No. 101077-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent,

v.

SEATTLE TUNNEL PARTNERS, a joint venture; TUTOR PERINI CORPORATION; and DRAGADOS USA, INC.,

Petitioners.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals' decision in this construction case (1) is entirely consistent with this state's appellate rulings on differing site condition (DSC) claims, (2) is entirely consistent with Washington spoliation case law and in any event is correct that even if the trial court's decision to impose adverse inference instructions for Seattle Tunnel Partner's spoliation were an abuse of discretion, the error would be harmless because the instructions addressed an issue, i.e., causation, that the jury never reached, and (3) is not a matter of substantial public interest both because the decision is an unpublished opinion and therefore has no precedential value, and because the decision does nothing more than apply well-established legal principles. Accordingly, the Petition for Review does not meet any of the criteria set forth in RAP 13.4(b) and should be denied.

II. BACKGROUND

A. Alaskan Way Viaduct Replacement

The State of Washington decided to replace an old and earthquake-damaged portion of State Route 99 in Seattle, known as the Alaskan Way Viaduct, with a tunnel. Seattle Tunnel Partners (STP), a joint venture of Tutor Perini Corporation and Dragados USA, Inc., was the successful bidder for the construction project. The Washington

State Department of Transportation (WSDOT) executed a design-build contract (Contract) with STP. Ex 2.

B. Initial Construction of the Tunnel

To excavate the tunnel, STP used a tunnel boring machine (TBM) fronted by a cutterhead 57 feet in diameter, six feet deep, and weighing 900 tons. RP 935-36, 950-51, 2303; Ex 152. As the cutterhead rotated and the TBM advanced, material in front of the TBM passed between the cutterhead's spokes and fell into the excavation chamber behind the cutterhead. RP 1729-30; Ex 1508. There, the excavated material was mixed with conditioners for transport to the back of the TBM via a conveyor system. *Id*. The excavated material was dumped into muck bins and removed from the job site. RP 1290-91, 1729-30.

Clogging of the cutterhead rapidly became a major problem. RP 2346; Exs 192, 248:4,6.[1] By October 2013 (less than three months after boring began), the clogging was so severe that the cutterhead deflected and the TBM's massive center pipe cracked. RP 768, 2261-62, 2266-70; Exs 61, 153.

[1] Numbers after a colon indicate the trial exhibit's page numbers. Pretrial proceedings are identified by date and RP page number; undated RP citations indicate trial testimony.

During the night shift of December 5, 2013, STP had difficulty advancing the TBM. RP 2665-66. As one STP employee explained, because the cutterhead was clogged and the excavation chamber was full, the TBM was trying to push forward "with a completely closed 'wall.'" Ex 208:1. Over the next two days, the TBM's performance deteriorated. *See, e.g.*, Exs 70, 71, 74, 160:7-9, 267. Thrust forces exceeded set limits, torque increased, and the main bearing seal overheated repeatedly. *Id*.; CP 11332-34; RP 2616-17, 2731, 3008-10. Ignoring or overriding alarms and safety features that kept shutting the TBM down, STP tried to force the machine forward. RP 2425, 2575-76, 2616-17, 2730-35; Exs 70, 71, 74, 76. On December 7, STP pushed the TBM to its breaking point. RP 2635, 2730-35; Exs 74:1, 76. The machine stopped advancing. Ex 2751:3.

C. STP Concocts Pipe Story

STP decided to blame the stoppage not on its own operational errors or the TBM's known design problems, but on a hollow pipe the TBM had bored through early on December 4, 2013. CP 2164; Exs 201, 232, 264, 2652. The 3/8-inch thick, eight-inch diameter steel pipe was the casing (well lining) for a pumping test well known as TW-2. CP 2164; Ex 6:38. STP publicized this stoppage theory despite

knowing it was likely "impossible" that the pipe would have been "able to block a monster of a machine like this one." Ex 196:1.[2]

D. Potential Change Order #250

Within days of the stoppage, STP gave WSDOT initial notice of a potential Change Order request (PCO #250). Ex 2652. Suggesting that the stoppage was caused by the TBM hitting TW-2, STP claimed that "since [the] pipe was not identified on any of the Contract Documents, the existence of this pipe may be considered a [DSC]." *Id*. at 2. STP was wrong on both counts.

