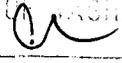


COURT OF APPEALS
DIVISION II

11 FEB 24 PM 12:15

STATE OF WASHINGTON
BY 
DEPUTY

No. 40415-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SPRADLIN ROCK PRODUCTS, INC.,
a Washington corporation,

Respondent,

v.

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

Appellant.

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

REPLY BRIEF OF APPELLANT

SMITH GOODFRIEND, P.S.

INGRAM, ZELASKO
& GOODWIN, LLP

By: Catherine W. Smith
WSBA No. 9542
Ian C. Cairns
WSBA No. 43210

By: Arthur A. Blauvelt
WSBA No. 8260

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

120 East First Street
Aberdeen, WA 98520
(360) 533-2865

Attorneys for Appellant

TABLE OF CONTENTS

I. INTRODUCTION 1

II. REPLY FACTS 1

Spradlin Improperly Relies On Rejected
Evidence And Recites The Facts In A Light
Most Favorable To It In This Appeal From
Summary Judgment..... 1

III. REPLY ARGUMENT 5

A. Whether The Parties Intended For Preliminary
Invoices To Permanently Establish Rates For
All Work Was A Question Of Fact That The
Trial Court Improperly Decided On Summary
Judgment. 5

B. The Doctrine Of Account Stated Prevents
Spradlin From Permanently Binding The PUD
To The Invoice Rates..... 15

C. Administrative Time Is Not Included In The
Calculation Of Costs When Compensation Is
Based, In Whole Or Part, On Costs. 18

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..... 21

E. Spradlin's Damages Were Unliquidated And
Not Subject To Prejudgment Interest. 22

IV. CONCLUSION..... 25

TABLE OF AUTHORITIES

FEDERAL CASES

Allapattah Services, Inc. v. Exxon Corp., 61 F.Supp.2d 1300 (S.D.Fla. 1999), *aff'd* 333 F.3d 1248 (2003), 545 U.S. 546 (2005)..... 9

Rule v. Brine, Inc., 85 F.3d 1002 (2d Cir. 1996)9-11

TCP Industries, Inc. v. Uniroyal, Inc., 661 F.2d 542 (6th Cir. 1981) 9

STATE CASES

Associated Petroleum Products, Inc. v. Northwest Cascade, Inc., 149 Wn. App. 429, 436 n.4, ¶ 12, 203 P.3d 1077, *rev. denied*, 166 Wn.2d 1034 (2009) 16-18

Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990)..... 6, 8, 12

Burgeson v. Columbia Producers, Inc., 60 Wn. App. 363, 803 P.2d 838, *rev. denied*, 116 Wn.2d 1033 (1991) 7, 8, 12

Davis v. Microsoft Corp., 149 Wn.2d 521, 70 P.3d 126 (2003) 24

Dioxin/Organochlorine Center v. Department of Ecology, 119 Wn.2d 761, 837 P.2d 1007 (1992)..... 4

Green v. A.P.C., 136 Wn.2d 87, 960 P.2d 912 (1998)..... 22

Hansen v. Transworld Wireless TV-Spokane, Inc., 111 Wn. App. 361, 44 P.3d 929 (2002), *rev. denied*, 148 Wn.2d 1004 (2003)..... 7, 12

<i>In re Proposed Incorporation of Village of Volo</i> , 229 Ill.App.3d 321, 592 N.E.2d 628, <i>app.</i> <i>denied</i> , 146 Ill.2d 629 (1992)	4
<i>In re Richardson's Estate</i> , 11 Wn. App. 758, 525 P.2d 816 (1974), <i>rev. denied</i> , 84 Wn.2d 1013 (1974).....	7
<i>Jet Boats, Inc. v. Puget Sound Nat. Bank</i> , 44 Wn. App. 32, 721 P.2d 18, <i>rev. denied</i> , 106 Wn.2d 1017 (1986)	23
<i>Keever & Associates, Inc. v. Randall</i> , 129 Wn. App. 733, 119 P.3d 926 (2005), <i>rev. denied</i> , 157 Wn.2d 1009 (2006)	19-21
<i>Kiewit-Grice v. State</i> , 77 Wn. App. 867, 895 P.2d 6, <i>rev. denied</i> , 127 Wn.2d 1018 (1995).....	23
<i>McKinstry Co. v. Aeronautical Machinists, Inc.</i> , 62 Wn. App. 442, 814 P.2d 251 (1991), <i>rev.</i> <i>denied</i> , 118 Wn.2d 1018 (1992).....	15
<i>Northwest Land & Inv., Inc. v. New West Federal Sav. and Loan Ass'n</i> , 57 Wn. App. 32, 786 P.2d 324, <i>rev. denied</i> , 115 Wn.2d 1013 (1990).....	23
<i>Smith v. Skone & Connors Produce, Inc.</i> , 107 Wn. App. 199, 26 P.3d 981 (2001), <i>rev. denied</i> , 145 Wn.2d 1028 (2002)	12, 15, 16, 24
<i>State v. Demery</i> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	3
<i>State v. Kindsvogel</i> , 149 Wn.2d 477, 69 P.3d 870 (2003).....	3
<i>Stender v. Twin City Foods, Inc.</i> , 82 Wn.2d 250, 510 P.2d 221 (1973)	6

