No. 1023324

SUPREME COURT
OF THE STATE OF WASHINGTON

GRAHAM CONTRACTING, LTD.

Petitioner,

v.

CITY OF FEDERAL WAY

Respondent.

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION I

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This appeal involves a straightforward application of contract interpretation and Washington law, and does not merit this Court's review. The parties' construction contract, which incorporated the Washington State Department of Transportation (WSDOT) Standard Specifications, required Petitioner Graham Contracting, Ltd. (Graham) to timely protest any disputes that arose during its work for the City of Federal Way (the City). Graham failed to do so and, following this Court's precedent in *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003) and myriad other cases, the Court of Appeals properly affirmed the dismissal of Graham's claims.

The Court of Appeals' *unreported* decision does not satisfy any basis for review under RAP 13.4(b). Graham asks the Court to clarify the meaning of the Standard Specifications, but their meaning is unambiguous and universally understood. The Specifications require timely protest for any dispute, not just those involving the "Engineer." This interpretation is not only

correct, it follows the prior *published* decision by the Court of Appeals in *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 277 P.3d 679 (2012). This Court denied review in *Realm* (175 Wn.2d 1015 (Oct. 10, 2012)), and it should do the same here.

The petition's two other arguments likewise don't merit review. The Court of Appeals did not refuse to consider the summary judgment record. It properly affirmed the trial court's refusal to consider new theories and additional evidence Graham raised for the first time in a motion for reconsideration after losing summary judgment. There is nothing erroneous or novel about this ruling either. "CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision." *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

Finally, Graham's complaints regarding the purported prematurity of Court of Appeals' fee award are baseless. Graham waived this argument because it failed to object to the City's fee request—raising the issue for the first time in its unsuccessful

motion for reconsideration. Graham is wrong in any event. This appeal arises from a CR 54(b) final judgment. Because Graham's dismissed claims have been severed from the rest of the case, Graham will "recover nothing" on those claims no matter what happens when this case returns to the trial court.

II. COUNTERSTATEMENT OF ISSUE

Does the Court of Appeals' unpublished opinion affirming the CR 54(b) summary judgment of certain of Graham's claims satisfy any of the criteria for review under RAP 13.4(b). **No.**

III. COUNTERSTATEMENT OF THE CASE

Graham spends pages and pages discussing evidence that it says creates an issue of fact on the identity of the project's contractually-designated "Engineer." The Court of Appeals properly recognized that this evidence is irrelevant because the Contract's notice requirements apply to all disputes, not just those involving the "Engineer." For the same reason, those facts are not relevant Graham's petition, and are not addressed here.

A. The Project and Contract

Over several years, the City added HOV lanes and other improvements to the Pacific Highway. The City contracted with Graham for Phase V of the project. CP 84-85 (¶3). The project involved laying new pavement, placing utilities underground, installing and modifying traffic signals, and building curbs, gutters, sidewalks, medians, and retaining walls. *Id.* (¶4). Graham submitted the lowest bid for the work. *Id.* (¶5).

The effective date of the parties' contract was August 25, 2016. *Id.* The contract included various documents, including the Request for Bid, Public Works Contract, Terms, Conditions, and Special Provisions, WSDOT Standard Specifications for Road, Bridge and Municipal Construction, Amendments to the Standard Specifications, and Plans (the "Contract"). *Id.* (¶6).

The Contract contained provisions that required Graham to give prompt written notice of any issue that it believed entitled it to more time or compensation. The Contract provided that Graham's failure to comply with these provisions waived its

right to make a claim or file suit. CP 96, 141, 158, 160, 860.

The Contract's primary notice provision is WSDOT Standard Specification 1-04.5, and it provided in relevant part:

> If in disagreement with anything required in a change order, another written order, or an oral order from the Engineer, including any direction, instruction, interpretation, or determination by the Engineer, the Contractor shall:
>
> 1. Immediately give a signed written notice of protest to the Project Engineer or the Project Engineer's field Inspectors before doing the Work;
>
> 2. Supplement the written protest within 14 calendar days with a written statement and supporting documents providing the following:
> …
>
> If the Contractor does not accept the Engineer's determination then the Contractor shall pursue the dispute and claims procedures set forth in Section 1-09.11. …

CP 140-41. Thus, if it disagreed with "a change order, another written order, or an oral order from the Engineer," to preserve a right to assert a claim, Graham was required to "immediately" submit a written protest, and "supplement" the protest with detailed information "within 14 calendar days."