E. A Contract Document Identified TW-2 as a Well Within the Tunnel Alignment

Three Contract Documents identified the geotechnical and environmental conditions at the site: the Geotechnical Baseline Report (GBR), the Environmental Baseline Report (EBR), and the Geotechnical and Environmental Data Report (GEDR).[3] The GBR contained engineering soil and groundwater baselines and narrative

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[2] When the TBM bored through TW-2, part of the well's casing was forced above ground, while part of it broke into pieces that the TBM ingested. CP 2164; Ex 2724. STP personnel observed the hollow steel pipe protruding from the ground and, recognizing it as a well casing, were unconcerned. RP 2408-09, 4366; Ex 68.

[3] "Contract Documents" was a defined term that included the Contract itself, the GBR, the EBR, and the GEDR (including Sub-Appendix C.4). CP 10680; RP 713-14; Exs 2:10 (§ 1.2), 5:10 (§ 1.1), 1169.

descriptions of geotechnical conditions, while the GEDR contained the field exploration and testing data underlying those narratives. RP 713-14, 1426; Exs 2:24 (§ 5.7.2), 5:11. The Contract required STP to give "full consideration" to the contents of all three documents during its bid preparation. Ex 2:24 (§ 5.7.2).[4]

The Contract also provided that if the GBR and EBR were "silent with respect to a particular geotechnical or environmental condition" that might be encountered during the construction project, then STP could "rely upon the [GEDR] … as describing such condition." *Id*. ***The condition STP encountered was TW-2 and its steel well casing, not some random piece of steel.*** Thus, when STP submitted its PCO #250 claim in September 2016, it admitted the GBR and EBR "were silent with respect to TW-2 … so the [GEDR] was relied upon to describe this condition." Ex 2751:11.[5]

The GEDR revealed TW-2's location, depth, and diameter, and described its use in pumping tests. Exs 6:34,38,40,77, 8:19; RP 1509-

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[4] ***The GBR was not to be used "in isolation for the planning or performance of any aspects of [STP's] work."*** Ex 5:11 (emphasis added); RP 1505-06. Rather, the GBR was to be read "in conjunction with" the GEDR. Ex 5:10; RP 1503; *see also* Ex 4:55 (§ 2.6.1).

[5] *See also* Ex 287:8 (containing STP's admission, in response to requests for admission, that the GBR and EBR were "'silent' with respect to the … Steel Well Casing").

10. A site plan showed all wells in or along the tunnel alignment and disclosed that TW-2 was directly in the TBM's path. Ex 6:77; RP 3928. The GEDR's Sub-Appendix C.4 also showed TW-2's location within the tunnel alignment and further disclosed that TW-2 was 110 feet deep and eight inches in diameter. Ex 8:10,19. It also referred to TW-2 as a pumping well and described the pumping test work plan. Ex 6:34,38,39-40; RP 1418. The GEDR did not identify the composition of TW-2's casing. *See* Exs 6, 8.

When preparing its bid, STP knew that WSDOT had put well and boring information related to the project in the GEDR and not in the GBR or EBR. RP 4259; *see also* RP 3925; Ex 5:15. As STP admitted, there was no baseline in the GBR that applied to wells or their construction. RP 4259; *see also* RP 3928.

F. Completion of the Tunnel

In January 2014, after conducting hyperbaric interventions to clear out the cutterhead and the excavation chamber, STP resumed boring. *See, e.g.*, RP 1732-34, 2344-46, 2792-99, 2812-15, 2820-22, 2828; CP 20. The TBM, however, soon started overheating and shutting down again. CP 20; Ex 2751:5. An investigation revealed that the TBM's outer seal was compromised and its main bearing contaminated. *Id.*; Ex 2750:4. To perform the necessary repairs, the

TBM's entire drive unit had to be lifted out of the tunnel and disassembled. Ex 260:12; RP 3679-82. The removal and repair effort resulted in the tunnel project not being substantially completed until more than two years after the Contract's deadline. RP 776-77, 1723-25.

