

No. 49604-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ODYSSEY-GERONIMO JV,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF  
TRANSPORTATION,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
THE HONORABLE ANNE HIRSCH

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BRIEF OF APPELLANT

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## I. INTRODUCTION

Appellant Odyssey-Geronimo JV (“OGJV”) successfully bid on a contract with respondent Washington State Department of Transportation (“WSDOT”) to blast and paint the Lewis and Clark Bridge that spans the Columbia River, relying on WSDOT’s statement of the “[t]he surface area of structural steel to be painted.” The painting industry standard for measuring surface area treats as “solid” “[c]losely fabricated items, such as . . . open web joists. . . .”

Although WSDOT instructed bidders to use its estimate of surface area “as a guide in determining the amount of preparation and paint involved,” WSDOT did not disclose that it had used a non-standard estimate of surface area in its bid documents that, unbeknownst to OGJV and other bidders, excluded the “voids” between the lattice framework of the bridge, resulting in a contract that stated the bridge’s surface area as 300,000 square feet less than the industry standard calculation, and 200,000 square feet less than a separate undisclosed WSDOT calculation that it used to obtain funding for the project, causing OGJV to expend 38% more labor and materials than OGJV anticipated in preparing its bid.

The painting industry standard is custom because it provides a more consistent and expeditious calculation – a fact confirmed when WSDOT spent over 3,600 man-hours during this litigation attempting to calculate surface area by excluding the voids (a calculation which still had obvious omission errors). But the trial court nonetheless accepted WSDOT's contention the industry standard was irrelevant because it had not been expressly "incorporated" into the contract and erroneously granted summary judgment in favor of WSDOT.

The trial court also erred in holding that OGJV failed to preserve any of its claims except for the "voids" dispute, including that WSDOT's calculations – regardless of industry standard – were riddled with errors such as excluding entire portions of the bridge. This Court should reverse the trial court's summary judgment, hold that WSDOT breached the contract as a matter of law, and remand for a trial limited to determining the amount of OGJV's damages. Should this Court affirm summary judgment, it should still reverse the trial court's \$374,689.04 judgment for attorney fees, which is not supported by the required findings and is based on "reconstructed" time records and includes unauthorized expert witness expenses.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering its Order Granting State of Washington Department of Transportation's Motion for Summary Judgment. (CP 814-16) (Appendix A)<sup>1</sup>

2. The trial court erred in entering its Order and Judgment Re: Plaintiff Odyssey-Geronimo JV, awarding WSDOT \$374,689.04 in attorney's fees and costs. (CP 1006-09) (Appendix B)

## **III. ISSUES RELATED TO ASSIGNMENT OF ERROR**

1. Did the trial court err in ruling that no reasonable fact-finder could interpret WSDOT's statement of the "surface area of structural steel to be painted" to include the voids between closely fabricated steel components, contrary to the standard practice in the painting industry?

2. OGJV alleged both in its protest letter and claim that WSDOT's calculations of surface area contained "omission and summation errors" and were "missing members and portions of members." Did the trial court err in holding that OGJV "waived" its claims that even accepting WSDOT's method of calculating surface area, a) WSDOT's calculation still underestimated the surface area

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<sup>1</sup> The trial court did not enter an order on OGJV's motion for summary judgment, but necessarily denied it in dismissing OGJV's claims with prejudice. (CP 815)

and b) that WSDOT's change order did not accurately reflect its own calculation of the surface area discrepancy?

3. WSDOT concedes that OGJV is entitled to additional payment based on WSDOT's misrepresentation of the bridge's surface area. Is OGJV entitled to a partial summary judgment holding WSDOT liable for breach of contract as a matter of law?

4. Did the trial court err in awarding WSDOT \$76,797.05 in expert witness fees under the public works contract statute, RCW 39.04.240, which contains no language authorizing an award of litigation expenses or expanded costs?

5. Did the trial court err in awarding WSDOT \$212,775 in attorney's fees and \$50,150 in paralegal fees based on "reconstructed" time records without making findings that those fees were reasonable?

#### **IV. STATEMENT OF THE CASE**

**A. In 2010 Odyssey-Geronimo JV won a contract from WSDOT to paint the Lewis and Clark bridge, relying on WSDOT's statement of the bridge's surface area, which it gave to bidders to help them prepare bids.**

In February 2010 WSDOT advertised a contract to blast and paint the Lewis and Clark Bridge that spans the Columbia River at Longview. (CP 43) The Lewis and Clark Bridge is a steel truss bridge built with lattice structural steel members that have gaps or

“voids” between them, as well as other areas with holes throughout the steel surface area. (CP 70-72, 124) In WSDOT’s published bid solicitation documents, it estimated “[t]he surface area of structural steel to be painted” (a common phrase in the painting industry) at 901,900 square feet, stating the number was “intended for use as a guide in determining the amount of preparation and paint involved.” (CP 79)

WSDOT’s statement of surface area segregated and calculated the surface area for eleven separate sections of the bridge. (CP 79)<sup>2</sup> Despite its detail, WSDOT’s statement omitted entire portions of the bridge. (CP 145-50, 430-43) WSDOT also did not disclose that the surface area published in its bid documents contained nearly 200,000 square feet less than the statement WSDOT had used to obtain funding for the project from the federal, Washington, and Oregon governments. (CP 390-92, 446-48)

Odyssey Contracting Corp. and Geronimo Painting Co. formed a joint venture to bid on the project called Odyssey-Geronimo JV (“OGJV”). (CP 6, 262) OGJV won the project by submitting a low bid of \$33.7 million on April 30, 2010, relying on

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<sup>2</sup> A surface area calculation is often referred to as a “take-off” in the painting industry, and that term is used throughout the record.

WSDOT's statement of the surface area to submit its bid. (CP 43, 46, 268, 294-95, 297) OGJV and WSDOT signed a contract that incorporated as a "special provision" WSDOT's statement of the surface area. (CP 77-79)<sup>3</sup> The contract also specified that "[p]ayment will be made on the basis of actual quantities of each item of Work completed in accordance with the Contract requirements." (CP 49; *see also* CP 367-68, 791)

The contract included the "Standard Specifications for Road, Bridge, and Municipal Construction" that were developed by WSDOT "to serve as a baseline for the work delivered to the public by the [WSDOT]." (CP 48) Section 6-07 of WSDOT's specifications, entitled "Painting," incorporates "the definitions used in Volume 2, Systems and Specifications, of the SSPC *Steel Structures Painting Manual*." (CP 63) The SSPC manual in turn references the Painting and Decorating Contractors of America Estimating Guide as "provid[ing] guidelines on measuring surfaces to be painted." (CP 201)<sup>4</sup> The PDCA guidelines state that when calculating surface area "[c]losely fabricated items, such as . . . open

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<sup>3</sup> The contract between OGJV and WSDOT consists of many documents, not all of which are in the record. (*See* CP 7, 52)

<sup>4</sup> The PDCA has acted as a trade association group for the entire painting industry since 1884. (CP 125)

web joists . . . should be measured as being solid.” (CP 219) The PDCA’s definition of surface area, which treats as solid the voids between closely fabricated items (such as the space between the lattices of the bridge and holes in the steel), is consistent with custom in the painting industry. (CP 140-41, 303-06, 748-49)