But that wasn't all. Even if Graham timely did those two things, in the event the parties were unable to resolve a protest, the Contract also required compliance with Sections 1-09.11 and 1-09.11(2). Those provisions required Graham to give a written notice within seven days of receipt following a determination on its protest, followed by a detailed claim substantiating its right to additional payment. CP 155, 158. Critically, as explained below, while Section 1-04.5 triggered compliance with Section 1-09.11, the opposite is also true. Because Section 1-09.11 applied to "any claim," it required Graham to "follow the procedures outlined in Section 1-04.5" as a prerequisite to suit. CP 155, 158.

Not only was compliance with Section 1-04.5 required by Section 1-09.11, Section 1-09.13 also required compliance with Section 1-04.5 as a condition precedent to suit. Specifically:

> Prior to seeking claim resolution through … litigation, ***the Contractor shall proceed under the administrative procedures in Sections 1-04.5 and 1-09.11****[.]* The provisions of these sections must be complied with in full, as a condition precedent to the Contractor's right to seek claim resolution through … litigation.

CP 860 (emphasis added). Similar waiver language appeared in Section 1-09.11. CP 157 ("Contractor agrees to waive ***any claim*** for additional payment if the written notifications provided in Section 1-04.5 are not given" (emphasis added)).

B. Graham Fails To Follow Notice Provisions

The City hired KPG to serve as its "Engineer" on the project, with responsibility to supervise Graham's work. CP 85 (¶7), 337 (¶3). Problems with Graham's work arose early on. Many of those problems related to Graham's undergrounding, utility work, and the joint utility trench (JUT). Graham improperly sequenced its undergrounding, utility, and JUT work, causing problems with its ability to complete the project on time. CP 86-87 (¶¶10-11). In particular, Graham had mistakenly planned its work as if the utility poles for existing power lines would be relocated prior to completion of the JUT. CP 87 (¶12).

Graham provided a "Notice of Delay" on November 3, 2016 related to the JUT work. CP 163-65. On November 8, 2016, KPG denied Graham request for a delay. CP 87 (¶13), 167-68.

Nearly a month later, on December 2, 2016, Graham sent a letter to complain about KPG's determination and request a meeting to discuss alternatives. CP 87-88 (¶14), 171-74. Critically, however, Graham did not protest KPG's determination under Section 1-04.5, nor did it question its authority to make that determination as the project's "Engineer." *Id.*

On December 16, 2016, KPG responded, informing Graham that KPG was not changing its November 8 determination. CP 88 (¶15), 176-77. Still, Graham did not protest or supplement under Section 1-04.5. Instead, Graham provided more "notices" resulting from its incorrect sequencing of utility and JUT work and scheduling delays—all of which related back to KPG's November 8 determination that the utility poles were to remain in place until the JUT was complete. CP 88 (¶16).

Rather than follow the Contract's notice provisions, Graham asked for a meeting. The City agreed. Following that meeting, the City wrote a follow-up letter on January 20, 2017 reiterating that neither Graham's November 3, 2016 "Notice of

Delay" nor its responses to KPG's November 8 determination complied with the notice and claim requirements set forth in Sections 1-04.5 and 1-09.11. The City concluded: "Graham should stop providing 'Notices of Delay' … arising out of this issue. Any such future notices are waived and invalid. The City considers this matter concluded." CP 88-89 (¶17), 179-87.

C. Graham Claims That KPG Is Not The Engineer

Realizing that its failure to give notice waived its right to additional time or compensation, Graham concocted a strategy in an effort to avoid the Contract's notice provisions. In June 2017, Graham wrote the City and, for the first time, took the position that the City's employee John Mulkey was the "Engineer," not KPG—and, thus, it had no duty to comply with Section 1-04.5 because it was not disputing anything that Mulkey ordered or decided. CP 346 (¶33), 280-84, 575-78.

The City—through KPG—responded by letter on July 7, 2017, pointing out that "Graham was informed … that KPG would act as the Engineer for this Project in collaboration with

City personnel, and KPG has been acting in that role from the beginning of the Project – as Graham is more than aware." CP 575. In addition to debunking Graham's ploy, KPG's July 7 letter again denied Graham's requests for more time and compensation from its earlier delays, explaining that "Graham cannot resurrect already waived and/or denied Claims by protesting later statements reminding Graham of prior decisions." CP 576.

