NO. 344801-III

Supreme Court No. 95085-7

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

SPECIALTY ASPHALT & CONSTRUCTION, LLC, a Washington Company, and LISA JACOBSEN, an individual,

Plaintiffs/Appellants,

v.

LINCOLN COUNTY, a Washington State County,

Defendant/Respondent.

RESPONDENT'S ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF THE PARTIES/INTRODUCTION

Respondent Lincoln County was the defendant in Spokane County Superior Court Cause No.: 14-2-01715-9, and the appellee in Court of Appeals, Division III. Appellants are Specialty Asphalt & Construction, LLC and Lisa Jacobsen (hereinafter "Specialty" unless Ms. Jacobsen is specifically identified) and were the plaintiffs in the Superior Court matter and the appellants in the Court of Appeals matter.

There is no genuine issue raised in Specialty's Petition that should be of concern to this Court. The Court of Appeals' opinion in this case is, narrowly drawn to the facts and appropriately applies controlling precedent. This Court should deny review.

II. STATEMENT OF THE ISSUES

This Court is fully aware of the provisions of RAP 13.4(b) which govern the only four grounds for the Court to accept a petition for review:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Specialty does not even attempt to argue that this case falls within any of those four provisions. *See Arctic Stone, Ltd. v. Dadvar*, 127 Wn. App. 789, 794 n.6, 112 P.3d 582, 584 (2005) ("We do not address assignments of error unsupported by argument or citation to authority."). Rather, there is a bald and unsupported assertion that "[t]his case satisfies all four grounds for review," then Specialty regurgitates the arguments made in the Court of Appeals below. *Petition*, at 8.

Specialty further makes several arguments in the Motion for Discretionary Review which have been raised for the first time in that brief. *See, e.g. Petition*, p.11 (regarding nominal damages). As such, those arguments need not be considered by the Court in reaching its determination whether to accept review.

For the reasons set forth herein, Lincoln County respectfully requests the Court deny review of Petitioner's case and award reasonable attorney fees and costs for the unending and ever-changing pursuit by Specialty.

III. STATEMENT OF THE CASE

A. Factual History

On July 16, 2013, Lincoln County sent out a proposal for bids for a paving project in the general proximity of the Lincoln County Courthouse. CP 34. The form used was a simpler form than the standard bid proposal used for larger projects. *Id.* Lincoln County's Public Works Department Operations and Permit Coordinator is Phil Nollmeyer. CP 28. Mr. Nollmeyer held the same position at all times relevant to this lawsuit. *Id.*

When Mr. Nollmeyer was preparing the bid proposal in this case, he used a template form that was designed for less complex projects. *Id.* The template form that Mr. Nollmeyer used contained the language "no bid bond or performance bond is required for this bid" on pages two and six. *Id.* This language is included in this particular template because performance bonds are not required for the purchase of materials or on simple maintenance contracts. *Id.* However, on public works contracts, a bond is in fact required (by RCW 39.08.010). CP 29.

The language was overlooked and mistakenly included in the bid documents. *Id.* It should have been deleted prior to the template form being sent out. *Id.*

The bid proposal further stated that "the bidder certifies that he/she will comply with all the assurances and certifications issued by Lincoln

County and conform to all applicable state and federal laws." CP 53. Lincoln County received two bids to perform the contract – one from Specialty and one from Arrow Concrete & Asphalt Specialties. CP 56. The Specialty bid was approximately $15,000.00 less than the Arrow Concrete bid. *Id.*

On August 6, 2013, Lincoln County determined that Specialty Asphalt would be awarded the project. CP 35. An award letter was set to Specialty on or about August 12, 2013, which included a contract and contract bond. *Id.* On or about August 16, 2013, the documents were sent back, with Lisa Jacobsen's signature on behalf of Specialty on the contract, and "bond not required" written onto the bond document. *Id.* The Lincoln County Commissioners did not sign the contract. *Id.*

