Court of Appeals No. 344801

Supreme Court No. 95085-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SPECIALTY ASPHALT & CONSTRUCTION LLC,
and LISA JACOBSEN, Appellants

v.

COUNTY OF LINCOLN, Respondent

MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Petitioners are Specialty Asphalt & Construction, LLC, and Lisa Jacobsen, its majority owner. They were both the plaintiffs and the appellants in an action initiated against defendant/appellee Lincoln County.

II. COURT OF APPEALS DECISION FOR REVIEW

Petitioners seek review of the Washington State Court of Appeals, Division Three, decision affirming summary judgment dismissing their gender discrimination, negligent misrepresentation and breach of contract claims in an unpublished opinion dated August 29, 2017. Appendix to Petition For Review, pp.1-15.

III. ISSUES PRESENTED FOR REVIEW

(1) Is it appropriate to conclude a minority contractor has not been harmed and dismiss a claim for sex discrimination where a public entity discouraged a female contractor from bidding a project, made a sexist remark to the contractor, subjected the contractor to unusual scrutiny, altered the terms of the contract award, and delayed the contractor's performance? And does such a ruling impair Washington's law against discrimination?

(2) During a summary judgment motion does evidence that a County discouraged a female contractor from bidding, altered contract terms, interfered with contract performance, and engaged in other adverse conduct, only create an inference of sex discrimination if there is evidence a male contractor was treated differently in exactly the same circumstance?

(3) Are Specialty's pecuniary losses which were suffered as a consequence of its reliance on the County's misrepresentation appropriate damages for a negligent misrepresentation claim?

(4) Should the County be permitted to avoid liability for post award breaches of its contractual duties simply because those duties arose out of a public works project?

IV. STATEMENT OF THE CASE

Plaintiff Lisa Jacobsen ("Jacobsen") has been the majority owner of Plaintiff Specialty Asphalt & Construction, LLC ("Specialty") since the company was incorporated in 2012. *CP 278,* ¶ 2. Specialty is a licensed contractor that performs asphalt paving and maintenance work. For approximately 20 years, Jacobsen has worked both in the field operating equipment and handling all aspects of paving jobs, including bidding projects. *CP 278-79,* ¶¶ *3-4.* In her experience, most public work projects did not require a bond. *CP 279,* ¶ *4.* A bond adds a significant cost and requires more work on a project. *CP 284-85,* ¶ *18.*

In July 2013, Jacobsen reviewed and responded to a call for bids ("the Bid Proposal") from Defendant Lincoln County ("the County") requesting extensive parking lot repair and maintenance at the courthouse in Davenport ("the Project"). The Bid Proposal stated in two separate places that no proposal bond or performance bond was required. *CP 279,* ¶ 6, *293, 297.* The County's Operations and Permit Coordinator, Phil Nollmeyer ("Nollmeyer"), drafted the Bid Proposal which the Public Works Director and

the County Engineer then reviewed. *Deposition of Phil Nollmeyer, CP 114.*

The Bid Proposal announced an opportunity to view the Project and scope of work on July 16, 2013. *CP 291.* Jacobsen was the only contractor at the scheduled walkthrough. *CP 319.* Three County Commissioners and Nollmeyer participated in the walkthrough. None of the County's representatives mentioned a bond requirement. *CP 280,* ¶ *7.*

At the beginning of the walkthrough, in front of the Commissioners, Nollmeyer said the shoes with heels Jacobsen was wearing were not appropriate attire for a walkthrough. The Commissioners appeared to be much more engaged with Jacobsen than Nollmeyer in the discussion of the Project. *CP 280,* ¶ 9. After the walk through, the County issued Addendum No. 1 to the Bid Proposal on July 16, 2013. Once again, Addendum No. 1 did not require any bond.

A few days after the scheduled walkthrough, a male representative of Arrow Concrete & Asphalt Specialties ("Arrow") showed up at the County. *CP 303, 319-20.* Nollmeyer acknowledged the intent of the scheduled walkthrough is to provide all potential bidders with access to the same information. *CP 321.* Nevertheless, Nollmeyer gave the Arrow representative a private unscheduled walkthrough. *CP 319-22.* David Lawless owns Arrow

and Nollmeyer knows him. *CP 228,¶ 25*, 324-25.

Prior to the due date for bids, Nollmeyer called Jacobsen and attempted to talk her out of bidding and said the project was messy and more trouble than it is worth. His comments and attitude made it very clear to Jacobsen that he did not believe her company, owned and operated by a woman, could do the job. *CP 281, ¶ 11.*

On July 27, 2013, Jacobsen submitted a bid on behalf of Specialty. *CP 281, ¶ 12.* The County Commissioners opened the bids on August 5, 2013, and awarded the project to the low bidder Specialty, but no one called Jacobsen. Nollmeyer or someone in Public Works was reluctant to notify Jacobsen. *CP 281-2, ¶ 13.*

Nollmeyer testified that before an award is made he checks the Department of Labor and Industries ("L&I") website to see if a contractor is in good standing and eligible to bid, and he did so in this case. *CP 327-30, 333.* However, L&I Contractor Tracking Information shows Lincoln County Public Works took the unusual step of initiating Contractor Tracking on August 7, 2013, the day after the Project was awarded to Specialty. *CP 287-88, ¶ 24, 302-3, 309.* Contractor Tracking allows an entity to track a contractor's status with L&I on an ongoing basis.