D. Graham Files Suit And Loses Summary Judgment

Graham filed suit in October 2020 seeking nearly $12 million in additional compensation for work on the Project. CP 1-6. The City moved for partial summary judgment. Relying on *Mike M. Johnson* and its progeny, the City argued that Graham waived its right to more compensation because it failed to comply with the Contract's various notice provisions for six categories of claims: "cumulative impact," delays, JUT work/differing site conditions, force account, implied warranty, and quantum meruit/unjust enrichment. CP 15-39.

In response, Graham did not argue that it complied with the Contract's notice provisions for these six claim categories. Rather, it opposed the City's motion and cross-moved on the theory that it had no duty to give notice at all. Graham argued that Section 1-04.5 only required it to protest actions of the "Engineer"—and that since it claimed Mulkey, not KPG, was the Engineer, Graham could bring its claims years after they arose without ever having given timely notice. CP 240-257, 643-672.

In granting the City's motion (and denying Graham's), the trial court found there were issues of fact as to the identity of the project's "Engineer," but concluded that it didn't matter: the Contract's notice provisions applied to all claims. The court rejected Graham's "strained reading" of the Contract, and concluded that "the record is clear" that the Contract required Graham "to follow a four (4) step claims process" for the claims at issue, and it was "undisputed that [Graham] did not follow this … process." CP 1051-60; *see also* VRP (6/25/2021) at 84-88.

E. Graham Raises New Theory On Reconsideration

In addition to rehashed arguments, Graham's motion for reconsideration raised an entirely new argument (with nearly 900 additional pages of evidence) that it did not make when opposing summary judgment: that it complied with Section 1-04.5 when protesting certain change orders (CP 1065-71, 2016) and liquidated damages (CP 1076-77, 2017)—two items the City had not raised in its motion. Graham, however, did not submit any new evidence showing it had timely protested the six categories of claims upon which the City had moved for judgment.

In its ruling on the motion, the trial court clarified that it had granted summary judgment only as to the six categories of claims raised in the City's motion. Beyond that, the court denied Graham's motion for reconsideration in its entirety. The court's order did not state that it had considered Graham's new-found theories regarding change orders and liquidated damages and, indeed, did not reference them at all. CP 2038-41.

F. The Court of Appeals Affirms

The Court of Appeals affirmed in an unpublished opinion. The court held that it did not matter who the "Engineer" was because, under Section 1-09.11, Graham was to "'follow the procedures outlined in Section 1-04.5' before filing any claim for additional compensation," and "[n]othing in these sections narrow the procedural requirement to claims arising only from orders or decisions of the Project Engineer." A-11. The court granted the City's unopposed request for appellate fees. A-13. Graham's motion for reconsideration was denied.

IV. ARGUMENT

A. The Contract Required Graham To Give Notice Under Section 1-04.5 As A Prerequisite To "Any Claim," Not Just Those Arising From Orders Of The "Engineer."

The Court of Appeals' interpretation of the WSDOT Standard Specifications, incorporated into the parties' Contract, was neither incorrect nor novel. It is entirely consistent with the Contracts' plain and unambiguous terms, the policy and purpose behind contractual notice provisions, and prior case law.

1. The Court of Appeals Properly Held That Graham's Compliance With Section 1-04.5 Was Required By Sections 1-09.11 and 1-09.13.

Under settled Washington law, a contractor's failure to strictly comply with the contract's notice provisions operates as a complete bar to the contractor's claims for additional time or compensation for its work. Washington courts have repeatedly recognized and applied this principle in cases governed by the same WSDOT Standard Specifications at issue here. *NOVA Contracting, Inc. v. City of Olympia*, 191 Wn.2d 854, 857, 426 P.3d 685 (2018); *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 174 P.3d 54 (2007); *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 386, 78 P.3d 161 (2003); *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 5, 277 P.3d 679 (2012).

Graham's petition advances the same flawed reading of the Standard Specifications that both the trial court and the Court of Appeals rejected. Graham argues that Section 1-04.5 limited Graham's duty to protest to instances where it disagreed with "a change order, another written order, or an oral order from the

Engineer." CP 140. According to Graham, no matter what other issue, dispute or problem arose during the project, if it didn't stem from "the Engineer," then it had no duty to comply with the Contract's notice and claim provisions; it could do nothing, wait until the project was over and then file suit seeking millions in extra compensation—which is what it did here. Pet. at 12-13.

The Court of Appeals' properly concluded that Graham's interpretation ignores the Contract's other provisions, which unambiguously incorporated Section 1-04.5's "procedures" and "means" as the predicate notice requirement for "any claim" that arose on the project—not just those related to the "Engineer." Op. at 10-11. This conclusion is compelled by Section 1-09.11, entitled "Disputes and Claims." It provides in relevant part:

> When protests occur during a Contract, the Contractor shall pursue resolution through the Project Engineer. The Contractor shall follow the procedures outlined in Section 1-04.5.