Upon discovering the error as to the bond requirement, the Lincoln County Commissioners withdrew the bid award on August 19, 2013. *Id.* Shelly Johnston, the Lincoln County Auditor, contacted Ms. Jacobsen and informed her that, based on Lincoln County's mistake in failing to include a bond requirement in the bid proposal, the bid was being withdrawn and the current bidding process was going to be terminated and rebid. CP 32; CP 35. Specialty objected. CP 35. Lincoln County then offered to maintain the original award so long as Specialty obtained the necessary bond (at Lincoln County's expense). *Id.* Specialty did not respond. *Id.*

Having not heard back from Specialty, Lincoln County contacted Specialty on April 16, 2014 to inquire as to whether Specialty would agree to the original award provisions and obtain the statutorily mandated bond at Lincoln County's expense. *Id.* Specialty refused, and claimed that the County's suggestion constituted "collusion or bid-rigging." CP 557.

B. Procedural History

Specialty filed the initial Summons and Complaint against Lincoln on May 12, 2014. CP 3. In that Complaint, Specialty alleged a single cause of action: injunction. Specialty's prayer for relief was as follows:

> 4.1 For an order for injunctive relief to enjoin the execution of a contract between Lincoln County and any other bidder for the Project;
> 4.2 For a mandatory injunction in favor of Specialty Asphalt to complete the Project without any requirement for a bond;
> 4.3 For a declaration judgment that the type of work requested for the for the Project, which is maintenance work and not contraction work, and does not require a bond;
> 4.4 For a declaration judgment that Lincoln County's payment of the bond does not constitute bid rigging or collusion;
> 4.5 For a judgment that Lincoln County pay the bond pursuant to RCW 39.08.015;
> 4.6 For an award of reasonable attorney fees and other costs permitted by law;
> 4.6 (sic) For such other relief the Court deems fair and equitable.

CP 7.

On October 1, 2015, after months of discovery, and approximately four months after the deadline to amend the pleadings and add parties, Specialty sought leave to add a plaintiff (Lisa Jacobsen) and to amend its Complaint for Injunction and Declaratory Relief. CP 125. Specialty sought to add claims of gender discrimination and negligent misrepresentation so that it could pursue monetary damages rather than solely injunctive relief. CP 560-61. Over Lincoln County's objection, the Court granted the untimely request and allowed Specialty to file its Amended Complaint.

On December 18, 2015, Lincoln County filed its Motion for Summary Judgment seeking dismissal of both Specialty's and Ms. Jacobsen's claims. CP 232. In response, Specialty provided an Affidavit of Lisa Jacobsen which largely violated CR 56(e) and several evidence rules attempting to create a question of fact. CP 278-309. In Lincoln County's Reply memorandum, the County sought to strike the offending portions of Ms. Jacobsen's Affidavit and the materials in Specialty's memorandum which cited to those inadmissible portions of the Affidavit. CP 361-67.

After considering the parties' arguments, the Court granted in part and denied in part Lincoln County's Motion for Summary Judgment. CP 417-20. Specifically, the Court found that Specialty had failed to prove a genuine issue of material fact existed regarding Specialty's gender discrimination and negligence/negligent misrepresentation claims. CP 418.

The Court dismissed those claims. CP 418-19. The Court denied Lincoln County's Motion for Summary Judgment on Specialty's breach of contract claim, finding that genuine issues of material fact existed and that summary judgment was therefore not appropriate. CP 418.

One week after the Court entered the Order Granting in Part and Denying in Part Lincoln County's Motion for Summary Judgment, Specialty filed a Second Motion for Leave to Amend the Complaint. CP 430. That Motion sought to allow Specialty to amend its Complaint to seek "money damages" on the breach of contract claim against Lincoln County, even though Washington law is clear that a successful plaintiff can only obtain an injunction in such cases.[1] CP 444-45. Lincoln County filed a Response asserting that the Motion for Leave to Amend the Complaint was futile because Washington law recognizes an exclusive remedy in these cases: an injunction. CP 498-502.

In a letter decision denying Specialty's Motion for Leave, the trial court recognized the binding case law in Washington and agreed with Lincoln County that the Motion for Leave was futile. CP 526-27.

Specialty also filed a Motion for Reconsideration of the trial court's decision granting in part Lincoln County's Motion for Summary Judgment.