Nollmeyer could not explain why the County would initiate tracking on Specialty the day after the award was made. *CP 331-33.* He also made it clear the County has never tracked other contractors. *CP 331-33.*

After Jacobsen did not hear anything about her bid, she called the County and was told Nollmeyer had been assigned to notify her the project was awarded to Specialty. *CP 281-2, ¶ 13.* Soon after the call, Jacobsen received a letter from County Auditor Johnston ("Auditor Johnston"), dated August 6, 2013, confirming Specialty's bid was lower than the only competing bid from Arrow. The letter and the enclosed award did not mention a bond, but it did ask Specialty to contact the County about a start date for the Project. *CP 282, ¶ 14, 302-03.*

Relying on the Award, Jacobsen began to mobilize resources and materials for the Project and told her administrative assistant to stop accepting new jobs for the year because the work season usually ends with freezing temperatures in October. *CP 282-83, ¶ 15.*

On August 12th the County sent a letter and a bond to Specialty. Jacobsen concluded the bond was sent in error and wrote on the document: "No proposal bond or performance bond required as per page #2." She returned it unsigned with the signed Contract. *CP 283,¶ 16, 305-07.*

Auditor Johnston called Jacobsen and said it had been brought to the County's attention that we have to have a bond. Jacobsen disagreed, citing to the County's Bid Proposal. The Auditor would not tell Jacobsen who had brought it to her attention that the County now wanted a bond. *CP 284, ¶ 17, 285, ¶ 20.* Auditor Johnston testified that she called Jacobsen on August 19, 2013, at the direction of the Commissioners and told Jacobsen the County would not allow Specialty to do the Project. *CP 340, 345-46.* Instead, the Commissioners planned to rebid the Project. *Id.*

On or about August 20, 2013, the County issued a new call for bids, with the requirement of a bond, for the Project. *CP 35, ¶ 6.* Specialty responded with a demand letter requesting that the County maintain its bid award. *CP 39.* The County then "withdrew the re-bidding process." *CP 35, ¶ 6.* Subsequent to withdrawing their bid process, the County offered to pay for the bond and have Specialty proceed with the Project. CP 35, ¶ *8.* In light of the warning in the Bid Proposal and after consulting with its insurance agent, Specialty did not accept that offer for fear it would constitute collusion or bid rigging and would subject the company to penalties by federal and state authorities. *CP 285-86, ¶¶ 19, 21, CP 296.*

In the spring of 2014, Specialty filed suit seeking injunctive and

declaratory relief because the County continued to insist the contract without a bond was illegal (*CP 12)* and it would not allow Specialty to perform the work. *CP 20.* The County filed a motion for summary judgment dismissing all of the claims brought by both Plaintiffs. At the hearing, the court struck as hearsay statements of third parties other than Nollmeyer. *CP 418-19.* The court granted partial summary judgment and dismissed the discrimination and the negligent misrepresentation claims. *CP 417-19.*

The trial court dismissed the discrimination claim because Jacobsen did not have corroborating evidence to support her testimony regarding adverse treatment by the County and found no evidence that Specialty was adversely affected as a result of the interaction with the County. *CP 525, 589.* The court did conclude that the contract was valid and the County had delayed Speciality's performance. *CP 412, 413, 527.*

In response to a motion for specific performance by the County, the trial court entered an order on May 6, 2016, compelling Specialty to perform the contract without a bond. *CP 599.* Specialty declined to perform the contract because conditions at the Project had changed over the three years since Specialty had received the award. *CP 412, ¶¶ 8-11, CP 595-96.* The court denied Specialty's motion to amend the complaint to seek damages on

the contract claim. *CP* 593. Following the dismissal of the contract claim, Specialty filed an appeal.

V. ARGUMENT

A. Grounds that qualify a case for review.

The Supreme Court will accept a case for review only if the petition involves an issue of substantial public interest, involves a significant question of law under the state or federal constitution, the decision of the Court of Appeals conflicts with a decision of the Supreme Court, or the decision of the Court of Appeals conflicts with another published decision of the Court of Appeals. RAP 13.4(b). This case satisfies all four grounds for review.

B. Standard of review for summary judgment decisions.

Appellate courts review a summary judgment order de novo. *Highline School District No. 401 v. Port of Seattle*, 87 Wash.2d 6, 15, 548 P.2d 1085 (1976). Summary judgment is only appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." CR 56(c). When considering a summary judgment motion, and on appellate review, the court must construe all facts and reasonable inferences in the light most favorable to the non-moving

party. *Lybbert v. Grant County,* 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

C. Is it appropriate to conclude a minority contractor has not been harmed and dismiss a claim for sex discrimination where a public entity discouraged a female contractor from bidding a project, made a sexist remark to the contractor, subjected the contractor to unusual scrutiny, altered the terms of the contract award, and delayed the contractor's performance? And does such a ruling impair Washington's law against discrimination?

