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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

BY



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SPRADLIN ROCK PRODUCTS, INC.,  
a Washington corporation,

Respondent,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF GRAYS HARBOR  
COUNTY, a municipal corporation,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR GRAYS HARBOR COUNTY  
THE HONORABLE F. MARK McCAULEY

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BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

1. The trial court erred in entering partial summary judgment on February 10, 2010, (CP 327-30) and in entering its order denying clarification or reconsideration on February 23, 2010 (CP 504-05), prohibiting defendant from challenging the rates charged in any of plaintiff's invoices.

2. The trial court erred in granting plaintiff's motions in limine (CP 490-93) and preventing defendant from introducing evidence to defend against plaintiff's contract claims based on its partial summary judgment. (2/10 RP 35-38; RP 12, 59-60, 144, 149-50, 469-70, 485-86, 505-08, 613-15, 684-86, 712-13; 2/18 RP 11-16, 55-56, 62; 2/19 RP 9-11, 104, 130-32, 150-51, 185-89; and RP 159, 681-86, 725-27; 2/18 RP 14-15 (offers of proof))<sup>1</sup>

3. The trial court erred in denying defendant's motion to dismiss plaintiff's claim for lost profits. (RP 467)

4. The trial court erred in giving Instruction No. 7, which told the jury that "the parties entered into a contract for plaintiff to restore, build and repair roads at the prices and rates for labor,

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<sup>1</sup> Five volumes of the verbatim report of proceedings are sequentially numbered and cited as "RP\_\_." Multiple days are included in other volumes of the verbatim report of proceedings that are not numbered. The referenced day is the first day reported in volumes cited as "2/\_ RP \_."

equipment, and other charges listed in invoices submitted by plaintiff to defendant and paid by defendant.” (CP 536-37; RP 713-715)

5. The trial court erred in denying defendant’s request for a special verdict. (CP 497-99, RP 718)

6. The trial court erred in entering its principal judgment against defendant based on the jury’s \$4,162,500.00 verdict on February 25, 2005. (CP 542-44)

7. The trial court erred in entering its judgment for prejudgment interest of \$659,149.60 and for \$25,000 in attorneys fees against defendant on April 19, 2010 (CP 656-58), in entering each and every finding and conclusion in support of that judgment (CP 660-63), and in entering its order retaxing costs on May 10, 2010. (CP 701)

## **II. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. Whether the doctrine of account stated precludes a defendant who has paid some invoices submitted pursuant to a verbal agreement to pay costs plus a reasonable profit from thereafter disputing rates charged in the invoices even if the defendant promptly objects once it obtains information necessary to dispute the charges?

2. Whether a defendant is precluded as a matter of law from disputing inflated costs and excessive profits in invoices that have not yet been paid?

3. Whether under a costs-plus-reasonable-profit contract a contractor may recover for labor rates billed at well over the wages and benefits paid, and for time spent by an owner of the contractor on administration?

4. Whether the jury should have been allowed to hear the parties' previous course of dealing, expert opinion, and other evidence relevant to determining a reasonable charge for work performed pursuant to a verbal agreement to pay costs and a reasonable profit?

5. Whether a contractor may claim lost profits on a contract that does not entitle the contractor to any specific work, but places it in a roster of eligible contractors who may be contacted in the future when projects arise?

6. Whether the trial court erred in awarding prejudgment interest on a portion of the jury's general verdict where the general verdict indisputably contains unliquidated amounts and the defendant sought, but the trial court refused to give the jury, a special verdict form?

7. Whether the trial court erred in awarding prejudgment interest under RCW 39.76.011 where the plaintiff conceded the parties' agreement was oral and the only written documents between the parties do not include material terms such as the scope of work, timing of work, or termination methods?

### III. STATEMENT OF FACTS

The trial court granted summary judgment to respondent Spradlin Rock Products, Inc. ("Spradlin") and instructed the jury that appellant Public Utility District No. 1 of Grays Harbor County ("the PUD") was prohibited from challenging rates charged in invoices that Spradlin submitted to the PUD because the PUD had paid some, but not all, of the invoices. This ruling essentially prevented the PUD from putting on a substantive defense at trial. This brief as a consequence sets out facts relevant to this determination in a light most favorable to appellant PUD. **Lesley v. State**, 83 Wn. App. 263, 266, 921 P.2d 1066 (1996), *rev. denied*, 131 Wn.2d 1026 (1997). Additional evidence elicited at trial is identified by supplemental "RP" cites in the following statement of facts:

**A. Spradlin And The PUD Had A Small Works Contract With Established Billing Practices And Procedures.**

Respondent Spradlin is a Washington corporation, wholly owned by Thomas “Tim” Spradlin and his wife, Terese, that builds roads and hauls rocks. Appellant PUD is a municipal corporation organized pursuant to RCW Title 54 that provides electrical power and high speed fiber optic services to Grays Harbor County and adjacent areas. (CP 26-27)

Spradlin had performed work for the PUD since 2000. (CP 154) In December 2006, Spradlin and the District signed a small works contract for 2007-2008. (CP 176, 397-423; Ex. 137 (refused)) Under this contract, Spradlin agreed that it would “furnish labor, material and equipment to provide trenching, backfilling and excavation, etc,” including “necessary equipment to construct access roads, clearing, grading, and grubbing as required for District to construct or maintain facilities,” in exchange for a “weighted cost per hour of \$52.90.” (CP 145, 397)

The total cost of this small works contract was not to exceed \$200,000. (CP 176, 397) The small works contract provided that the PUD could terminate Spradlin with or without cause, and that

the award of projects would be subject to a bidding process. (CP 402, 418-19; RP 637)

As part of the parties' small works contract, Spradlin identified equipment that was expected to be used and the hourly rate for this equipment. (CP 145) This analysis was the basis for the "total weighted cost" per hour of \$52.90 the District agreed to pay. (CP 145, 397) Spradlin's hourly equipment rates ranged from \$47.00 for a "10 yard dump truck, operator, and necessary equipment to haul machinery to and from job site" to \$76.00 for a "back hoe and operator." (CP 145)

As with the previous work performed by Spradlin for the PUD, these contract rates included both the equipment and the operator in a single hourly rate. (CP 133, 145, 166) Spradlin had never billed the PUD separately for an equipment operator. Spradlin had never billed the PUD separately for administrative or fuel costs. (CP 126, 128, 133)

**B. After A December 2007 Storm The PUD Orally Agreed To Pay Spradlin Its Costs And A Reasonable Profit For Repair Work.**