CP 155. This provision required Graham to comply with Section 1-04.5 for any and all "protests [that] occur during a Contract." Nothing in Section 1-09.11 limits its applicability—and its

requirement to "follow the procedures … in Section 1-04.5"—only to protests involving the Engineer's orders or actions.

As the Court of Appeals recognized, Section 1-09.11(2) likewise confirms that Section 1-09.11 independently compels compliance with Section 1-04.5. It provides in relevant part:

> If the Contractor claims that additional payment is due and the Contractor has pursued and exhausted all the means provided in Section[] 1-04.5 … to resolve a dispute, the Contractor may file a claim as provided in this section. The Contractor agrees to waive any claim for additional payment if the written notifications provided in Section 1-04.5 are not given …, or if a claim is not filed as provided in this section. …

CP 158. "Washington courts have repeatedly construed the word 'any' to mean 'every' and 'all.'" *NOVA*, 191 Wn.2d at 865-66 (cleaned up). Here, too, Section 1-09.11(2) conditioned the right to file "any claim" on a showing that Graham "pursued and exhausted" the written protest procedure in Section 1-04.5.

The Contract makes this equally and separately clear in Section 1-09.13, as noted by the Court of Appeals. A-12 n. 8.

That section, entitled "Claims Resolution," sets forth conditions precedent filing suit, and provides in relevant part:

> Prior to seeking claim resolution through … litigation, the Contractor shall proceed under the administrative procedures in Sections 1-04.5 and 1-09.11, and any Special Provision provided in the Contract for resolution of disputes. The provisions of these sections must be complied with in full, as a condition precedent to the Contractor's right to seek claim resolution through … litigation.

CP 860. "Section 1-09.13 requires compliance with section 1-04.5 twice—it directly requires compliance with 1-04.5, and it requires compliance with section 1-09.11 which … itself requires compliance with section 1-04.5." *Realm*, 168 Wn. App. at 6. In short, then, the unambiguous meaning of Sections 1-09.11 and 1-09.13—neither of which is tied to actions of the Engineer—incorporate Section 1-04.5's written protest requirement as a prerequisite to any claim or litigation. *See* CP 155, 158, 860.

Other provisions in the Contract confirm that compliance with Section 1-04.5 is not limited to protesting actions of the "Engineer." For example, if it came upon "Differing Site Conditions," Section 1-04.7 stated that "[n]o claim" would be

"allowed unless the Contractor has followed the procedures … in Sections 1-04.5 and 1-09.11." CP 142. Similarly, "[w]hen others delay the Work through late performance of utility work," Section 1-07.17 instructed Graham to "adhere to the requirements of Section 1-04.5." CP 145-46. If Graham was correct, application of Section 1-04.5 to these provisions—none of which involve actions of the "Engineer"—would be nonsensical, contrary to the rules of contract interpretation.

Indeed, it is Graham, not the City, that asks the courts to rewrite the Contract to excuse its failure to comply with the Contract's notice provisions and alter the balance of risk allocation reflected in the Standard Specifications. If only the Engineer's actions triggered Section 1-04.5, entire categories of disputes would evade the Contract's notice provisions, defeating their intended purpose. The City "would be denied the benefit of advance notice and the opportunity to resolve disputes before they devolve into litigation because contractors could simply choose to litigate their disputes …." *Realm*, 168 Wn. App. at 11.

To be sure, such a result would conflict with the well-founded policy underlying the *Mike M. Johnson* line of cases.

2. The Court of Appeals' Opinion Follows Division Two's Published Opinion In *Realm*.

Graham argues that the Court of Appeals' interpretation of the WSDOT Standard Specifications is novel and that "[n]o prior Washington state appellate court has ever interpreted 1.04.5 in this manner …." Pet. at 18. Wrong. Graham conspicuously fails to discuss the 2012 published opinion in *Realm, Inc. v. City of Olympia*. *Realm* squarely debunks Graham's arguments in two ways. First, it holds—like the Court of Appeals here—that Sections 1-09.11 and 1-09.13 independently and separately trigger a contractor's obligation to give notice under Section 1-04.5. And, second, it confirms that this obligation applies equally to disputes that do not involve actions of the "Engineer."

The WSDOT Standard Specifications at issue in *Realm* were identical to those at issue here. Section 1-08.10(3), which governed costs upon the city's termination of the contract, required Realm to comply with "sections 1-09.11 and 1-09.12."