Washington has established a clear mandate to eliminate all forms of discrimination by enacting RCW 49.60. *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 359–60, 20 P.3d 921 (2001). The overarching purpose of the law is "to deter and to eradicate discrimination in Washington." RCW 49.60.010. Matters involving discrimination, especially by a governmental entity like the one in this case, are issues of substantial public interest. *See Josephinium Associates v. Kahli*, 111 Wn. App. 617, 622, 45 P.3d 627 (2002); *Washington State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 206, 293 P.3d 413 (2013).

The Court of Appeals has rendered the foregoing public policy ineffective. By ruling that although Jacobsen and Specialty were not "harmed" when Nollmeyer discouraged Jacobsen from bidding, made a sexist remark about Jacobsen's clothing, singled out the female owned business for post award tracking on the L&I website, and engaged in other

discriminatory acts, the court diminished Washington's commitment to eliminate discrimination.

The public policy calls for the eradication of all discrimination and hence no discrimination should be tolerated. Sexist behavior in a job interview or in a bidding process is not tolerable or lawful, even if the victim endures it and ultimately gets the job or contract.

The fact Specialty was awarded the contract is not evidence agents of the County did not discriminate and Specialty and Jacobsen were not harmed. The award was made because Specialty was the low bidder, but Specialty's status as the low bidder did it no good. When Specialty got the award, someone suddenly advised Auditor Johnston the County "needed" a bond, the County demanded a bond and delayed Specialty's performance. The cumulative effect of the County's conduct was not trivial or a mere annoyance.

Specialty was denied the right to perform and have the benefit of the agreed upon terms. Obtaining a bond would have been expensive and it would have required work that was not contemplated in the bidding process.

Significantly, the County's summary judgment motion did not argue Plaintiffs were not damaged, and the trial court and appellate court raised the

issue of damages *sua sponte*. *CP 218-30.* Jacobsen and Specialty had no opportunity create a specific record on the issue of damages. Nevertheless the record contains ample evidence of damage. *CP 280, ¶8, 281, ¶11, 282-6.*

Even if Jacobsen and Specialty did not prove actual damages, the Court of Appeals should not have affirmed the dismissal. In discrimination cases, nominal damages are presumed even if no damages are proven. *Minger v. Reinhard Distributing Co., Inc.*, 87 Wn. App. 941, 946-47, 943 P.2d 400 (1997); *Lewis v. Doll*, 53 Wn. App. 203, 212, 765 P.2d 1341 (1989) (citing *Browning v. Slenderella Systems*, 54 Wash.2d 440, 450-51, 341 P.2d 859 (1959); *Miles v. F.E.R.M. Enterprises, Inc.*, 29 Wn. App. 61, 68, 627 P.2d 564 (1981)). In the *F.E.R.M. Enterprises* decision, the court explained that "[a] plaintiff need not allege nominal damages, and they are proved merely by showing a deprivation of a civil right." *Id.* (citations omitted).

The possibility of nominal damages should have prevented summary judgment. In a recent decision, the U.S. Court of Appeals for the Ninth Circuit held that a plaintiff can recover nominal damages in equity if an employer unlawfully interferes with the exercise of rights under the Americans with Disabilities Act and, therefore, the court reversed the grant

of summary judgment on mootness grounds even though the plaintiff no longer qualified for injunctive or declaratory relief. *Bayer v. Neiman Marcus Group, Inc.*, 861 F.3d 853, 859, 868-73 (9th Cir. 2017). *See Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002); *Poland v. Chertoff*, 559 F. Supp. 2d 1127, 1129-31 (D. Or. 2008).

D. During a summary judgment motion does evidence that a County discouraged a female contractor from bidding, altered contract terms, interfered with contract performance and engaged in other adverse conduct only create an inference of sex discrimination if there is evidence a male contractor was treated differently in exactly the same circumstances?

The Court of Appeals used a rigid, mechanized and ritualistic approach based on a test used in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), and in *Marquis v. Spokane,* 130 Wash.2d 97, 109, 922 P.2d 43 (1996) to determine if there was evidence of discrimination. For instance, the appellate court found the evidence of discrimination lacking because there was no evidence Arrow and Specialty were treated differently while they were in the same situation and the court found Specialty won the bid. Appendix, p. 8. In *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 363, 753 P.2d 517 (1988) the Supreme Court rejected this kind of analysis.

The Court of Appeals speculated Nollmeyer might have criticized the

shoes worn by Arrow's employee, might have granted Specialty a private walkthrough and might have also discouraged Arrow from bidding. This speculative and rigid comparison, coupled with the failure to draw inferences from the evidence in favor on the non-moving party, reduce Washington's disdain for discrimination to mere rhetoric.

