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Division III
State of Washington

No. 344801

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SPECIALTY ASPHALT & CONSTRUCTION, LLC,
a Washington limited liability company;
and LISA JACOBSEN, individually,

Appellants,

v.

COUNTY OF LINCOLN,
a Washington State County,

Respondent.

APPELLANTS' BRIEF

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TABLE OF CONTENTS

I. Assignments of Error 1

II. Issues Pertaining to Assignments of Error 1

III. Statement of the Case 6

IV. Argument 19

Standard of Review 19

Is a Plaintiff Responding to Summary Judgment Required to Produce Evidence to Corroborate Her Testimony Describing Defendant's Disparate Treatment and If So, Did Plaintiffs Here Do So? 20

Are There Disputed Facts Precluding Summary Judgment When There Is Evidence Plaintiffs Were Treated Adversely By the County When Compared with Male Contractors? 23

Did the Court Err at Summary Judgment When it Struck as Hearsay Statements of All Third Parties Who Were County Officials Claiming to Be Speaking for the County?. 25

Should The Court Have Granted Plaintiffs' Motion For Reconsideration Regarding the Dismissal of the Discrimination Claim?. 26

Did the Court Err When It Granted Summary Judgment Dismissing the Claim for Negligent Misrepresentation?. 27

Did the Court Abuse Its Discretion When It Denied Plaintiffs' Motion To Amend Because the Amendment Was Futile?. 31

Was the County Entitled to a Summary Judgment Order Granting an Injunction Ordering Specialty to Perform the Contract or Have its Case Dismissed When the Trial Court Ruled the County's

Delay Increased the Cost of Performance and There Was No Reliable Mechanism for Specialty to Recover Added Costs? 40

V. Specialty Is Entitled to Attorney Fees 43

VI. Conclusion 43

TABLE OF AUTHORITIES

Table of Cases

Acme Fin. Co. v. Monohon,
188 Wash. 392, 394, 62 P.2d 1089, 1089-90 (1936). 40

Bailey v. Forks,
108 Wn.2d 262, 737 P.2d 1257 (1987) 28

Bank of Am. NT & SA v. Hubert,
153 Wn.2d 102, 122, 101 P.3d 409, 419 (2004) 19

Berge v. Gorton,
88 Wash.2d 756, 567 P.2d 187 (1977). 41

Chambers–Castanes v. King County,
100 Wn.2d 275, 285, 669 P.2d 451 (1983). 31

Davis v. W. One Auto. Grp.,
140 Wn.App. 449, 456, 166 P.3d 807 (2007). 24

Ellingson v. Spokane Mortgage Company,
19 Wn. App. 35, 54 n.6, 573 P.2d 1347 (1978) 20

ESCA Corp. v. KPMG Peat Marwick,
135 Wn.2d 820, 829 (1998) 27

Fabre v. Town of Ruston,
180 Wn. App. 150, 160 (2014) 30

Goggin v. City of Seattle,
48 Wn.2d 894, 897 (1956). 29

Gostovich v. City of W. Richland,
75 Wn.2d 583, 585 (1969). 34

Haberman v. Washington Pub. Power Supply Sys.,
109 Wash. 2d 107, 159, 744 P.2d 1032, 1065 (1987),
amended, 109 Wash. 2d 107, 750 P.2d 254 (1988). 30

Hanson Excavating Co., Inc. v. Cowlitz County,
28 Wn. App. 123,125-27 (1981)
(quoting *Platt Electric Supply, Inc. v. City of Seattle,*
16 Wn. App. at 274). 38

Highline Sch. Dist. No. 401 v. Port of Seattle,
87 Wash.2d 6, 15, 548 P.2d 1085 (1976). 19

Hill v. BCTI Income Fund-I,
144 Wn.2d 172, 179-80, 23 P.3d 440 (2001) 20

Hoffer v. State,
110 Wash. 2d 415, 422, 755 P.2d 781, 786 (1988), *on reconsideration in part*, 113 Wash. 2d 148, 776 P.2d 963 (1989) 29

Jenkins v. State,
85 Wn.2d 883, 890, 540 P.2d 1363, 1368 (1975) 39

Kenco Enterprises Nw., LLC v. Wiese,
172 Wn. App. 607, 614, 291 P.3d 261, 264 (2013) 19

Kozol v. Washington State Dep't of Corr.,
188 Wn. App. 1012 (2015), rev'd, 379 P.3d 72
(Wash. 2016), as corrected (Aug. 1, 2016) 39

Kries v. WA-SPOK Primary Care, LLC,
190 Wn. App. 98, 117, 362 P.3d 974, 982 (2015) 23

Lager v. Berggren,
187 Wash. 462, 466 67, 60 P.2d 99, 101 (1936) 38

Lester N. Johnson Co., Inc. v. City of Spokane,
22 Wn. App. 265, 271 (1978) 32

MacLean v. City of Bellingham,
41 Wn. App. 700, 703 04, 705 P.2d 1232, 1234 (1985)
cert. granted, judgment vacated sub nom.
MacLean v. City of Bellingham, Washington,
475 U.S. 1105, 106 S. Ct. 1509, 89 L. Ed. 2d 909 (1986) 40, 41

Minger v. Reinhard Distrib. Co., Inc.,
87 Wn. App. 941, 946, 943 P.2d 400, 402 (1997) 25

Mottner v. Town of Mercer Island,
75 Wn.2d 575, 577 (1969) 33

Peerless Food Products, Inc. v. State,
119 Wn.2d 584 (1992) 33, 35

Platt Electric Supply, Inc. v. City of Seattle, Div. of Purchasing,
16 Wn. App. 265, 269 (1976) 38

Sales v. Weyerhaeuser Co.,
163 Wn.2d 14, 19, 177 P.3d 1122, 1124 (2008) 39

Scoccolo Construction, Inc. ex rel. Curb One, Inc. v. City of Renton,
158 Wn.2d 506 (2006) 32, 36, 39

Skyline Contractors, Inc. v. Spokane Housing Authority,
172 Wn. App. 193, 195 (2012) 34, 35, 41

Stiefel v. City of Kent, 132 Wn.App.
523, 529, 132 P.3d 1111 (2006) 29

Sunland Investments v. Graham,

54 Wn. App. 361,364, 773 P. 2nd 874 (1989) 28

Sutton v. Tacoma Sch. Dist. No. 10,
180 Wn. App. 859, 866, 324 P.3d 763, 767 (2014) 27

Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland,
95 Wn. App. 896, 906, 977 P.2d 639, 645 (1999) 26

Woods View II, LLC v. Kitsap Cty.,
188 Wn. App. 1, 28 (2015)
review denied, 184 Wn.2d 1015, 360 P.3d 818 (2015) 30

Other Authorities

RCW 39.04.015 . . . . . 19, 36, 42

RAP 18.1(a) 42

33 *Washington Practice*, *Construction Law Manual*

§ 8:14 (2015-2016 ed.) 37

I.