On December 2, 2007, a massive storm struck Grays Harbor County. The storm was of unprecedented magnitude and required an enormous effort to restore and repair the damage. The County

was declared a disaster area; nearly 98 percent of PUD customers were without power following the storm. (CP 124, 153) Following the storm, Mr. Spradlin contacted the PUD and asked whether it needed his company's assistance with repair work. (CP 124) The PUD asked Mr. Spradlin, who was vacationing in Hawaii, whether Spradlin could help open roads to allow repair crews to reach power lines. (CP 124, 129) Mr. Spradlin orally agreed. (CP 124, 129)

Other than the equipment on the small works roster, for which the parties agreed Spradlin was to charge the roster rate, the PUD orally agreed that in lieu of specified rates or charges Spradlin would be compensated for its costs and receive a reasonable profit. (CP 125, 129, 311) As Mr. Spradlin testified on summary judgment "What was it – numerously agreed to was I was going to recover my costs, which included . . . some profit after the expenses were all made." (CP 311)

Pursuant to this oral agreement, after Mr. and Mrs. Spradlin returned from their Maui vacation early that morning, Spradlin put crews to work on December 3, 2007, opening roads in the Grays Harbor City Area. (CP 124)

**C. The PUD Approved And Paid Over \$1.5 Million For December 2007 Repair Work In Spring 2008, Conditioned On Spradlin Providing Backup Materials To Support Invoiced Charges.**

The PUD did not receive its first invoice from Spradlin until February 4, 2008. (CP 45) The PUD hoped to seek partial reimbursement for costs associated with the immense storm damage from the Federal Emergency Management Agency (FEMA). (CP 129, 140) Accordingly, the PUD asked Spradlin to submit invoices in a format that would comply with FEMA requirements. (CP 129, 140) In order to aid Spradlin in formatting the invoices, the PUD sent Spradlin sample invoices from other contractors. (CP 40, 48-54)

Spradlin eventually submitted an initial set of four invoices to the PUD in late February 2008. (CP 44, 64-76) These invoices, covering the four weeks between 12/3/07 to 12/30/07, were for work at Powell Road Highline, Grays Harbor City, Aberdeen Lake, and Think-of-Me Hill. The four invoices totaled \$1,578,051.12. (CP 64, 68, 72, 75, 155)

The PUD paid these four invoices on February 22, 2008, February 29, 2008, and April 10th, 2008, with the understanding that any discrepancies in billing could be worked out after the fact

by examining the “backup material” documenting Spradlin’s work. (CP 138) Ed Pauley, Operations Manager for the PUD, explained that “without the bills being broke down or itemized with the backup, I figured it is one of those things, if somebody made a mistake, it could go back and forth.” (CP 139) In an April 4, 2008 letter to the PUD, Mr. Spradlin confirmed this arrangement: “The PUD is free to review the records and if errors are discovered to point the errors out to me so I can make an appropriate response.” (CP 147)

**D. The PUD Quickly Became Concerned About Spradlin’s Charges, Ultimately Leading To Spradlin’s Termination in April 2008.**

After the PUD received the invoices for the December 2007 work it quickly became concerned about the amounts being billed, and started an audit of Spradlin’s invoices. (CP 214-15) Douglas Streeter, the PUD’s Chief Financial Officer, determined that numerous charges contained in the invoices, including a fuel surcharge, overhead surcharge, and operator charges, were not justified. (CP 216-17) Mr. Streeter shared his concerns with Richard Lovely, the PUD General Manager. The District decided to have an outside expert analyze Spradlin’s costs (CP 215), and asked for a meeting with Mr. Spradlin to discuss his company’s invoicing. (CP 147)

Mr. Spradlin met with PUD officials to discuss Spradlin's invoices and billing practices on March 25, 2008. (CP 134, 137) The PUD learned that Spradlin had failed to file statements of intent to pay prevailing wages required by RCW 39.12.040 and FEMA. (CP 129) The PUD expressed concerns regarding Spradlin's records and asked for supporting documentation for the invoices, including the required statements of intent to pay prevailing wage and certified payrolls. (CP 137, 148, 150)

Six days after this meeting between the PUD and Spradlin, Rusty Gill, owner of RG Construction, attended the weekly March 31, 2008, public meeting of the Grays Harbor PUD commissioners. (CP 134, 382) At this meeting, Mr. Gill complained to the commissioners that Spradlin had moved equipment his company had left in an area where Spradlin was working, without his permission. (CP 134, 382) Mr. Gill expressed his belief that Spradlin had "stolen" the equipment and billed the PUD for its use.<sup>2</sup> (CP 383)

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<sup>2</sup> Mr. Spradlin claimed that he did not know who owned the equipment when Spradlin "borrowed" it. (CP 134-35) The trial court excluded as evidence pleadings in the ensuing litigation between Spradlin and Gill that Spradlin was prepared to pay RG Construction \$25,568.49 for the equipment it had "borrowed" and billed the PUD \$78,501.21 for its use. (CP 224, 249, 64-65, 68-69, 73, 76)

This incident raised more red flags about Spradlin's billing practices, and contributed to the PUD's decision to terminate Spradlin as a contractor on April 4, 2008. (CP 151, 643) Later the same day, Mr. Spradlin delivered a response, along with some (but not all) of the previously requested records, to the PUD, disputing the basis for Spradlin's dismissal and offering further inspection of records. (CP 146-49) The PUD responded, directing Spradlin to "cease any further work" and to "remove any equipment from the Neilton project and any other location in which you may have been working on behalf of the District" on April 8, 2008. (CP 151)

**E. Although The PUD Reasonably Assumed That The Invoiced Rates Would Be Consistent With The Parties' Contract and Past Dealings, It Learned That The Rates Spradlin Charged Were Radically Different Than Prior Rates, And Inconsistent With Both Spradlin's Costs And A Reasonable Profit.**

After receiving the backup materials and other records from Spradlin, the PUD discovered that many of the rates charged by Spradlin were well above its costs and anything that could possibly be deemed a reasonable profit:

**1. The PUD Only Discovered After Spradlin Submitted Its Records That An Invoiced 24% Overhead Charge Was Four Times The “Extraordinary Damage” Cited As Justification For The Charge.**

Spradlin’s invoices included a 24% “24/7 Operating Expenses [sic] and Overhead” charge. (CP 64-76) This overhead surcharge, which Spradlin had never charged the PUD previously, represents a significant portion of Spradlin’s invoices: \$1,069,499.15. (CP 126, 283) Spradlin applied the charge to all materials, equipment, labor, and fuel. (CP 64-76)

Mr. Spradlin admitted that no one at the PUD ever agreed to this overhead surcharge, and that “[t]here was not a specific percentage of overhead that was agreed to.” (CP 311) He justified the need for the surcharge because of the “extraordinary damage” the work for the PUD caused Spradlin equipment.<sup>3</sup> (CP 311) Mr. Spradlin’s own estimate of all repairs anticipated or desired by Spradlin to equipment totaled \$247,222.40 – less than 25% of the overhead charge. (CP 284-85) The PUD could not know from Spradlin’s invoices that these overhead charges were in excess of 400% of the Spradlin’s actual expenses.