Realm, 168 Wn. App. at 5. While Section 1-08.10(4) provided that if the parties could not agree on payment due, "the matter will be resolved as outlined in Section 1-09.13." *Id.* Like Graham, Realm argued that Section 1-04.5 did not apply as a prerequisite to making claims under either provision.

The *Realm* court held that the contractor's compliance with Section 1-04.5 was compelled by Sections 1-09.11 and 1-09.13, because both "refer back" to Section 1-04.5:

> [T]wo provisions of the contract relating to termination for public convenience [sections 1-09.11 and 1-09.13] refer back to the contract's notice provision, section 1-04.5. … Moreover, section 1-09.13 unambiguously requires contractors to comply "in full" with sections 1-04.5 and 1-09.11 as a precondition to litigation, flatly contradicting Realm's argument that it need not comply with section 1-04.5 regarding disputes about the payment due on termination.

Id. at 6-7. The Court of Appeals' application of Section 1-04.5 by way of Sections 1-09.11 and 1-09.13 is entirely consistent with *Realm*. Because it was undisputed that Realm never gave notice under Section 1-04.5, the court concluded that it had waived its clams. *Id.* at 8. The same is true here.

Just as important, the dispute in *Realm* did not involve the "Engineer." Under the Section 1-08.10(2), the Engineer makes the decision to terminate, but Realm didn't dispute that decision. Rather, Realm disputed the payment it received after termination, and Sections 1-08.10(3) & (4) (the sections at issue in *Realm*) dictated that the Contracting Agency (i.e., the city) determined the amount of the payment; it was that determination that Realm disputed. Section 1-08.10(4) ("If the Contracting Agency and the Contractor cannot agree as to the proper amount of payment, the matter will be resolved as outlined in Section 1-09.13 …").[1] Even though the dispute arose from the actions of the city, not the Engineer, the *Realm* court had no difficulty applying Section 1-04.5 by virtue of its incorporation in Sections 1-09.11 and 1-09.13. The Court of Appeals likewise had no difficulty here.

[1] The *Realm* court paraphrased Section 1-08.10 without quoting the actual Specification language. WSDOT maintains all prior versions of the Standard Specifications on its website. The 2008 version, which was in effect at the time, can be found at: https://wsdot.wa.gov/publications/manuals/fulltext/M41-10/SS2008.pdf. The relevant language has not changed.

B. The Court Of Appeals Properly Affirmed The Trial Court's Refusal To Address New Theories And Evidence Graham Raised For The First Time In A Motion For Reconsideration.

Graham's argument that the Court of Appeals improperly refused to consider evidence submitted with its CR 59 motion presents no basis for review. The Court of Appeals affirmed the trial court's denial of Graham's motion for reconsideration because it correctly recognized that it was based on entirely new theories—not just new evidence. Op. at 8 n. 6. "CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision." *Wilcox*, 130 Wn. App. at 241, 122 P.3d 729 (2005) (citing *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 970 P.2d 343 (1999)).

That fact alone, which Graham ignores, was a proper basis to affirm the denial of Graham's motion. It is well-settled that the Court of Appeals was not required to consider a new theory (or the evidence supporting it) submitted for the first time as part of a motion for reconsideration where, as here, the trial court properly exercised its discretion to deny the motion under CR 59.

Dynamic Res., Inc. v. Dep't of Revenue, 21 Wn. App.2d 814, 825, 508 P.3d 680 (2022); *Margitan v. Risk Mgmt. Inc.*, 2020 WL 1027968, *3 n. 2 (Wn. App. Mar. 3, 2020); *Saltaire Craftsmen, LLC v. Blake*, 2020 WL 6557691, *3 (Wn. App. Nov. 9, 2020).[2]

Graham argues the trial court actually considered its new evidence because the order denying reconsideration listed its new declarations—along with all other pleadings filed with the underlying motions for summary judgment. But there was a good reason for this. The order also corrected the court's prior summary judgment order—effectively, replacing that earlier order. Because the motion for reconsideration was the predicate for the corrected summary judgment order, CR 56(h) required the order to contain a list of all documents and evidence filed with the motion. *See* CR 56(h) ("The order … shall designate the

[2] Graham argues that the case cited by the Court of Appeals "is bounded by its facts" and "applies to post-trial motions for reconsideration." Pet. at 28. Nonsense. While *JDFJ* was not a summary judgment case, the black-letter rule it applied is ubiquitously cited in cases reviewing CR 59 motions following summary judgment (with many of those cases citing *JDFJ*).

documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.").