ASSIGNMENTS OF ERROR

(1) The trial court erred by granting summary judgment dismissing the sex discrimination claim.

(2) The trial court erred by granting summary judgment dismissing the negligent misrepresentation claim.

(3) The trial court erred at summary judgment when it struck as hearsay statements of county officials speaking for the county.

(4) The trial court erred when it denied plaintiffs' motion for reconsideration regarding the dismissal of the sex discrimination claim.

(5) The trial court abused its discretion when it denied plaintiffs' motion to file a second amended complaint.

(6) The trial court erred when it entered a summary judgment granting an injunction ordering Specialty to perform the contract or have its case dismissed.

II.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(1) Is a plaintiff responding to summary judgment required to produce evidence to corroborate her testimony describing defendant's

disparate treatment and if so, did plaintiffs here do so?

(2) Are there disputed facts precluding summary judgment when there is evidence plaintiffs where treated adversely by the county when compared with male contractors?

(3) Did the court err at summary judgment when it struck as hearsay statements of county officials claiming to be speaking for the county?

(4) Should The Court Have Granted Plaintiffs' Motion For Reconsideration Regarding the Dismissal of the Sex Discrimination Claim?

(5) Did the court err when it granted summary judgment dismissing the claim for negligent misrepresentation?

(6) Did the court abuse its discretion when it denied plaintiffs' motion to amend because the amendment was futile?

(7) Was the county entitled to a summary judgment order granting an injunction ordering Specialty to perform the contract or have its case dismissed when the trial court ruled the county's delay increased the cost of performance and there was no reliable mechanism for Specialty to recover added costs?

III.

STATEMENT OF THE CASE

Lisa Jacobsen (Jacobsen) has been the majority owner of Plaintiff Specialty Asphalt (Specialty) since the company was incorporated in 2012. *RP 278,* ¶ 2. Specialty Asphalt is a licensed contractor providing asphalt paving and maintenance work. Throughout Jacobsen's approximately 20 years with Specialty, she has worked both in the field operating equipment and handled business matters such as bidding projects. *RP 279,* ¶ *3*. In Jacobsen's experience in the industry, most public work projects did not require a bond. *RP 279,* ¶ *4*.

In July 2013, Jacobsen on behalf of Specialty reviewed and responded to a Notice of Call for Bid ("Bid Proposal") issued by Defendant Lincoln County (the County) requesting extensive repair and maintenance on the parking lot at the Courthouse in Davenport ("Project"). For example, the parking lot had potholes and several sections where the pavement had failed. The Project would include excavating the sections that had failed, placing crushed rock to strengthen the sub-base structure, laying down new asphalt over the rock, and adding a crack seal to the perimeter of the patch. *RP 279,* ¶ *5*.

The Bid Proposal clearly stated in two separate places no proposal bond or performance bond was required. *RP 279,* ¶ 6, *293,297.* The Notice of Call for Bid, was reviewed by the County's Public Works Director, the County Engineer, and the Operations and Permit Coordinator when it was drafted. *Deposition of Phil Nollmeyer RP 114.*

Lincoln County's Notice of Call for Bid announced "[a]n opportunity to view the proposed scope of work and project site . . . at 9:00AM on Tuesday, July 16, 2013 at the . . . Courthouse." *RP 291.* Jacobsen was the only potential bidder who participated in the scheduled walkthrough for the Project. Several representatives from the County attended the walkthrough, including Phil Nollmeyer, the Operations and Permit Coordinator in the Public Works Department, and the three County Commissioners. None of the county representatives mentioned a bond requirement during the walkthrough. *RP 280,* ¶ *7.*

During the walkthrough on July 16, 2013, which took close to two hours, Jacobsen asked questions and raised several issues that generated a productive conversation with the Commissioners about how the County could maximize the goals of the Project. They discussed bringing a specific area up to code for accessibility under the Americans with Disabilities Act and

installing concrete bollards for the purpose of protecting the sidewalk. Jacobsen also told Nollmeyer and the Commissioners that Specialty would not "chip seal" the existing asphalt because people entering the Courthouse would track oil and stone chips onto the building's marble floor. Instead, she suggested a seal coat. *RP 280,* ¶ 8.

At the beginning of the walkthrough, in front of the Commissioners, Nollmeyer made a comment that the pair of shoes with heels that Jacobsen was wearing was not the most appropriate attire for a walkthrough. The Commissioners appeared to be much more engaged with Jacobsen than Nollmeyer in the discussion of the Project over the course of the walkthrough. *RP 280,* ¶ 9.

Apparently as a result of some of the issues that the County representatives and Jacobsen discussed during the walkthrough, the County issued Addendum No. 1 to the Bid Proposal later on July 16, 2013. None of the provisions of Addendum No. 1 required any proposal, bid, or performance bond. Addendum No. 1 extended the due date for bids from July 19, 2013, to August 2, 2013. *RP 280, ¶ 10, 299.*

Prior to the new due date for the bid, Nollmeyer called Jacobsen while she was driving on I-5 in Western Washington. She pulled into a rest area to

speak with him. Nollmeyer attempted to talk her out of submitting a bid on behalf of Specialty for the Project. Nollmeyer stated words to the effect: "You aren't going to submit a bid, are you? That project is really messy; more trouble than it is worth." Jacobsen's response was that Specialty did plan to submit a bid and could perform the Project. Nollmeyer continued to tell Jacobsen that Specialty did not want to bid this Project. The woman who was accompanying Jacobsen that day in the truck could see how upset the call made Jacobsen and asked her what was wrong? Although Nollmeyer did not explicitly say the words, his comments and attitude made it very clear to Jacobsen that he did not believe her company, owned and operated by a woman, could do the job. *RP 281, ¶ 11.*

On July 27, 2013, Jacobsen submitted a bid on behalf of Specialty in the total amount of $79,690.05. Consistent with the Bid Proposal, Specialty's bid did not include any proposed bonds. *RP 281, ¶ 12.* The County Commissioners opened the bids August 5, 2013. Several days passed after August 5 without any word from the County. Jacobsen placed a call to the county, speaking either to Shelly Johnston, the Auditor, or Marci Patterson, the Deputy Clerk to the Board of Commissioners. She asked who received the award for the Project. The woman replied with words to the effect:

"What do you mean, Lisa? You should know. You got the job." Specialty had the low bid, and Nollmeyer was directed to call the winning bidder and he had not done so. *RP 281-2, ¶ 13.*

The day after Jacobsen's telephone conversation, she did receive written notification of the award from Johnston in the mail. The letter dated August 6, 2013, stated that the contract for the Project "has been awarded to your firm at your bid price of $79,690.05"and the Bid Award for the Project, which three of the Commissioners and Patterson had signed was enclosed. According to the Commissioners' Order, Specialty's bid was lower than a competing bid from Arrow Concrete & Asphalt Specialties ("Arrow"). Neither Johnston's letter nor the Commissioners' Order made any reference to a bond. Johnston's letter stated that a "contract will be forwarded to you under separate cover or by email" and asked that the company contact her "regarding a projected start date." *RP 282, 14.*

Jacobsen promptly placed a call to Johnston to discuss the start date because Specialty had the capability to begin the Project in the near future. Johnston was not in the office, so Jacobsen left a voice mail asking her to return the call. Relying on the Award, Jacobsen began to mobilize resources and materials for the Project and told her administrative assistant to inform

callers Specialty would not be able to accept new jobs because the Project had filled out the schedule for the paving season. *RP 282-3, ¶ 15.*

A few days after receiving the Award, Jacobsen received a letter dated August 12 from Johnston with documents entitled "Contract" and "Contract Bond." Johnston's letter instructed Jacobsen to sign all three copies of the contract and the bond. Jacobsen concluded that Johnston had enclosed the Contract Bond in error and wrote on the document: "No proposal bond or performance bond required as per page #2." She returned the signed Contract and the Contract Bond, bearing her notation, to Lincoln County by mail on August 19th. Jacobsen made a note of the date that she mailed the documents on her copy of the Contract. *RP 283,¶ 16, 305-7.*

After Jacobsen mailed the signed Contract back to the County Auditor's Office, she received a return call from Johnston. Jacobsen thanked Johnston for calling and suggested that they meet to schedule the work. Johnston said that the County had sent Specialty some documents, to include a Contract Bond, and asked if Jacobsen had received the documents. Jacobsen replied that she had sent the documents back, commenting that Johnston should have them in the next day or two. Johnston responded with words to the effect: "Well, okay. Let me call you back."

When Johnston called she said words to the effect, "It has been brought to our attention that we have to have a bond." Jacobsen replied: "No, Shelly, in two places in your Request for Proposal you state that no bond is required for the Project." As Jacobsen kept telling her that the Bid Proposal explicitly represented that the County was not requesting a bond for the Project and that a bond is a significant item that cannot be an afterthought to a bid and a contract, Johnston kept repeating that "it has been brought to our attention that the County wants Specialty Asphalt to provide a bond." The Auditor would not tell Jacobsen who had brought it to their attention that the County now wanted a bond. *RP 284, ¶ 17.* Specialty and Jacobsen contend an agent or agents of the County decided to require a bond because Specialty was owned and operated by a woman.

If an owner intends to require a bond for a project, Specialty must take that bond requirement into consideration when deciding whether to submit a bid and when deciding the amount of the bid. A bond is a significant item that involves more than the dollar premium that the contractor must pay a carrier for the bond. In addition, Specialty must spend a considerable amount of administrative time compiling information for the bond issuer. Furthermore, contractors such as Specialty, have a bond cap. Bond carriers

will only permit a contractor to obtain a certain total dollar value of bonds based on the assets, credit worthiness, and performance history of the contractor. A bond counts against that cap for a period well beyond the completion of the work on a job because a claim against the contractor for the job can be presented well after the contractor finishes the work. By taking a job that requires a bond, a contractor approaching its bond cap may be precluding itself from subsequently bidding on a more lucrative project that requires a bond. *RP 284-5, ¶ 18.*

Jacobsen called Specialty's independent insurance agent who arranges for bonds from various carriers. When she started explaining the situation to the company's insurance agent, Larry Sears, he asked how long before the job goes to award? When Jacobsen replied that the County already had awarded the contract to Specialty, the insurance agent stated words to the effect: "No bond is required. They've already awarded the job. If we try to send this job for a bond now it's going to throw all kinds of red flags up." *RP 285,¶ 19.*

Jacobsen told Johnston that she had consulted with the company's insurance agent and explained his position. Johnston responded that the County could not legally move forward without a bond. Jacobsen disputed her statement, explaining that Specialty recently had performed a similar job

for the City of Davenport without a bond and that the County can accept the responsibility of proceeding without a bond. Johnston replied that her hands were tied. *RP 285-6, ¶ 20.*

In an effort to obtain a notice to proceed for the Project, Jacobsen had additional conversations with Johnston. At one point, Johnston said: "Lisa, you can make this go away if you just provide a bond." She suggested that the County issue a new call for bid with a bond requirement and added words to the effect: "I will make sure that you get the job." Jacobsen was astonished that Johnston would make that suggestion because her proposal would be bid rigging that would expose the County and Specialty to liability. At another point, Johnston suggested that Specialty obtain a bond and the County would pay the cost. Likewise, that suggestion would expose both parties to liability for collusion or bid rigging because another material term had been added to the Bid Proposal, for which the County would provide the compensation to one party after contractors had submitted their bids. The County's Bid Proposal specifically warned about collusion and bid rigging. The Bid Proposal required a bidder to declare: "That the undersigned person(s), firm, association or corporation has (have) not, either directly or indirectly, entered into any agreement, participated in any collusion, or

otherwise taken action in restrain[t] of free competitive bidding in connection with the project for which this proposal is submitted." On the same page, the Bid Proposal provided the number for a U.S. Department of Transportation "hotline" and encouraged the reporting "of possible bid rigging, bidder collusion, or other fraudulent activities." Jacobsen told Johnston that Specialty could not pursue either of Johnston's suggested resolutions. *RP 286, ¶ 21, 296.*

Frequently public entities will confirm with the Washington Department of Labor & Industries that a bidder has a current contractor's license and is in good standing with the Department. Specialty had a current contractor's license and continued to be in good standing with the workmen's compensation program. *RP 287, ¶ 23.*

However, Jacobsen had never encountered a situation in which a public entity that awarded a contract to Specialty initiated Contractor Tracking through the Washington Department of Labor & Industries ("L&I") after awarding the contract to Specialty. Jacobsen obtained through L&I a copy of a Contractor Tracking Information sheet for Specialty Asphalt. Contractor Tracking allows an entity to track a contractor's status with L&I on an ongoing basis. The L&I Contractor Tracking Information reflects that