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<sup>3</sup> The record does not reflect whether the “extraordinary damage” included that claimed to the equipment Spradlin had “borrowed” from RG Construction.

**2. The PUD Only Discovered After Spradlin Submitted Its Records That An Invoiced Fuel Surcharge Was More Than Four Times The Actual Cost Of Fuel.**

Spradlin also added a 22.5% fuel surcharge, “to reflect the increased price of diesel fuel,” to all its invoices. (CP 128, 272-73) In total, Spradlin billed the PUD \$519,894.96 for fuel surcharges. (CP 282) Upon inspection of Spradlin’s fuel receipts, the PUD learned that the fuel surcharge exceeded Spradlin’s costs by \$367,189.88, and represented 421% of Spradlin’s actual fuel cost. On a per gallon basis, Spradlin paid an average fuel cost of \$3.529 per gallon, yet charged the PUD an average of \$12.015 per gallon. (CP 282)

This fuel charge, like the overhead surcharge, had never been assessed by Spradlin before the December 2007 storm. (CP 128) Spradlin did not explain the basis of the fuel surcharge in its invoices. In particular, until it began investigating the invoices, the PUD had no way of knowing that it was being charged a fuel surcharge for equipment *while it was not running*. (CP 64-76, 277-278) Compounding this overcharge, the fuel surcharge was also multiplied by the 24% overhead charge. (CP 64-76)

**3. The PUD Only Discovered After Spradlin Submitted Its Certified Payrolls That The Invoiced Labor Rates Were Excessive.**

The certified payrolls submitted by Spradlin after it was terminated for the first time revealed the actual wage rates of its employees. A comparison of the certified payrolls and the challenged invoices shows that Spradlin charged the PUD substantially more for labor than the costs Spradlin incurred.

For example, Spradlin's certified payrolls reveal that Bradley Spradlin was paid \$83.84 for 14 hours of double time work, on 12/16/07, but that he was billed to the PUD at a rate of \$118.25. (*Compare CP 70 with CP 425*) Kirk Anderson was paid \$50/hr of regular time for the same time period, yet was billed to the PUD at \$70.30/hr of regular time. (*Compare CP 70 with CP 425*) Jay Spradlin was paid \$33.25/hr, but billed to the PUD at \$54.00/hr. (*Compare CP 66 with CP 424*)

Even accounting for fringe benefits (as reflected in Spradlin's belated statements of intent to pay prevailing wages, *see CP 287*), these rates represent substantial overcharges to the PUD – an overcharge compounded by the 24% overhead charge. (*CP 64-76*) These discrepancies between Spradlin's labor costs and the rates it charged to the PUD are numerous, and span virtually every invoice

submitted by Spradlin. They could not be discovered until after an inspection of Spradlin's payroll records – records that had not been made available by Spradlin when the first set of invoices was paid.

**4. The PUD Only Discovered Duplicative Billing For Administrative Time After Spradlin Submitted Its Certified Payrolls.**

In addition to its 24% overhead surcharge, Spradlin charged the PUD separately for the time of Mrs. Spradlin, who managed Spradlin's office. (CP 64-76, 130) Prior to the 2007 storm, Spradlin had never attempted to bill the PUD for any office time (CP 136), and after the storm Spradlin failed to provide any indication or notice that it was now billing for Mrs. Spradlin's work, often as much as 16.5 hours per day (see e.g., CP 291), at a regular rate of \$98.55/hr, overtime rate of \$142.83/hr, and double time rate of \$179.36/hr.<sup>4</sup> The invoices submitted by Spradlin simply list a second "T. Spradlin," without specifying the work performed. (See CP 64-76) It was not until after the PUD reviewed the certified payrolls that it established that Spradlin sought, in addition to over \$1,000,000 in overhead expenses, \$157,187 for Mrs. Spradlin's

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<sup>4</sup> Mr. Spradlin testified on summary judgment that his wife's administrative "duties," chargeable on an hourly basis, included "unanticipated phone calls late at night," "keeping track" of where Mr. Spradlin was, and "get[ting] a message to someone" if "[s]omebody's going to be late for work." (CP 126)

time, on an hourly basis. This administrative charge was also compounded by the 24% overhead surcharge. (CP 64-76)

**5. The PUD Only Discovered After Spradlin Submitted Its Records That Spradlin Charged Higher Rates Than Those Previously Established By The Small Works Contract On Certain Equipment Governed By The Contract.**

As part of their oral contract to repair storm damage, the parties agreed that Spradlin would charge the small works rate for the equipment listed in the small works contract. (CP 125) The small works rate included both the equipment and the operator in a single hourly rate. (CP 145) Spradlin nonetheless attempted to charge the PUD a rate well in excess of the small works rate by billing the PUD separately for an operator for the small works equipment – even though the operator had been previously included in the hourly rate of the equipment. (CP 64-76) Because Spradlin did not specify who was operating what equipment, this overcharge could not be discovered until after Spradlin submitted certified payrolls that revealed the double charging. (See CP 366-370 (explaining nature of overcharges)) As with all other charges, this charge was multiplied by the 24% overhead charge. (CP 64-76)

The consequence of all these overcharges was to at least triple the rates charged for equipment covered by the small works project. For instance, Spradlin had bid a track hoe and operator at \$76.00/hr in the parties' small works project. (CP 145) In the disputed invoices, when Mr. Spradlin (the most frequent operator of the excavator) operated the equipment, he billed his time at a regular rate of \$98.55/hr, overtime of \$142.83/hr, and double time of \$179.36/hr – in addition to the \$76.00/hr equipment charge. (CP 64-76) Spradlin then added a 22.4% fuel surcharge, and 24% overtime. The rate for a track hoe and operator thus was inflated from the \$76.00/hr agreed to in the small works contract to a minimum of \$237.35/hr. (CP 168)

**F. The PUD Only Paid Invoices Related To The December 2007 Emergency Project. The PUD Objected To And Did Not Pay Spradlin's Charges In Connection With A Previously-Planned Road Project In 2008.**

Spradlin worked on several sites for the PUD, including the two major projects Think-of-Me Hill and Quinault Ridge (also called Neilton). Think-of-Me Hill was an emergency project undertaken immediately after the December 2007 storm, whereas the Quinault Ridge Road Project was a pre-planned construction project that did not begin until seven weeks after the storm. (See CP 268-70, 300-

310) Mr. Spradlin confirmed that the jobs were significantly different, because the Think-of-Me Hill project had no operating plan, and thus required Mr. Spradlin to exercise his discretion when planning the road routes and grades. (RP 264) Mr. Spradlin testified that lack of an operating plan triples or quadruples the cost of a project. (RP 266)