G. STP's Spoliation of Multiple Pieces of Evidence

1. Pipe and Metal Pieces, and Granite Boulders

STP had a contractual duty to provide access to all PCO #250-related materials so WSDOT could investigate STP's assertion that the pipe caused the TBM's damage. Ex 2:77 (§ 11.5.4). After boring through TW-2, STP recovered various pipe pieces and metal fragments and granite boulders from the ground, inside the TBM, and the muck disposal bin. Ex 2724. STP management knew that the recovered pipe pieces, metal pieces, and boulders were important pieces of physical evidence that needed to be preserved. CP 994-95; 1.9.19 RP 65-68, 76. But despite its contractual duty and express promises to WSDOT that it would preserve the evidence, STP failed to move the critical evidence to safe storage.[6] CP 1046, 1222-57, 1593-96, 2465-66; 1.9.19 RP 69,

[6] The only pipe pieces that STP moved to a secure warehouse were pieces it did not claim damaged the TBM. 1.9.19 RP 79; CP 1113-14. All critical pipe and metal pieces (including a piece that WSDOT's expert believed did not come from TW-2), along with the granite

76-81. Instead, STP left a pallet containing the pipe and metal pieces, and the boulders unattended on the open jobsite. *Id*.; CP 1113-14; 1.10.19 RP 178. No sign was posted warning that the evidence should be left undisturbed and no written policy or procedure to protect the evidence was disseminated. 1.9.19 RP 94-95.

By February 2014, STP had lost or destroyed this critical evidence. CP 1595; 1.9.19 RP 81. It then hid the loss or destruction of this evidence from WSDOT for more than a year—all while repeatedly promising WSDOT during that time that it would preserve all such evidence. 1.10.19 RP 83-84; CP 1113-15, 1222-57, 2166. Although STP eventually blamed the loss or destruction on an employee's yard-cleaning efforts, it never produced any sworn testimony or other evidence from this employee. *See* 1.9.19 RP 1-195; 1.10.19 RP 1-252; CP 3247.

2. Deputy Project Manager's Work Journal

STP's deputy project manager took daily notes during the construction project. 1.9.19 RP 88-90; CP 1033-34. When required to produce the journals containing the notes, STP produced them all except (1) a journal reportedly stolen out of the deputy project

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boulders, were lost or destroyed. Exs 249, 2724; CP 1113-37, 1593-96, 2093-98, 2465-66.

manager's truck, and (2) the journal covering the critical period of early October 2013 to mid-March 2014. CP 1035-36, 1579, 2165. The latter journal covered the period when (a) the TBM stopped and STP unsuccessfully tried to force it to advance, (b) STP conducted the hyperbaric interventions to clear the cutterhead and the excavation chamber, (c) STP decided to blame the pipe for the stoppage, (d) STP recovered the pipe and metal pieces and boulders that it knew were important pieces of evidence, but failed to secure them, and (e) STP lost or destroyed that evidence. STP never provided any explanation for the loss or destruction of that journal. CP 1037-41; 1.9.19 RP 90-92.

H. Pretrial and Trial Proceedings

WSDOT sued STP claiming that STP breached the Contract by, among other things, failing to meet the Contract's substantial completion deadline. STP counterclaimed, asserting that WSDOT breached the Contract by, among other things, denying STP's DSC claim for extensions of time and additional compensation to complete the project.

After discovery, WSDOT moved for spoliation sanctions based on STP's loss or destruction of important evidence. CP 913-41. Following a two-day evidentiary hearing, the trial court entered detailed

findings of fact and conclusions of law and ruled that STP had committed sanctionable spoliation. CP 3223-67.

Pretrial arguments were held to determine the sanction. CP 5233. Denying WSDOT's request for dismissal of STP's counterclaims, the court ruled that an adverse inference instruction was the appropriate remedy for STP's loss or destruction of the pipe pieces and boulders but postponed deciding whether an adverse inference instruction for the journal's loss or destruction would also be imposed. 6.27.19 RP 56-58. The parties argued over proposed language for the instruction, 7.26.19 RP 4-43, but it was not until the court finalized the entire set of jury instructions that the precise language of the two adverse inference instructions was decided, CP 10684-85.