Lincoln County Public Works had initiated Contractor Tracking on August 7, 2013, the day after Lincoln County awarded Specialty the contract. Specialty has remained in compliance with state requirements since receiving the award of the contract for the Project. Jacobsen was not aware of any reason that Lincoln County Public Works would initiate Contractor Tracking of Specialty the day after the Commissioners awarded the job to Specialty other than Nollmeyer was disappointed that her company had received the award and he hoped that the Contractor Tracking would uncover a reason to disqualify her company. *RP 287-8, ¶ 24, 302-3, 309.*

Nollmeyer testified that before the Commissioners awarded the Project to Specialty he went as a matter of standard procedure to the L&I website to check whether Specialty was "debarred or suspended from bidding" and whether its license and workman's compensation were current. *RP 327-30, 333.* After looking at the Contractor Tracking Information sheet that reflects that Lincoln County Public Works requested tracking of Specialty Asphalt starting on August 7, 2013, Nollmeyer denied knowing how to track a contractor on the L&I website and could not offer any explanation for why his department would initiate tracking of Specialty the day after the Commissioners awarded the Project to the company. *RP 331-3.*

The only other bidder on the Project was Arrow Concrete from Spokane. David Lawless, a business acquaintance of Jacobsen for many years, owns Arrow Concrete. In addition to competing for jobs with Lawless' company, Specialty purchases supplies from a related business, Arrow Construction Supply, that Lawless owns. Neither Lawless nor any other representative of Arrow Concrete participated with Jacobsen in the scheduled walkthrough for the Project. *RP 288, ¶ 25, 303.*

Lincoln County Public Works has done a considerable amount of business with Arrow Construction Supply and Arrow Concrete over the years. *RP 321-25.* Nollmeyer knows the owner, Lawless, and knows some of Arrow Construction's employees. *Id.* Although acknowledging that the intent of the scheduled walkthrough is to provide all potential bidders with the same information about a job, Nollmeyer admitted that he gave a male representative of Arrow Construction who just showed up a private walkthrough after the scheduled walkthrough was held. *RP 319-21.* He could not specifically remember whether he checked Arrow Concrete on the L&I website at the same time that he checked Specialty, to ensure that Arrow Concrete likewise was qualified to bid a public works job. *RP 329-30.* Nollmeyer explained that he simply may have checked his prior electronic

records for Arrow. *Id.*

Johnston testified that she called Jacobsen on August 19, 2013, at the direction of the County Commissioners and she told Jacobsen the County would not allow Specialty to do the project. *RP 340, 345-6.* Instead, the Commissioners planned to rebid the Project and they hoped that Specialty would submit a bid. *Id.*

On or about August 20, 2013, the County issued a new call for bids, with the requirement of a bond, for the Project. *RP 35, ¶ 6.* Approximately three days later, Specialty sent a demand letter requesting that the County maintain its bid award. *RP 39.* In response, the County "withdrew the re-bidding process." *RP 35, ¶ 6.* Only subsequent to withdrawing the re-bid process did the County offer to pay for the bond and have Specialty proceed with the Project. RP 35, ¶*8.* Specialty did not accept that offer for fear that the proposal would constitute collusion or bid rigging and would subject the company to penalties by federal and state authorities. *RP 286.*

In the spring of 2014, Specialty filed suit seeking injunctive and declaratory relief because the County continued to insist the contract was illegal (*RP 12)* because a bond was required and it would not allow the work go forward. *RP 20.* After depositions were taken, Specialty filed a motion

to amend its complaint to add Jacobsen as a party and to add a claim for discrimination. The County objected claiming notice of the discrimination claim had not been given under RCW 4.96.020, so Specialty gave the required notice before proceeding with its motion to amend and add Jacobsen as a party. *RP 75,85.* The court granted the motion to intervene and to add the discrimination claim.

The County filed a motion for summary judgment dismissing all of the claims brought by both Plaintiffs. At the summary judgment hearing the Court struck statements of third parties other than Nollmeyer as hearsay. *RP 418-19.* The court granted partial summary judgment and dismissed the discrimination. *RP 417-19.* The court explained its reasoning for dismissing the discrimination claim when it ruled on a motion for reconsideration. The court found Jacobsen did not have corroborating evidence to support her testimony regarding adverse treatment by the County and no evidence Specialty was adversely affected as a result of the interaction with the County. *RP 525, 589.*

There was independent corroborating evidence Specialty and Jacobsen were treated differently than male contractors when the County, checked on and tracked Specialty with Labor and Industries after the award

was made. *RP 287-8, ¶ 24, 302-3, 309.* Male owned Arrow Construction was given a private meeting and walkthrough of the project contrary to the County's normal practice and the terms in the call for bids. *RP 291,319-21.* The County demanded a bond from Specialty, even though it repeatedly told bidders no bond was required. *RP 279,* ¶ 6, *293,297.* The court found the County's demand for a bond was made in good faith. *RP 598.*

Specialty was adversely affected by the interaction with the County. Jacobsen testified she experienced emotional distress and wasted time as a result of the interaction with the County. She was "shocked," "angry" and disturbed by Nollmeyer's efforts to convince her not to bid the project. *RP 281,* ¶ 11. Jacobsen testified about the hours of work she devoted to the walk through (*RP 280,* ¶ *8*), numerous communications with representatives of the County (*RP 280-6*) and preparations she made to do the job. *RP 282-3.* Ultimately there is no dispute that Specialty was delayed by County (*RP 598)* and Specialty contends the delay was intentional discrimination that made it impossible to go forward with the work. Specialty was damaged when it lost the project.

The court also dismissed the negligent misrepresentation claim citing the public duty doctrine. When it became increasingly apparent it was

unlikely the work could be done on the original terms because of the County's delays, Specialty filed a motion to file a second amended complaint seeking damages, the court denied the motion because the amendment was futile. *RP 527, 593.*

After the County became aware the passage of time made it impossible for Specialty to do the work for the contract price, and the deterioration of the site increased the scope of the required work (*RP 412-3)*, it suddenly decided it would agree to allow Specialty to do the work on the same terms as the 2014 contract. *RP 380, 391-2, 425,428, 469,500, 578.* This stipulation was at least three years after the project was budgeted and bid and the condition of the property had deteriorated to the point the project could no longer be done for the bid price. *RP 412, 413.* The court did find the County's demand for a bond delayed Speciality's performance. *RP 598.*

The County moved for and trial court entered an order compelling Specialty to perform the contract between the parties. *RP 599.* The trial court found Specialty was entitled to recover additional costs associated with the County's delay, but did not provide any mechanism for payment of those additional costs. The County had not plead a counterclaim and Specialty objected to the County being granted an injunction. *RP 564-5.* Specialty also

objected that is was unclear how the additional costs could be recovered because of RCW 39.04.015 that forbids changes to a contract after an award is made. *RP 596.*

IV.