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[1] *See, e.g., Skyline Contractors, Inc. v. Spokane Housing Authority*, 172 Wn. App. 193, 201, 289 P.3d 690 (2012).

CP 450. The trial court again issued a letter decision denying Specialty's Motion. CP 524-25. The Court found that Specialty was merely attempting to reargue the merits of the Motion for Summary Judgment. *Id.* The court also reiterated its findings that Specialty had failed to provide the court with sufficient prima facie evidence to preclude summary judgment on the discrimination claim. CP 525.

At that junction of the case, Specialty's only surviving claim against Lincoln County was for breach of contract. The trial court had already twice denied Specialty's attempts to add monetary damages to its prayer for relief because the sole avenue of relief for Specialty was for an injunction. CP 525; 527. Therefore, the *only* relief that was still available to Specialty was an injunction precluding Lincoln County from offering the contract to an entity other than Specialty. CP 527.

Conceding the breach of contract issue after the trial court's various findings and rulings, Lincoln County stipulated to allowing Specialty to complete the work. *Id.* Specialty did not respond with a clear answer, and Lincoln County was therefore forced to ask the trial court to intervene. CP 380. Lincoln County filed its Second Motion to Compel Performance, requesting that the Court order Specialty to 1) agree to perform the work or 2) to dismiss its lawsuit. CP 385. The County was willing to concede the injunction and allow Specialty to perform the work without a performance

bond. CP 391-92. If Specialty chose not to avail itself of the only remaining relief, then no justiciable controversies remained for the court or fact-finder to decide, and the matter could properly be dismissed. CP 383-85.

The trial court agreed with the County and found that Specialty had only two options available to it: proceed with the project as Specialty requested in its prayer for relief or decline to proceed with the project in which case the court could dismiss the matter as Specialty was choosing not to avail itself of the only relief available to it (rendering the lawsuit moot). CP 598. The trial court issued a deadline of April 30, 2016 for Specialty to declare its intention. *Id.* On May 2, 2016, Specialty filed a Notice declaring that it was not availing itself of the injunction available to it. CP 595.

At the presentment hearing on May 6, 2016 regarding the Order Granting Lincoln County's Motion to Compel Performance, the Court noted that Specialty was choosing not to perform the work, and therefore nothing remained for the Court or a jury to decide. CP 597-99. The case was dismissed as moot. *Id.*

Specialty filed a Notice of Appeal on June 3, 2016, seeking review of the following Orders:

- Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment;

- Order Denying Plaintiffs' Motion for Reconsideration Regarding Defendant's Motion for Summary Judgment;

- Order Denying Plaintiff's Motion for Leave to File Second Amended Complaint; and

- Order Granting Defendant's [Second] Motion to Compel Performance.

CP 600-16.

IV. ARGUMENT

A. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH A DECISION OF THE SUPREME COURT.

In this case, the Court of Appeals relied upon the Supreme Court's decision in *Marquis v. City of Spokane*, 130 Wn. 2d 97, 922 P.2d 43 (1996), when affirming the trial court's dismissal of Specialty's gender discrimination claim. *Opinion*, at 6-7, attached as Appendix A to Specialty's Petition.

In *Marquis*, this Court held that 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; *see also 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 (emphasis added).

For purposes of its decision the Court of Appeals held that even assuming the first two prongs of the *Marquis* test, Specialty had failed on multiple fronts to produce sufficient facts to thwart the County's motion for summary judgment. *Opinion*, at 7. First, Specialty failed to produce evidence that Ms. Jacobsen was treated differently than her male counterpart – in this case, Arrow Construction. *Id.* Rather, Specialty focused on its *perceived* differences in treatment without providing the trial court with any *actual* evidence of how Arrow was treated differently. Indeed, Specialty did not depose any employee of Arrow Construction in this case, nor did Specialty present any evidence whatsoever from Arrow as to how Arrow was treated.