<i>Tjart v. Smith Barney, Inc.</i> , 107 Wn. App. 885, 28 P.3d 823 (2001), <i>rev. denied</i> , 145 Wn.2d 1027, <i>cert. denied</i> , 537 U.S. 954 (2002)	6
<i>Vermont Morgan Corp. v. Ringer Enterprises, Inc.</i> , 92 A.D.2d 1020, 461 N.Y.S.2d 446 (N.Y.A.D. 3 Dept. 1983)	9
<i>Voicelink Data Services, Inc. v. Datapulse, Inc.</i> , 86 Wn. App. 613, 937 P.2d 1158 (1997).....	4, 22
<i>Yousoufian v. Office of Ron Sims</i> , 152 Wn.2d 421, 98 P.3d 463 (2004)	3

STATUTES

RCW 39.76.011.....	24, 25
RCW 62A.2-305	8, 9

RULES AND REGULATIONS

RAP 9.12.....	4
RAP 10.3.....	3

I. INTRODUCTION

It is undisputed that the parties agreed that the plaintiff was to be paid its costs and a reasonable profit for performing road work. The trial court's erroneous grant of a summary judgment defining what was a proper charge for costs and a reasonable profit prevented the jury from hearing evidence important to a determination of that factual issue. As a result, the decision should be reversed and remanded for a new trial where the jury may consider all of the evidence relevant to its decision. This court need not determine other issues, as the verdict was, at plaintiff's insistence, a general verdict. But this court should instruct the trial court that plaintiff's claim for lost profits should not be submitted to the jury, and that plaintiff is not entitled to prejudgment interest on remand.

II. REPLY FACTS

Spradlin Improperly Relies On Rejected Evidence And Recites The Facts In A Light Most Favorable To It In This Appeal From Summary Judgment.

From the beginning of this case, appellant Public Utility District No. 1 of Grays Harbor County ("the PUD") has sought only the opportunity to demonstrate that respondent Spradlin Rock Products, Inc.'s ("Spradlin") invoices did not conform to the parties'

agreement that the PUD would pay Spradlin costs plus a reasonable profit for its work. (CP 125, 129, 311) The trial court effectively precluded the PUD from doing so by entering its summary judgment defining the rates the PUD was required to pay plaintiff. This decision was based on disputed facts that should have been, but were not, viewed in the light most favorable to the PUD as the non-moving party. Spradlin compounds this error by reciting the “facts” in its brief in a light most favorable to Spradlin, the prevailing party on summary judgment. Spradlin also improperly relies on “evidence” that was never admitted in the trial court about what role a potential FEMA claim had in the parties’ discussion about the disputed work.

Spradlin claims that the PUD asked Spradlin to charge the small works rate so they could tie the emergency contract to the written small works contract (Brief of Respondent (BR) 14), and that FEMA denied the requests because there was no written contract. Spradlin cites only its own (unsupported) motion for summary judgment and a passing reference to FEMA by Spradlin in the letter he wrote to the PUD after termination. Spradlin also claims that the PUD decided to not pay Spradlin because FEMA refused to reimburse the PUD. (BR 16-17) Spradlin cites no evidence at all

that supports this assertion. Indeed, the evidence cited by Spradlin only reinforces that the PUD was becoming concerned about the amount of Spradlin's invoices, and accordingly requested backup materials. (CP 140 ("I can't reject the amount until I see the backup"))