ARGUMENT

Standard of Review.

The Court of Appeals reviews a summary judgment order de novo and it view the evidence in the light most favorable to the nonmoving party. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wash.2d 6, 15, 548 P.2d 1085 (1976). "Trial court rulings on the admissibility of evidence on summary judgment are reviewed de novo and motions for reconsideration are reviewed for an abuse of discretion." *Kenco Enterprises Nw., LLC v. Wiese*, 172 Wn. App. 607, 614, 291 P.3d 261, 264 (2013).

The standard for review of a trial court's denial of a motion to amend pleadings is abuse of discretion. *Bank of Am. NT & SA v. Hubert*, 153 Wn.2d 102, 122, 101 P.3d 409, 419 (2004).

1. Is a Plaintiff Responding to Summary Judgment Required to Produce Evidence to Corroborate Her Testimony Describing

Defendant's Disparate Treatment and If So, Did Plaintiffs Here Do So?

The court granted summary judgment because Plaintiffs did not have any evidence corroborating Jacobsen's testimony she was treated adversely by agents of the County. Jacobsen testified Nollmeyer discouraged her from bidding and he made a remark about her shoes at the walkthrough. However, this is not all of the evidence of discrimination and the law does not require the corroborating evidence to overcome a motion for summary judgment. Even self-serving testimony must be treated as true and it creates a material issue of fact

Courts have thus repeatedly stressed that '[c]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden.'" *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179-80, 23 P.3d 440 (2001) (internal citations omitted). Jacobsen's testimony about detailed specific discriminatory conduct and other evidence proving male bidders were treated differently than she was raise issues of fact regarding discrimination. *Ellingson v. Spokane Mortgage Company*, 19 Wn. App. 35, 54 n.6, 573 P.2d 1347 (1978), holds "direct evidence of discrimination is very difficult if not impossible to produce, [and as a result] courts have

recognized the use of comparative evidence based on 'similarly situated' persons." Such evidence of disparate treatment was in the record here and summary judgment should not have been granted.

Even if corroborating evidence was required, the court overlooked independent corroborating evidence of disparate treatment from Nollmeyer and public records. For example, Nollmeyer testified about a private walkthrough and meeting he gave to a male bidder even though that male bidder "just showed up" after he missed the group walkthrough scheduled for all bidders. That group walkthrough was scheduled in the request for bids for the express purpose of treating all bidders equally. The private meeting was a break with protocol it is independent evidence of disparate treatment. When Jacobsen's company was the only potential bidder, the commitment to equal treatment went out the window even though a male bidder "just showed up" long after the scheduled walk through.

The County also tracked Specialty's status with the Department of Labor and Industries after the project was awarded to Specialty. The normal procedure was to check with Labor and Industries before an award was made and the County did not engage in the practice of tracking contractors at all. Yet when a minority owned business won the bid,

someone acting for the County again did not follow the normal practice. The County gave no reason for treating Specialty differently than other contractors. A jury is likely to conclude the County was searching for an excuse to disqualify Specialty after the award was made because it was a minority owned business.

Also a comparison of Nollmeyer's testimony about his treatment of Arrow Construction with what happened to Specialty makes it clear Specialty got extra scrutiny. Nollmeyer testified he was not even sure he checked on Arrow Construction's status with Labor and Industries before or after the award was made. *RP 330.*

Another corroborating fact is that three county officials approved a call for bids that said in two places no bond was required. None of them made a change indicating a bond was required. There was another opportunity to require and bond when the County issued an addendum to the request for bids and still no bond was required. Then, when a minority owned business won the bid, someone at the County told the county commissioners a bond was required and Specialty was not permitted to do the job without one. The County used a demand for a bond to fend off a minority owned business.

Significantly, the County abandoned its demand for a bond after counsel for Specialty indicated the company no longer wanted to do the work because too much time had passed. *RP 391 ¶ 3.* A jury could conclude the County's sudden willingness to allow Specialty to proceed without a bond is evidence it never wanted or needed a bond in the first place.

2. Are There Disputed Facts Precluding Summary Judgment When There Is Evidence Plaintiffs Were Treated Adversely By the County When Compared with Male Contractors?

The court dismissed the discrimination claim and denied a motion for reconsideration when it mistakenly found Specialty and Jacobsen were not adversely affected by the County's actions. The court also incorrectly found the County delayed Specialty from performing the work, but that the delay was the result of a good faith mistake about the need for a bond. "Findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court." *Kries v. WA-SPOK Primary Care, LLC*, 190 Wn. App. 98, 117, 362 P.3d 974, 982 (2015).

The fact Specialty was delayed is undisputed, but whether or not the motive for the delay was discriminatory or in good faith is a disputed

fact precluding summary judgment. When there are competing inferences of both discrimination and nondiscrimination the resulting dispute must be resolved by a jury. *Davis v. W. One Auto. Grp.*, 140 Wn.App. 449, 456, 166 P.3d 807 (2007). The same is true for Specialty's claim the delay ultimately made it impossible to perform the the job.

Beyond the delay and lost of the project, it is clear the trial court found Plaintiffs were not adversely affected by their dealings with the County. Specialty and Jacobsen were adversely affected by the County's actions. No woman should be subject to the treatment Jacobsen endured prior to submitting a bid. She was discouraged from submitting a bid, Nollmeyer made inappropriate remarks to her, and another male bidder was given an unfair advantage outside the normal bidding process. Jacobsen was shocked, angry and disturbed by these actions by Nollmeyer. These actions alone are enough to cause emotional distress and prevent summary judgment.

It should be noted the County's motion for summary judgment did not argue summary judgment was appropriate because Plaintiffs were not damaged. *RP 218- 30.* Plaintiffs had no opportunity to respond to create a record on the issue of causation of damage if that was the issue the trial

court was raising.

In any event , a jury could easily conclude form this record the County's discrimination prevented Specialty from performing the project it was entitled to perform and it was damaged as a result. The County's discriminatory demand for bond followed by a sudden willingness to go forward without a bond is evidence the County never really wanted a bond in the first place. Jacobsen and Specialty were damaged by the County's disparate and discriminatory behavior.