The adverse inference instructions were carefully crafted. One of them told the jury that (a) STP had a duty to preserve all documents and materials relating to its DSC claim (including pipe pieces and two boulders), (b) STP had lost or destroyed the boulders and specified pieces of pipe presumed to be associated with TW-2, and (c) the jury was to infer that the pipe pieces did not cause damage to the TBM's cutter tools and that the two lost boulders did cause such damage. CP 10684. The other instruction told the jury that (a) STP had a duty to preserve the deputy project manager's journal that covered the

December 2013 through February 2014 period, (b) the journal likely contained information relating to the potential cause of the stoppage of the TBM, (c) STP had lost or destroyed that journal, and (d) the jury could infer that the lost or destroyed journal contained information adverse to STP's positions in the case. CP 10685.

A 12-person jury attended 36 days of trial, which included testimony from 37 witnesses and the admission of more than 260 exhibits. At trial, STP tried to prove to the jury that the TBM's encounter with TW-2's steel well casing caused the TBM's damage and the resulting delay, and that because the GBR's description of the types of subsurface debris that might be encountered did not include any mention of steel, the GBR had indicated there was no steel in the TBM's path. According to STP, this meant TW-2's steel well casing was a DSC, which entitled STP to an extension of time to complete the tunnel and additional compensation.[7]

To counter STP's causation arguments, WSDOT introduced evidence that the TBM's stoppage was due to operator error or TBM

[7] STP urged the jury to rely on the finding of the Disputes Review Board (DRB) that TW-2's casing was a DSC, but the DRB did not have all the evidence that was shown at trial. *See, e.g.*, RP 1797-98, 2694-700, 2717. The jury had the right to reject the DRB's recommendation. Ex 2:130 (§ 24.2); CP 10682.

design defects, or both. To counter STP's DSC claim, WSDOT introduced evidence that although TW-2 was not disclosed in the GBR (it was a functional monitoring well, not debris), TW-2 ***was*** disclosed in the GEDR.[8] WSDOT argued that because neither the GEDR nor any other Contract Document expressly stated what TW-2's casing was made of, the subsurface condition STP encountered was not substantially or materially different from the conditions indicated in the Contract Documents and therefore was not a DSC. The steel casing also was not a DSC because (a) STP could not reasonably rely on any assumption that TW-2's casing was made of material other than steel, and (b) it was foreseeable that the casing was made of steel because (i) the GEDR had disclosed that TW-2 was an eight-inch diameter well used in the same pumping tests as the new pumping wells constructed with eight-inch diameter steel casings, Exs 6:33-34,38,40, 8:19, (ii) it

[8] WSDOT also introduced evidence that in 2011, it provided STP with a chart listing 10 wells in or near the tunnel alignment. RP 1967-69; Ex 19. The chart described TW-2 as being in "direct conflict" with the TBM's path. *Id*. An STP geotechnical employee was instructed to check out the wells on the chart. Ex 19:1; CP 10973-75. In 2011 and 2012, he located TW-2, removed its lid, and took groundwater level readings from inside the well. RP 4325-26, 4337-39, 4378-81; Ex 22:2,7. After doing so, the employee confirmed TW-2's location and reported that it was a functional monitoring well. Ex 20:2, 22:19. STP's geotechnical manager planned to decommission TW-2 (remove the well casing and fill the well) before the TBM reached it but failed to do so. Ex 20; CP 10973-74, 10968-70, 10997-98.

was common for pumping wells to have steel casings, RP 1418, 1708-09, and (iii) no Contract Document identified an eight-inch diameter well with a non-steel casing, RP 5708-09.

After being instructed on the law and hearing closing arguments from the parties, the jury returned a special verdict finding that TW-2's steel casing was not a DSC. CP 10659. Having answered this first question in the negative, the jury was instructed not to answer the following questions about the cause(s) of the TBM's stoppage. *Id.* Per their instructions, the jury skipped to the end of the special verdict form and awarded WSDOT its liquidated damages. CP 10659-63.

Based on the jury's verdict, the trial court entered judgment in favor of WSDOT and jointly and severally against STP, Tutor Perini Corporation, and Dragados USA, Inc. CP 10738-41.