"[T]he rule requires the superior court to list all declarations presented to it, but not necessarily to consider all declarations." *Boyer v. Morimoto*, 10 Wn. App.2d 506, 528, 449 P.3d 285 (2019). Here, it is clear that the trial court did not consider the new evidence. At hearing, the court stated it would consider "the new information" only if it made "a determination [that] there's a basis for reconsideration under CR 59." *Id.* at 128-29. The court's order shows that there was no such basis. The court denied reconsideration without discussion, and corrected the summary judgment order to align with the same six topics raised by the City in its motion. Critically, the order did not address—or even reference—Graham's new-found theories based on change orders and liquidated damages. CP 2038-41.

Finally, this Court can easily reject Graham's claim that the Court of Appeals' decision conflicts with *Keck v. Collins,*184 Wn.2d 358, 357 P.3d 1080 (2015). This argument is waived. If

Graham believed *Keck* compelled the trial court to conduct a *Burnet* analysis, it needed to raise the issue below so that the trial court could have considered it. *Boyer*, 10 Wn. App.2d at 535-37. Graham didn't do that. And, even if the trial court should have conducted a *Burnet* analysis *sua sponte*, then Graham needed to challenge that ostensible error in its merits briefing to the Court of Appeals. RAP 10.3(a)(4) & (6). Graham didn't do that either. Graham raised this alleged error for the first time in its motion for reconsideration to the Court of Appeals. Too late.

Graham is wrong about *Keck* in any event. *Keck* is properly limited to situations where a trial court is asked to strike untimely evidence prior to entry of judgment—not where, as here, a party submits new evidence on reconsideration after summary judgment. *Spice v. Estate of Mathews*, 2017 WL 6337457, *4 (Wn. App. Dec. 12, 2017) ("We decline … to extend the holding of *Keck* to the exclusion of untimely evidence submitted as part of a motion for reconsideration."). At bottom,

Graham's reliance on *Keck* to drum a basis for review is both procedurally and substantively groundless.

C. The Court Of Appeals Properly Awarded The City Its Appellate Fees.

Graham cannot explain why the Court of Appeals' fee award merits review under RAP 13.4(b). It doesn't. RCW 39.04.240 adopts RCW 4.84.250 through 4.84.280 in actions on a public works contract, and it mandates a fee award where—as here—the plaintiff "recovers nothing." RCW 4.84.270. Graham argues that an award on this basis was "premature" because it "remains to be seen whether and how much Graham will recover in this action"—pointing out that the City's motion for partial summary judgment did not end the entire case. Pet. at 29-31.

Graham's argument is baseless for two reasons. The first is procedural. The City properly made its request for fees in its answering brief. Resp. Br. at 64-65; RAP 18.1(b). Graham could have made its prematurity argument in its reply—but did not. In fact, Graham did not oppose the City's request for fees at all. The

issue was waived, and the Court of Appeals properly refused to address it for the first time on reconsideration.

The second reason is substantive. Graham argues that the City's status as the prevailing party cannot be decided until conclusion of the "entire case." Pet. at 31. It is true that an award of appellate fees may be premature where a successful appeal merely reinstates previously dismissed claims; in such cases, prevailing party status must await the outcome of the case on remand. But unlike those cases, here, Graham requested, and the trial court entered, a CR 54(b) final judgment as to all claims decided on summary judgment. CP 2043-2047.

When that occurred, Graham forfeited any argument that prevailing party status under RAP 18.1(a) and RCW 39.04.240 turns on the outcome of the "entire case." In effect, entry of the CR 54(b) judgment severed the dismissed claims from the rest of the case. And as to those claims, the CR 54(b) judgment was final. Not only did Graham "recover nothing" on those claims in

the trial court, now having lost on appeal, nothing that happens on remand can alter the City's status as prevailing party.

D. The City Is Entitled To Attorneys' Fees.

Because the Court of Appeals properly awarded the City fees on appeal, this Court should likewise award the City the fees it reasonably incurred answering this petition. RAP 18.1(j).

V. CONCLUSION

The petition should be denied.

I certify that this answer to the petition for review contains 4,824 words in compliance with RAP 18.17.

Respectfully submitted September 27, 2023.

LANE POWELL PC

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2023, I electronically filed the foregoing **ANSWER TO PETITION FOR REVIEW** with the Clerk of the Court using the CM/ECF system, as well as by electronic mail, which will send notification of such filing to the following:

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