Spradlin similarly asserts that the PUD rushed Spradlin to complete Neilton/Quinault Ridge so the PUD could recover costs from FEMA. (BR 9, 35) The only "evidence" cited is an offer of proof that was rejected by the trial court. (2/19 RP 119-24) Spradlin has not assigned error to the trial court's refusal to admit evidence on this point, nor has Spradlin argued that the court abused its discretion in granting the motion in limine to exclude mention of FEMA. (2/17 RP 14) "The trial court has wide discretion to determine the admissibility of evidence." ***State v. Demery***, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). If Spradlin intended to challenge this ruling on appeal, it was obligated to assign error to it. RAP 10.3(b); ***State v. Kindsvogel***, 149 Wn.2d 477, 480-81, 69 P.3d 870 (2003). Spradlin may not rely on this excluded evidence on appeal. ***Yousoufian v. Office of Ron Sims***, 152 Wn.2d 421, 438-39, 98 P.3d 463 (2004) (issues on which respondent does not cross-appeal or assign error are waived); ***In re***

Proposed Incorporation of Village of Volo, 229 Ill.App.3d 321, 592 N.E.2d 628, 635, *app. denied*, 146 Ill.2d 629 (1992) (“[Respondents]’ reliance on the testimony . . . is improper. The trial court struck the entire testimony and only allowed it as an offer of proof. [Respondents] have not argued or cited pertinent authority concerning any error in the trial court’s ruling, and therefore any error is waived.”).

Further, because this is an appeal from a pre-trial summary judgment, this court will only consider evidence that was before the court at the time of the motion. RAP 9.12. The testimony in the offer of proof was not before the trial court on summary judgment. (CP 327-30) Even ignoring the procedural stance of this case (as Spradlin does throughout its brief), Spradlin cannot rely on evidence that was not considered below to support the trial court’s decision on summary judgment. ***Dioxin/Organochlorine Center v. Department of Ecology***, 119 Wn.2d 761, 771, 837 P.2d 1007 (1992) (“Because this court is a reviewing court, it only considers on appeal evidence which was admitted in the trial court.”); see also ***Voicelink Data Services, Inc. v. Datapulse, Inc.***, 86 Wn. App. 613, 619 n.2, 937 P.2d 1158 (1997) (“Assertions by counsel are not evidence.”) This court should rely on the evidence on

summary judgment as recited in the PUD's opening brief, and disregard Spradlin's improper restatement of the case.

III. REPLY ARGUMENT

A. Whether The Parties Intended For Preliminary Invoices To Permanently Establish Rates For All Work Was A Question Of Fact That The Trial Court Improperly Decided On Summary Judgment.

The PUD agreed to compensate Spradlin for its actual costs and a reasonable profit. (CP 125, 129, 311 ("What was . . . numerous agreed to was I was going to recover my costs, which included . . . some profit.")) It did not agree to pay Spradlin for drastically inflated costs and an unreasonable profit. The trial court's summary judgment order prevented the PUD from presenting any evidence of Spradlin's actual costs and a reasonable profit, which the PUD mistakenly believed the initial invoices represented. Whether the parties intended for preliminary invoices to permanently establish rates for all work was a question of fact that the trial court improperly decided on summary judgment.

Spradlin attempts to support this erroneous ruling by arguing that the parties left the price term "open" (BR 28-34) and that its invoices filled that term. According to Spradlin, because the PUD paid invoices on the mistaken belief that they represented

Spradlin's *actual* costs and a *reasonable* profit, the PUD is bound to pay those rates in perpetuity. Spradlin's argument ignores the nature of the parties' agreement and misstates the law.

Washington follows the "context rule" in interpreting contracts and determining the intent of the parties. ***Berg v. Hudesman***, 115 Wn.2d 657, 801 P.2d 222 (1990). The context rule requires that the intent of contracting parties be determined by viewing the entire context of contract formation:

Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

Berg, 115 Wn.2d at 667, *quoting Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973).

"[A]pplication of the context rule leads the courts to discover the intent of the parties based on their real meeting of the minds." ***Tjart v. Smith Barney, Inc.***, 107 Wn. App. 885, 895, 28 P.3d 823 (2001), *rev. denied*, 145 Wn.2d 1027, *cert. denied*, 537 U.S. 954 (2002). Interpretation of a contract is a question of fact, whereas construction of a contract (attaching legal consequences to the

terms of a contract) is a question of law. **Burgeson v. Columbia Producers, Inc.**, 60 Wn. App. 363, 366-67, 803 P.2d 838, *rev. denied*, 116 Wn.2d 1033 (1991); *see also Hansen v. Transworld Wireless TV-Spokane, Inc.*, 111 Wn. App. 361, 376, 44 P.3d 929 (2002) (“Whether there was mutual assent normally is a question of fact for the jury.”), *rev. denied*, 148 Wn.2d 1004 (2003); **In re Richardson’s Estate**, 11 Wn. App. 758, 761, 525 P.2d 816 (1974) (“The existence of a contractual intention is ordinarily a fact question to be resolved by the trier of the facts.”), *rev. denied*, 84 Wn.2d 1013 (1974).