**B. After it started painting the bridge, OGJV learned WSDOT had severely underrepresented the surface area of the bridge.**

In the fall of 2010 OGJV began painting the bridge and by the summer of 2011 OGJV representatives had become concerned that productivity was below anticipated levels. (CP 87-91, 263) OGJV investigated a number of possible causes and concluded the statement of surface area provided by WSDOT in its bid solicitation significantly underestimated the surface area to be painted. (CP 264, 268) Performing its own calculation, OGJV determined the square footage of the bridge was 1,240,980 square feet, 339,980 and 38% more than WSDOT’s statement of 901,900 provided in its bid documentation. (CP 105, 139, 143)

On December 10, 2012, OGJV sent a letter to WSDOT outlining the discrepancy between the bid statement and OGJV’s calculations. (CP 102) As a result of the discrepancy, OGJV was “expending significantly more labor hours and materials on this

project than anticipated.” (CP 102) OGJV requested that WSDOT consider an equitable adjustment to the payment owed OGJV, as allowed by the contract. (CP 103; *see also* CP 54) During this dispute WSDOT alleged that its initial surface area calculation included in its bid documents was lower than OGJV’s calculation because WSDOT had not treated voids as solid. (CP 104) WSDOT rejected OGJV’s contention that OGJV’s surface area calculation was “industry standard” and told OGJV that it would only consider “calculations of the actual surface area.” (CP 104)

WSDOT then spent over six months and 3,600 man hours trying to support its initial estimate of what it called “actual surface area,” eventually determining, using computer assisted drawing (also known as “CAD”), that the surface area of the bridge was 998,191 square feet, nearly 100,000 square feet more than its original statement. (CP 116, 384, 749, 758) This calculation, however, still erroneously excluded parts of the bridge, as WSDOT conceded in this litigation. (CP 509-11, 517-18) Though WSDOT acknowledged it had misrepresented the surface area regardless of whether it improperly disregarded voids and issued a change order for a 10.7% adjustment of the contract price, WSDOT continued to reject OGJV’s position that it should be paid based on a calculation

conforming to industry standards, or, at a minimum, a calculation that included all parts of the bridge. (CP 105-07, 115-19, 397-402)

OGJV eventually invoked the dispute resolution procedure provided for in the contract, a Disputes Review Board (“DRB”). (CP 120-37) Though the DRB agreed that the PDCA definition of “surface area” was incorporated by reference into the contract (CP 272-73), the DRB ultimately ruled in WSDOT’s favor, accepting its position that a calculation of “[t]he surface area of structural steel to be painted” does not treat voids as solid. (CP 120-37)<sup>5</sup>

After the DRB ruling, OGJV submitted a statement of claim, as required by the contract, asserting that payment should reflect “the Work completed is 38% greater than the original contract quantity provided by WSDOT.” (CP 138-44) That claim alleged that WSDOT relied on an erroneous “surface area” definition, that “[t]he WSDOT Pre-Bid Takeoff . . . omitted many bridge members” and that WSDOT had – unbeknownst to any bidder – selected the lowest of four WSDOT alternative calculations for the surface area of the bridge. (CP 141; *see also* CP 145-50 (WSDOT spreadsheets showing calculations)) The highest calculation increased the

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<sup>5</sup> In the meantime, OGJV successfully completed the project on May 29, 2014. (CP 112)

surface area by 32%. (CP 141, 145) OGJV stressed that even accepting WSDOT's method of calculating surface area, WSDOT's recalculation "contains omission and summation errors." (CP 141) Finally, OGJV's claim asserted that WSDOT's change order did not actually reflect a 10.7% increase of surface area, as WSDOT alleged, "due to arbitrary deductions." (CP 142)

**C. The trial court dismissed OGJV's claims on summary judgment, ruling the industry standard for calculating surface area was irrelevant and that OGJV waived all claims save for the "voids" dispute.**

On July 16, 2015, OGJV sued WSDOT in Thurston County Superior Court alleging claims for breach of contract, quantum meruit, and declaratory judgment. (CP 5-13) WSDOT moved for summary judgment, repeating its argument that the definition of "surface area of structural steel to be painted" did not include the voids between closely fabricated steel members. (CP 20-41) OGJV separately moved for partial summary judgment on liability, and OGJV incorporated this motion into its opposition to WSDOT's summary judgment motion. (CP 244-60, 278, 307-23)

The trial court granted WSDOT's motion and dismissed OGJV's claims with prejudice, ruling that the phrase "surface area of structural steel to be painted" in the contract "is not ambiguous."

(CP 814-16; 9/23 RP 50-55)<sup>6</sup> The trial court accepted WSDOT's argument that the industry practice of calculating surface area to include voids between closely fabricated items was irrelevant because "the contract does not say 'incorporating the industry standards.'" (9/23 RP 51) The trial court further ruled that the only issue raised in OGJV's claim was "whether or not the surface area to be painted included the voids." (9/23 RP 54-55)

The trial court awarded WSDOT judgment for \$374,689.04 in attorney's fees and costs under the public works contract statute, RCW 39.04.240, including \$76,707.05 in expert witness fees, as well as \$50,150 in paralegal fees. (CP 1006-09) WSDOT's fee application was based not on contemporaneous time records, but "reconstructed" timesheets created well after the work was done. (CP 1007) The trial court did not make any findings that WSDOT's fees were reasonable, but reduced the fees sought by 50% because "WSDOT's documentation of attorney fees is insufficient." (CP 1007)

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<sup>6</sup> At the hearing on WSDOT's motion, the trial court considered all the declarations submitted by OGJV – those opposing WSDOT's motion and those in support of OGJV's motion: "I spent a great deal of time looking at everything that was provided to me, and I looked through the file." (9/23 RP 25) However, the trial court refused to consider OGJV's memorandum in support of its partial summary judgment motion, which OGJV incorporated into its opposition, resulting in a combined pleading in excess of the page limit allowed by local rule. (9/23 RP 24-25)

OGJV appealed the trial court's rulings on summary judgment, and attorney's fees and costs. (CP 811-12, 1010-15)

## V. ARGUMENT

**A. Interpretation of the contractual term “[t]he surface area of structural steel to be painted” depends on extrinsic evidence and is a disputed question of fact for a jury.**

The trial court erred in granting WSDOT summary judgment because the painting industry practice is to treat voids between closely fabricated steel members as solid when calculating surface area. The trial court erred in refusing to interpret a contractual term in light of this industry standard. This Court should reverse and remand to allow a jury to consider and weigh this extrinsic evidence to determine what the parties intended.<sup>7</sup>

“[T]he touchstone of the interpretation of contracts is the intent of the parties.” *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222

<sup>7</sup> This Court reviews a summary judgment order de novo, performing the same inquiry as the trial court, and summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kelley v. Tonda*, No. 74423-2-1, 2017 WL 1133393, at \*2 (Wash. Ct. App. Mar. 27, 2017). This Court must view the facts and all reasonable inferences from them in the light most favorable to the nonmoving party, OGJV. *Kelley*, 2017 WL 1133393, at \*2.