Similarly, Specialty asserted that Arrow benefited from a "private" walk through, yet failed to produce any evidence that Specialty had attempted to obtain a similar "private" walk through and that request was

denied. Quite to the contrary, it was undisputed in this case that after Ms. Jacobsen attended the advertised walk through and provided recommendations to the County Commissioners and Phil Nollmeyer. CP 216. The County then incorporated those recommended changes into the project and even issued an addendum to the project formalizing the recommendations received from Ms. Jacobsen as project requirements. CP 214-15.

The Court of Appeals returned to the pertinent issue: "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." *Opinion*, at 8. The burden is on the **plaintiff** to set forth sufficient evidence to establish a prima facie discrimination case. *Ellingson*, 19 Wn. App. at 54. However, Specialty argues in its Petition: "The County had the opportunity to, but did not, offer such evidence [that Arrow had received similar treatment]." *Petition*, at 16. The County did not and does not have the burden of disproving a prima facie case. Rather, as the *Ellingson* court noted, the plaintiff has the burden of establishing a prima facie case through admissible evidence. The Court of Appeals correctly noted that Specialty failed to satisfy the prima facie elements of the discrimination claim as those elements are set forth in *Marquis*.

The Court of Appeals decision in this case does not conflict with Washington Supreme Court jurisprudence. Rather, the Court of Appeals applied the appropriate standard from the preeminent Supreme Court case setting forth the applicable law in these types of discrimination claims, and then appropriately determined that Specialty had failed to meet its burden on summary judgment. Review should be denied under RAP 13.4(b)(1).

B. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH A PUBLISHED DECISION OF THE COURT OF APPEALS.

Similarly, Specialty has failed to show that the decision in this case conflicts with any published decision of any panel of the Court of Appeals. The only substantive argument Specialty raises which implicate Washington Court of Appeals decisions is with regard to nominal damages. *Petition*, at 11. As noted, *supra*, the Court need not consider the nominal damages argument, because it has not been raised prior to this Petition. *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *review denied*, 165 Wn. 2d 1017, 199 P.3d 411 (2009); RAP 2.5(a).

However, even if this Court will consider the issue, the decisions cited by Specialty do not conflict with the Court of Appeals' decision below. Specialty asserts: "In discrimination cases, nominal damages are presumed even if no damages are proven." *Petition*, at 11. However, this line of reasoning overlooks a substantial and fatal flaw to this argument: Specialty

failed to prove discrimination. Indeed, in the string of citations that Specialty sets forth in the Petition, not a single case cited stands for the proposition that when a discrimination claim is dismissed on summary judgment, a plaintiff is still entitled to damages merely for having brought the claim in court.

In brief, the following cases are the cases cited by Specialty in its Petition. A cursory examination of these cases demonstrates the fallacy in Specialty's reasoning.

In *Minger v. Reinhard Distributing Co., Inc.*, 87 Wn. App. 941, 943 P.2d 400 (1997), a **jury** found that the employees bringing suit *were* sexually harassed, but neglected to award damages.

In *Lewis v. Doll*, 53 Wn. App. 203, 765 P.2d 1341 (1989), the Court of Appeals granted a patron's motion for a directed verdict finding discrimination occurred as a matter of law, and remanded to the trial court for a determination of damages.

Browning v. Slenderella Sys,, 54 Wn. 2d 440, 341 P.2d 859 (1959) has been disapproved. *Nord v. Shoreline Sav. Ass'n*, 116 Wn. 2d 477, 484, 805 P.2d 800 (1991).

In *Miles v. F.E.R.M. Enters., Inc.*, 29 Wn. App. 61, 627 P.2d 564 (1981), a **jury** found that prospective purchasers had been discriminated against, but awarded $0 in damages.

These cases are clearly factually and legally distinguishable from the case at bar. As such, Specialty has failed to set forth any published decisions of any division of the Court of Appeals which conflicts with the Court of Appeals decision in this case.

C. THE COURT OF APPEALS DECISION DOES NOT INVOLVE A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION.

The only claim in this case that even potentially has constitutional implications is the gender discrimination claim. As the Court of Appeals properly sets forth in the bulk of its opinion, Specialty had a burden to set forth a prima facie case and failed to do so. The Court of Appeals then provided several examples of where Specialty's evidence fell short.