Spradlin cites **Burgeson** for the proposition that a court can fill “gaps” in a contract as a matter of law. (BR 29) However, this “gap-filling” rule only applies “with respect to matters that the parties did not have in contemplation and as to which they had no intention to be expressed.” **Burgeson**, 60 Wn. App. at 367. **Burgeson** involved filling a “gap” concerning which party was responsible for repairs to irrigation equipment on leased land, which “the parties admit they did not discuss” and for which there was “no evidence as to their intent.” 60 Wn. App. at 367. The issue was whether the trial court had properly considered extrinsic evidence in deciding after trial which party was obligated to make certain

repairs under their lease. Citing *Berg*, the Court of Appeals concluded that it had, but then construed the contract to allocate the cost of repairs for irrigation equipment that had actually been paid out of pocket by one party, as required by the lease. *Burgeson*, 60 Wn. App. at 367.

In the present case, unlike in *Burgeson*, the equipment rates and labor costs incurred were contemplated by the parties, and there was disputed evidence on summary judgment regarding the intent of the parties and whether Spradlin's invoices reflected that intent. (*Compare* CP 125, 129, 311 *and* Brief of Appellant (BA) § III.E (detailing unreasonableness of invoices)) Indeed, in making the argument that the price was an "open term" that could be filled through its invoicing, Spradlin contradicts itself, claiming both that the trial court filled a "gap" about which the parties had no expressed intent and that the invoices "constitute a clear agreement" on the issue. (*Compare* BR 29 *and* BR 32)

Spradlin also relies on the Uniform Commercial Code, and on cases interpreting the UCC, in arguing that the court could fill the parties' "open" price term. (BA 29-30) But the UCC applies only to goods, and has a very well-defined statutory method of establishing price. RCW 62A.2-305. The UCC was intended to

help make more certain price and terms in situations where ordinary contract rules may impede the flow of goods. RCW 62A.2-305, comment 2. That is not the case here. Further, contrary to the argument made by Spradlin (BR 30), the court here forbade the use of course of dealing and other evidence that would have demonstrated the unprecedented and egregious nature of the “price” charged by Spradlin. (BA 33-36)

Even accepting that the price term was “open,” determination of an open price term is a question of fact. ***Rule v. Brine, Inc.***, 85 F.3d 1002 (2d Cir. 1996) (reversing grant of summary judgment for defendant and holding that plaintiff could dispute meaning of “reasonable royalties” despite having accepted fixed monthly payments for 15 years); ***TCP Industries, Inc. v. Uniroyal, Inc.***, 661 F.2d 542, 548 (6th Cir. 1981) (“the question of the parties’ intentions when a price term is left open is a question for the trier of fact”); ***Allapattah Services, Inc. v. Exxon Corp.***, 61 F.Supp.2d 1300, 1303 (S.D.Fla. 1999) (“[A] question of fact is raised when ascertaining the parties’ intentions as to an open price term.”), *aff’d* 333 F.3d 1248 (2003), 545 U.S. 546 (2005); ***Vermont Morgan Corp. v. Ringer Enterprises, Inc.***, 92 A.D.2d 1020, 1020-21, 461 N.Y.S.2d 446 (N.Y.A.D. 3 Dept. 1983). It was error for the

trial court to determine that the invoice rates were the parties' agreement as a matter of law.

In *Rule*, for instance, the plaintiff Rule agreed to design and assign the rights to lacrosse equipment to the defendants Brine. In return, Brine agreed to pay Rule "reasonable royalties." *Rule*, 85 F.3d at 1004. For 15 years, Brine sent Rule a regular monthly payment, which Rule accepted. The relationship between the parties soured and Rule sued for breach of contract and unjust enrichment, claiming that the monthly payments did not represent the "reasonable royalties" that the parties had agreed upon. The trial court granted Brine summary judgment, ruling that the monthly payments were the agreed upon compensation. *Rule*, 85 F.3d at 1009. The Second Circuit reversed, holding that there was a material issue of fact whether the monthly payments, despite being made and accepted without objection for 15 years, were the agreed upon compensation, and that a jury could "infer that Rule's innocent assumptions that Brine's representations were truthful did not constitute a modification of the contract." *Rule*, 85 F.3d at 1013.