The PUD only paid invoices relating to Think-of-Me Hill, Grays Harbor City, and Aberdeen Lake, and never paid invoices for the Quinault Ridge Road project. (CP 4, 20, 64-76) After the PUD paid \$1,578,051.12 relating to the Think-of-Me Hill, Grays Harbor City and Aberdeen Lake projects, Spradlin billed the PUD for an additional \$2,383,423.36 for work relating to Think-of-Me Hill (\$3,961,474.48 total), and \$2,022,906.68 for work on Quinault Ridge. (CP 4, 20) The Quinault Ridge invoices were sent to the PUD on June 3, 2008, June 11, 2008, and June 17, 2008. None of these invoices were ever paid by the PUD. (CP 4, 20)

**G. The Trial Court Granted Summary Judgment Precluding The PUD From Challenging The Rates Charged By Spradlin In Any Of Its Invoices On Either Project.**

Spradlin filed its initial Complaint for Debt and Damages for Breach of Contract on October 9, 2008 (CP 1-5) and amended its Complaint on September 18, 2009 (CP 23-31) to seek, among

other things, consequential damages for, lost profits, loan interest, and loan fees. (CP 30, 266)

On December 18, 2009, Spradlin moved for partial summary judgment to establish the rates in the paid invoices as the contract price for all work done by Spradlin after December 3, 2007. (CP 34-44) The trial court rejected the PUD's objection that the motion was in violation of the Case Schedule Order requiring that dispositive motions be resolved by January 19, 2010 (CP 120, 182) and on February 10, 2010, granted the motion and forbade the PUD from challenging the rates in the February 2008 invoices in any manner in the jury trial scheduled to begin seven days later. (CP 327-30) Considering the supporting materials on the merits, the trial court entered an order denying the PUD's motion for reconsideration during trial, on February 23, 2010. (CP 504-05)

**H. The Trial Court Awarded \$650,000 In Prejudgment Interest On \$3.3 Million Of The Jury's \$4.2 Million General Verdict. The PUD Has Paid Spradlin \$1 Million In Partial Satisfaction Of The Judgment.**

As a result of the trial court's summary judgment the PUD was prevented from presenting a defense at trial, including any evidence of past billing practices between the parties, any prior course of dealing between the parties, and any expert evidence of

a reasonable charge or reasonable profits for Spradlin's work. (CP 490-93; 2/10 RP 35-38; RP 12, 59-60, 144, 149-50, 469-70, 485-86, 505-08, 613-15, 684-86, 712-13; 2/18 RP 11-16, 55-56, 62; 2/19 RP 9-11, 104, 130-32, 150-51, 185-89) The trial court granted Spradlin's motion in limine excluding as irrelevant to the established rates any evidence related to the prior lawsuit between Spradlin and RG Construction over the "borrowed" equipment, and any "irrelevant character evidence . . . that Spradlin or its owners or employees misappropriated or otherwise wrongfully used equipment belonging to third parties, including specifically, RG Construction, Inc. and/or Rusty Gill." (CP 492-93)

In support of plaintiff's claim for lost profits, Mr. Spradlin testified at trial that he "felt" Spradlin would have received a job working on Frye Creek under the small works contract if the PUD had not terminated Spradlin as a small works contractor. (2/19 RP 88) There was uncontested testimony that small works projects were awarded under a roster/bidding process, and that being on the roster in no way guaranteed any amount of work. (RP 636-38) The trial court denied the PUD's motion to dismiss and let Spradlin's "lost profits" claim go to the jury. (RP 461, 467)

The PUD acknowledged to the jury at trial that it owed Spradlin something, but within the constraints imposed by the trial court's partial summary judgment contested the amounts claimed. During closing argument, counsel for the PUD argued to the jury that Spradlin was not entitled to lost profits or consequential damages for interest on loans taken out by Spradlin, that the charges for Mrs. Spradlin's time were excessive, that equipment should not have been billed while not running, and that the PUD should not have been billed for equipment not on-site. (RP 748-62, 768-87)

Given the partial summary judgment that had hamstrung the defense, the PUD's counsel ultimately suggested to the jury that \$3,295,748 was the proper amount of damages. (RP 785) During closing argument, Spradlin's counsel suggested \$5,210,172 as the appropriate amount of damages, and argued that defense counsel's number was "not evidence." (RP 801)

The PUD sought, but Spradlin successfully resisted, a special verdict form that would have required the jury to separate the components of its damage award. (CP 495-99; RP 716) After a 7-day trial, the jury returned a general verdict in favor of Spradlin for \$4,162,500. (RP 541)

After the jury returned its verdict, the trial court awarded prejudgment interest of \$659,149.60, calculated on \$3.3 million of the jury's \$4.1 general verdict, based on the amount of the damage award defense counsel suggested during closing argument. (CP 657; RP 893) Even though it had acknowledged that the verdict contained "things that were of unliquidated nature" (RP 896), the trial court concluded that the verdict was a liquidated amount and that there was a written public works contract. (CP 661-62) The trial court found that "prejudgment interest should accrue on the amount the defendant calculated was due plaintiff (\$3,295,748) from the date of the last invoice submitted which was June 17, 2008. This is the minimum amount due and is probably a benefit to the Defendant." (CP 663)

The trial court entered its \$4,162,500 judgment on the jury's verdict on February 25, 2010. (CP 542-44) The trial court entered judgment for \$659,149.60 in prejudgment interest, and \$25,000.00 in attorney fees on April 19, 2010. (CP 656-58) The PUD timely appealed both judgments. (CP 545-46, 653-54) The PUD paid \$1,062,700.00 in partial satisfaction of the principal judgment on April 28, 2010. (CP 718)

#### IV. ARGUMENT

**A. The Trial Court Erred In Preventing The PUD From Challenging Spradlin's Unreasonable Rates And Charges As A Matter Of Law Based On The PUD's Initial Partial Payment Of Disputed Invoices.**

The trial court held that, as a matter of law, the PUD could not contest any of the charges or rates contained in all of the invoices submitted by Spradlin for work over a 4-month period, because the PUD had paid an initial set of four invoices covering a 4-week period during which Spradlin was working on an emergency project. (CP 327-30) The trial court erred: First, because the doctrine of account stated allows challenges to rates in invoices even after they have been paid. Second, because payment of invoices on a project immediately after the storm on an emergency basis could not as a matter of law establish the rates for unpaid non-emergency invoices. Third, because the trial court's misapplication of the doctrine of account stated creates perverse incentives for contracting parties to inflate or artificially hide charges in invoices, and contravenes Washington public policy allowing a party to challenge deceptive invoices after they have been paid.

