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NO. 73647-7-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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INTEGRATED FACILITIES MANAGEMENT, LLC, a Washington  
limited liability corporation, d/b/a SUN LIGHTING f/k/a PARTNER  
MERCHANT SERVICES INC.,

Appellant,

v.

CITY OF MERCER ISLAND, a Washington municipal corporation,  
Respondent.

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**BRIEF OF RESPONDENT CITY OF MERCER ISLAND**

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## I. INTRODUCTION

The central issue before this Court is whether or not the doctrines of laches and estoppel bar Appellant Integrated Facilities Management, dba Sun Lighting's ("Sun Lighting") contractual claims against Respondent City of Mercer Island ("City"). Both doctrines are applied to prevent injustices and both were applied properly by the lower court here.

Sun Lighting installed holiday lighting for the City between the years 2005 and 2009 and was paid for all of its work. In the fall of 2010, the City clearly and unequivocally put Sun Lighting on notice that it was under no obligation to contract with Sun Lighting for the 2010 holiday season. The City invited Sun Lighting and other vendors to submit bids for the holiday lighting project. Sun Lighting's principal, Robert Folgedalen, participated in this process. Soon thereafter, the City awarded the contract to the lowest bidder, Hollywood Lights. Neither Sun Lighting nor Folgedalen protested the City's award of the contract to Hollywood Lights. Hollywood Lighting completed the work and was paid.

For nearly four years nothing happened. Three more holiday seasons came and went. Sun Lighting made no demands of the City for breached contractual obligations, detrimental reliance or other claims in equity. Suddenly, out of the blue, on May 12, 2014, Sun Lighting filed a Claim for Damages with the City seeking over \$40,000 for non-payment of services.

A few months later, Sun Lighting filed suit, alleging the City breached its contract with Sun Lighting and failed to pay for services rendered. Sun Lighting also asked for equitable relief.

The City filed for summary judgment and presented extensive evidence that Sun Lighting was paid for all of the work it completed for the City. At oral argument, Sun Lighting's counsel conceded the gravamen of its claim had no merit. The City also argued that any claims based upon a written contract were barred for multiple reasons, including laches and estoppel. Laches bars Sun Lighting's claims because although it had knowledge of an alleged cause of action against the City in the fall of 2010, it did nothing. Instead, Sun Lighting delayed filing suit without any excuse or justification, for nearly four years. This lengthy delay was manifestly unreasonable and damaged the City. Estoppel also applies because relying upon Sun Lighting's actions and lack thereof, the City changed its position; specifically, the City entered into another contract with a different vendor for the 2010 holiday lighting contract and paid for this work. Four years later, Sun Lighting claims the City should pay it not only for work that it never completed, but for work that the City paid Hollywood Lights to complete.

Accordingly, the City respectfully asks this Court to affirm the superior court's February 13, 2015 Order dismissing Sun Lighting's contractual claims as barred by laches and estoppel.

## 2. ASSIGNMENTS OF ERROR

- 2.1 The Lower Court Properly Dismissed the Written Contractual Claims Based Upon Laches.
- 2.2 The Lower Court Properly Determined that Estoppel Barred Sun Lighting's Contractual Claims.
- 2.3 The Prior Contract Is Irrelevant to the Estoppel and Laches Analysis.
- 2.4 There Are No Disputed Issues of Material Fact.

## 3. STATEMENT OF THE CASE

Sun Lighting has made multiple claims against the City. All of the claims relate to holiday lighting display work at the City. Each year, the City contracts with a vendor to install holiday lighting displays. The City's Parks and Recreation Department manages this contract. CP 52, ¶5. The scope of work generally includes providing all lights, electrical cords and other installation hardware, and installing, maintaining and removing all lights in specified areas throughout the City. Id.

In approximately the fall of 2005, the City started contracting for holiday lighting with various companies identifying Robert Folgedalen as the principal. CP 83, ¶19; see e.g., CP 153, 177. According to the City's knowledge, Folgedalen's companies included: Electric Elves, Mr. Electric Seattle, and Sun Lighting. CP 82-83, ¶¶18-20. Sun Lighting installed holiday lighting for the City during the holiday seasons of 2005 through

2009. CP 150, ¶¶4-6; CP 152-99. Throughout that time period, the City paid Sun Lighting over \$119,000.00 for its services.<sup>1</sup> CP 83, ¶¶19-20; CP 136-144.