In the present case, as in *Rule*, the PUD disputes whether the sums paid on the first four invoices represent the "reasonable" compensation the parties agreed upon. (*Compare* CP 125, 129,

311 *with* 85 F.3d at 1012-14) The PUD paid initial invoices believing that they represented the parties' agreement, and ceased payments after examining late-provided back-up information and coming to believe that Spradlin's rates were unreasonable. (BA §§ III.D-E) Indeed, Spradlin acknowledged that his invoices were subject to PUD review before the PUD paid the fourth invoice. (CP 147)

These initial payments could not establish, *as a matter of law*, that the invoice rates represent the parties' agreement of reasonable compensation. **Rule**, 85 F.3d at 1012-14. Here, as in **Rule**, a jury could find that the PUD did not agree to the invoice rates because they do not reflect the parties' agreement to "reasonable" compensation. A jury could also find that the PUD did not agree to the invoice rates because the PUD reserved the right to verify their reasonableness by asking for backup materials to document Spradlin's costs. (CP 138-39) As in **Rule**, the PUD was entitled to rely on the parties' agreement that compensation would be "reasonable" and the PUD's payment in reliance on this agreement "did not constitute a modification of the contract," 85 F.3d at 1013, and summary judgment was inappropriate.

Here, the trial court on summary judgment and in the face of disputed material facts determined the intent of the parties and interpreted the contract, improperly deciding questions of fact that were for a jury. **Burgeson**, 60 Wn. App. 363; **Hansen**, 111 Wn. App. at 376. **Berg** itself demonstrates that where there is disputed evidence regarding the intent of the parties, questions of fact are presented and summary judgment is inappropriate. 115 Wn.2d at 671 (remanding for determination of material issues of fact “as to the intent of the contracting parties and interpretation of the [contract]”). Likewise, the main case that Spradlin and the trial court rely on was decided after a full trial in which disputed issues of fact were resolved. **Smith v. Skone & Conners Produce, Inc.**, 107 Wn. App. 199, 202-03, 206, 208-09, 26 P.3d 981 (2001), *rev. denied*, 145 Wn.2d 1028 (2002).

There was ample evidence before the trial court on summary judgment disputing Spradlin’s contention that the PUD intended to pay the invoice rates, regardless of their reasonableness, for all the work done by Spradlin. (See, e.g., BA § III.B; CP 125, 129, 311 (agreement was for “reasonable profit”); BA § III.C; CP 138 (agreement contingent on provision of backup materials); BA § III.F; CP 155-56, 268-70 (detailing separate nature of Think-Of-Me-Hill

and Neilton/Quinault Ridge Projects); BA §§ III.E.1-2; CP 272-76 (detailing unreasonable nature of fuel and overhead charges); BA § III.E.5 (invoice rates were inconsistent with prior dealings between the parties)) Spradlin ignores this evidence, instead relying on a mischaracterization of the trial record to justify the trial court's summary judgment.

For instance, Spradlin cites trial exhibit 18 for the proposition that the PUD "treated Neilton[/Quinault Ridge] as part of the ongoing emergency." (BR 9, *see also* BR 35-36) Exhibit 18 is the PUD's general declaration of an emergency. It does not specifically address Neilton/Quinault Ridge. Further, although the citation of 2/18 RP 266; 2/19 RP 28, 175 (BR 9), supports the proposition that building roads in the winter was more expensive, it does not support the claim that the PUD insisted the Neilton/Quinault Ridge work be done in February.

Spradlin also cites the offer of proof made by Tim Spradlin (2/19 RP 119-24) for this proposition, but Spradlin's testimony refers to Think-of-Me-Hill, and not Neilton/Quinault Ridge. The offer of proof is cited again (BR 34-35) for the proposition that the PUD pushed Spradlin to finish the work on Neilton/Quinault Ridge quickly. Leaving aside Spradlin's improper reliance on an offer of

unadmitted evidence, *see infra* at 2-4, the evidence on summary judgment was that the PUD never agreed to the specific rates in the invoices for any of the work, much less that incurred on the Nielton/Quinault Ridge project. At a minimum, as argued in the opening brief (BA 30-32), it did not support the summary judgment for this separate project.

Rather, the PUD agreed to pay Spradlin its costs plus a reasonable profit, contingent on Spradlin accurately demonstrating its costs and the reasonableness of its charges. (CP 138 (payment contingent on backup materials); *see also* CP 147) After Spradlin was unable to do this and the PUD began to suspect the unreasonableness of Spradlin's rates, the PUD refused to pay further invoices because the invoices did not conform to the parties' original agreement. (BA § III.D) The PUD's suspicions of unreasonableness were well warranted. (BA § III.E) Moreover, this evidence of unreasonableness was not available at the time the PUD paid the invoices. (BA § III.E) It was error for the trial court to ignore this evidence, grant summary judgment, and forbid the PUD from presenting evidence to the jury regarding its intent and whether the parties mutually assented to the invoice rates.