Even if no evidence of an adverse effect (damage) was present in the record, nominal damages are presumed in a civil rights action even if no damage is shown. *Minger v. Reinhard Distrib. Co., Inc.*, 87 Wn. App. 941, 946, 943 P.2d 400, 402 (1997). At a minimum, the possibility of nominal damages should have prevented summary judgment.

3. Did the Court Err at Summary Judgment When it Struck as Hearsay Statements of County Officials Claiming to Be Speaking for the County?

At the summary judgment hearing the Court struck statements of third parties other than Nollmeyer as hearsay. Although it is not clear

what the reach of the ruling was, it appears all statements from Auditor Johnston and Commissioner Hutsell were stricken.

The sweeping nature of the Court's order without clearly identifying the specific statements and the reasoning behind the ruling is an abuse of discretion. This is especially true when the statements are not hearsay under the rules of evidence.

The statements of Johnston and Hutsell, who both expressly spoke in a representative capacity for the County, were admissions of a party opponent. ER 801(d) (2). *RP 287, ¶ 22 line 9,377,¶ 12.* The statements were not offered to prove the truth of the matter asserted. For example, Johnston's claims the County could not proceed without a bond, were not offered to prove the truth of the matter asserted. Johnston's statements were made in an official capacity and she expressly stated he spoke for the County . *RP 15-6, 32*

4. Should The Court Have Granted Plaintiffs' Motion For Reconsideration Regarding the Dismissal of the Discrimination Claim?

It is an abuse of discretion to deny a motion for reconsideration

when a trial court acts in a manifestly unreasonable manner or bases it upon untenable grounds or reasons. *Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland*, 95 Wn. App. 896, 906, 977 P.2d 639, 645 (1999). In this case the trial court denied the motion to reconsider because Plaintiffs did not have corroborating evidence of adverse treatment. A plaintiff does not need to present corroborating evidence in order to overcome a summary motion. Even self serving testimony must be treated as true. *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 866, 324 P.3d 763, 767 (2014). The trial court denied the motion to reconsider for untenable reasons.

5. Did the Court Err When It Granted Summary Judgment Dismissing the Claim for Negligent Misrepresentation?

The County persuaded the Court to dismiss the negligent misrepresentation claim because Plaintiff could not have relied on the representations of the County the public duty doctrine precluded liability.

Whether a party's reliance is justified is a question of fact left to the finder of fact to decide in light of the surrounding circumstances. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 829 (1998). The

circumstances here are trial court concluded a contract between Specialty and the County was formed. Because the County has not cross appealed that ruling constitutes the law of the case. *Sunland Investments v. Graham, 54* Wn. App. 361,364, 773 P. 2nd 874 (1989). There can be no doubt Specialty was entitled to rely on the contract between the parties.

Other evidence of reasonable reliance includes the fact the County twice stated in writing that no bond was required, that the Project was relatively small and that the County would withhold payment to the contractor until wages and expenses were paid. Other circumstances were that Specialty attended the walkthrough and no mention of a bond was made, that an addendum making material changes to the Call for Bid issued by the County after the walkthrough and a bond was not mentioned. Specialty frequently performed public work without a bond and RCW 39.08.015 allows public works to proceed when a bond is not obtained. These circumstances indicate a finder of fact could decide that Specialty's reliance on the County's statements was reasonable. Under these circumstances, a reasonable finder of fact would have to conclude that Specialty was entitled to rely on the County's statements that no bond was required.

The public duty doctrine does not apply where the government is performing proprietary functions. *Bailey v. Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987). A government acts in a proprietary capacity "when it engages in a business-like venture as contrasted with a governmental function." Black's Law Dictionary 1097 (5th ed. 1979). *Hoffer v. State*, 110 Wash. 2d 415, 422, 755 P.2d 781, 786 (1988), *on reconsideration in part*, 113 Wash. 2d 148, 776 P.2d 963 (1989).

"A public entity acts in a proprietary rather than a governmental capacity when it engages in businesslike activities that are normally performed by private enterprise." *Stiefel v. City of Kent*, 132 Wn.App. 523, 529, 132 P.3d 1111 (2006). "Governmental functions are those generally performed exclusively by governmental entities." *Id.* Hiring contractors to perform work on corporate grounds is an activity normally performed by private enterprise and it is not exclusive to governmental entities. For example, the construction and maintenance of city streets is a proprietary function. *Goggin v. City of Seattle*, 48 Wn.2d 894, 897 (1956). The general operation of a municipal water system is also a proprietary function. *Stiefel at 529.*

Even if the County was engaged in a governmental function, a

special relationship arose between the County and Specialty. A special relationship exists where: (1) there is direct contact or privity between the public official and the injured plaintiff that sets that plaintiff apart from the general public, (2) a public official gives the plaintiff express assurances, and (3) the plaintiff justifiably relies upon those express assurances. *Fabre v. Town of Ruston*, 180 Wn. App. 150, 160 (2014).

"The first element, privity, is defined broadly—it refers to the relationship between a government agency and any reasonably foreseeable plaintiff." *Woods View II, LLC v. Kitsap Cty.*, 188 Wn. App. 1, 28 (2015) *review denied*, 184 Wn.2d 1015, 360 P.3d 818 (2015). In *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wash. 2d 107, 159, 744 P.2d 1032, 1065 (1987), amended, 109 Wash. 2d 107, 750 P.2d 254 (1988), a public entity issued statements and reports for the purpose of raising money for public use. The court ruled that the reports and statements were not issued pursuant to a general public duty and, therefore, the public duty doctrine did not apply.

The County also admits it sent the request for bids directly to Specialty (*See* Def. SJ Memo at 10.), when the walkthrough occurred and when Jacobsen spoke directly to County officials and agents for about two

hours. The call for bid was not issued to the general public, it was issued to contractors and businesses that engaged in paving work.

There were also express assurances made in both the call for bids and the subsequent addendum that was sent to Specialty. During the walkthrough further assurances of the nature of the project were given.

The misrepresentations made in this case were not made to satisfy a general duty to the public and it was directed to Specialty and a limited class of people to induce them to provide services to the County. Even if the public duty doctrine applies here, a special duty arose to perform an act to benefit a particular person or class such as the contractors that acted on the misrepresentation. *Chambers–Castanes v. King County*, 100 Wn.2d 275, 285, 669 P.2d 451 (1983).

6. Did the Court Abuse Its Discretion When It Denied Plaintiffs' Motion To Amend Because the Amendment Was Futile?

The court below denied Specialty and Jacobsen the opportunity to recover money damages and denied a motion to amend the Complaint to seek damages because it concluded money damages are not available in a public works case unless Plaintiff completes the work and sues for

damages. *RP 593.*

When a public entity prevents a low bidder with an award from performing the contract, relief is not limited to an injunctive remedy. The combination of the county's misrepresentation, its refusal to allow Specialty to do the work and its demand for additional consideration from Specialty after the award was made constituted unlawful interference with performance of the award. The County is liable to pay money damages for its misconduct and interference with Specialty's performance.