### 3.1 The 2010 Holiday Lighting Project.

In September 2010, City employee Keith Kerner left his position with the City and Jason Kintner took his place. CP 52, ¶4. During the transition, Kerner and Kintner discussed the annual holiday lighting project and contract. CP 52, ¶7. Based upon the City's sustainability efforts, Kintner updated the scope of work to require the new technology of light-emitting diode, commonly referred to as "LED" lighting, which is more energy efficient and economical than the incandescent lights previously used. *Id.* Kintner searched City records for an existing contract on the City's standard contracting form, but he could not locate one. CP 52-53, ¶¶11-14. As part of his search, Kintner asked Folgedalen if he could produce a copy of a signed contract on the City's standard form valid for the 2010 holiday season. CP 53, ¶12. Folgedalen did not produce one. *Id.* Instead, Folgedalen faxed Kintner several "Holiday Décor Agreement[s]" and "Holiday Décor Change Order[s]" with a "Sun Lighting Seattle" logo,

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<sup>1</sup> The City paid Sun Lighting and average of approximately \$24,000.00 per year.

dated October 2, 2009.<sup>2</sup> CP 53, ¶13; CP 38-43. The City determined these documents did not represent a valid contract for multiple reasons, including that the business entity listed on them no longer existed.<sup>3</sup> CP 53, ¶¶13-15.

In the late afternoon of Friday, October 29, 2010, Kintner informed Folgedalen via e-mail that the City was under no contractual obligation with Sun Lighting, and thus, it was soliciting bids from vendors for the holiday lighting project. CP 53, ¶¶15-16. City records indicate at the time of this e-mail, no right-of-way permit had been obtained or applied for by Sun Lighting to install holiday lights. CP 244, ¶5; CP 247. A right-of-way permit is required to install holiday lighting on City right-of-way. CP 244, ¶4. Sun Lighting obtained right-of-way permits for previous years' installations. CP 244, ¶7.

On November 1, 2010, Folgedalen replied to Kintner simply: "So the City believes we are currently not under contract? Please elaborate." CP 68-69. Kintner again informed Folgedalen on November 2, 2010, that no valid contract existed and that "[g]iven the economic climate, it is in the City's best interest to solicit bids." CP 68. Kintner again invited Folgedalen to submit a bid. Id. On November 4, 2010, Kintner e-mailed Folgedalen and

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<sup>2</sup> Notably, these agreements reference several different company names. Erik Folgedalen's e-mail address is at Mr. Electric Seattle. The sales address is listed at "Electric Elves" and the top left corner has the logo of "Sun Lighting Seattle."

<sup>3</sup> Additionally, the dollar amounts on these agreements do not match the amounts actually invoiced to the City. CP 68; CP 83, ¶20; CP 136-144.

gave him the City Attorney Office's phone number and suggested he contact that office directly with any further questions. CP 71. It is unknown if Folgedalen did so. All of the e-mail correspondence between Kintner and Folgedalen took place on Folgedalen's NW Christmas Lighting e-mail account. CP 68-73. Nowhere in these e-mail exchanges did Folgedalen claim Sun Lighting had given up other holiday work or claim it was ready to install the lighting on Saturday, October 30, 2010.

Folgedalen and two other vendors submitted timely bids for the 2010 holiday lighting project. CP 54, ¶¶21-22; CP 68, 73. Folgedalen, under the name NW Christmas Lighting, submitted the highest bid at \$27,484.50. CP 75. Hollywood Lights submitted the lowest bid at \$22,243.83 (including tax). Id. The City awarded the contract to the lowest bidder, Hollywood Lights, whose bid included more light strings, LED lights and was over five thousand dollars below that of Folgedalen's bid. CP 75. Sun Lighting did not protest this bid award or the ensuing contract. CP 54, ¶25.