The ultimate burden in cases brought under RCW 49.60 is to present evidence sufficient for a trier of fact to reasonably conclude unlawful discriminatory animus was more likely than not a substantial factor motivating the County's adverse actions. *Hill v. BCTI Income Fund-I,* 144 Wn.2d 172, 186–87, 23 P.3d 440 (2001), *as amended on denial of reconsideration* (July 17, 2001).

The fact Nollmeyer discouraged Jacobsen from bidding by itself creates an inference he did not want a woman to get the Project. The fact Nollmeyer could not explain why he deviated from County policy and gave Arrow a private walkthrough creates an inference that he or someone had a preference for male bidders. Nollmeyer's comment about Jacobsen's heeled shoes suggests he did not like a woman participating in the walkthrough. These inferences do not depend on evidence that Arrow was treated differently, although such an inference can easily be drawn. For example if

Nollmeyer wanted to discourage Arrow from bidding, all he had to do was refuse to give Arrow a private walkthrough. Instead Arrow got special treatment.

The Court of Appeals's mechanical analysis went so far as to explain away the County's post award monitoring by claiming Specialty was unique because a winning bidder and losing bidder are not in the same class. Appendix, p. 8. This strained attempt at comparison ignores the evidence that past successful bidders were never tracked by the County and Nollmeyer had no explanation for tracking Specialty. *CP 331-33*. The unprecedented tracking gives rise to an inference of discrimination. Most surprising is the portion of the ruling that Specialty winning the bid was "the reason [for] the repeated checking on Specialty's licensing." Appendix p.8. This statement has no evidentiary support whatsoever. The County offered no explanation for tracking Specialty's licensing. *CP 331-33*. In this instance, the court below has made a factual finding without any evidence.

The Court of Appeals improperly determined questions of fact and construed evidence in the light most favorable to the County. Findings of fact on summary judgment are not proper. *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991). The function of a summary judgment

proceeding is to determine whether a genuine issue of material fact exists; it is not to resolve issues of fact or to arrive at conclusions based thereon. *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21, 586 P.2d 860 (1978).

The Court of Appeals held that "[the bid notice] mistakenly stated in two places that no proposal bond or performance bond was required." Appendix, p.2. Plaintiffs contend three County officials did not "mistakenly" issue the Bid Proposal and the Addendum without a bond requirement, and the subsequent demand for a bond was discriminatory. A jury should decide if the demand for a bond was a mistake. Even if it was a mistake, the question for the jury would be whether or not it was discriminatory for the County to ultimately insist on a bond rather than to proceed without one.

The appellate court also ignored the summary judgment standard when it stated, "the comment on Ms. Jacobsen's heels being inappropriate for a job site and the telephone call discouraging her from bidding do not establish disparate treatment due to gender." Appendix, p.8. The Court of Appeals engaged in a series of "what ifs" when it stated: "There is no information concerning whether Arrow's representatives received similar or different treatment" and "Nollmeyer also may have discouraged Arrow from

bidding and commented on the footwear worn by its representatives." Appendix, p.8. The County had the opportunity to, but did not, offer such evidence. Theorizing that *maybe* Arrow was treated the same as Specialty, and speculating that *maybe* Nollmeyer discouraged Arrow, is improper. The appellate court failed to draw all inferences in favor of the non-moving party contrary to established law and numerous published appellate decisions.

Moreover, the Court of Appeals incorrectly made the determination that Specialty "won" the bid. Appendix p.8. Specialty was the low bidder, but it did not win anything because it was not allowed to complete the Project. The County awarded the Project to low bidder Specialty, but then it demanded a bond, repudiated the contract, and delayed Specialty's performance.

In any other setting, if one party demanded additional work or consideration not contemplated by the contract, repudiated and interfered with performance, no one would say the non-breaching party "won" the contract. The County's conduct has legal consequences and it gives rise to an inference of discrimination.

The courts below opined that because the County claimed it was willing to pay the cost of a bond, that meant it did not discriminate against

Specialty. This finding ignores the fact that the County initially attempted to rebid the Project and Specialty was not required to accept the modification of the agreement. The law does not require a minority to do more than is required of others. The County did not, and does not, contend it uniformly required bonds from all contractors. On the contrary, the undisputed evidence is the County was informed it needed a bond after the award was made. If a bond was a typical requirement, no one would have needed to inform the County a bond was required.

The Court of Appeals decision stands for the proposition that Specialty and Jacobsen must endure and tolerate discrimination during the bidding process because they ultimately were the low bidder. Appendix p.8. This does not eradicate discrimination in Washington, it protects it.

E. Are Specialty's pecuniary losses which were suffered as a consequence of its reliance on the County's misrepresentation appropriate damages for a negligent misrepresentation claim?

The Court of Appeals also improperly concluded Specialty presented no evidence of damage resulting directly from the County's misrepresentation. Once again this issue was not raised in the trial court, but Specialty did present evidence of damage. Specialty lost money because the County told Specialty it had the contract and it asked when Specialty could

start. As a result of it being late in the paving season, Specialty stopped taking other jobs and began preparing to perform the contract and it lost money. These pecuniary losses were suffered as a consequence of Specialty's reliance on the County's misrepresentation and are allowable under Washington law. *Janda v. Brier Realty*, 97 Wn. App. 45, 50, 984 P.2d 412, 415 (1999).