1. **The Doctrine Of Account Stated Allows A Party To Challenge The Basis On Which Rates Were Assessed Even After Paying An Invoice.**

The doctrine of account stated binds a party contractually only when both creditor and debtor manifest that a stated sum is an accurate computation of an amount due. ***Sunnyside Valley Irrigation Dist. v. Roza Irrigation Dist.***, 124 Wn.2d 312, 315, 877 P.2d 1283 (1994) (quoting 2 *Restatement (Second) of Contracts* § 282(1), at 386 (1981)). An account stated exists if “the parties mutually agree to settle their account by payment of a stated sum.” ***Housing Authority of County of King v. Northeast Lake Washington Sewer and Water District***, 56 Wn. App. 589, 596, 784 P.2d 1284 (1990). An express agreement to settle the account is not required to create an account stated, but “[t]here must be some form of assent to the account, [which] may be implied from the circumstances and acts of the parties.” ***Associated Petroleum Products, Inc. v. Northwest Cascade, Inc.***, 149 Wn. App. 429, 436, ¶12, 203 P.3d 1077, *rev. denied*, 166 Wn.2d 1034 (2009) (citing ***Sunnyside***, 124 Wn.2d at 316). “The effect of an account stated as a promise is subject to the rules on mistake.” ***Associated***, 149 Wn. App. at 437, ¶ 16 (citing *Restatement (Second) of Contracts* § 282 cmt. c, at 387).

Payment of an invoice does not establish an account stated if the paying party objects to the invoice within a reasonable time. In **Associated**, for instance, defendant agreed to pay plaintiff 20 cents over the market rate for diesel fuel as a service charge. After defendant had paid several invoices, plaintiff started including in its invoices a charge for “time on site.” Defendant paid seven bi-monthly invoices before it objected to the charge. After terminating the contract for other reasons, defendant noticed the charges and sought an explanation, which plaintiff was unable to provide. Defendant had two remaining unpaid invoices from plaintiff that it paid, but from which it deducted the disputed amount. 149 Wn. App. at 432-33, ¶¶2-6.

As here, in **Associated** the trial court granted summary judgment for plaintiff and ordered defendant to pay the entire amount in the invoices. 149 Wn. App. at 433, ¶6. The Court of Appeals reversed, expressly rejecting plaintiff’s argument that “the invoiced price, paid without objection, establishes the parties’ contract price,” and holding that whether defendant’s “failure to learn of the additional invoice charges was an excusable unilateral mistake” was a disputed fact for trial. **Associated**, 149 Wn. App. at 436-38, ¶¶12 & n.4, 15, 17. The court held that “the trier of fact

could find that [plaintiff] had to provide something more than simply changing its billings to create a new agreement.” 149 Wn. App. at 435, ¶10.<sup>5</sup>

As in **Associated**, the PUD paid four initial invoices, believing they represented the parties’ agreement that Spradlin would be paid for its costs plus a reasonable profit. (CP 125, 129, 311) Not yet suspecting the possible fraud that was later revealed by Spradlin’s records, the PUD believed in good faith that any mistakes could be worked out by inspection of supporting documents. (CP 138-140) As in **Associated**, the PUD quickly objected when it believed that it was being billed for unreasonable charges that it had not agreed to. (CP 151) The trial court erred in holding the PUD liable as a matter of law because the PUD’s failure to learn of the additional invoice charges was an excusable unilateral mistake. **Associated**, 149 Wn. App. at 437, ¶16.

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<sup>5</sup> The Supreme Court held that “payment, together with a failure to objectively manifest either protest or an intent to negotiate the sum at some future time, does establish an account stated” in **Sunnyside Valley Irrigation Dist. v. Rosa Irrigation Dist.**, 124 Wn.2d 312, 316-17 n. 1, 877 P.2d 1283 (1994). The **Associated** court properly distinguished **Sunnyside** on the grounds that “the debtor made no allegation of fraud, mistake, or accident to explain its failure to protest” in **Sunnyside**, 149 Wn. App. at 437, ¶15. In contrast to **Sunnyside**, the court held that, as here, defendant “asserts that it mistakenly believed that the invoices it paid would be consistent with the contract it had negotiated with [plaintiff]” in **Associated**, 149 Wn. App. at 437, ¶15.

## 2. The Trial Court Misplaced Its Reliance On *Smith*.

*Associated* follows a long line of cases, dating back to Territorial days, holding that a party has a right to challenge an account stated on the basis of fraud or mistake. See, e.g., *Baxter v. Lockett*, 2 Wash.Terr. 228, 240, 6 P. 429 (1884) (a party challenging the account was “entitled to show fraud, error, or mistake which had come to their knowledge *after the account became a stated account.*”) (emphasis added); *Ryan v. Dowell*, 86 Wash. 76, 82, 149 P. 343 (1915) (same); *Merritt v. Meisenheimer*, 84 Wash. 174, 183, 146 P. 370 (1915) (whether a party objected within a reasonable time to prevent creation of an unimpeachable account is a jury question). Instead of following *Associated*, the trial court incorrectly relied instead on *Smith v. Skone & Connors Produce, Inc.*, 107 Wn. App. 199, 26 P.3d 981 (2001), *rev. denied*, 145 Wn.2d 1028 (2002), where the Court of Appeals affirmed a trial court’s decision after trial denying the plaintiff’s claims for reimbursement of payments made years earlier. As *Smith* was decided after a trial at which the trial court resolved all issues of fact, it is distinguishable on this ground alone. Further, the facts in *Smith* differ materially from those here:

The plaintiff in **Smith**, a potato farmer, had an oral contract with defendant for the cleaning, packing, and selling of plaintiff's potatoes. 107 Wn. App. at 201. Defendant initially charged plaintiff a \$65 packing charge, but after two years increased this charge to \$70. **Smith**, 107 Wn. App. at 202-03. After the third year's crop was sold, the parties met twice "to settle the account," and plaintiff received written statements that "confirmed the oral agreement between the parties and contained the essential terms of the agreement," including the \$70 charge. **Smith**, 107 Wn. App. at 203, 207.

Plaintiff sued to establish the packing charge at \$65 and sought reimbursement of invoiced charges it had paid years earlier when it accepted its settlement checks. **Smith**, 107 Wn. App. at 203-04. The trial court rejected plaintiff's claim following trial. The Court of Appeals affirmed, holding that the account statements were a written contract and that the prior \$65 charge conflicted with the new express agreement of the parties represented by the account statements. **Smith**, 107 Wn. App. at 206-09. The **Smith** court in particular relied on the trial court's *findings* that the parties had met "*to settle the account*," 107 Wn. App. at 203 (emphasis added), that plaintiff did not "object to the clearly *final terms of the*

*account*,” 107 Wn. App. at 207 (emphasis added), and that plaintiff cashed a year-end settlement check labeled “final payment.” 107 Wn. App. at 202.