I. The Court of Appeals' Decision

The Court of Appeals issued an unpublished opinion affirming the judgment. *Wash. State Dep't of Transp. v. Seattle Tunnel Partners*, No. 54425-3-II (Wash. Ct. App. June 14, 2022) (slip op.). Among other rulings, the court rejected appellants' arguments that the DSC jury instruction was legally erroneous and that the trial court abused its discretion by imposing adverse inference instructions as the sanction for STP's spoliation. *Id*. at 12-19, 27-30. It agreed with WSDOT that

even if the trial court had abused its discretion in giving the adverse inference instructions to the jury (it had not), the error was harmless because the instructions concerned causation – an issue the jury never reached. *Id.* at 27.

III. ARGUMENT

A. The Court of Appeals' Decision Is Entirely Consistent with Washington Law on DSC Claims

Under Washington law, a DSC claim[9] has four elements in addition to causation and damages: (1) the contract documents indicated certain conditions, (2) the contractor reasonably relied on those indications when bidding, (3) the actual conditions materially differed from those indicated in the contract, and (4) the materially different conditions were not foreseeable. *See King County v. Vinci Constr. Grands Projets*, 191 Wn. App. 142, 165-66, 364 P.3d 784 (2015) ("*Brightwater*"[10]), *aff'd on other issues*, 188 Wn.2d 618 (2017); *see also, e.g., Md. Cas. Co. v. City of Seattle*, 9 Wn.2d 666, 670, 116 P.2d 280 (1941) (addressing the first three elements); *Basin Paving Co.*

[9] Also called a changed conditions claim. *See, e.g., King County v. Vinci Constr. Grands Projets*, 191 Wn. App. 142, 165, 364 P.3d 784 (2015), *aff'd on other issues*, 188 Wn.2d 618 (2017).

[10] In the trial court, the parties and the court referred to this case as "*Brightwater*" because that was the name of the construction project for King County's expanded wastewater treatment system. WSDOT used the same reference in its Court of Appeals briefing and does so here.

v. Mike M. Johnson, Inc., 107 Wn. App. 61, 67-68, 27 P.3d 609 (2001) (addressing the fourth element), *rev. denied*, 145 Wn.2d 1018 (2002).

The instruction on STP's DSC claim was entirely consistent with this well-established law. The instruction's first and second elements reflected the Contract's DSC definition and the first and third *Brightwater* elements. *Compare* CP 10679 *with* Ex 3:12 *and Brightwater*, 191 Wn. App. at 166. STP does not challenge these elements.

The instruction's third and fourth elements were that STP reasonably relied on the conditions indicated in the Contract Documents in making its bid and that the materially different condition STP encountered was not foreseeable to STP at bid time. CP 10679. STP argues these elements should not have been included in the instruction. But as discussed below, these elements were based on long-standing and well-established state law.

The *Brightwater* court drew the reasonable reliance element from the *Maryland Casualty* case. *Brightwater*, 191 Wn. App. at 165-66. There, this Court announced as a "basic principle of law" that when "plans or specifications lead a public contractor ***reasonably to believe that conditions indicated therein exist, and may be relied upon*** in making his bid, he will be entitled to compensation for extra work or

expense made necessary by conditions being other than as so represented." *Md. Cas.*, 9 Wn.2d at 670 (emphasis added; internal quotation marks and citation omitted); *see also Dravo Corp. v. Mun. of Metro. Seattle*, 79 Wn.2d 214, 218, 484 P.2d 399 (1971) (citing the same principle); *Nelson Constr. Co. of Ferndale, Inc. v. Port of Bremerton*, 20 Wn. App. 321, 328-29, 582 P.2d 511 (1978) (same). Including the reasonable reliance element in the instruction therefore was entirely consistent with Washington's DSC case law.

The *Brightwater* court drew the lack of foreseeability element from the *Basin Paving* case. *Brightwater*, 191 Wn. App. at 166. The contractor in *Basin Paving* encountered more rock than expected when boring a tunnel for the Town of Lind's wastewater and water system project; the contractor argued that the unexpected amount of rock was a compensable changed condition because it exceeded the town's projections based on boring tests. *Basin Paving*, 107 Wn. App. at 65. The Court of Appeals disagreed, holding that recovery is "limited to when the 'condition complained of could not reasonably have been anticipated by either party to the contract.'" *Id.* (quoting *Bignold v. King County*, 65 Wn.2d 817, 821-22, 399 P.2d 611 (1965)).