B. The Doctrine Of Account Stated Prevents Spradlin From Permanently Binding The PUD To The Invoice Rates.

In its opening brief the PUD demonstrated that under the doctrine of account stated, the payment of invoices does not establish the contract price as a matter of law. (BA 24-26) Spradlin asserts that the court need not consider whether the doctrine of account stated and the pertinent exceptions apply because the trial court did not base its decision on them. (BR 27-28) But a trial court cannot inoculate itself from review by ignoring the applicable law, and Spradlin's theory of appellate review is not the law. ***McKinstry Co. v. Aeronautical Machinists, Inc.***, 62 Wn. App. 442, 450 n.6, 814 P.2d 251 (1991) ("[T]he basis for the court's ruling is irrelevant because this court reviews an appeal from a summary judgment de novo."), *rev. denied*, 118 Wn.2d 1018 (1992). The trial court erred and its summary judgment should be reversed on this basis.

In any event, Spradlin's "preservation" argument ignores the indisputable fact that this theory was always in the case. The case relied upon by the trial court clearly applies the doctrine of account stated. ***Smith v. Skone & Conners Produce, Inc.***, 107 Wn. App. 199, 26 P.3d 981 (2001). The court in ***Smith*** explicitly stated that

the parties met “to settle the account,” 107 Wn. App. at 203 (emphasis added), and refused to allow the plaintiff to object to the packing charge because he did not “object to the clearly *final terms of the account.*” 107 Wn. App. at 207 (emphasis added).

Curiously, Spradlin now argues that **Smith** did not apply the doctrine of account stated because one party simply paid the other “after they met to go over the account statements.” (BR 32 n.8) By any other name, this is the doctrine of account stated. Counsel for Spradlin essentially admitted as much during oral argument on the summary judgment motion. (1/19 RP 855-56 (“There must be some form of assent to the account. . .”))

Spradlin tries to distinguish a case in which this court applied the doctrine of account stated to reject the precise argument Spradlin now makes that “the invoiced price, paid without objection, establishes the parties’ contract price.” **Associated Petroleum Products, Inc. v. Northwest Cascade, Inc.**, 149 Wn. App. 429, 436 n.4, ¶ 12, 203 P.3d 1077, *rev. denied*, 166 Wn.2d 1034 (2009) (discussed at BA 24-27).¹ Spradlin claims that **Associated** does not apply because the charges here were “in black and white.” (BR

¹ Spradlin asserts the PUD relied only on **Associated** for this principle (BR 36), ignoring the long line of cases cited by the PUD that are consistent with **Associated**. (BA 27)

38) But the charges in **Associated** were also “in black and white,” included in invoices paid by the party who later was allowed to object to them. Yet this court still found that they did not establish the contract price. **Associated**, 149 Wn. App. at 438.

Spradlin also asserts that there could have been no mistake or fraud because Spradlin’s invoices were deemed to be “99.992% accurate” by its witnesses at trial. (BR 38) Spradlin ignores that the PUD was forbidden from putting on any evidence regarding the reasonableness of Spradlin’s rates. Spradlin’s expert acknowledged that he was not asked to determine the reasonableness of any of the rates; he just “did the math” by multiplying the (exorbitant) rates charged by the (claimed) number of hours. (2/19 RP 100) A statement of accuracy that only verifies the math used in calculating unreasonable rates that were never agreed upon is meaningless.

In any event, even if the doctrine of account stated did not explicitly apply, the logic of **Associated** does, and the parallels between Spradlin’s argument and those rejected in **Associated** are striking. In essence, Spradlin argues that the PUD was required to suspect fraud from the beginning, and object to and not pay on Spradlin’s invoices when received, or waive irrevocably the right to

protest the rates even if the charges turn out to be wholly unreasonable and in contradiction to the parties' agreement (*actual* costs plus a *reasonable* profit).

Associated rejected this result, finding that one party may not hoodwink another and later hide behind its unexplained and unreasonable invoices. **Associated** further recognized that mistake "refers to the party's *beliefs* at the time the contract is made, not the party's acts." 149 Wn. App. at 437 n.5, ¶ 15 (emphasis in original). Here, the PUD believed, mistakenly, that Spradlin's invoices reflected the agreement that the PUD would pay Spradlin for its actual costs and a reasonable profit. The PUD cannot be bound to pay the invoice rates in perpetuity when it only paid on four of the thirteen invoices submitted, on the mistaken belief that they reflected the parties' agreement. The doctrine of account stated prevents Spradlin from permanently binding the PUD to the invoice rates.