The trial court erred in granting summary judgment in reliance on **Smith** to hold that the four paid invoices established the contractual rate/price between the PUD and Spradlin as a matter of law. In contrast to **Smith**, the PUD and Spradlin never manifested “that a stated sum is an accurate computation of an amount due.” **Sunnyside Valley Irrigation**, 124 Wn.2d at 315. Indeed, by approving the invoices conditioned on receiving backup documentation, the PUD specifically reserved its right to protest and signaled its intent to further negotiate the sum due in the future. The PUD then challenged all the invoices based on facts that it learned after the first four invoices were paid. (CP 151)

The PUD could not have known that it was being significantly overcharged until after it received verifying documentation from Spradlin. *See, supra*, § III.E at 12-17. Once the PUD had reason to question the invoices, it asked Spradlin to provide documentation justifying the charges being assessed, and challenged the unjustified rates and charges. By contrast, in **Smith**, the plaintiff had the information necessary to object to the

challenged rates at the time he was paid. The PUD can not be faulted for not immediately questioning the numerous varied charges submitted, especially when Spradlin was just one of the contractors employed by the PUD to repair the overwhelming storm damage. (CP 153) The PUD was entitled to establish at trial that it made an excusable mistake in paying the invoices, and that the payment was at least partially the result of Spradlin's fraud. (CP 160)

**3. Payment Of Invoices Relating To An Emergency Project Undertaken Immediately After The Storm Did Not Bind The PUD For Non-Emergency Work Begun Over 7 Weeks After The Storm.**

The trial court also erred in holding that the PUD was liable to Spradlin as a matter of law not just on the project for which the PUD actually paid invoices (Think-of-Me Hill), but also for another completely unrelated project (Quinault Ridge). (CP 330) The doctrine of account stated could only extend to accounts that have been paid and accepted as final, and the two projects admittedly represented separate accounts.

In **Smith**, for instance, the parties met annually for three years to settle their account after the crop had been harvested and sold. The court held that plaintiff could not dispute the charge after

having willingly accepted a final settlement check specific to that harvest. **Smith**, 107 Wn. App. at 208-09. However, the court rejected defendant's attempts to establish the rate for the disputed year with the account settlements from prior years. **Smith**, 107 Wn. App. at 208-09.

This holding, in a case that is key to respondent's argument, has particular significance here, as Think-of-Me Hill was an emergency project undertaken immediately after the storm, whereas the Quinault Ridge Road Project was a pre-planned construction project that did not begin until seven weeks after the storm. See, *supra*, § III.F at 18. (See CP 268-70, 300-310) Spradlin clearly considered the projects separate from the outset, filing two separate statements of intent to pay prevailing wages, one for each project. (CP 286-87)<sup>6</sup> When Spradlin sued the PUD for over \$2 million in unpaid invoices on each project, it specifically separated the projects and invoices in its complaint and amended complaint. (CP 4, 20) Spradlin later confirmed that the projects were different, moving for a directed verdict on the Quinault Ridge invoices, but not on the invoices relating to Think-of-Me Hill. (RP 696)

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<sup>6</sup> RCW 39.12.040 requires a separate statement of intent for each contract.

The PUD has never paid any invoice for the Quinault Ridge project. The Quinault Ridge invoices were sent to the PUD months after Spradlin had been terminated as a contractor. (CP 4, 20) Neither **Smith** nor any other case supports the trial court's holding that the same rates and charges would as a matter of law apply to these drastically different projects. The trial court erred in holding that payment of invoices for the Think-of-Me Hill project, a project completely unrelated to Quinault Ridge and commenced under entirely different circumstances, established the rates for Quinault Ridge as well.

**4. The Trial Court's Misapplication Of The Doctrine Of Account Stated Contravenes Public Policy And Creates An Incentive For A Contracting Party To Pad Invoices With Unexplained Fees.**

The trial court's misapplication of the account stated doctrine encourages fraud and makes for poor public policy. Washington courts have long encouraged challenges to fraudulent invoices, and have held defendants liable for adding charges that were not part of the parties' original contract whether or not an invoice containing those new charges has been paid. See, e.g., **McKee v. AT&T Corp.**, 164 Wn.2d 372, 191 P.3d 845 (2008) (class action fee challenging monthly cell phone bills); **Indoor**

***Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.***, 162 Wn.2d 59, 170 P.3d 10 (2007) (challenge to deceptive phone fees); ***Dwyer v. J.I. Kislak Mortg. Corp.***, 103 Wn. App. 542, 13 P.3d 240 (2000) (challenge to deceptive mortgage fees), *rev. denied*, 143 Wn.2d 1024 (2001); ***Robinson v. Avis Rent A Car System, Inc.***, 106 Wn. App. 104, 22 P.3d 818 (2001) (challenge alleging deceptive rental car fees), *rev. denied*, 145 Wn.2d 1004 (2001); ***Pickett v. Holland America Line-Westours, Inc.***, 145 Wn.2d 178, 35 P.3d 351 (2001) (challenge to cruise ship fees), *cert. denied*, 546 U.S. 941 (2002). By barring a defendant from challenging an invoice once it has been provisionally paid, the trial court's holding would provide a perverse incentive for a contracting party to slip into invoices whatever extra charges it can, in the hope that the other party will not notice and pay the charge. This court should reject this misapplication of the account stated doctrine and reverse the trial court's summary judgment based upon it.

**B. The Trial Court Erred By Preventing The PUD From Presenting Course Of Dealing And Other Evidence That Would Have Demonstrated The Unprecedented And Egregious Nature Of Spradlin's Charges.**

The trial court erred by refusing to allow the PUD to present evidence demonstrating that Spradlin's billing practices for the

storm work differed significantly from the parties' prior course of dealing on the basis of its partial summary judgment. Course of dealing is "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." ***Morgan v. Stokely-Van Camp, Inc.***, 34 Wn. App. 801, 809, 663 P.2d 1384 (1983). Course of dealing refers to dealings between the same parties, but not necessarily on the same contract. ***Morgan***, 34 Wn. App at 809. "The court may consider trade usage and course of dealing between parties to interpret a contract's terms, even absent any ambiguity in its terms." ***Geonerco, Inc. v. Grand Ridge Properties IV LLC***, 146 Wn. App. 459, 465, ¶19, 191 P.3d 76 (2008).