(1990)). Washington courts “follow the objective manifestation theory of contracts” and “focus on the agreement’s objective manifestations to ascertain the parties’ intent.” *Kelley v. Tonda*, No. 74423-2-1, 2017 WL 1133393, at \*3 (Wash. Ct. App. Mar. 27, 2017) (quotation and alteration omitted).

In *Berg*, the Supreme Court adopted the “context rule” for interpreting contracts, which holds that extrinsic evidence is admissible to assist the court in ascertaining the parties’ intent, regardless of whether the contractual language is ambiguous. 115 Wn.2d at 667-69. Admissible extrinsic evidence includes “(1) the subject matter and objective of the contract, (2) the circumstances surrounding the making of the contract, (3) the subsequent conduct of the parties to the contract, (4) the reasonableness of the parties’ respective interpretations, (5) statements made by the parties in preliminary negotiations, (6) usages of trade, and (7) the course of dealing between the parties.” *Kelley*, 2017 WL 1133393 at \*3 (quoted source omitted). “The ‘context rule’ to contract interpretation tends to favor fact finding rather than summary resolution of these contract disputes,” consistent with the general rule that “[d]etermining what the parties to a contract intended is generally a question of fact.” *Neuson v. Macy’s Dep’t Stores Inc.*,

160 Wn. App. 786, 796, ¶ 22, 249 P.3d 1054 (2011), *rev. denied*, 172 Wn.2d 1005 (2011); *Columbia Asset Recovery Grp., LLC v. Kelly*, 177 Wn. App. 475, 484, ¶ 17, 312 P.3d 687 (2013).

Washington courts have repeatedly relied on industry standards as an aid in determining contractual intent. *Bremerton Concrete Prods. Co. v. Miller*, 49 Wn. App. 806, 809-10, 745 P.2d 1338 (1987) (relying on industry standard for freeboard measurement of breakwater floats); *Puget Sound Fin., L.L.C. v. Unisearch, Inc.*, 146 Wn.2d 428, 435, 47 P.3d 940 (2002) (relying on “numerous examples of liability exclusions on invoices” and an expert who testified that liability exclusions were common industry practice); *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn.2d 568, 585, 998 P.2d 305 (2000) (relying on industry usage of licensing agreements for software); *see generally* Restatement (Second) of Contracts § 222 (1981). As with all extrinsic evidence, what inferences to draw from industry standards presents a question of fact. *Mortenson*, 140 P.2d at 585; *see also* Restatement (Second) of Contracts § 222 (“The existence and scope of a usage of trade are to be determined as questions of fact.”).

Here, the trial court erred in granting summary judgment in the face of OGJV’s evidence – including the contract itself – that the

standard practice in the painting industry is to calculate surface area between closely fabricated steel as solid. The trial court erroneously accepted WSDOT's assertion that the contract was unambiguous and thus the industry standard was irrelevant to interpretation of the contract unless the standard was expressly "incorporated" into the contract, reasoning "there needs to be a clear and unequivocal incorporation by reference" and "the contract does not say 'incorporating the industry standards.'" (9/23 RP 51) But regardless of whether an industry standard is expressly "incorporated" into a contract, it must still be consulted as extrinsic evidence because the "intent of the contracting parties *cannot be interpreted* without examining the context surrounding an instrument's execution." *Kelley*, 2017 WL 1133393, at \*3 (emphasis added; quoted source omitted); *see also Puget Sound Fin.*, 146 Wn.2d at 434 ("Ambiguity is not required before evidence of trade usage or course of dealing can be used to ascertain the terms of a contract.").

OGJV presented substantial evidence that the standard practice in the painting industry – expressed in the PDCA guidelines – is to measure as a solid surface any open spaces between closely fabricated steel components of a bridge. (CP 218-

19 (PDCA guidelines); CP 303-06 (expert declaration: “For built-up members with lattice bars or perforated plates, the openings are disregarded and the area is calculated as being solid.”); *see also* CP 105-06, 140-41, 748-49 (letters and claim statement from OGJV explaining industry practice)) The PDCA, which has represented the painting industry since 1884, states that when measuring surface area “[c]losely fabricated items, such as . . . open web joists . . . should be measured as being solid.” (CP 219) The painting industry uses this standard because painting contractors bid on many projects and must have a simple, consistent, reviewable, and repeatable way for estimating surface area, which is the key driver of project cost. (CP 140) As the PDCA guidelines stress, “methods used to measure surface area during the estimating process must be consistent to be meaningful”:

Because there is a relationship between surface area and the amount of labor and materials required for painting and decorating work, methods used to measure surface area during the estimating process must be consistent to be meaningful. When consistent methods are used to measure surface area, then labor production rates and material spread rates may be accurately determined from past painting and decorating work and used as a basis for estimating labor and materials requirements for bidding future painting work.

(CP 218)

Including in surface area the space between closely fabricated steel components provides a much simpler, reliable, and substantially less expensive method than does excluding voids in calculating the physical dimensions of a steel bridge. (CP 140, 749) Indeed, WSDOT's actions in this case underscore that fact – it took WSDOT more than *six months and 3,600 man hours* to calculate “the actual structural steel surface area” of the bridge using computer assisted drawing, and even then WSDOT's calculation still missed parts of the bridge. (CP 116, 384, 509-11, 517-18, 749)

It is not reasonable, nor even possible, for contractors to undertake this type of effort for each project bid, most of which will be unsuccessful. Nor is it reasonable to subject taxpayers to such an enormous expense when the industry standard provides a much simpler and more consistent method. It is reasonable for contractors to rely on industry standards when reviewing a calculation provided by a public agency, especially when the contract drafted by the agency expressly states the calculation “is intended for use as a guide in determining the amount of preparation and paint involved.” (CP 79; *see also* CP 297 (WSDOT construction engineer agreeing “[t]his number would be . . . taken[n] into consideration” by contractor)) *See also Bremerton*

*Concrete*, 49 Wn. App. at 810 (relying on industry standard measurement method because “no measurement is specified in the plans”).