Washington law permits a contractor to recover money damages when a public entity wrongfully interferes with the performance of a public works contract. In *Scoccolo Construction, Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wn.2d 506 (2006), the Supreme Court of Washington affirmed a trial court's award of damages and prejudgment interest to a contractor on a public works project where the city and its agents interfered with and delayed the contractor's performance. The County interfered with performance by refusing to allow the work to be done on the specified terms. Specialty made a written demand that it be allowed to perform, and the County withdrew the bidding process and refused to allow performance to go forward. *RP 35, ¶7, 236.*

The decision in *Lester N. Johnson Co., Inc. v. City of Spokane*, 22 Wn. App. 265, 271 (1978), also stands for the proposition that a contractor can collect damages for delay caused by a municipality in a public works project.

The Defendant cites *Peerless Food Products, Inc. v. State*, 119 Wn.2d 584 (1992), to support the contention injunctive relief is the only remedy. The decision in *Peerless* only applies when the low bidder is not awarded a contract. The case does not apply to situations where the low bidder, like Specialty, received the award and the public entity refuses to allow it to perform. The *Peerless* court clearly described the circumstances where the rule applies: "By restricting the remedy **available to disappointed low bidders** to the parameters outlined in *Mottner* and *Bellingham Am.*, **we allow relief to bidders** that does not compete with the public interest and is consistent with a mutual public interest in public contracts being performed by the lowest bidder." *Peerless* at 596-97 (emphasis added).

The other cases cited by the County all involved disappointed bidders who did not receive an award. In *Mottner v. Town of Mercer Island*, 75 Wn.2d 575, 577 (1969), *Peerless Food Products, Inc. v. State*,

119 Wn.2d at 596, *BBG Grp., LLC v. City of Monroe*, 96 Wn. App. 517, 518, (1999), and *Gostovich v. City of W. Richland*, 75 Wn.2d 583, 585 (1969), each of the plaintiffs did not receive an award and no contractual duties arose. All of the cases involved some kind of procedural irregularity in the process of making the award and none of cases involved a successful low bidder with an award. Specialty Asphalt legitimately received an award and it immediately began to perform the contract by refusing other jobs and by mobilizing resources. *RP 282-3, ¶ 15.*

Skyline Contractors, Inc. v. Spokane Housing Authority, 172 Wn. App. 193, 195 (2012) is an exception, but it is distingishable. After an award was made the Spokane Housing Authority withdrew its acceptance of the Skyline bid and determined that it was not a responsive bidder because it lacked the qualifications specified in the request for bids. Despite Skyline's post award efforts to meet the requirements, the Housing Authority claimed Skyline was not the lowest responsive bidder. Skyline initially sought and obtained injunctive relief preventing the work from being done by another contractor, but it did not post the bond required for the injunction. Hence the only reason an injunction was not an adequate remedy for Skyline was that it failed to follow through and get

the injunction that was granted. In the present case, the County's refusal to allow Specialty to do the job pushed the work into the next paving season making an injunction an inadequate remedy.

The *Skyline* case is also distinguishable because the policy the court used to justify its ruling does not apply to these facts. The *Skyline* court applied the policy adopted in the *Peerless* case as the basis of its ruling:

> "This policy seeks not to make the public suffer *twice:* first, for the award of an excessive contract to one not the lowest bidder; and second, for the additional payment of lost profits to an unsuccessful bidder who is not performing the contract.... [P]rotecting the public treasury has priority over compensation for bidders wrongfully rejected." *Skyline Contractors, Inc. v. Spokane Hous. Auth.*, 172 Wn. App. 193, 204-05, 289 P.3d 690, 696 (2012).

The County in this case is not paying for an excessive award to someone who is not the low bidder while at the same time paying Specialty lost profits. No other contractor has an award and the County has not paid any other contractor to do the work. The only reason the work was not promptly done by the Specialty, the responsive low bidder, is that the County refused to let Specialty do the work on time.

Skyline is also distinguishable because there is no doubt Specialty

here was the lowest responsive bidder. Specialty's bid was completely congruent with the request for bids and it was qualified to do the job.

Finally, the combination of the County's misrepresentation waiving a bond, its refusal to allow the Specialty to do the work and its demand for additional consideration from Specialty after the award was made constituted unlawful interference with performance of the award. The County is liable to pay money damages for its misconduct and interference with Specialty's performance.

Specialty, like the contractors in *Scoccolo and Johnson Co.,* had begun to perform the contract at the time the County interfered and delayed performance of the project. That interference caused a delay that has left Specialty without an adequate injunctive remedy because costs have increased and a modification of the contract is illegal.

There is no doubt that once the County made the award to Specialty without requesting a bond, the only way for Specialty to perform the contract and still be made whole, would be to renegotiate the contract price. However, such a negotiation is illegal. RCW 39.04.015 governs modifications to the bid price in public contracts. It states:

> Notwithstanding the provisions of RCW 39.04.010, a state contracting authority is authorized to negotiate an adjustment to a bid price, based upon agreed changes to the contract plans and specifications, with a low responsive bidder under the following conditions:
>
> (1) All bids for a state public works project involving buildings and any associated building utilities and appendants exceed the available funds, as certified by the appropriate fiscal officer;
>
> (2) The apparent low responsive bid does not exceed the available funds by: (a) Five percent on projects valued under one million dollars; (b) the greater of fifty thousand dollars or two and one-half percent for projects valued between one million dollars and five million dollars; or (c) the greater of one hundred twenty-five thousand dollars or one percent for projects valued over five million dollars; and
>
> (3) The negotiated adjustment will bring the bid price within the amount of available funds.

None of the circumstances listed in the statute apply in this case. 33

Washington Practice, Construction Law Manual § 8:14 (2015-2016 ed.)

makes it clear further negotiation is not allowed:

> Ordinarily, the bid price must remain the same; **no further negotiation is allowed by either the government agency or the service provider**. If the bids are not satisfactory, the remedy is to call for new bids. One statutory exception exists. The government agency may negotiate with the lowest responsible bidder if all of the bids exceed the available funds, the apparent low bidder does not exceed the available funds by a certain percentage, and the negotiated adjusted price falls within the amount of

available funds for the project. (Emphasis added.)