On November 9, 2010, Kintner informed the vendors via e-mail that "[a]fter discussion and evaluation of each quote, the City has awarded the 2010 Holiday Décor to Hollywood Lights." CP 77. Folgedalen responded to Kintner on November 10, 2010, asking only what Hollywood Light's final option selections and price were. CP 79. Kintner replied that "Hollywood Lights came in with 100% LED lights and increasing the string count for a

price of \$20,314.” Id. After that e-mail, Kintner had no further contact with Folgedalen. CP 54, ¶25. At no time did Folgedalen protest the selection of Hollywood Lights. Id. With no protest from any vendor, the City entered into a contract with Hollywood Lights. Id. Hollywood Lights completed the work and was paid on December 22, 2010 and March 2, 2011. CP 84, ¶28; CP 146-149.

Fast forward nearly four years to May 2014, when Sun Lighting resurfaced and inexplicably claimed the City owed it over forty thousand dollars. CP 36-44.

### 3.2 Procedural History of the Case.

On May 12, 2014, Sun Lighting submitted a Claim for Damages to the City for \$40,740.04. Id. The description of the claim reads simply: “None (sic) payment for services. See attached.” CP 36. Robert and Eric (sic) Folgedalen are listed as witnesses. Id. Attached to the Claim for Damages form are four documents, all dated October 2, 2009:

1. Holiday Décor Agreement for 2009 Mercer Island, totaling \$25,305.92;
2. Holiday Décor Service Agreement “2009 MI Pergola,” totaling \$3,476.27;
3. Holiday Décor Change Order “2009 MI Sequoia Tree,” totaling \$9,597.45; and
4. Holiday Décor Change Order “2009 – MI Luther Burbank Trellis,” totaling \$2,360.40.

CP 38-44. The combined total of the four documents is \$40,740.04. CP 33, ¶5. These documents contain contractual language and are signed by then-City employee, Keith Kerner. CP 40-44.

On July 31, 2014, Sun Lighting filed a complaint in King County Superior Court against the City for “Breach of Contract and For Damages.” CP 30-31. Sun Lighting specifically alleged that the City failed to provide valid written cancellation of a “renewing contract” dated October 2, 2009, and that the City failed to “pay for services rendered in the last holiday season.” CP 31. Sun Lighting also asked for other relief “as the Court deems just and equitable.” *Id.* Based on the dollar amount at issue, the case was assigned to mandatory arbitration. CP 8.

The City filed for summary judgment, and the lower court heard oral argument on February 13, 2015. CP 230-32. The City argued that: (1) there was no evidence supporting a claim for services rendered; (2) there was no valid contract in existence; and (3) the contractual claims are barred by the equitable doctrines of laches and estoppel. CP 6-206. In response, Sun Lighting alleged for the first time that it gave up approximately \$45,000 in other work to complete work for the City in 2010 (despite only being paid an average of \$24,000 per year in previous years). CP 211. At the hearing, Sun Lighting conceded its claim for non-payment of services rendered for the prior holiday season was without merit. CP 231; RP 20:3-5.

In its Order on Motion for Summary Judgment (“Order”), dated February 13, 2015, the lower court determined Sun Lighting’s complaint: (1) asserted a breach of “contractual claims”; (2) sought payment for “services rendered”; and (3) prayed for additional “just and equitable relief” or “claims sounding in equity.” CP 231. Judge Downing then ruled that “the doctrines of estoppel and laches preclude the contractual claims,” and he granted the City’s motion “to dismiss the plaintiff’s claims for any breach of a written contract.” Id.

Sun Lighting’s claim in equity for potential detrimental reliance damages was allowed to proceed to arbitration. Id. The City filed a second motion for summary judgment seeking dismissal of all remaining claims on the bases they were barred by the statute of limitations and that Sun Lighting had not complied with the claim filing statute, chapter 4.96 RCW. CP 233-312. On June 5, 2015, the Court issued its Order on Second Motion for Summary Judgment (“Second Order”), granting the City’s motion and dismissing all remaining claims as time-barred. CP 338-39.

The February 13, 2015 Order is the only order appealed by Sun Lighting and the only order addressed in Sun Lighting's briefing.<sup>4</sup> Consequently, the Second Order is not before this Court.

#### 4. ARGUMENT

##### 4.1 Standard of Review on Appeal.

The review of a grant of summary judgment is de novo, and the reviewing court engages in the same inquiry as the trial court. Wash. Imaging Servs., LLC v. Dep't of Revenue, 171 Wn.2d 548, 555, 252 P.3d 885 (2011).