The parties here did not negotiate specific billing practices, and thus the course of dealing between the parties was essential to determining what constituted costs and a reasonable profit for Spradlin. This prior course of dealing established, among other things:

- All previous billings submitted by Spradlin included both the equipment and the operator in a single hourly rate. (CP 166, 405; *see also, supra*, § III.A at 5, III.E.5 at 16)

- Spradlin had never billed the PUD for administrative costs as a separate line item. (CP 126; *see also, supra*, § III.E.1 at 12) The overhead charge amounted to \$1,069,499.15 in total for all invoices. (CP 283)

- Spradlin had never billed the PUD for the administrative time of its bookkeeper and part owner, Mrs. Spradlin. (CP 126; *see also, supra*, § III.E.4 at 15) In the disputed invoices the PUD was charged (in addition to the \$1,069,499.15 sought in overhead expenses) \$157,187 for this administrative time. (CP 169) The PUD did not learn that it had been billed for administrative time until after it paid the invoices because the invoices gave no indication that “T. Spradlin” was not a construction worker (as every other employee listed on the invoice), but was in fact Mrs. Spradlin, who worked as a bookkeeper in Spradlin’s offices. (CP 64-76)

- Spradlin had never billed the PUD for fuel costs as a separate line item. (CP 128; *see also, supra*, § III.E.2 at 13) The

total fuel surcharge of \$519,894.96 exceeded Spradlin's fuel costs by \$367,189.68. (CP 282)

The parties' course of dealing would have established that the PUD never agreed to Spradlin's new charges. Further, expert evidence of reasonable charges for the work Spradlin performed, and evidence of the circumstances of Spradlin's use and billing for equipment it did not own, would have been relevant to the jury's deliberations had the trial court not granted summary judgment making moot all evidence relevant to the rates invoiced by Spradlin. See *Pulcino v. Federal Express Corporation*, 94 Wn. App. 413, 431, 972 P.2d 522 (1999), *aff'd*, 141 Wn.2d 629, 9 P.3d 787 (2000) (holding "erroneous evidentiary and discovery rulings" premised on erroneous limitation of party's claim required reversal). It was error for the court to exclude evidence that was directly relevant to the terms of the parties' agreement based on its erroneous summary judgment.

**C. Under A Costs-Plus-Reasonable-Profit Contract A Party May Only Recover For The Actual Costs of Labor And May Not Recover For Administrative Time.**

Spradlin acknowledged that it agreed to be compensated for its costs plus a reasonable profit. (CP 125, 129, 311) Where parties agree to a costs-plus-reasonable-profit form of

compensation, a party may not bill for rates at higher than its costs, or recover for administrative time. ***Keever & Associates, Inc. v. Randall***, 129 Wn. App. 733, 119 P.3d 926 (2005), *rev. denied*, 157 Wn.2d 1009 (2006). It was error for the trial court to hold that Spradlin was entitled as a matter of law to bill for more than its actual costs, and to recover for administrative time of its owners.

The parties orally agreed that plaintiff-contractor would be paid his actual costs of labor and materials plus 10 percent for overhead and profit in ***Keever***, 129 Wn. App. at 736, ¶2. The Court of Appeals affirmed the trial court's holding that the contractor could not recover rates that were higher than its workers' actual wages and other applicable assessments. ***Keever***, 129 Wn. App. at 741, ¶13. The Court of Appeals also held that the contractor could not recover as part of its costs the time spent by its president administering the contract: "[I]t is a generally accepted principle that administrative time is not covered under a cost-plus contract." ***Keever***, 129 Wn. App. at 739, ¶9.

As in ***Keever***, Spradlin billed the PUD for labor at rates higher than its actual costs even though the parties had agreed that Spradlin would be compensated for costs plus a reasonable profit. (CP 125, 129, 311) Even accounting for fringe benefits, the rates

charged by Spradlin for labor well exceeded the costs to Spradlin. See, *supra*, § III.E.3 at 14. As in ***Keever***, Spradlin also billed for administrative time of an owner of the company, Mrs. Spradlin, even though the PUD never specifically agreed to an overhead or administrative charge. (CP 311) The trial court erred in holding as a matter of law that the PUD was bound to pay labor rates exceeding Spradlin's actual cost, and for administrative time.

**D. The Trial Court Erred In Allowing Spradlin's Claim For Lost Profits To Go To The Jury Because The Small Works Contract Did Not Entitle Spradlin To Any Specific Work.**

The trial court erred in refusing to dismiss Spradlin's claim for lost profits on a potential project based on testimony that Mr. Spradlin "felt" it would have received if Spradlin had not been terminated as an eligible small works contractor. (2/19 RP 88) Such damages are, as a matter of law, too speculative to be awarded. ***Golf Landscaping, Inc. v. Century Const. Co., a Div. of Orvco, Inc.***, 39 Wn. App. 895, 696 P.2d 590 (1984).

In ***Golf Landscaping***, a subcontractor alleged that if not for the delays caused by the general contractor, it would have obtained other contracts during the period of delay. The Court of Appeals reversed an award of lost profits as speculative: "It is wholly

conjectural whether [the contractor] would have been awarded those additional contracts. The petition states only that he was unable to bid on them and that he had a 'reasonable expectation' of receiving them. Such an attenuated theory of damages is legally insufficient." ***Golf Landscaping***, 39 Wn. App. at 903-04 (emphasis omitted) (quoting ***Rocky Mountain Constr. Co. v. United States***, 25 Cont.Cas.Fed. (CCH) ¶ 82,755 (Ct.Cl.1978)).

Spradlin's small works contract with the PUD did not guarantee any work, but only made Spradlin eligible to bid on small works projects that could be awarded through the submission and evaluation of bids. (RP 636-38; CP 402) As this process is competitive, there was no guarantee that had Spradlin remained an eligible contractor it would have received the Frye Creek project. (RP 638; CP 402) As in ***Golf Landscaping***, Spradlin's "reasonable expectation" of receiving the Frye Creek contract is a legally insufficient basis upon which to award lost profits. 39 Wn. App. at 903-04. The trial court erred in refusing to dismiss Spradlin's lost profits claim before it went to the jury.

**E. The Trial Court Erred In Granting Prejudgment Interest On A Lump-Sum General Verdict Containing Unliquidated Damages When There Was No Written Contract Between The Parties.**

**1. Defense Counsel's Suggested Damages Calculation Does Not Liquidate An Otherwise Unliquidated Amount.**

The trial court erred in awarding prejudgment interest on a lump sum verdict that indisputably contained unliquidated damages. In order to be liquidated, “[t]he amount owed must be ascertainable without the aid of a discretionary court ruling concerning the amount due.” *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148,154, 948 P.2d 397 (1997), *rev. denied*, 135 Wn.2d 1003 (1998). A general jury verdict that contains both liquidated and unliquidated damages may not be dissected into its component parts, and thus prejudgment interest must be denied on the entire verdict. *Kiewit-Grice v. State*, 77 Wn. App. 867, 895 P.2d 6, *rev. denied*, 127 Wn.2d 1018 (1995); *see also Wheeler v. Catholic Archdiocese of Seattle*, 124 Wn.2d 634, 880 P.2d 29 (1994); *Foster v. Giroux*, 8 Wn. App. 398, 506 P.2d 897 (1973). In particular, lost profits are necessarily unliquidated, because their determination involves the exercise of discretion. *See Northwest Land & Inv., Inc. v. New West Federal Sav. and Loan Ass'n*, 57

Wn. App. 32, 46, 786 P.2d 324, *rev. denied*, 115 Wn.2d 1013 (1990); ***Jet Boats, Inc. v. Puget Sound Nat. Bank***, 44 Wn. App. 32, 40, 721 P.2d 18, *rev. denied*, 106 Wn.2d 1017 (1986).