"[T]he law does not permit the city purchasing agent to negotiate privately with a selected bidder or bidders for the purpose of obtaining a change in bids." *Platt Electric Supply, Inc. v. City of Seattle, Div. of Purchasing,* 16 Wn. App. 265, 269 (1976). Post bidding negotiation of contract terms for a project requiring competitive bidding circumvents this policy and opens "'the doors to possible fraud, collusion, and favoritism'" and any contract that results from such conduct is void. *Hanson Excavating Co., Inc. v. Cowlitz County*, 28 Wn. App. 123,125-27 (1981) (quoting *Platt Electric Supply, Inc. v. City of Seattle,* 16 Wn. App. at 274). Furthermore, the court cannot order specific performance of a modified contract in this case because both parties agree the contract needs to be modified. Specific performance of a modified contract is not available here because a court cannot require performance of any contract other than the one which the parties themselves have made. *Lager v. Berggren*, 187 Wash. 462, 466 67, 60 P.2d 99, 101 (1936).

There is one last reason the amendment must be permitted. Having waived sovereign immunity, the government is not free to impose arbitrary limitations on a citizen's right to recover damages. Once sovereign

immunity has been waived, even partially, any legislative classifications made with reference thereto will be constitutional only if they conform to the equal protection guarantees of the state and federal constitutions. *Jenkins v. State*, 85 Wn.2d 883, 890, 540 P.2d 1363, 1368 (1975). Here, there is no reason to deny Specialty the right to recover money damages when it is the victim of misconduct at the hands of the County. There is no rational basis to treat Specialty any differently than the contractors in *Scoccolo and Johnson Co.*

The County did not claim it was prejudiced by Specialty's proposed amendment. Instead it merely claimed the amendment was futile and the court agreed. *RP 526.* The court abused its discretion when it erroneously concluded Specialty was limited to injunctive relief. A decision based on an erroneous view of the law necessarily constitutes an abuse of discretion. *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 19, 177 P.3d 1122, 1124 (2008). Moreover, even a motion to amend raising new claims is usually allowed, even if made shortly before trial, if the new claims "required essentially the same proof" as the previously alleged claims. *Kozol v. Washington State Dep't of Corr.*, 188 Wn. App. 1012 (2015), rev'd, 379 P.3d 72 (Wash. 2016), as corrected (Aug. 1, 2016).

This amendment did not inject any new facts into the case or prejudice the County.

7. Was the County Entitled to a Summary Judgment Order Granting an Injunction Ordering Specialty to Perform the Contract or Have its Case Dismissed When the Trial Court Ruled the County's Delay Increased the Cost of Performance and There Was No Reliable Mechanism for Specialty to Recover Added Costs?

The County did not file a counterclaim and its Answer did not mention a request for injunctive relief. The County was not entitled to demand affirmative injunctive relief. In *Acme Fin. Co. v. Monohon,* 188 Wash. 392, 394, 62 P.2d 1089, 1089-90 (1936), the Washington Supreme Court ruled that a defendant was not entitled to any affirmative relief because it failed to file a counterclaim. *Acme* also held that a prayer for relief cannot be relied upon to enlarge the scope of the Answer to support affirmative relief.

In *MacLean v. City of Bellingham,* 41 Wn. App. 700, 703 04, 705 P.2d 1232, 1234 (1985) *cert. granted, judgment vacated sub nom. MacLean v. City of Bellingham, Washington,* 475 U.S. 1105, 106 S. Ct.

1509, 89 L. Ed. 2d 909 (1986), the Washington Court of Appeals decided that a it was improper to grant an injunction when the complaint did not request injunctive relief. It ruled:

> MacLean's complaint did not contain a demand for judgment for injunctive relief. Furthermore, a complaint, even under our liberal rules of pleading, is required to contain direct allegations sufficient to give notice to the court and the opponent of the nature of the plaintiff's claim. *Berge v. Gorton,* 88 Wash.2d 756, 567 P.2d 187 (1977); *Warren v. Glascam Bldrs. Inc.,* 40 Wash.App. 229, 698 P.2d 565 (1985). We find the pleadings insufficient to give the City and the trial court notice of the type of injunctive relief requested. *MacLean v. City of Bellingham,* 41 Wn. App. 700, 703 04, 705 P.2d 1232, 1234 (1985) *cert. granted, judgment vacated sub nom. MacLean v. City of Bellingham, Washington,* 475 U.S. 1105, 106 S. Ct. 1509, 89 L. Ed. 2d 909 (1986).

The County was the sole wrongdoer and it did not seek affirmative relief so it was not entitled to injunctive relief. The order compelling performance was particularly inappropriate because it effectively dismissed Plaintiffs' case if performance did not occur.

The Defendant is also not entitled to demand performance from Plaintiff because it breached the contract between the parties. One party's material breach will discharge the duty of the other party to perform the

agreement. *Skyline* at 203. The order also imposed obligations on the Plaintiff alone.

The order was granted with material questions of fact in dispute. While the trial court ruled Specialty was entitled to additional costs, there was a dispute about how much those would be. Specialty was in an impossible position because it had to decide whether or not to perform the work with no way to recover added costs other than to bring a new suit and even then there would be no assurance about how much Specialty would be paid for the added work.

RCW 39.04.015 prohibited an adjustment in bid price under these circumstances, so ordering Specialty to do the work without some judicial remedy left the company at risk for the County to retaliate by raising objections about the work or by simply refusing to adjust the contract price. There were questions of fact and law unresolved about whether or not Specialty could and would recover its additional costs. Specialty was left with nothing but the right to file a new case seeking damages for added costs with no assurance the it would recover those costs after the work was done and the costs were incurred.

V.

SPECIALTY IS ENTITLED

TO ATTORNEY'S FEES ON APPEAL.

RAP 18.1(a) provides for attorney's fees on appeal if timely request is made. Attorney's fees should be ordered in favor of the appellant.

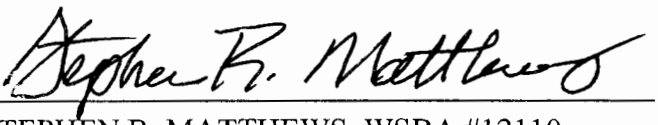
VI.

CONCLUSION

The court below committed reversible error and the judgment must be reversed and the case remanded for trial.

DATED: December 5, 2016.

Respectfully submitted by:



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CERTIFICATE OF SERVICE

I, LORIE MATTHEWS, hereby certify that on December 5, 2016, I caused to be served a true and correct copy of the preceding document by hand delivery to the following:

Michael E. McFarland Jr.
Evans Craven & Lackie PS
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Spokane WA 99201

LORIE MATTHEWS