##### 4.2 Summary Judgment Standard.

The court grants summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The purpose of a summary judgment motion is to "examine the sufficiency of the evidence behind the plaintiff's formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists." Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225,

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<sup>4</sup> The Notice of Appeal designated in the Clerk's Papers has no order or judgment attached to it. CP 340. In response to this Court's July 16, 2015 letter, Sun Lighting filed the February 13, 2015 Order on approximately August 6, 2015. The City received the order and proof of service on August 11, 2015. The lower court also entered a Second Order, dated June 5, 2015, yet this order was neither appealed nor briefed. RAP 5.3(a) requires the party filing the notice of appeal to attach a copy "of the signed order or judgment from which the appeal is made." RAP 10.3(a)(3); Dickson v. U.S. Fidelity & Guaranty Co., 77 Wn.2d 785, 787-88, 466 P.2d 515 (1970) (an issue cannot be raised for the first time in a reply brief; each error must be set forth within the opening brief).

770 P.2d 182 (1989) (quoting Zobrist v. Culp, 18 Wn. App. 622, 637, 570 P.2d 147 (1977)).

Summary judgment is appropriate when the pleadings and affidavits and other documents on file demonstrate the absence of any genuine issue of material fact. CR 56(c); Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). A fact is material if it controls the outcome of the litigation. Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). “A disputed fact must be material to issues dispositive of the particular relief sought by the parties.” Fleury v. Bowden, 11 Wn. App. 617, 524 P.2d 449 (1974).

Although all facts and reasonable inferences must be considered in the light most favorable to the nonmoving party, the nonmoving party may not simply “rely on speculation, argumentative assertions that unresolved factual matters remain, or in having its affidavits considered at their face value.” Zobrist, 18 Wn. App. at 637. Instead, the nonmoving party “must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.” Id.

#### 4.3 The Lower Court Properly Dismissed the Written Contractual Claims Based Upon Laches.

##### 4.3.1 The Application of the Doctrine of Laches.

The doctrine of laches bars an action when a party takes no steps to

enforce its rights causing the condition of the other party to change. Brost v. L.A.N.D., Inc., 37 Wn. App. 372, 375-76, 680 P.2d 453 (1984). Laches is “an implied waiver arising from knowledge of a given state of affairs and acquiescence in it.” Buell v. Bremerton, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972). The elements of laches are: (1) knowledge or reasonable opportunity to discover a cause of action against the defendant; (2) an unreasonable delay in commencing that cause of action; and (3) damage to the defendant resulting from the unreasonable delay. Lopp v. Peninsula Sch. Dist., 90 Wn.2d 754, 759, 585 P.2d 801 (1978). Although the doctrine of laches is an extraordinary remedy, it can be applied to bar an action in certain circumstances even short of the applicable statute of limitations. Rutter v. Rutter, 59 Wn.2d 781, 785, 370 P.2d 862 (1962). Additionally, “where laches bars an action, logic and judicial economy dictate that the court avoid the substantive issues altogether.” Carlson v. Galbralter Sav. of Wash., 50 Wn. App. 424, 429, 749 P.2d 697 (1988).

#### 4.3.2 Sun Lighting Had Knowledge of a Potential Cause of Action.

A party has knowledge or a reasonable opportunity to discover a cause of action if it knew of the facts underlying the claim and alleged improprieties. Carlson, 50 Wn. App. 424. For example, in Carlson, the Carlsons loaned money to Mad Dog Builders, and the loan was secured by

a deed of trust on Mad Dog's property. Id. at 425. An additional creditor initiated a trustee's sale, which, after several delays, took place on June 24, 1983. Id. at 426. The Carlsons delayed filing suit to invalidate the foreclosure sale until August 13, 1986. Id. The court determined the record established the plaintiffs knew in 1983 (three years before filing suit) that they might have a cause of action. Id. at 429. The court found the three year delay to be unreasonable as a matter of law. Id. at 431.

Similarly, in Lopp v. Peninsula Sch. Dist., the plaintiff brought suit to enjoin and prohibit the sale of general obligation bonds in a school district based upon the ballot title one month after a special election was held. 90 Wn.2d at 761. In ruling the suit was barred by laches, the court determined Lopp had a reasonable opportunity to discover he had a cause of action because he knew about the resolution calling for a special election, was alerted to a change in ballot title, read about the substance of a special meeting and voted in the election where the ballot title was clearly indicated. Id. at 760-61.