In ***Kiewit-Grice***, the Court of Appeals reversed an award of prejudgment interest on a general verdict in favor of a contractor, holding that the general verdict could not be dissected into its liquidated and unliquidated parts. 77 Wn. App. at 870-73. The court also rejected the contractor's argument that the entire verdict was liquidated, reasoning that the defendant had presented conflicting expert testimony regarding the calculation of the amount owed, and that the jury must have exercised its discretion if it accepted neither of the party's proposed damage numbers. ***Kiewit-Grice***, 77 Wn. App. at 873-74. See also ***St. Hilaire v. Food Services of America, Inc.***, 82 Wn. App. 343, 354, 917 P.2d 1114 (1996); ***Douglas Northwest, Inc. v. Bill O'Brien & Sons Const., Inc.***, 64 Wn. App. 661, 691, 828 P.2d 565 (1992); ***Aker Verdal A/S v. Neil F. Lampson, Inc.***, 65 Wn. App. 177, 192, 828 P.2d 610 (1992) (where conflicting expert testimony is presented regarding the proper method of calculating damages any resulting damages award is unliquidated).

The PUD sought, and the trial court refused, a special verdict form that would have separated the damages. (CP 495-99) See ***Davis v. Microsoft Corp.***, 149 Wn.2d 521, 539-40, 70 P.3d 126 (2003) (requiring remand where defendant proposed “a special verdict form that would have eliminated the uncertainty”). It is undisputed that the jury’s general lump-sum verdict contained unliquidated damages. Spradlin sought unliquidated damages for lost profits and other consequential damages. (CP 266) The trial court admitted that portions of the verdict were unliquidated. (RP 895-96) Moreover, the PUD contested the amount of hours in each invoice, the parties offered conflicting expert testimony on the reasonable number of equipment hours that Spradlin could charge the PUD (RP 544-45, 571, 576), and the jury had to exercise its discretion to determine a reasonable number of hours for Ms. Spradlin’s work. The jury returned a number between the argued amounts, verifying that it exercised its discretion in determining what damages to award. ***Kiewit-Grice***, 77 Wn. App. at 873-74.

As a basis for determining the amount on which to award prejudgment interest, the trial court resorted to using the damages award suggested by defense counsel – who had been hamstrung in his defense by the court’s erroneous summary judgment. But just

as neither settlement, stipulation, or admission to a specific damage amount can render an otherwise unliquidated amount liquidated, neither can defense counsel's argument. See **Lakes v. von der Mehden**, 117 Wn. App. 212, 217-20, 70 P.3d 154 (2003) (CR 36 admission does not render amount admitted liquidated), *rev. denied*, 150 Wn.2d 1036 (2004); **Hansen v. Rothaus**, 107 Wn.2d 468, 477-78, 730 P.2d 662 1986 (1986) (agreement to reasonableness of settlement does not render amount liquidated); **Pearson Const. Corp. v. Intertherm, Inc.**, 18 Wn. App. 17, 20, 566 P.2d 575 (1977) (stipulation to amount of damages does not render amount liquidated); see also **Dautel v. Heritage Home Center, Inc.**, 89 Wn. App. 148, 154, 948 P.2d 397 (1997) ("The fact that the parties stipulated to a portion of the amount owing does not by itself render that amount liquidated."); **Fiorito Bros., Inc. v. State Through Dept. of Transp.**, 53 Wn. App. 876, 878 n1., 771 P.2d 1166 (1989) ("[W]e know of no valid theory by which a party can be required to pay prejudgment interest just because it has a settlement figure in mind that the other side has rejected.").

The trial court's award of prejudgment interest contravenes the longstanding policy that encourages defendants to admit the amounts they believe they owe. **Lakes**, 117 Wn. App. at 218-19;

*Hansen*, 107 Wn.2d at 477-78; *Pearson*, 18 Wn. App. at 20. It was error regardless of the wisdom of the trial court's partial summary judgment.

**2. There Was No Written Public Works Contract On Which To Base An Award Of Prejudgment Interest.**

The trial court also erred in awarding prejudgment interest under RCW 39.76.011 on the alternative ground that there was a written public works contract. (CP 656-663) The statute authorizing prejudgment interest was intended to prevent "routine delinquency" on the part of public entities. *Fiorito Bros., Inc. v. State*, 53 Wn. App. at 878. Here, there was no contract in writing for a fixed or determinable amount, and RCW 39.76.011 does not apply.

The parties had an undisputedly oral agreement. (CP 146: Mr. Spradlin: "There were no written contracts for these projects.") Even accepting the trial court's erroneous summary judgment ruling that the four paid invoices established the prices between the parties for both projects and all the invoices, there were a host of other contract terms that were not reduced to writing, such as where Spradlin would work, when it would work, what equipment it would use, how long the jobs would take, or how the parties might

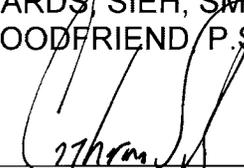
terminate the contract. Indeed, the main term of the contract – the work to be performed – was never reduced to writing, but rather was agreed to orally. (CP 124, 129, 311) At trial, Mr. Spradlin’s testimony confirmed that his company was given vast discretion on the work to be performed, “I had to drive my own stakes, I determined my own slopes. I determined what was the safest and best way to get there.” (2/18 RP 264) There is simply no writing that can be deemed to have established “a contract in writing for the execution of public work for a fixed or determinable amount” that could support an award of prejudgment interest under RCW 39.76.011.

**V. CONCLUSION**

This court should reverse the judgments and remand for trial before a properly instructed jury that is allowed to hear all evidence relevant to Spradlin’s contract claims against the PUD.

Dated this 14<sup>th</sup> day of October, 2010.

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**DECLARATION OF SERVICE**

STATE OF WASHINGTON

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 14, 2010, I arranged for service of the foregoing Brief of Appellant, to the court and to counsel for the parties to this action as follows:

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**DATED** at Seattle, Washington this 14th day of October, 2010.

  
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Carrie Steen