C. Administrative Time Is Not Included In The Calculation Of Costs When Compensation Is Based, In Whole Or Part, On Costs.

Spradlin charged the PUD a 24% overhead fee for administration, as well as for the time of Mrs. Spradlin who ran Spradlin's office. In its opening brief (BA 36-38), the PUD

demonstrated that administrative costs are not a cost which can be recovered in a contract where compensation is based on costs, citing *Keever & Associates, Inc. v. Randall*, 129 Wn. App. 733, 119 P.3d 926 (2005), *rev. denied*, 157 Wn.2d 1009 (2006) (discussed at BA 36-37). Spradlin seeks to avoid the holding of *Keever* by arguing that the parties did not have a “cost-plus-a-percentage-of-the-cost” contract. Spradlin misses the point: in a contract where compensation is based on costs, administration is not a cost including in the calculation of costs.

Spradlin argues that *Keever* is inapposite because there was no “plus” to its costs. (BR 42-43) This assertion is belied by the record on summary judgment (CP 125, 129 (Spradlin would be compensated for “direct or indirect [costs] and a reasonable profit”, 311 (What was . . . numerously agreed to was I was going to recover my costs, which included . . . some profit.)). Spradlin cannot plausibly argue that its compensation was not based on cost, and that a case dealing with how costs are calculated is inapposite.

Spradlin asserts that the rationale of the *Keever* rule is that the “plus” is added as compensation for administrative costs. (BR 42-43) However, *Keever* rejected the administrative costs not because the “plus” was compensation for them, but because they

were not an “actual cost.” 129 Wn. App. at 739, ¶ 7 (“[T]he administrative fee cannot be an actual cost recoverable by the general contractor because it did not cost the general contractor anything. . . . [T]he payment was essentially additional overhead/profit to the general contractor”).

Keever is directly on point. The PUD agreed to pay Spradlin for its costs plus a reasonable profit. (CP 125, 129, 311) Not satisfied with a reasonable profit, Spradlin sought to add an additional administrative charge which it could not explain. (BA § III.E.1) The only purported justification for this charge was the extra damage that Spradlin’s vehicles incurred. However, Spradlin’s own estimate of this cost was less than 25% of the total he charged the PUD for administrative costs. (BA § III.E.1, CP 284-85)² Spradlin cites trial testimony (2/17 RP 98-99) and CP 177 for the proposition that the amounts charged were the actual costs (BR 22-23, 33), but this evidence also conflicts with the evidence on summary judgment cited in the opening brief. (BA14-15; see *also* BR 43)

² Further, Spradlin also argues that the fuel surcharge was intended to recover more than Spradlin’s fuel costs. (BR 22) Not only is that assertion not supported by the citation to CP 128, the PUD disputed that claim on summary judgment. Spradlin’s reliance on both the fuel surcharge and administrative costs to cover “extras” is just additional evidence of its duplicative and unreasonable charges.

The court must reject this administrative fee as a basis for establishing Spradlin's actual costs, as the *Keever* court did, because it is simply "additional overhead/profit" to Spradlin. Administration can not be included in the calculation of costs when compensation is based, in whole or part, on costs.

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.

Spradlin cites 2/23 RP 652, 661, for the proposition that he would have been given the Frye Creek project because Spradlin had the contract for "dirt work." (BR 44) However, in this same testimony the witness testified that the Frye Creek project would not have gone to the dirt work contractor because of the dollar amount:

[W]ith the dollar amount of the Fry Creek job we would not have given that to the small works dirt work contractor because it was estimated to be \$52,000.

(2/23 RP 661; *see also* 2/23 RP 638 (Q: So if a company is on your small works roster, is that any guarantee that they are going to get the work? A: They might. But it's no guarantee that they will.)) 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.

E. Spradlin's Damages Were Unliquidated And Not Subject To Prejudgment Interest.

Spradlin acknowledges that the trial court based its decision to award prejudgment interest on defense counsel's calculation of damages during closing argument. (BR 46; *see also* CP 648) "Argument of counsel does not constitute evidence." ***Green v. A.P.C.***, 136 Wn.2d 87, 100, 960 P.2d 912 (1998); *see also* ***Voicelink Data Services, Inc. v. Datapulse, Inc.***, 86 Wn. App. 613, 619 n.2, 937 P.2d 1158 (1997) ("Assertions by counsel are not evidence."). The trial court indisputedly relied on defense counsel's argument during closing argument to determine the amount on which to award prejudgment interest. (RP 895) ("I'm very comfortable with . . . the three million figure that Mr. Blauvelt argued"). This was error.