In the same way, Sun Lighting had knowledge of a potential cause of action against the City, however meritless, immediately upon being informed it needed to enter into a new contract for the 2010 holiday season or later when informed the contract was awarded to another vendor. Notwithstanding, Sun Lighting did not protest or litigate within a

reasonable time after acquiring such knowledge, as explained in the next section. Indeed, Sun Lighting presented evidence that its attorney Richard Forsell called the City twice regarding the holiday lighting contract, which establishes Sun Lighting's knowledge of the events that may have given rise to a potential (albeit meritless) claim. CP 212-13. This element of laches is met.

#### 4.3.3 Sun Lighting's Delay Was Unreasonable.

A delay is unreasonable if the plaintiff did nothing to notify defendants of a possible lawsuit and there is no excuse for the delay. Lopp, 90 Wn.2d at 761. The length of delay on its own is not determinative. In Carlson, the court found a three year delay in challenging a foreclosure suit unreasonable. Carlson, 50 Wn. App. at 430-31. In contrast, the court deemed a delay of mere months in Lopp as unreasonable. Lopp, 90 Wn.2d at 760-61. In particular, Lopp's lawsuit, filed a month after a special election, constituted an unreasonable delay because he never tried to notify defendants of a possible lawsuit and "has not given . . . any other explanation for his delay." Id. at 761. Similarly, in Carlson, the court determined the delay to be unreasonable "as a matter of law" because the plaintiffs presented no facts to justify the delay. Carlson, 50 Wn. App. at 432.

Here, Sun Lighting's nearly four year delay was also unreasonable. Analogous to the facts in Lopp, there is nothing in the record that establishes Sun Lighting specifically notified the City of a potential lawsuit and Sun Lighting has not offered any reason to justify its delay. Judge Downing asked Sun Lighting's counsel<sup>5</sup> why it delayed filing suit for so long:

THE COURT: But why would a case like this sit from November of 2010, when supposedly the rug is yanked out from underneath the lighting company, and then nothing happens until the summer of 2014?

MR. WALKER: Right. That's just when they did it . . . That's just when – you know, when they got around to doing it. . . I mean, would have been nice for them maybe to do it. . .

THE COURT: But most people, if they think they're getting cheated out of 25 to 40 grand, will howl and protest and – insist on getting the matter resolved rather than waiting one, two, three years . . . you know, four years.

MR. WALKER: That's probably– I'm not going to say that's not true. . . . Of course that's true. But, you know, they got their attorneys-fees situation figured out, and then they acted.

RP 16:15-17:24. Counsel's passing comment about an attorney-fees situation is irrelevant and is devoid of support in the record. No declaration submitted by Sun Lighting mentions anything about a so-

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<sup>5</sup> No one from Sun Lighting attended either summary judgment hearing.

called “attorney-fees situation.” Counsel’s statement, “[t]hat’s just when they did it,” is telling. Because Sun Lighting has presented no facts to justify the delay, the delay is manifestly unreasonable.

#### 4.3.4 The City Was Prejudiced by This Unreasonable Delay.

Most important to the analysis and application of the doctrine of laches is the harm and prejudice to the other party. Cotton v. City of Elma, 100 Wn. App. 685, 694, 998 P.2d 339 (2000). Harm or prejudice to a defendant can arise from acquiescence in an act or a change of conditions. Carrillo v. City of Ocean Shores, 122 Wn. App. 592, 609, 94 P.3d 961 (2004). Prejudice occurs when a defendant has altered its position and it is inequitable to enforce the claim. Lopp, 50 Wn. App. 754; Rutter v. Rutter, 59 Wn.2d 781, 785, 370 P.2d 862 (1962). In Lopp, the court determined the school district would suffer harm if Lopp’s suit forced the district to start the entire bond offering procedure again. Id. at 761. In Carlson, application of the plaintiff’s theory would have impeded the defendant’s claim to title of the property at issue. Carlson, 50 Wn. App. at 701.

In the same way, the City was damaged because of Sun Lighting’s unreasonable delay. The record demonstrates that the City altered its position. The City sought bids, obtained a more favorable price than

offered in Folgedalen's bid, and then paid for new holiday lighting to be installed. CP 84, ¶28, CP 146-49. The City has established it was prejudiced by Sun Lighting's unreasonable delay in bringing suit.