Citing *Bignold*, the *Basin Paving* court concluded that a contractor "cannot recover additional compensation for a 'changed

condition,' if the complained of condition was foreseeable." *Id.* at 67-68 (citation omitted). It upheld the dismissal of the contractor's claim, in part because it was foreseeable that there was more subsurface rock than was indicated in the test data. *Id.* at 68. Thus, it also was entirely consistent with Washington DSC law for the trial court in this case to include the lack of foreseeability element in the instruction. *See also Modern Builders, Inc. of Tacoma v. Manke*, 27 Wn. App. 86, 94, 615 P.2d 1332 (1980) (holding no quantum meruit recovery was warranted for additional work when the need for such work was "clearly foreseeable by a reasonable contractor at the time of contract formation"); *Nelson Constr.*, 20 Wn. App. at 329-30 (upholding rejection of changed conditions claim because the actual conditions "were not reasonably unanticipated").

1. The Decision Does Not Conflict with *Bignold*

Contrary to STP's argument, the Court of Appeals' decision does not conflict with the *Bignold* decision. The *Bignold* ruling rested on a key factual finding by the trial court, which was that the subsurface conditions encountered by the contractor (huge boulders and material too wet to use for embankment purposes) "***were materially different from conditions indicated on the plans***." 65 Wn.2d at 822 (emphasis added). Here, the Contract Documents did not indicate that TW-2's

well casing was made of something other than steel. There simply was no basis for a factual finding that the condition encountered (TW-2 and its casing) was materially different from the conditions indicated in the Contract Documents. *See Brightwater*, 191 Wn. App. at 167-68.

2. The Decision Does Not Conflict with *Berschauer/Phillips*

Berschauer/Phillips Construction Co. v. Seattle School District No. 1, 124 Wn.2d 816, 881 P.2d 986 (1994), also does not help STP. As the Court of Appeals explained, when there is a contract dispute and a clause that addresses the disputed issue but does not fully incorporate all the elements of the legal standard applicable to the dispute, *Berschauer/Phillips* does not bar inclusion of the omitted elements to resolve the dispute, even if the omitted elements are "tort-like." Slip op. at 18-19. Parties in construction delay disputes may be limited to listed contractual remedies, but *Berschauer/Phillips* does not say that the legal elements of a claim are limited.

As discussed above, the applicable legal standard for DSC claims has long included the reasonable reliance and lack of foreseeability elements. STP fails to cite evidence that the Contract eliminated those elements or that STP negotiated for that result. And nowhere did the Contract dictate that a contractor's DSC claim would hinge solely on

the DSC definition. Accordingly, the trial court's incorporation of the reasonable reliance and lack of foreseeability elements into the DSC instruction posed no threat to the certainty and predictability underlying the Contract and was not a legal error.

Because the Court of Appeals' decision to uphold the instruction does not conflict with any ruling by this Court, RAP 13.4(b)(1) does not provide a basis for this Court to accept review of the Court of Appeals' decision on this issue.

3. The Decision Is Consistent with Federal DSC Law

Notably, Washington courts are not alone in ruling that reasonable reliance and lack of foreseeability are essential elements of a DSC claim. For example, in *International Technology Corp. v. Winter*, 523 F.3d 1341, 1348-48 (Fed. Cir. 2008), the Federal Circuit Court of Appeals explained that in a government contract, a misrepresentation of site conditions can support a common law breach of contract claim or a DSC claim brought under the DSC clause common in government contracts, but both types of claim require reasonable reliance on the contractual representation and lack of foreseeability as to the actual condition encountered. Many other federal decisions involving DSC claims have also required reasonable

reliance and lack of foreseeability. *See, e.g., Phillips & Jordan, Inc. v. United States*, 158 Fed. Cl. 313, 328 (2022); *Marine Indus. Constr., LLC v. United States*, 158 Fed. Cl. 158, 188 (2022); *Renda Marine, Inc. v. United States*, 66 Fed. Cl. 639, 655-56 (2005); *Connor Bros. Constr. Co. v. United States*, 65 Fed. Cl. 657, 680-81 (2005).