F. Should the County be permitted to avoid liability for its post award misconduct and breach of its contractual duty simply because those duties arose out of a public works project?

Specialty's petition for review of the dismissal of it breach of contract claim is appropriate for two reasons. First, the Court of Appeals improperly relied on *Skyline Contractors, Inc. v. Spokane Housing Authority*, 172 Wn. App. 193, 195 (2012). The case is distinguishable. In *Skyline* injunctive relief was an adequate remedy but Skyline failed to take advantage of that relief. In this case, the County's refusal to allow Specialty to do the job pushed the work into the next paving season making an injunction an inadequate remedy. *CP 412-13.* The County's discriminatory conduct also made impossible to perform the contract.

The *Skyline* case is also distinguishable because Specialty is not a disappointed bidder. It was entitled to and got the contract. This was not a

bidding problem.

Second, the policy in *Skyline* does not apply to these facts. The *Skyline* court refused to consider damages pursuant to the policy that the public should not pay twice for the same work, once for the award of an excessive contract price and once for lost profits of the lowest bidder. The County will not paying for an excessive award to someone who is not the low bidder. No other contractor has an award and the County has not paid any other contractor to do the work. There is no reason the County should not be liable for its interference with Specialty's performance.

Once sovereign immunity has been waived, any classifications limiting the right to recover damage must be constitutional and conform to the equal protection guarantees of the state and federal constitutions. *Jenkins v. State*, 85 Wn.2d 883, 890, 540 P.2d 1363, 1368 (1975). Here, there is no rational reason to deny Specialty the right to recover money damages for the County's misconduct. This is not a dispute between two bidders and there is no doubt the award was made to the right contractor. The damage here flows from post award misconduct preventing performance of a legitimate agreement. There is no rational basis to deny damages to Specialty.

Even if the policy used in *Skyline* is at issue, it is not the product of legislative action and it should be narrowly applied. The public does not have an interest in condoning the County's post award misconduct here.

VI. CONCLUSION

This petition for review should be granted because discrimination is an issue of substantial public interest. The courts below committed reversible error when they made factual determinations on summary judgment and other legal errors that conflict with published appellate decisions. The judgment must be reversed and the case remanded for trial.

DATED: September 28, 2017

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I, LORIE MATTHEWS, hereby certify that on September 28, 2017, I caused to be served a true and correct copy of the preceding document by hand delivery to the following:

Michael E. McFarland Jr.
Evans Craven & Lackie PS
818 W Riverside Ave., Suite 250
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LORIE MATTHEWS

APPENDIX

FILED
AUGUST 29, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

SPECIALTY ASPHALT & CONSTRUCTION, LLC, a Washington limited liability company, and Lisa Jacobsen, individually,	)	No. 34480-1-III
Appellant,	)	UNPUBLISHED OPINION
v.	)	
COUNTY OF LINCOLN, a Washington State County,	)	
Respondent.	)	

KORSMO, J. — Specialty Asphalt appeals from the dismissal of its case at summary judgment. We agree with the trial court that appellants failed to establish that any disparate treatment harmed them and, therefore, affirm.

FACTS

Specialty Asphalt and its majority owner, Lisa Jacobsen, are the appellants. Specialty was the successful bidder on a project to pave a parking lot at the Lincoln County Courthouse. Problems developed early in the bid letting process.

Specialty responded in July 2013 to a Notice of Call for Bid issued by Lincoln County requesting repair and maintenance on the parking lot at the courthouse in

Davenport. The county's permit coordinator, Phil Nollmeyer, prepared the bid notice. It mistakenly stated in two places that no proposal bond or performance bond was required.

Ms. Jacobsen was the only person to appear for the public walkthrough of the project. Several county representatives, including Mr. Nollmeyer and the three county commissioners, participated. Mr. Nollmeyer apparently[1] commented that the heeled shoes worn by Ms. Jacobsen were not the most appropriate footwear for the outing. In response to comments made by Ms. Jacobsen, the Bid Notice was amended. However, there still was no bond requirement in the amended notice.

Mr. Nollmeyer subsequently gave a representative of Arrow Concrete & Asphalt a private walkthrough at a later date following the public walkthrough. Mr. Nollmeyer testified that a representative from Arrow simply showed up and Nollmeyer showed him the project location so that Arrow could prepare a bid. Prior to the due date for the bid, Nollmeyer allegedly called Ms. Jacobsen on the phone and attempted to talk her out of placing a bid. Ms. Jacobsen believed that Nollmeyer thought a woman could not do the job.

Specialty submitted a bid on July 27, 2013 that did not include a bond. The county also received a bid from Arrow. The Specialty bid was approximately $15,000

[1] While we understand that the county does not agree with all of the factual allegations, we recite the facts in the light most favorable to Specialty since it was not the moving party at summary judgment.

less than Arrow's.[2] Specialty was awarded the project. Ms. Jacobsen learned that fact when she called the county to find out the results and was told that Mr. Nollmeyer should have called her already. A letter arrived from Nollmeyer the next day advising her that Specialty had won the bid. Specialty began mobilizing its resources for the job and turned down other potential business.