Spradlin argues that the trial court's reliance on argument was not error because the argument was "based on the uncontroverted evidence at trial." (BR 46) However, the evidence of damages was, in fact, heavily controverted and provided no basis to calculate damages with the exactness necessary for an award of prejudgment interest. Leaving aside the improper summary judgment, which limited the PUD's ability to put on a

defense, the PUD vehemently contested the amount that it owed Spradlin and presented substantial conflicting evidence. 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. (RP 707)

The verdict also contained damages for lost profits (CP 266), which are unliquidated. 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). The trial court itself acknowledged that the jury's general verdict contained unliquidated damages. (RP 895-96) Far from providing a basis for calculating damages with "exactness," this evidence left the jury to exercise its discretion and opinion, and the damages it awarded are unsegregated and unliquidated.

Spradlin argues that **Kiewit-Grice v. State**, 77 Wn. App. 867, 895 P.2d 6, *rev. denied*, 127 Wn.2d 1018 (1995) is inapposite because the trial court did not "dissect" the verdict. (BR 49)

Spradlin fails to explain how the trial court's division of the verdict into liquidated and unliquidated amounts is anything but "dissection." Likewise, Spradlin ignores that the PUD specifically tried to avoid this issue by proposing a special verdict form that would have separated liquidated and unliquidated damages. (CP 497-99) See **Davis v. Microsoft Corp.**, 149 Wn.2d 521, 539-40, 70 P.3d 126 (2003) (*discussed at BA 42*).

Finally, Spradlin again relies on **Smith v. Skone & Connors Produce, Inc.**, 107 Wn. App. 199, 26 P.3d 981 (2001) in arguing that there was a written contract to support a statutory award of prejudgment interest under RCW 39.76.011(1). (BR 49-50) **Smith** is also inapposite on this issue. The written statements "contained the essential terms of the agreement, including amounts, prices, costs for processing and packing, and the commission." **Smith**, 107 Wn. App. at 207. As explained in the opening brief (BA 44-45), there was no written contract here (CP 146: Mr. Spradlin: "There were no written contracts for these projects."). Unlike the account statements in **Smith**, the invoices Spradlin relies on do not contain many major contract terms, 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.

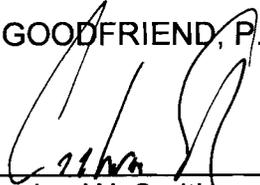
Without such critical terms there is no written contract for purposes of RCW 39.76.011(1). The trial court's award of prejudgment interest must also be reversed, and this court should direct the trial court that prejudgment interest may not be awarded on remand.

IV. CONCLUSION

For the reasons set out in this and the opening brief, this court should reverse and remand for trial before a properly instructed jury that is allowed to hear all evidence relevant to the claims.

Dated this 23rd day of February, 2011.

SMITH GOODFRIEND, P.S.

By:  _____

Catherine W. Smith
WSBA No. 9542
Ian C. Cairns
WSBA No. 43210

INGRAM, ZELASKO
& GOODWIN, LLP

By:  _____

Arthur A. Blauvelt
WSBA No. 8260

Attorneys for Appellant

COURT OF APPEALS
DIVISION II

11 FEB 24 PM 12:15

STATE OF WASHINGTON
BY _____
DEPUTY

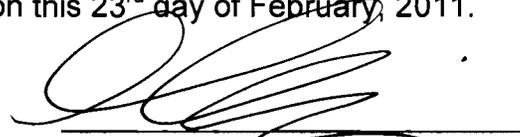
DECLARATION OF SERVICE

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

That on February 23, 2011, I arranged for service of the foregoing File Reply Brief of Appellant, to the court and to counsel for the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> E-Mail <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Jon C. Parker Parker, Johnson & Parker, P.S. P.O. Box 700 Hoquiam WA 98550	<input type="checkbox"/> E-Mail <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Arthur A. Blauvelt, III Ingram, Zelasko & Goodwin, LLP 120 East First Street Aberdeen, WA 98520	<input type="checkbox"/> E-Mail <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Richard A. Pitt Grays Harbor PUD #1 2720 Sumner Avenue P.O. Box 480 Aberdeen, WA 98520	<input type="checkbox"/> E-Mail <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Kenneth W. Masters Shelby Lemmel Masters Law Group PLLC 241 Madison Ave N Bainbridge Island WA 98110-1811	<input type="checkbox"/> E-Mail <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 23rd day of February, 2011.


Amanda C. King