WSDOT in fact had a calculation of the bridge’s surface area at 1,072,226 square feet that was much closer to OGJV’s calculation, but WSDOT concealed that calculation from OGJV and other bidders after using it to obtain funding for the project from state and federal governments. (CP 390-92, 446-48) WSDOT has *never* explained why its higher calculation was suitable for obtaining funding for itself, but not for contractors to use when preparing their bids. Because WSDOT concealed this calculation, OGJV had no reason to suspect it should have double-checked WSDOT’s calculation, as WSDOT now asserts it should have done. (CP 23, 115) Had WSDOT told OGJV that it should perform its own calculation or even that WSDOT’s calculation of surface area departed from industry standard in any way, OGJV (as well as all other bidders) would have performed its own calculations or, at a minimum, adopted a higher cost per square foot when relying on WSDOT’s calculation. (CP 748)

If a public agency providing a surface area calculation for bidding purposes does not rely on industry standards, contractors

will necessarily increase their bids to reflect the risk that the agency's calculation significantly underestimates the surface area. Contractors also could not rely on painting industry statistics, such as labor production rates and material consumption rates, all of which are based on surface area. (CP 140; *see also* CP 125 ("surface area is the basis from which all painting projects are bid and tracked")) Nor could agencies consider bids as "apples to apples" comparisons because each contractor would use a different method for calculating "actual" surface area. Such uncertainty will necessarily make public contracts more expensive and hurt taxpayers. (CP 749) For all these reasons, calculating surface area by including the voids between closely fabricated steel components "is widely if not universally accepted by other bridge painting contractors." (CP 105)

The contract itself – drafted by WSDOT – confirmed the existence of this industry standard and the reasonableness of OGJV's reliance on it. *See McKasson v. Johnson*, 178 Wn. App. 422, 430, ¶ 15, 315 P.3d 1138 (2013) (contracts are construed against their drafters). The contract included Section 6-07 of WSDOT's "Standard Specifications for Road, Bridge, and Municipal Construction," which incorporates by reference "the definitions

used in Volume 2, Systems and Specifications, of the SSPC *Steel Structures Painting Manual*.” (CP 48, 63) The SSPC manual recognizes the PDCA as an authority “on measuring surfaces to be painted” and the PDCA in turn states that when calculating surface area “[c]losely fabricated items, such as . . . open web joists . . . should be measured as being solid.” (CP 201, 219)<sup>8</sup> As OGJV stressed to WSDOT, “All participants in the architectural, engineering, design, construction, and painting & wall covering industry benefit from the use and circulation of the PDCA Industry Standard.” (CP 125, 749)

WSDOT, for its part, has repeatedly denied that treating voids as solid when calculating surface area is the industry standard. (See, e.g., CP 21 (“an alleged painting industry standard”), 104 (“WSDOT does not agree that this is an ‘industry standard’”), 127 (rejecting OGJV’s position “that it is ‘industry standard’ to include voids when estimating the structural steel surface area”)) But the parties’ conflicting assertions only underscore that the interpretation of this contract could not be

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<sup>8</sup> The DRB agreed with OGJV that “the PDCA definition of ‘surface area’ to be painted was incorporated by reference in the contract documents,” but erroneously discounted this extrinsic evidence, arguing that “the surface area of structural steel to be painted” was “not ambiguous” and “does not include voids.” (CP 136, 272-73)

resolved on summary judgment by the trial court and instead should have been resolved by a jury. *Kelley*, 2017 WL 1133393, at \*3 (“summary judgment is inappropriate when more than one reasonable inference can be drawn from the extrinsic evidence”).

The trial court erred in accepting WSDOT’s argument that the industry standard was irrelevant. Because a jury could have adopted differing inferences from the extrinsic evidence, the trial court’s summary judgment order must be reversed.

**B. The trial court erred in holding that OGJV waived its other claims, including that WSDOT miscalculated the surface area because of simple math errors such as excluding entire parts of the bridge.**

The trial court also erroneously held that the only issue OGJV raised in its claim was whether the definition of surface area included voids. To the contrary, OGJV stated in its claim two other bases for seeking additional compensation from WSDOT: 1) even accepting WSDOT’s method of calculating surface area, WSDOT’s calculation “contains omission and summation errors,” *e.g.*, excluded entire portions of the bridge, and 2) WSDOT’s change order did not actually reflect a 10.7% increase in compensation. (CP 141-42) In other words, regardless of the “voids” issue, WSDOT significantly underestimated the surface area because it simply did the math wrong and OGJV was entitled to an equitable adjustment

of the contract price under the terms of the contract. This Court should reverse the trial court's holding that OGJV waived the other grounds for its claim.

The trial court's ruling that OGJV did not provide WSDOT adequate notice of each basis for its claim ignores OGJV's demand for an equitable adjustment. In December 2012, OGJV sent a letter to WSDOT outlining a discrepancy between its statement of surface area and OGJV's calculations, stating it was "expending significantly more labor hours and materials on this project than anticipated." (CP 102) On October 21, 2013, OGJV asked WSDOT to equitably adjust the contract price, as allowed by the contract, and also for "a complete copy" of "information regarding the contract surface area." (CP 745-46) On May 2, 2014, WSDOT denied OGJV's request for additional compensation stating it had completed an "in depth evaluation of the surface area," but it failed to provide any supporting information for its evaluation. (CP 747)

OGJV then submitted a formal protest letter under Section 1-04.5 of the contract on June 24, 2014, in which it disputed not only WSDOT's definition of surface area, but stated that "WSDOT's latest calculations seem to be missing members and portions of members, which would accumulate to a significant quantify of

area,” and that there “is not enough information to perform a complete and reliable review of WSDOT’s latest surface area calculations.” (CP 749; *see also* CP 108-09 (May 29, 2014 email from OGJV to WSDOT requesting information discussed in protest letter)) WSDOT then issued a change order on November 13, 2014, that was supposed to reflect a 10.7% increase in compensation. (CP 116-19) When OGJV submitted its claim on April 2, 2015, it “demonstrated that WSDOT’s recalculation also contains omission and summation errors, the extent of which cannot be determined due to the lack of information provided by WSDOT.” (CP 141)

The trial court erred in ruling that OGJV attempted “to change the basis of their claim” and that OGJV’s claims were limited to “whether or not the voids would be included.” (9/23 RP 54) OGJV did not make new arguments in the trial court, because it plainly raised the issue of WSDOT’s calculation errors – including leaving out entire parts of the bridge – in both its initial protest letter and formal claim. Moreover, because OGJV repeatedly requested the information necessary to make a detailed challenge to WSDOT’s calculations of “actual” surface area – and WSDOT failed to provide it – any deficiency in OGJV’s claim is a result of WSDOT’s intransigence, and thus cannot be a basis for holding

OGJV waived its right to contest those calculations in court. *See Weber Const., Inc. v. Cty. of Spokane*, 124 Wn. App. 29, 34-35, 98 P.3d 60 (2004) (contractor complied with protest procedures by telling agency it lacked information necessary to calculate protest and agency waived protest procedures by failing to provide it), *rev. denied*, 154 Wn.2d 1006 (2005).

Likewise, OGJV did not – as the trial court held – waive its right to challenge WSDOT’s change order by “failing” to challenge it in an exchange of letters sent months *before* the change order was issued. (See RP 54-55 (citing letters from October 2013, May 2014, and June 2014 as evidence OGJV failed to preserve its challenge to November 2014 change order); see CP 745-50) OGJV promptly raised its dispute with the change order in its formal claim explaining the change order included “arbitrary deductions” and thus did not fully compensate OGJV, even using WSDOT’s erroneous calculation of surface area. (CP 142)

The trial court erred in holding that OGJV waived its claim for additional compensation for another reason – WSDOT did not raise this argument until its summary judgment reply. In its summary judgment motion WSDOT focused on its arguments concerning contract interpretation, and whether OGJV could have

reasonably relied on the industry standard to interpret the term “surface area.” (CP 28-36) It did not argue that OGJV had not asserted claims based on WSDOT’s errors in calculating “actual” surface area, or the amount of its change order. That argument was made for the first time in its reply (CP 730-33), and thus was untimely. *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991) (“It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment.”).