The county sent an award letter to Specialty that included a contract and a contract bond. Specialty signed and returned the contract, but returned the bond unsigned after reminding the county that the Bid Notice had not required a bond. The county declined to sign the contract and the county auditor notified Ms. Jacobsen that the bidding process would be terminated due to the bond requirement mistake. County Commissioner Scott Hutsell spoke with Ms. Jacobsen and promised to work with the company.

Specialty objected to the bond requirement and alleged that the county was only seeking the bond because Specialty was owned by a woman.[3] The county offered to cover the cost of the bond if Specialty obtained one. Specialty refused to do so on the advice of its insurance agent because it could expose Specialty to investigation by the United States Department of Transportation.

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[2] Our record does not indicate whether or not the Arrow bid included a bond.

[3] Specialty also alleged that the county began tracking its contractor's bond on an ongoing basis after the bid award because it was trying to find a reason to terminate the contract. The county also checked on Arrow, but did not monitor its bond.

Specialty filed suit against the county on May 12, 2014, asking for injunctive and declaratory relief. It sought to prevent the county from going forward with another contractor. Specialty also sought a declaration that it could go forward without using a bond and a declaration that the county's offer to pay bond costs did not constitute bid-rigging. After some discovery, Specialty was allowed to amend its complaint to add Ms. Jacobsen as a party and to raise claims of gender discrimination and negligent misrepresentation.

The county moved for summary judgment in mid-December 2015. Ms. Jacobsen responded with an affidavit stating the facts (noted above) supporting her claim of gender discrimination. The county moved to strike hearsay contained within the declaration. The county also later filed a motion to compel Specialty to perform its contract obligations or to dismiss its contract claims.

The court partially granted summary judgment on February 5, 2016, striking the gender and negligent misrepresentation claims, but finding that factual questions prevented dismissal of the contract-based claims. The court also granted the motion to strike hearsay except as to statements made by Mr. Nollmeyer. After the court permitted the contract claims to go forward, the county conceded the contract issue and stipulated to Specialty completing the contract without a bond.

Specialty then moved the court to allow it to amend its complaint a second time to obtain an award of damages for breach of contract. On April 1, the superior court denied

the motion to amend. The court ruled that amendment would be futile because money damages are not available in public works cases prior to the completion of the contract; only after completion may an aggrieved contractor bring suit for damages. Meanwhile, the county made a second motion to compel specific performance or dismiss the lawsuit.

Specialty sought reconsideration on the ruling denying the amendment. The court denied reconsideration. Pursuant to the contract, Specialty then filed a notice of inability to perform the work. The court then granted the county's motion to compel the work without the bond. Specialty declined to perform the project and the trial court dismissed the case as moot.

Specialty appealed to this court. A panel heard oral argument.

ANALYSIS

This appeal requires review of the summary judgment ruling and the dismissal of the contract claim, as well as a challenge to the court's ruling striking part of Ms. Jacobsen's affidavit.[4] Since at least one element was missing from each of the claims, the trial court properly dismissed the action.

[4] Appellant also contends that the trial court erred in denying reconsideration. Since we conclude that the claims were properly dismissed, we decline to address the reconsideration argument.

Summary Judgment

Both the gender discrimination and negligent misrepresentation claims were dismissed at summary judgment. We consider those claims in the order stated, along with the argument that the trial court erred in striking portions of the affidavit.

Well settled standards govern our review. Summary judgment is proper when the moving party bears its initial burden of establishing that it is entitled to judgment because there are no disputed issues of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), *overruled on other grounds by* 130 Wn.2d 160 (1996). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). If that initial showing is made, then the burden shifts to the other party to establish there is a genuine issue for the trier of fact. *Young*, 112 Wn.2d at 225-226. The responding party may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, it must put forth evidence showing the existence of a triable issue. *Id.* The evidence must be admissible. CR 56(e) (affidavits "shall set forth such facts as would be admissible in evidence").

Gender Discrimination

An independent contractor who is discriminated against in the making or performance of a contract for employment because of her sex has a cause of action for affirmative relief and for damages under RCW 49.60.030. *Marquis v. City of Spokane*,

130 Wn.2d 97, 115, 922 P.2d 43 (1996). In an action for discrimination in the making and performance of an employment contract, the plaintiff must show (1) membership in a protected class, (2) plaintiff was similarly situated to members of the opposite sex, (3) because of plaintiff's sex she was treated differently than members of the opposite sex, *i.e.* she was offered a contract only on terms that made the performance of the job more onerous or less lucrative than contracts given to members of the opposite sex, or, once offered the contract, was treated in a manner that made the performance of the work more difficult than that of members of the opposite sex who were similarly situated. *Id.* at 113-114; *Ellingson v. Spokane Mortg. Co.*, 19 Wn. App. 48, 54, 573 P.2d 389 (1978). The plaintiff has the burden of establishing specific and material facts to support each element of his or her prima facie case. *Ellingson*, 19 Wn. App. at 54.