4.3.5 The Case Sun Lighting Relies Upon, *Brost v. L.A.N.D.*, Is Inapposite.

Sun Lighting bases its entire argument against the application of laches on one case: *Brost v. L.A.N.D., Inc.*, 37 Wn. App. 372, 680 P.2d 453 (1984). Appellant's Brief at 10-12. The argument consists mainly of block quotes and conclusory statements, which is legally inadequate and should not be considered by this Court. See *Amalgamated Transit v. State*, 142 Wn.2d 183, 203, 11 P.3d 762, (2000) (an argument is inadequate and therefore not considered by the court when the entirety of the argument presented is a cite to one case and conclusory statements).

Notwithstanding, the *Brost* case is easily distinguishable from the instant case. *Brost* involved a foreclosure suit where another party, the Hales, failed to include the Brosts as defendants, despite the fact that the Brosts were contract vendees of one of the lots in the property foreclosed. *Brost*, 37 Wn. App. at 373. The public notice of the foreclosure sale failed to comply with state law. *Id.* Initially, the Brosts made no effort to enforce the contract, and the trial court ruled the suit was barred by the doctrine of laches. *Id.* at 374. In overturning this decision, the appellate

court assessed the inherent equities of the case and determined applying the doctrine would not prevent injustice and hardship, but instead would create an injustice. Id. at 376. Important to the court's analysis was that the legally deficient public notice of the foreclosure sale meant the Brosts never received the "constitutionally required notice or any opportunity to protect their interests." Id.

Sun Lighting's situation is not comparable to the facts of Brost. First, no constitutionally protected interest is at issue here. At issue in the trial court's February 13, 2015 Order is "work that [Sun Lighting] felt it had contracted to do but was denied the opportunity to perform in the 2010-11 holiday season." CP 231. Second, applying the doctrine here does not create an injustice, but rather prevents an injustice. Sun Lighting simply (and incorrectly) concludes with no analysis that "[t]here was no prejudice to the City." Appellant's Brief at 12. This is contrary to undisputed evidence<sup>6</sup> submitted by the City establishing that allowing the suit to proceed would prejudice the City and its taxpayers. Not only was Folgedalen's bid approximately 25% higher than Hollywood Lights' bid, but also Hollywood Lights offered all LED lights and increased the string count. CP 75. Hollywood Lights completed the work and was paid. CP

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<sup>6</sup> Although Sun Lighting argues there are two "disputed findings of fact," this is not disputed. *See* Appellant's Brief at 4.

84, ¶28; CP 146-49. The contractual claims asserted by Sun Lighting nearly four years later ask the court to force the City to pay twice for the 2010 holiday lighting project. This would prejudice the City.

Third, Sun Lighting argues that under Brost, “absent highly unusual circumstances, it is not appropriate to apply laches.” Appellant’s Brief at 12. Sun Lighting contends there are no highly unusual circumstances in this case because “[n]othing changed from Respondent’s position over those less than four years between when Respondent breached the contract to when Appellant filed the lawsuit.” Id. This argument is difficult to understand, especially from the City’s perspective, and it is not supported by the record. It was unusual, from the City’s perspective, to face an unreasonably delayed lawsuit after four years’ worth of holiday lighting work had been undertaken and paid in full.

Finally, Sun Lighting ignores an important part of the court’s analysis in Brost, whereby the court reasoned: “the defense of laches is improperly invoked when both parties are equally at fault in creating the delay.” Id. at 377 (citing McKnight v. Basilides, 19 Wn.2d 391, 143 P.2d 307 (1943)). Although the Brosts failed to enforce their contract promptly, the court found it significant that the Hales also languished on their rights. As a result, the court concluded the Hales’ “own dilatory conduct precludes them from relying on the defense of laches.” Id. There

are no equivalent facts here. Sun Lighting identifies nothing in the record that demonstrates the City was equally at fault in creating the lengthy delay. Rather, the record establishes the opposite. The City clearly explained its position on the 2010 holiday lighting contract to Sun Lighting on multiple occasions and invited Folgedalen to submit a bid for the work. The City also informed Folgedalen immediately that another vendor was awarded the contract.