Even should this Court accept WSDOT’s contention that “the surface area of structural steel to be painted” does not include open spaces between closely fabricated steel components, it should nonetheless reverse and remand for resolution of the other bases for OGJV’s claim.

**C. OGJV is entitled to partial summary judgment based on WSDOT’s undisputed misrepresentation of the surface area and its concession that OGJV is entitled to payment for the extra work.**

This Court should hold that WSDOT breached the contract as a matter of law and remand for a trial limited to the amount of OGJV’s damages because WSDOT breached the contract by misrepresenting the surface area and by failing to pay OGJV for its uncompensated work arising from WSDOT’s misrepresentation.

(CP 307-23) As WSDOT conceded below and the contract requires, the contract price must reflect the work OGJV actually performed.

Under the contract OGJV is entitled to “[p]ayment . . . on the basis of the actual quantities of each item of Work completed in accordance with the Contract requirements.” (CP 49; *see also* CP 54 (equitable adjustment of contract price), 367-68, 791) WSDOT acknowledged in its change order that it misrepresented the surface area, stating OGJV had painted a “larger amount of structural steel” than WSDOT disclosed in its bid documents. (CP 118) WSDOT’s own witnesses likewise conceded that even after recalculating the “actual” surface area of the bridge, it erroneously excluded whole portions of the bridge (CP 509-11, 517-18) and that “if it’s determined as part of this litigation that the actual square footage or quantity of steel that was blasted and painted and contained was actually higher than WSDOT has determined right now . . . [the contract] entitles OGJV [to] payment for that additional amount.” (CP 368)

The trial court erred in refusing to consider OGJV’s summary judgment motion on the basis of Thurston County Local

Rule 10. (9/23 RP 24-25)<sup>9</sup> The court’s “overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action.” *Keck v. Collins*, 184 Wn.2d 358, 369, ¶ 25, 357 P.3d 1080 (2015) (quoting *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498, 933 P.2d 1036 (1997)). “The purpose of summary judgment is not to cut litigants off from their right of trial by jury if *they really have evidence which they will offer on a trial*,” but “to carefully test this out” and thus a trial court cannot simply ignore material called to its attention on summary judgment. *Keck v. Collins*, 184 Wn.2d, 369, ¶¶ 25-26 (trial court erred in refusing to consider declaration that was untimely under summary judgment rule) (quotation omitted; emphasis in original).

Regardless, even if the trial court had discretion to limit its consideration of OGJV’s motion, on de novo review, this Court can and should direct entry of summary judgment in OGJV’s favor because the facts concerning WSDOT’s liability are undisputed. *See Impecoven v. Dep’t of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752

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<sup>9</sup> The trial court plainly erred in excluding from its summary judgment order the declarations it expressly considered because RAP 9.12 requires a trial court to designate in its order “the documents and other evidence called to [its] attention . . . before the order on summary judgment was entered.”

(1992) (“Because the facts are not in dispute, we order entry of summary judgment in favor of DOR, the nonmoving party.”); *see also* RAP 12.2 (“The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.”).

Even accepting WSDOT’s calculation of surface area that does not conform to industry standards, WSDOT undisputedly breached the contract by misrepresenting the surface area and failing to pay OGJV for the additional work it performed. This Court should reverse the summary judgment in favor of WSDOT, hold that WSDOT breached the contract as a matter of law, and remand for trial solely of the amount of OGJV’s damages.

**D. The Court should reverse the award of attorney and paralegal fees, which lack the requisite findings, and the award of expert expenses, which are not compensable as “costs” or “attorney fees” under the Public Works Act.**

**1. The trial court erred in awarding WSDOT over \$75,000 in expert witness fees as part of its award of “attorney’s fees” under RCW 39.04.240.**

Because the trial court’s award of attorney’s fees and costs rests on its erroneous summary judgment order, upon reversing the trial court’s summary judgment order, the fee and cost award must also be reversed. Even should this court affirm the summary

judgment order, it must still reverse the award of expert witness fees to WSDOT, which was based on an erroneous interpretation of RCW 39.04.240.

Washington follows the “American Rule” that “each party in a civil action will pay its own attorney fees and costs.” *Berryman v. Metcalf*, 177 Wn. App. 644, 656, ¶ 24, 312 P.3d 745 (2013), *rev. denied*, 179 Wn.2d 1026 (2014). A court may award a prevailing party fees only if specifically authorized by contract, statute, or a recognized ground in equity. *Berryman*, 177 Wn. App. at 656, ¶ 24.

The trial court awarded WSDOT its attorney’s fees under RCW 39.04.240, which authorizes an award of fees in actions arising out of a public works contract if the party seeking fees betters a timely settlement offer. *See* RCW 39.04.240 (incorporating offer of settlement provisions of RCW 4.84.250 through 4.84.280, which apply to small claims actions).<sup>10</sup> Under RCW 4.84.250, if a party betters a timely settlement offer, then

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<sup>10</sup> RCW 39.04.240(1) states: “(1) The provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party, except that: (a) The maximum dollar limitation in RCW 4.84.250 shall not apply; and (b) in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.”

“there shall be taxed and allowed to [it] as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys’ fees.”

“Where an expert is employed and is acting for one of the parties, it is not proper to charge the allowance of fees for such expert against the losing party as a part of the costs of the action.” *Wagner v. Foote*, 128 Wn.2d 408, 417-18, 908 P.2d 884 (1996) (quoting *Fiorito v. Goerig*, 27 Wn.2d 615, 620, 179 P.2d 316 (1947)). Thus, recoverable “[c]osts have generally been narrowly defined and absent specific statutory authority, expert witness fees are not recoverable as costs.” *Hayes v. City of Seattle*, 131 Wn.2d 706, 718, 934 P.2d 1179, *opinion corrected*, 943 P.2d 265 (Wash. 1997). RCW 4.84.010, which defines the costs generally available to a prevailing party, “does not authorize expert witness fees in an award of costs.” *Estep v. Hamilton*, 148 Wn. App. 246, 263, ¶ 47, 201 P.3d 331, 339 (2008), *rev. denied*, 166 Wn.2d 1027 (2009).

No language in RCW 39.04.240 or RCW 4.84.250 authorizes an award of expert witness fees, and no case has awarded them under those statutes. While RCW 4.84.250 indicates a legislative intent to allow the trial court to assess “a reasonable amount” of attorney fees, there is nothing in the language of the statute that

could authorize an expanded definition of costs beyond those in RCW 4.84.010, as other statutes expressly do. *See, e.g.*, RCW 49.60.030(2) (incorporating cost recovery provision of § 2000e-5(k) of the United States Civil Rights Act of 1964, which allows “a reasonable attorney’s fee (including expert fees) as part of the costs”); RCW 8.24.030 (“reasonable attorneys’ fees and expert witness costs may be allowed by the court to reimburse the condemnee”).