Even assuming the first two elements of a discrimination claim, appellant's action foundered on the third prong for a couple of different reasons. First, it is difficult to see how the perceived differences in treatment occurred because of Ms. Jacobsen's gender since there was no evidence that Arrow was treated differently. The group walkthrough that she participated in cannot be disparate treatment; it was advertised and available for any potential bidders to take part in. Even if one wants to interpret the later visit by Arrow's representative as special treatment of Arrow, it does not establish disparate treatment of Specialty in the absence of evidence that Specialty was denied a similar opportunity.

Similarly, the comment on Ms. Jacobsen's heels being inappropriate for a jobsite and the telephone call discouraging her from bidding do not establish disparate treatment due to gender. There is no information concerning whether Arrow's representatives received similar or different treatment. For all this record shows, Mr. Nollmeyer also may have discouraged Arrow from bidding and commented on the footwear worn by its representative.

The second reason that the arguments are unavailing is that the alleged disparate treatment did not cost Specialty the bid—it still won. That fact is also the reason that the repeated checking on Specialty's licensing after the award of the bid is not evidence of disparate treatment. After the bid was awarded, there was no competing "class" to compare treatment with; a winning bidder and a losing bidder are no longer similarly situated in the same "class." Instead, the county faced a winning bidder who had not accepted the contract offered (with a bond). Specialty was in a class by itself and whatever scrutiny it was receiving was not disparate with respect to another similarly situated entity. There were none.

Specialty likewise has not shown that the phone call or the heel comments or any of the other instances of disparate treatment affected it in any manner. There was no increase in costs or delay in processing of the bid due to the alleged behavior. Similarly, there is no suggestion that the license monitoring somehow affected the ability to perform the contract or otherwise imposed burdens on Specialty. The disparate treatment did not

make performance of the job more onerous or less lucrative, nor did it make performance of the contract more difficult.

The trial court correctly determined that the third element of the gender discrimination claim was not established by the identified instances of disparate conduct. Summary judgment was properly granted.

Negligent Misrepresentation

The court also dismissed the negligent misrepresentation claim at summary judgment. Special claims that material factual disputes precluded summary judgment, while the county argues that the claim failed because of both the public duty doctrine and Specialty's failure to prove an element of its cause of action. We agree with the latter contention and do not consider the public duty argument.

Washington's adoption of the tort of negligent misrepresentation is based on the *Restatement (Second) of Torts* § 552 (1977). To establish the elements of that tort, one must establish:

> A plaintiff claiming negligent misrepresentation must prove by clear, cogent, and convincing evidence that (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages. . . . Moreover, the plaintiff must not have been negligent in relying on the representation.

Ross v. Kirner, 162 Wn.2d 493, 499-500, 172 P.3d 701 (2007) (internal citations omitted).

Commentary on the *Restatement* recognizes that liability is based on negligence of the actor in failing to exercise reasonable care or competence in supplying correct information. RESTATEMENT § 552, cmt. a. Under the *Restatement*, damages for negligent misrepresentation are limited to "those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is a legal cause." RESTATEMENT § 552B. "Recovery of damages for the benefit of the plaintiff's contract with the defendant is specifically not allowed under the Restatement." *Janda v. Brier Realty*, 97 Wn. App. 45, 50, 984 P.2d 412 (1999).

The plaintiff must establish the evidence proving damages with enough certainty to provide a reasonable basis for estimating it. *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 717, 845 P.2d 987 (1993) (citing *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 16, 390 P.2d 677, 396 P.2d 879 (1964)). Although the precise amount of damages need not be shown, damages must be supported by competent evidence in the record; to be competent, the evidence or proof of damages must be established by a reasonable basis, and it must not subject the trier of fact to mere speculation or conjecture. *Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 443, 886 P.2d 172 (1994); *Lewis River Golf*, 120 Wn.2d at 717-718 (requirement of reasonable certainty applies more to the fact of damages than to the amount of damages).

While the parties have genuine factual disputes concerning other elements of the tort, this case fails on the damages element. Specialty did not establish damages because the county first agreed to cover the cost of the bond and later rescinded the need for the bond, removing the potential pecuniary damage caused by the county's original insistence on a performance bond. *See* RESTATEMENT § 552B. Ultimately, prior to completion of the contract, Specialty had not been damaged. *Lewis River Golf*, 120 Wn.2d at 717. The *Restatement* provides an on-point example concerning liability for providing incorrect information. In that circumstance, damages occur when the plaintiff suffers "pecuniary loss *in performing their contracts*." RESTATEMENT § 552 cmt. h, illus. 9 (emphasis added). As Specialty never performed on the contract, it was not damaged in the sense recognized by this tort.

The court correctly dismissed the negligent misrepresentation claim at summary judgment.

Evidentiary Ruling

Specialty also argues that the trial court erred in striking portions of Ms. Jacobsen's declaration on hearsay grounds. If the court erred in this regard, the stricken materials did not prejudice Specialty.

