract; instead we determined that the trial court's holding was not against the manifest weight of the evidence. Because defendant's argument is preconditioned on our reversing the trial court, it fails because we uphold the trial court's judgment on the issue of breach.

¶ 177 Defendant last argues that the trial court's determination that plaintiff was a prevailing party for the purposes of the contractual fee-shifting provision was also in error because it was plaintiff, as shown by the evidence, that breached the contract, and not defendant. This argument, too, fails, because we determined that the trial court's judgment that defendant, not plaintiff, breached the contract was not against the manifest weight of the evidence. Because plaintiff prevailed on its claim, we hold that the trial court did not err in deeming it a prevailing party for purposes of the fee-shifting provision of the contract.

¶ 178 We now turn to plaintiff's issues on its cross-appeal. Plaintiff argues that the trial court erred in awarding defendant damages for the extras performed but not paid for because they were required under the contract and were not authorized by plaintiff. Plaintiff also contends that the trial court abused its discretion in refusing to award it attorney fees under the fee shifting provision of the parties' contract. We consider each contention in turn.

¶ 179 Plaintiff first contends on cross-appeal that the trial court's judgment on defendant's claimed extras, namely, the silt fence, and the re-excavation and restoration of the detention ponds, was against the manifest weight of the evidence. Plaintiff argues that these items were included in the contract between the parties, pointing to exhibit B to the contract, which provided that defendant would:

> "Furnish all labor, equipment and material for excavating and grading including but not limited to topsoil stripping, on-site excavation, off-site borrow (import), stockpiling of excavated material, structural fill placement from imported and excavated materials, topsoil re-spreading for pong, outlet, and miscellaneous fills, miscellaneous fills from imported and excavated materials, subgrade preparation for pavement and curb and gutters, erosion control and other miscellaneous work."

Plaintiff also argues that it did not authorize the work or agree to pay defendant any additional amounts for the extras which defendant was required to undertake under the contract. We disagree.

¶ 180 Plaintiff first overlooks the fact that the trial court held that defendant's bid proposal was part of the parties' contract, albeit inadvertently unsigned. Instead, plaintiff points to exhibit B, which conflicts with the bid proposal in that the bid proposal specifically excludes the silt fence and places that under extras. Thus, plaintiff's argument regarding the silt fence is premised on an erroneous assumption and, therefore, we reject that argument as to the silt fence.

¶ 181 As regards the re-excavation and restoration of the retention ponds, the evidence showed that fill, underground utilities spoil, and soil from runoff had filled two of the retention ponds. The parties were both aware of the condition. Mayes, as president of plaintiff, asked defendant to remove the material and to restore the ponds according to the site plans. Mayes also testified that he expected that defendant would be paid. Thus, there is ample evidence to support the trial court's determination that defendant was entitled to be paid for the extras it performed. Accordingly, we cannot say that the trial court's judgment regarding the extras was against the manifest weight of the evidence.

¶ 182 Plaintiff insists that the re-excavation and restoration of the ponds was covered under the contract and specifically under exhibit B. We might have been inclined to agree had defendant not

excavated and graded the ponds before the fill and other materials effectively contaminated the ponds. Defendant already did the job of excavating and grading the ponds called for under the contract. Due to error and misfortune, none of which appears to be attributable to defendant, the ponds were filled with extraneous material. In order to restore the ponds' functionality, the re-excavation and regrading of the ponds was required. In recognition of the extra work, Mayes asked defendant to fix the problem, and Mayes understood that defendant should be paid for its extra work. While the first pass at the work was clearly required by and falls under the parties' contract, the contract is silent about redoing the work if problems arise that are not of defendant's own making. Here, the retention ponds were spoiled and needed to be redone, and the contaminaton was not defendant's fault. Accordingly, we reject plaintiff's contention.

¶ 183 Next, plaintiff argues that the trial court abused its discretion in refusing to award it attorney fees under the contract despite the fact that the court held that plaintiff was a prevailing party. Whether and in what amount a trial court will award attorney fees pursuant to a contractual fee-shifting provision is a matter committed to the trial court's sound discretion. *McHenry Savings Bank v. Autoworks of Wauconda, Inc.*, 399 Ill. App. 3d 104, 113 (2010). We review the trial court's decision on attorney fees for an abuse of discretion. *McHenry Savings Bank*, 399 Ill. App. 3d at 113.

¶ 184 Plaintiff makes two sub-arguments. First, it argues that the fee award is mandated as an indemnity pursuant to the contract. The contract provides that:

> "The Contractor [defendant] shall indemnify and hold harmless Owner [plaintiff] from and against any and all liabilities, loss, damage, expense, costs and claims, including attorneys [*sic*] fees, arising from Contractor's performance of his obligations hereunder. Either party shall be entitled to recover from the other any attorney's fees incurred in enforcing the covenants of this Agreement."

Contractual fee-shifting provisions will be enforced by the courts. *Bjork v. Draper*, 381 Ill. App. 3d 528, 543 (2008). The court will strictly construe a fee-shifting provision. *Bjork*, 381 Ill. App. 3d at 544. Plaintiff notes that the provision contains no mention of a prevailing party and does not condition the award of fees on a party's success in the litigation. Plaintiff reasons that, because plaintiff was enforcing the agreement against defendant and incurred attorney fees, it is entitled to recover its fees based solely on indemnity.

¶ 185 Plaintiff raises this argument for the first time on appeal. An issue not raised in the trial court cannot be raised for the first time on appeal and is deemed to be forfeited. *Village of Algonquin v. Tiedel*, 345 Ill. App. 3d 229, 236-37 (2003). Because plaintiff raises the indemnity theory for attorney-fee recovery for the first time on appeal, we hold that plaintiff has forfeited the issue.

¶ 186 Plaintiff also argues that it was a prevailing party while defendant did not prevail on its claims. According to plaintiff it recovered 100% of its claimed damages, while defendant recovered only about 40% of its claimed damages. Further, considering the entire pot of available damages, plaintiff claims it recovered 92% of that pot and defendant recovered only 8%. Plaintiff reasons that, because of plaintiff's overwhelming success, it should have been allowed to recover its attorney fees. We disagree.

¶ 187 Plaintiff's conception of the relative success of each party is flawed. Defendant included in its damages the amount for the extras plus the amount due under the contract. Plaintiff similarly included contractual amounts for damages. The contract claim, however, was binary; one or the other party would prevail on it. If plaintiff prevailed on the contract claim, then defendant could not, and vice versa. On the other hand, defendant prevailed and was awarded 100% of its claimed damages for the extras. Thus, we do not view this as a plaintiff's 100% to 40% victory, but we believe each side prevailed fully on its independent claims. While plaintiff prevailed on the contract

claim, defendant prevailed on the extras claim, and both sides prevailed to the fullest extent possible. Plaintiff's argument, that its victory was proportionately greater than defendant simply does not pan out.

¶ 188 Plaintiff also provides a "metric" to show that it recovered 92% of the potential pot of damages. This metric perpetuates the flaw we have identified above in that it fails to recognize the binary nature of the contractual damages claim and ignores defendant's complete success in the extras claim. Accordingly, we reject the argument based on this "metric."

¶ 189 We note that both parties claimed roughly the same amount of attorney fees (about $60,000 in fees and $4,000 in costs for plaintiff and about $62,000 in fees plus costs to be determined by the court for defendant). In light of this and the fact that both parties clearly were prevailing parties for the purposes of the fee-shifting provision (each party recovering fully on its independent claims), we cannot say that the trial court abused its discretion in refusing to award fees to either party.

¶ 190 III. CONCLUSION

¶ 191 Accordingly, for the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 192 Affirmed.