In sum, under both federal and state law, while a contract may define a DSC as a subsurface condition that is materially different from the conditions indicated in the contract documents, recovery on a DSC claim also necessarily requires proof of reasonable reliance and lack of foreseeability. Otherwise, a contractor could pursue a DSC claim and be awarded compensation beyond its bid price even if it knew full well, and took into account when making its bid, that the contract documents omitted a detail in the description of the subsurface conditions. Although that is not and should not be the law, that would be the consequence if STP's arguments were accepted.

B. The Court of Appeals' Decision Is Entirely Consistent with Washington Spoliation Law

STP argues that the Court of Appeals' decision conflicts with the ruling in *Cook v. Tarbert Logging, Inc.*, 190 Wn. App. 448, 360 P.3d 855 (2015). That simply is not true.

First, on the issue of the propriety of different types of spoliation sanctions, as Division One recently concluded in the case of *J.K. by Wolf v. Bellevue School District No. 405*, 20 Wn. App. 2d 291, 312, 500 P.3d 138 (2021), *Cook* is distinguishable because in that case there was no duty to preserve the destroyed evidence. Here, as in *J.K.*, there was a duty to preserve the evidence. And here, as in *J.K.,* the party with that duty failed to meet it.

Second, adverse inference instructions are the traditional remedy for spoliation. *See Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977) ("We have previously held on several occasions that where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him."); *Henderson v. Tyrrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996) (noting that an adverse inference instruction has been "the common remedy" for spoliation); *see also Perez v. U.S. Postal Serv.*, No. C12-00315 RSM, 2014 WL 10726125, at *2 (W.D. Wash. July 30, 2014) (acknowledging that an adverse inference instruction is an appropriate spoliation sanction).

Third, STP ignores the key point of the Court of Appeals' harmless error rulings. With respect to the instruction regarding the lost or destroyed pipe pieces and boulders, "STP identifie[d] nothing to indicate that the adverse instruction relating to what caused the damage to the TBM, a question the jury never reached, had any bearing on the jury's decision" on the threshold question of whether TW-2's casing was a DSC. Slip op. at 29. With respect to the instruction regarding the lost or destroyed journal, STP "provide[d] no evidence" suggesting the jury used that instruction to infer that TW-2's casing was not a DSC. *Id.* Further, the Court of Appeals noted the instruction indicated that any information in the journal "would have likely concerned the causation element, not the DSC element." *Id.* at 30. Because the jury did not reach the causation question, even if giving the instructions had been an abuse of discretion (it was not), it was harmless.

In any event, STP does not deny that it lost or destroyed the critical evidence that was described in the instructions. As the Court of Appeals pointed out, "the instructions did not paint STP in any worse light than the evidence of the conduct itself, the admission of which STP does not challenge." *Id.* at 29 n.10. At trial, STP did not once object to WSDOT's references to STP's loss or destruction of key pieces of evidence and did not object to the admission of Exhibit 249,

which identified the pipe and metal pieces and the boulders that STP lost or destroyed. RP 1356-57.

STP has not established that review is warranted under RAP 13.4(b)(2).

C. The Decision Does Not Involve an Issue of Substantial Public Interest That Warrants Review by This Court

The Court of Appeals' decision does not break new ground with respect to DSC claims or spoliation sanctions. It is also unpublished and therefore has no precedential value. *See* GR 14.1(a). Under these circumstances, there is no reason this Court should accept review under RAP 13.4(b)(4).

IV. CONCLUSION

STP's Petition for Review should be denied.

I certify that this document contains 4,976 words, excluding the words in the items listed in RAP 18.17(c).

DATED: August 10, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2022, I caused the foregoing document to be efiled, which will send notification to all counsel of record.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

DATED at Seattle, Washington, this 10th day of August, 2022.

s/Karrie Fielder
Karrie Fielder, Legal Practice Assistant

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Transmittal Information

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