The record establishes all elements of laches and as a result, the lower court correctly applied the doctrine to dismiss Sun Lighting's written contractual claims. Because laches bars Sun Lighting's contractual claims, the court can avoid substantive contractual issues altogether and the February 13, 2015 Order should be affirmed.

#### 4.4 The Lower Court Properly Determined that Estoppel Barred Sun Lighting's Contractual Claims.

##### 4.4.1 The City Can Establish All Elements of Estoppel.

The doctrine of estoppel applies when a party acts in a way or makes a statement that another party justifiably relies upon to its detriment. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 19, 43 P.3d 4 (2002). Estoppel holds a party to its representations. Wilson v. Westinghouse Elec. Corp., 85 Wn.2d 78, 81, 530 P.2d 298 (1975). When estoppel applies, it precludes a party from asserting rights (in both law and in equity) that might have otherwise existed. Strand v.

State, 16 Wn.2d 107, 115, 132 P.2d 1011 (1943).

To establish estoppel, the City must show: “(1) An admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.” Business Factors v. Taylor-Edwards Warehouse & Transfer Co., 21 Wn. App. 441, 449, 585 P.2d 825 (1978). Estoppel arises not only from a party’s acts, representations, or admissions, but also by silence when he/she ought to speak out. Strand, 16 Wn.2d at 115-16.

The first element of estoppel is met by demonstrating the asserted claim conflicts with the party’s previous acts, statements or conduct. See Alcorn Trailer City v. Blazer, 18 Wn. App. 782, 572 P.2d 15 (1977). In Alcorn, the defendant, Blazer, leased premises to Alcorn Trailer City (“ATC”) with an option to purchase. Id. at 783. The initial lease provided that ATC agreed to maintain fire and liability insurance on the building during the lease. Id. Although ATC obtained liability insurance, it never obtained fire insurance and was never asked about it. Id. at 784. When a new lease was drafted, ATC objected to a provision regarding fire insurance and crossed out the provision and initialed it. Id. Later, Blazer signed the lease and accepted rent, despite testifying that it was her

understanding both parties would carry fire insurance. Id. at 785. Soon thereafter, the building and its contents were destroyed by fire. Id. ATC asked Blazer to keep track of the insurance so he could deduct that from the purchase price of the building. Blazer refused to recognize ATC's attempt to exercise the option and contended she carried fire insurance solely for her own benefit. Id. at 788. The court determined her earlier conduct—signing the lease and accepting rent was inconsistent with her later claim that her fire insurance was only for her own benefit and not for ATC's benefit. Id. at 789; see also Beggs v. Pasco, 93 Wn.2d 682, 688, 611 P.2d 1252 (1980) (city's actions of assigning police duties to certain police department personnel are inconsistent with the City's attempts by ordinance to prevent them from being covered by Law Enforcement Officers and Fire Fighter's Retirement System).

The evidence in this case satisfies the first element of estoppel. Specifically, Sun Lighting's statements and actions in the fall of 2010 and its silence from approximately early November 2010 until May 2014 are inconsistent with its untimely damages claim against the City. This conduct compares to Blazer's conduct in Alcorn. Kintner informed Folgedalen explicitly that he did not believe the City was under contract with Sun Lighting and that "a new contract needs to be completed for the 2010 holiday décor." CP 53, ¶16; CP 64. Kintner also advised him that the

City was soliciting bids from vendors and invited him to submit a bid. CP 64. Folgedalen acknowledged receipt of this e-mail and submitted a bid to enter into a new contract with the City. CP 54, ¶21; CP 73. Importantly, Sun Lighting did not contest the City's action to seek bids, nor did Sun Lighting protest the award of the 2010 holiday décor contract to Hollywood Lights as the lowest bidder. CP 54, ¶25. Sun Lighting did not seek an injunction against the City's contract with Hollywood Lights. See CP 54; 201-13. Folgedalen simply e-mailed Kintner asking what Hollywood's final option selections and prices were. CP 54, ¶24; CP 79. Kintner responded and heard nothing further from Folgedalen in any capacity or as a representative from any company. Id.