Where a statute does not expressly authorize an award of expert witness fees courts have repeatedly refused to include them in an award of attorney’s fees and costs. *Hayes*, 131 Wn.2d at 718-19 (refusing to award expert witness fees as “attorney’s fees” under RCW 64.40.020 because “it does not explicitly provide for recovery of expert witness fees”); *Park Ave. Condo. Owners Ass’n v. Buchan Developments, L.L.C.*, 117 Wn. App. 369, 388, 71 P.3d 692 (declining to award expert witness fees under Washington Condominium Act, RCW Ch. 64.34), *on reconsideration in part*, 75 P.3d 974 (Wash. Ct. App. 2003); *Miller v. Kenny*, 180 Wn. App. 772, 827, ¶ 143, 325 P.3d 278 (2014) (“The Consumer Protection Act does not authorize an award of costs beyond those permitted by RCW 4.84.010.”).

WSDOT recognized below that nothing in RCW 39.04.240 or RCW 4.84.250 supported an award of expert witness fees, as it did not cite these statutes or any cases applying them, but instead relied on cases awarding expert witness fees under the Washington Law Against Discrimination (WLAD) and *Olympic Steamship v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). (CP 913-14 (citing *Johnson v. State, Dep't of Transp.*, 177 Wn. App. 684, 313 P.3d 1197 (2013), *rev. denied*, 179 Wn.2d 1025 (2014) and *Panorama Vill. Condo. Owners Ass'n Bd. of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910 (2001))

Neither *Johnson* nor *Panorama* supports the award of expert witness fees to WSDOT in this case. *Johnson* denied expert witness fees, and simply noted in passing that expert witness fees are allowed under the WLAD because they are specifically authorized by that statute. *Johnson*, 177 Wn. App. at 701, ¶ 30 (“an award of expert witness fees is clearly authorized by RCW 49.60.030(2)”). *Panorama* did not involve a statutory award of litigation expenses, but an equitable one that was a “*limited exception* to the American rule for bad faith insurance claims based upon the insurer’s enhanced duty to its insured,” and which “require[s] that the insured be made whole by way of recoupment of

the costs of obtaining policy benefits.” *Park Ave. Condo. Owners Ass’n*, 117 Wn. App. at 388. *Johnson* and *Panorama* confirm that absent statutory authorization or a common law or equitable exception to the “American rule,” a court cannot include expert witness fees as a recoverable “cost.”

Regardless, WSDOT is nothing like a discrimination victim or an insured seeking to establish coverage. The Legislature and our Supreme Court have allowed such plaintiffs to recover expanded costs because they both seek – often with extremely limited resources – to promote the important public policy goals of fighting discrimination and forcing insurers to honor their duty of good faith. No similar public policy reason would encourage parties to a public works contract – the State and private contractors – to recover expert witness fees. Indeed, *Johnson* and *Panorama* undercut WSDOT’s request, because unlike the disadvantaged plaintiffs in those cases, public works contracts are “very one-sided” in favor of the public agency, as the Legislature noted when it enacted RCW 39.04.240. House Bill Report, H.B. 1671, 1999 Reg. Sess.

Upon reversing the trial court’s summary judgment order this Court should also reverse the award of attorney’s fees and

costs. But even should it affirm summary judgment, this Court should reverse the \$76,797.05 in expert witness fees awarded to WSDOT, which was not authorized by any statute.

**2. The trial court erred in awarding WSDOT over \$260,000 in attorney and paralegal fees based on “reconstructed” time records without finding the fees were reasonable.**

The trial court awarded WSDOT \$212,775 in attorney’s fees and over \$50,000 in paralegal fees based on the “reconstructed” timesheets of WSDOT’s attorneys and paralegals. But the trial court did not enter findings addressing the lodestar factors that would support a finding that those fees were reasonable. At a minimum, this Court should reverse the trial court’s award of attorney and paralegal fees, and remand to the trial court to make a new award supported by the required findings.

An award of reasonable attorney’s fees is calculated by multiplying a lawyer’s reasonable hourly rate by the reasonable number of hours incurred in obtaining a successful result. *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632 (1998), *overruled on other grounds by Matsyuk v. State Farm*, 173 Wn.2d 643, 272 P.3d 802 (2012). This “lodestar method” is limited “to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive

time.” *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). “The burden of demonstrating that a fee is reasonable is upon the fee applicant.” *Berryman*, 177 Wn. App. at 657, ¶ 25. To demonstrate that fees are reasonable, “Counsel must provide contemporaneous records documenting the hours worked” that include, in addition to the number of hours worked, the type of work performed, and the category of attorney who performed the work. *Mahler*, 135 Wn.2d at 434 (citing *Bowers*, 100 Wn.2d at 597).

“[A]n award of attorney fees must be supported by findings of fact and conclusions of law.” *Berryman*, 177 Wn. App. at 658, ¶ 28. Findings and conclusions supporting a fee award must be more than “conclusory” and must show the appellate court “that the trial judge actively and independently confronted the question of what was a reasonable fee,” including that the hourly rate charged and amount of hours are reasonable. *Berryman*, 177 Wn. App. at 658, ¶ 29. “The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court’s analysis.” *Berryman*, 177 Wn. App. at 658, ¶ 30. Though a trial court’s calculation of a reasonable fee is reviewed for an abuse of

discretion, it abuses that discretion by failing to make the required findings. *Berryman*, 177 Wn. App. at 659, ¶ 32.

Here, the trial court erred by failing to make the requisite lodestar findings, which are particularly necessary here because the trial court awarded WSDOT fees based on “reconstructed” and block-billed timesheets<sup>11</sup>, purporting to document over a 1,000 hours of attorney work well after that work was done. Though the trial court applied a 50% reduction to WSDOT’s fees because “WSDOT’s documentation of attorney fees is insufficient” (CP 1007)<sup>12</sup>, it nowhere explained the basis of that reduction or how the resulting \$265,000 award resulted in a reasonable fee. Had the trial court considered reasonableness, it would have necessarily

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<sup>11</sup> WSDOT’s timesheets “block” together a week or sometimes even *an entire month’s work*. (See, e.g. CP 905-06, 909-10)

<sup>12</sup> As our Supreme Court has stressed, “[t]here is no excuse for an established law firm to rely on estimates made on the eve of payment and almost entirely unsupported by daily records.” *Disciplinary Proceedings Against Dann*, 136 Wn.2d 67, 78, 960 P.2d 416 (1998) (quoting *In re Hudson & Manhattan R.R. Co.*, 339 F.2d 114, 115 (2d Cir. 1964)). Courts have repeatedly rejected reconstructed timesheets because they are, as WSDOT’s timesheets exemplify, plagued by generalities that do not allow the court or opposing party to judge whether the time was reasonably spent, rather than duplicative or unproductive. See, e.g., *Nat’l Ass’n of Concerned Veterans v. Sec’y of Def.*, 675 F.2d 1319, 1327, 1329 (D.C. Cir. 1982) (“Casual after-the-fact estimates of time expended on a case are insufficient to support an award of attorneys’ fees”). Where courts have relied on reconstructed timesheets, they have done so only after making detailed findings explaining why the timesheets are reliable *and* why the overall fee award is reasonable in light of the opposing party’s objections. *Miller v. Kenny*, 180 Wn. App. at 820-27, ¶¶ 118-140.

found that much of WSDOT's time was unproductive and duplicative. For example, in March 2016 one attorney attributed 95 hours to "WSDOT's production of documents" and to handling the transition of paralegals. (CP 906) In another instance, a different attorney billed 45 hours stating only it was "spent reviewing records and deposition transcripts, research on summary judgment issues, and drafting the summary judgment motion." (CP 909) The trial court awarded these two attorney's \$124,450 in fees based on their reconstructed time entries, all of which were similarly vague, without ever finding that the time spent was reasonable.