In its ruling, the trial court denied the motion to strike statements attributed to Mr. Nollmeyer, but granted the motion to strike other hearsay in Ms. Jacobsen's affidavit. On appeal, Specialty challenges the ruling as to statements made by the auditor and a county

commissioner, both of whom Specialty alleges are speaking agents for the county. Specifically, the affidavit states that Ms. Jacobsen spoke with:

> Lincoln County Commissioner Scott Hutsell about the award that Specialty Asphalt had received. Commissioner Hutsell understood that the Bid Proposal had affirmatively represented that the county was not requesting a bond for the Project and that a bidder, such as Specialty Asphalt, must formulate its bid on the items that the county identifies in the Bid Proposal. He described the situation as a mess. Commissioner Hutsell assured me that the county would not let this go bad for Specialty Asphalt and that he would investigate the available options that would enable the Project to go forward with my company. He graciously expressed his appreciation for contractors that showed an interest in coming to perform work in Lincoln County.

Clerk's Papers at 287.

Assuming that the hearsay attributed to Mr. Hutsell, as well as that attributed to Shelly Johnston, the auditor, should have been admitted, the error was of no moment. Commissioner Hutsell reiterated that the bid did not include a request for a bond on the project, a fact the county never denied. The commissioner described the situation as "a mess," an opinion that no one denies. If Commissioner Hutsell assured Ms. Jacobsen that the county "would not let this go bad for Specialty" and that "he would investigate the available options that would enable the Project to go forward" with Specialty, it is unclear how striking these statements was prejudicial to Specialty, as the statements address Specialty's contract claim, which survived summary judgment.

Similarly, the auditor's statements involved an undisputed position—Lincoln County was asking for a bond even though the bid proposal did not call for one. If the

court actually disregarded those statements, they were cumulative to Ms. Jacobsen's own testimony on the topic, something the court was required to consider and undoubtedly had done. Additionally, as with Hutsell's statements, the Johnston statements primarily went to the contract claim and were cumulative on the misrepresentation claim.

Any error in striking these statements was harmless because they did not impact the summary judgment ruling.

Contract Claims

Finally, Specialty claims that the court erred in dismissing the contract action and in refusing to permit it to further amend the complaint to assert a claim for damages due to breach of contract. Since both arguments fail for the same reason, we address them together.[5]

It long has been settled that the exclusive remedy for an aggrieved bidder on a public works contract is injunctive relief. *Mottner v. Town of Mercer Island*, 75 Wn.2d 575, 579-580, 452 P.2d 750 (1969). The controlling case is our decision in *Skyline Contractors. Inc. v. Spokane Housing Authority*, 172 Wn. App. 193, 204, 289 P.3d 690 (2012). There the Spokane Housing Authority (SHA) awarded a public works contract to Skyline. *Id.* at 197-198. Soon afterwards, SHA withdrew its offer based on the failure of

[5] A trial court may appropriately deny a motion to amend if an amended claim is futile. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154, 943 P.2d 1358 (1997). It is for that reason that we will not separately address the argument that the court erred in failing to grant the amendment.

Skyline to produce a required piece of documentation on its subcontractors. *Id.* at 198. In withdrawing its bid, SHA pointed to specific terms of the invitation for bids that Skyline either violated or failed to satisfy, related to Skyline's agreements with its subcontractors. *Id.* at 199. This court held that the exclusive remedy for Skyline was to seek an injunction to prevent SHA from awarding the contract to another bidder. As Skyline elected not to pursue this exclusive remedy, summary judgment of Skyline's claim for damages was appropriate. *Id.* at 207.

In contrast, damages for breach of contract are available when the contractor has performed its duties under the agreement. *Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wn.2d 506, 509, 145 P.3d 371 (2006). Scoccolo Construction, unlike Specialty, did not sue the City of Renton until *after* completion of the project. *Id.* at 512.

The trial court correctly reasoned that this case was closer to the *Skyline* fact pattern. Specialty sought the authorized relief for a bidder—an injunction to prevent anyone else from performing the project. It received that relief. Indeed, the county ultimately conceded that point. Accordingly, the trial court found for Specialty.

Rather than proceed with the contract and then subsequently seek any damages caused by the delay, Specialty chose not to proceed with the project. The trial court correctly concluded that the case was now moot. Specialty had won its relief and there was nothing left since the other counts were dismissed at summary judgment. There also

was no basis for amending the complaint to seek breach of contract damages since Specialty had not performed the contract.

There was no justiciable controversy remaining. *See Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 186, 157 P.3d 847 (2007). The matter was properly dismissed.

Finally, both parties seek attorney fees on appeal. Specialty did not prevail in this appeal, so there is no basis for granting its request. Although the county seeks fees on the basis that the appeal was frivolous, we disagree with that characterization. Specialty had legitimate arguments on appeal that presented debatable issues, even if none of them succeeded. The appeal was not frivolous and the county is not entitled to attorney fees.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Siddoway, J.

Pennell, J.