There is already a clear prohibition in Washington against gender discrimination. *See* RCW 49.60.030. The facts and application of law to facts in this case do not redefine, modify nor clarify that freedom from discrimination. Specialty may not like the current status of the law with regard to the exclusive remedies available to it in this case, but that issue and responsibility lies with the legislative branch of our government, not the judiciary.

As has been shown throughout this case, Specialty has failed to establish a colorable claim of gender discrimination. To assert then that if

this Court accepts review of the claim that the claim will have constitutional implications is wrought with fallacy.

D. THE COURT OF APPEALS DECISION DOES NOT INVOLVE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

The Washington Supreme Court has interpreted "substantial public interest" under RAP 13.4(b)(4) to mean issues with "sweeping implications." *State v. Watson*, 155 Wn. 2d 574, 578, 122 P.3d 903 (2005).

The facts of this case are only germane to the parties involved and do not involve even a public interest, much less a substantial one. Rather, this case involves a typographical error on a construction bid form. The record indicates that only two companies submitted a bid based upon that error. The Court of Appeals did not even see fit to publish the opinion due to the limited or even nil stare decisis import of the decision.

Further, it is telling in this case that after the proverbial dust settled after the County's Motion for Summary Judgment, Specialty knowingly and voluntarily waived the injunctive relief received in this case which was to complete the project. CP 595-96.

The issues involved in this case equate to essentially a private dispute between the parties. The alleged discrimination is neither novel nor does it involve a systemic pattern of discriminatory conduct. There are no "sweeping implications" to be found here and the tenuous nature of

Specialty's allegations have been pointed out time again by the Courts which have reviewed this case.

V. ATTORNEY FEES ON APPEAL

Specialty has changed its position throughout this pendency of this case, and attempts to do so again in the Petition. Lincoln County has been forced to respond every step of the way despite the nebulous nature of the allegations. Lincoln County respectfully requests the Court award its reasonable attorney fees and costs pursuant to RAP 18.1 and/or 18.9.

Washington law is clear that the remedies available to an aggrieved bidder on a public works contract is an injunction, and an injunction only.

Further, even when the trial court indicated that based upon the motion practice and ensuing stipulation to the injunction by Lincoln County, Specialty then decided it did not want to pursue the work. Specialty has made numerous attempts in this case to circumvent this well-settled Washington law. First, Specialty attempted a gender discrimination claim to try and obtain money damages. When that was unsuccessful, Specialty attempted to amend its Complaint for a second time to add "money damages" despite already being told by the trial court that such relief was unavailable.

After the trial court advised the parties that Specialty's breach of contract claim could proceed, Lincoln County offered to allow Specialty to

complete the project. Only *then* did Specialty indicate that it no longer wished to perform the project, thereby admitting that its own lawsuit was moot.

This appeal is frivolous. The Petition is also frivolous in that it does not even attempt to demonstrate to the Court why review by the Supreme Court is appropriate here. The trial court properly dismissed Specialty's claims in this case. The Court of Appeals properly upheld the dismissal. Specialty remains unsatisfied with Washington law and the trial court's rulings, but has regrettably chosen to waste further time and resources pursuing an avenue of relief that is not available to it.

VI. CONCLUSION

For the reasons set forth herein, Lincoln County respectfully requests this Court deny the Petition for Discretionary Review and award Lincoln County its reasonable attorney fees and costs incurred in preparing this Answer.

RESPECTFULLY SUBMITTED this 27 day of October, 2017.

EVANS, CRAVEN & LACKIE, P.S.

By: _____

MICHAEL E. McFARLAND, JR., WSBA#23000
JEREMY M. ZENER, WSBA #41957
Attorneys for Respondent Lincoln County

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of October, 2017, a copy of Respondent's Answer to Motion for Discretionary Review was served on counsel at the following address via hand delivery:

Stephen R. Matthews
Phillabaum, Ledlin, Matthews, & Sheldon, PLLC
1235 N. Post, Suite 100
Spokane, WA 99201

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

DATED this 27 day of October, 2017, at Spokane, Washington.

Kimberley L. Mauss

EVANS, CRAVEN & LACKIE, P.S.

October 27, 2017 - 2:38 PM

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