The trial court similarly erred in failing to find that the paralegal fees requested by WSDOT were for compensable and reasonable *legal services*. A court may award fees for a paralegal's work under RCW 39.04.240 *only if* the services performed are "legal in nature," performed by someone qualified to perform substantive legal work, and, as with attorney's fees, the amount of time expended is reasonable. *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 845, 917 P.2d 1086 (1995).

Much of WSDOT's paralegal fees were for non-legal, clerical work such as "download[ing] documents" or "[u]pload[ing] . . . photos and project file documents to vendor FTP site." (CP 935; *see*

also CP 887 (“[a]rrang[ing] for document scanning”; “[u]pload[ing] documents to vendor”), 937 (“Rec’d thumbdrive of responsive docs. Scanned, copied, uploaded”), 938 (“Downloading Pltff productions”; “organiz[ing] binders, database, emails”; “[c]leaning up F: drive folder”) The trial court nowhere addressed OGJV’s objection (CP 875-88, 1001-02) that this work was clerical and required no legal training, and instead simply accepted WSDOT’s assertion the work was legal in nature. *Berryman*, 177 Wn. App. at 658, ¶ 29 (trial court commits reversible error by failing to address objections and instead “simply accept[ing], unquestioningly, the fee affidavits”).

Because the trial court erroneously granted WSDOT summary judgment, upon reversing summary judgment any issues concerning fees become moot. However, should this Court affirm summary judgment, it should reverse the trial court’s award of fees and remand for the required findings, instructing the trial court to expressly find that the attorney’s fees sought by WSDOT are reasonable and that the paralegal fees reflect legal work.

## **VI. CONCLUSION**

The trial court erred in ignoring OGJV’s extrinsic evidence when interpreting the contract. It further erred in holding that

OGJV did not preserve its other claims, in failing to hold that WSDOT breached the contract as a matter of law, and in awarding WSDOT attorney's fees and costs. This Court should reverse the trial court's summary judgment order, hold that WSDOT breached the contract as a matter of law, and remand for a trial limited to determining the amount of OGJV's damages.

Dated this 15<sup>th</sup> day of May, 2017.

SMITH GOODFRIEND, P.S.

By:  \_\_\_\_\_

Howard M. Goodfriend

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Ian C. Cairns

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Attorneys for Appellant

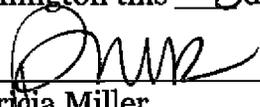
**DECLARATION OF SERVICE**

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

That on May <sup>15<sup>th</sup></sup>, 2017, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	Facsimile Messenger U.S. Mail <input checked="" type="checkbox"/> E-File
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**DATED** at Seattle, Washington this 15 day of May, 2017.

  
\_\_\_\_\_  
Patricia Miller

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SUPERIOR COURT  
THURSTON COUNTY, WASH.

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EXPEDITE  
 No Hearing Set  
 Hearing is Set  
Date: October 7, 2016  
Time: 9:00 a.m.  
Judge/Calendar: The Honorable Anna Hirsch

STATE OF WASHINGTON  
THURSTON COUNTY SUPERIOR COURT

ODYSSEY GERONIMO JV,

Plaintiff,

v.

STATE OF WASHINGTON, DEPARTMENT  
OF TRANSPORTATION,

Defendant.

NO. 15-2-01349-9

(PROPOSED) ORDER GRANTING  
STATE OF WASHINGTON,  
DEPARTMENT OF  
TRANSPORTATION'S MOTION FOR  
SUMMARY JUDGMENT

AA

This matter came before the Court on the motion of defendant State of Washington, Department of Transportation (WSDOT) for an order of summary judgment pursuant to CR 56 dismissing plaintiff's claims with prejudice. The Court has considered the following materials:

1. WSDOT's motion;
2. Declaration of Craig McDaniel, P.E., and exhibits 1-8;
3. Declaration of Lori Figone, P.E., and exhibits 9-31;
4. Declaration of Deborah L. Cade and exhibits 32-42;
5. Plaintiff's response;
6. Declaration of Nora Loftus and exhibits;
7. Declaration of John Todd, Sr.;
8. Declaration of Michael Reina and exhibits;
9. WSDOT's reply;

(PROPOSED) ORDER GRANTING STATE OF  
WASHINGTON, DEPARTMENT OF  
TRANSPORTATION'S MOTION FOR  
SUMMARY JUDGMENT

1

ATTORNEY GENERAL OF WASHINGTON  
Transportation & Public Construction Division  
7141 Clearwater Drive SW  
P.O. Box 40115  
Olympia, WA 98504-0115  
(360) 733-6126 Facsimile (360) 586-5877

App. A

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10. Second Declaration of Lori Figone, P.E., and exhibits 43-45;

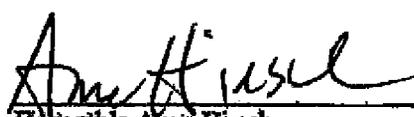
11. Declaration of DeWayne Wilson, P.E.; and

12. Declaration of Robert Hatfield and exhibits 46-59.

In ruling on WSDOT's motion for summary judgment, the Court did not consider the separate motion for partial summary judgment filed by Odyssey-Geronimo Joint Venture. The Court has also heard argument, and is fully informed. Therefore, for the reasons stated on the record, it is hereby

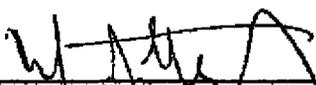
ORDERED that WSDOT's motion is granted, and plaintiff's claims are dismissed with prejudice.

DONE IN OPEN COURT on 10-7-16

  
Honorable Anne Hirsch  
Superior Court Judge

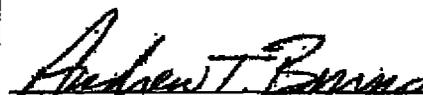
PRESENTED BY:

ROBERT W. FERGUSON  
Attorney General

  
DEBORAH L. CADE, WSEA #18929  
Assistant Attorney General  
ROBERT J. HATFIELD, WSEA #39905  
Assistant Attorney General  
Attorneys for Defendant  
State of Washington, Department of Transportation

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Approved as to form and notice of presentation waived:

  
Cosgrave Vergeer Kester LLP  
Andrew T. Burns, WSBA No. 43550

Frantz Ward LLP  
Ian H. Frank (0066634)  
Nora E. Loftus (0079985)  
Attorneys for Plaintiff Odyssey-Geronimo Joint Venture

(PROPOSED) ORDER GRANTING STATE OF  
WASHINGTON, DEPARTMENT OF  
TRANSPORTATION'S MOTION FOR  
SUMMARY JUDGMENT

3

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Olympia, WA 98504-0113  
(360) 733-6126 Fax/mile: (360) 584-8847

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15-2-01349-9  
JD  
Judgment  
1217791

FILED  
SUPERIOR COURT  
THURSTON COUNTY, WASH.

17 APR 12 AM 11:07

Linda Myhre Enlow  
Thurston County Clerk

- EXPEDITE
- No Hearing Set
- Hearing is Set



Date:  
Time:  
Judge/Calendar: The Honorable Anne Hirsch

STATE OF WASHINGTON  
THURSTON COUNTY SUPERIOR COURT

ODYSSEY-GERONIMO JV,

NO. 15-2-01349-9

Plaintiff,

(PROPOSED) ORDER AND  
JUDGMENT RE: PLAINTIFF  
ODYSSEY-GERONIMO JV

v.

STATE OF WASHINGTON, DEPARTMENT  
OF TRANSPORTATION,

EX PARTE

Defendant.

I. JUDGMENT SUMMARY

- |   |   |
|---|---|
| 1. Judgment Creditor  | State of Washington, Department of Transportation |
| 2. Judgment Creditor's Attorney:  | Deborah L. Cade, Assistant Attorney General       |
| 3. Judgment Debtor:   | Odyssey-Geronimo Joint Venture                    |
| 4. Principal Judgment Amount  | \$0   |
| 5. Attorney Fees (including paralegal fees and expert witness fees):                            | \$339,722.05                                      |
| 6. Litigation Costs (filing fee, deposition transcripts, deposition travel, document database): | \$34,966.99                                       |
| 7. Total Award  | \$374,689.04                                      |

(PROPOSED) ORDER AND JUDGMENT  
RE: PLAINTIFF ODYSSEY-GERONIMO JV

App. B

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**II. ORDER AND JUDGMENT**

THIS MATTER came before the Court upon the order of summary judgment entered by the Court in favor of WSDOT and against OGJV, dismissing with prejudice all of OGJV's claims against WSDOT. WSDOT has filed a post-trial motion for costs and attorney fees pursuant to RCW 39.04.240. The Court has considered WSDOT's motion and attached declarations, OGJV's response and attached declaration, WSDOT's reply and attached declarations, WSDOT's surreply and attached declarations, OGJV's response to WSDOT's surreply, and oral argument from both parties on December 9, 2016 and February 3, 2017, and is fully advised. Therefore, it is hereby

ORDERED that Defendant WSDOT is the prevailing party in this matter and is, therefore, entitled to recovery of reasonable attorney fees. However, the Court finds that WSDOT's documentation of attorney fees is insufficient and that the amount of attorney fees awarded should be discounted by fifty percent. Paralegal fees will also be discounted by fifty percent, with the exception of those hours contemporaneously documented by Tiffany Orozco, less five hours of time for Eclipse training that WSDOT has withdrawn from its request, and Jennifer Williams. Therefore, WSDOT will be awarded attorney fees as follows:

(1) An award against Plaintiff OGJV for reasonable attorney fees, including paralegal and expert fees, pursuant to RCW 39.04.240 and RCW 4.84.250, of \$339,722.05, which represents the following fees:

- a. Total attorney fees: \$212,775.00, which represents fifty percent of the \$425,550.00 submitted by WSDOT for the following attorneys:
  - i. Sunset Brinton (737 hours at \$200 per hour): \$147,400.00
  - ii. Deborah Cade (406 hours at \$250 per hour): \$101,500.00
  - iii. D. Thomas Wendel (48.5 hours at \$250 per hour): \$12,125.00
  - iv. Daniel Galvin (3.5 hours at \$250 per hour): \$875.00

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v. Robert Hatfield (818.25 hours at \$200 per hour): \$163,650.00

b. Total paralegal fees: \$50,150.00, which represents fifty percent of the fees of Danielle Oliver and Robert Hartford, and one hundred percent of the fees of Tiffany Orozco, less five hours of time for Eclipse training that WSDOT has withdrawn from its request, and Jennifer Williams:

i. Tiffany Orozco (338.25 hours at \$85 per hour): \$28,751.25

ii. Robert Hartford, Jr (50% of 95 hours (47.5 hours) at \$85 per hour):  
\$4,037.50

iii. Jennifer Williams (91 hours at \$85 per hour): \$7,735.00

iv. Danielle Oliver (50% of 226.5 hours (113.25 hours) at \$85 per hour):  
\$9,626.25

c. Total expert fees: \$76,797.05

i. Skip Vernon, Coating & Lining Technologies, Inc.: \$33,419.99

ii. Greg Gadawski, Financial Forensics: \$16,563.06

iii. Bob Cusumano, Coatings Consultants, Inc.: \$1,827.00

iv. Mark Nagata and Scott Lower, Trauner Consulting: \$24,987.00; and

(2) An award against Plaintiff OGJV for its reasonable litigation costs, including pro-rated deposition costs, deposition travel expenses, and filing fees, pursuant to RCW 4.84.010, of \$34,966.99, which represents the following costs:

d. Pro-rated deposition expenses: \$2,271.28

e. Deposition travel expenses: \$9,190.01

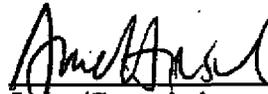
f. Jury demand filing fee: \$250.00

g. Document database cost: \$23,255.70.

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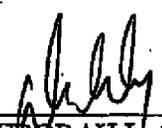
1 A total of \$374,689.04 is therefore awarded to WSDOT pursuant to RCW 39.04.240 and  
2 RCW 4.84.250.

3 DATED 4/16/17  
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5   
6 \_\_\_\_\_  
7 Judge/Commissioner

8 PRESENTED BY:

9 ROBERT W. FERGUSON  
10 Attorney General

11   
12 \_\_\_\_\_  
13 DEBORAH L. CADE, WSBA #18329  
14 Assistant Attorney General #50846 David Palay  
15 Attorney for Defendant  
16 State of Washington, Department of Transportation

17 Approved as to form only without waiving any rights to appeal:

18 FRANTZ WARD LLP

19 s/ Nora E. Loftus approved by email 3/20/17

20 NORA E. LOFTUS, Ohio Bar #0079985

21 IAN H. FRANK, Ohio Bar #0066634

22 Attorneys at Law

Attorneys for Plaintiff Odyssey-Geronimo JV

23 COSGRAVE VERGEER KESTER LLP

24 Andrew T. Burns, WSBA #43550

25 Joshua R. Kennedy, Oregon Bar #63941

26 Attorneys for Plaintiff Odyssey-Geronimo JV

(PROPOSED) ORDER AND JUDGMENT  
RE: PLAINTIFF ODYSSEY-GERONIMO JV

4

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**SMITH GOODFRIEND, PS**

**May 15, 2017 - 3:55 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 49604-6  
**Appellate Court Case Title:** Odyssey-Geronimo JV, Appellant v. State of WA, Dept of Transportation,  
Respondent  
**Superior Court Case Number:** 15-2-01349-9

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