The City can demonstrate the second element of estoppel—taking action in reasonable reliance upon Sun Lighting's acts and course of conduct. It is reasonable to rely upon statements made by those acting within the scope of their authority. See Shafer v. State, 83 Wn.2d 618, 625, 521 P.2d 736 (1974). The City took reasonable action based upon Sun Lighting's and Folgedalen's course of conduct. Specifically, the City changed its position based upon Folgedalen's bid submission for the 2010 holiday lighting contract and his (and Sun Lighting's) failure to protest the contract award to the lowest bidder. Hollywood Lights completed the work, and the City paid them. This is comparable to the facts in Alcorn.

In that case, ATC reasonably relied upon Blazer's conduct, which included signing the lease and accepting the rent. ATC then did not procure fire insurance and paid rent under the lease. Alcorn, 18 Wn. App. at 789.

The City can also establish the third element of estoppel. A party satisfies the injury requirement if it reasonably relies upon the actions of another and changes its position to its "detriment as a result of this reliance." Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wn.2d 738, 747, 863 P.2d 535 (1993). Losing money or opportunities constitutes an injury. See Alcorn, 18 Wn. App. at 789 (injury to ATC based upon not allowing a reduction in the purchase price by the insurance proceeds); Kramarevcky, 122 Wn.2d at 738 (injury to party based upon potentially missing out on job training assistance).

Undisputed evidence in the record shows that the City would suffer injury if Sun Lighting is allowed to contradict its prior conduct and statements. The City paid the lowest bidder \$22,243.83 to complete the 2010 holiday lighting project. CP 84, ¶28; CP 146-49. Sun Lighting now demands the City pay it for work it never completed and for an unsupported and inexplicable \$45,000 in lost revenue. Appellant's Brief at 7. Sun Lighting also claims the City is responsible for damages, attorney fees, costs and interest. CP 30-31.

#### 4.4.2 Sun Lighting's Arguments Against the Application of Estoppel Lack Merit.

Sun Lighting, for the first time on appeal, responds substantively to the application of the doctrine of estoppel to bar its contractual claims. Sun Lighting's initial response to the City's summary judgment motion included only one passing reference to estoppel, which was devoid of legal authority and analysis.<sup>7</sup> Generally, a party's failure to raise an issue before the lower court precludes the party from raising it on appeal. Lunsford v. Saberhagen Holdings, Inc., 139 Wn. App. 334, 338, 160 P.3d 1089 (2007).

Now Sun Lighting claims the submission of a bid to complete the 2010 holiday lighting was not inconsistent with its position that the City breached the contract because a "sister corporation" submitted the bid. Appellant's Brief at 16. At no time has Sun Lighting defined what a "sister" corporation is and how it is legally distinct from Sun Lighting. A conclusory argument unsupported by citation to authority "is insufficient to merit judicial consideration." Joy v. Dep't of Labor & Indus., 170 Wn. App. 614, 629, 285 P.3d 187 (2012).

Even if the court considered this argument, it has no merit. Throughout his history with the City, Folgedalen, acting as principal,

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<sup>7</sup> This passing reference is located in the section entitled "Public Policy Allows Contracts." CP 219-20.

contracted and interacted with the City via multiple business entities. See, e.g., CP 132-144; CP 153, 159, 177, 183. Now in a self-serving manner, Sun Lighting claims NW Christmas Lighting is a “sister” corporation. However, the record contains no evidence NW Christmas Lighting was a distinct or sister entity. Folgedalen’s contested declaration<sup>8</sup> merely includes the conclusory statement that the bid was from a “separate corporate entity.”<sup>9</sup> CP 208. The court “will not consider allegations of fact without support in the record.” Voicelink Data Servs. v. Datapulse, Inc., 86 Wn. App. 613, 619, 937 P.2d 1158 (1997). Additionally, Sun Lighting cannot simply rely upon having its affidavits considered at face value. Zobrist, 18 Wn. App. at 637.

The way Folgedalen communicated with Kintner in the fall of 2010 also undermines Sun Lighting’s argument that a sister corporation’s actions cannot be attributed to him. Curiously, all of Folgedalen’s correspondence with Kintner about the 2010 holiday lighting contract, including before submitting a bid, was conducted with the e-mail address

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<sup>8</sup> The City objected that the Declaration of Robert Folgedalen does not comply with CR56(e). This declaration contains nothing regarding Robert Folgedalen’s relationship to the Plaintiff and fails to affirmatively show he is “competent to testify to the matters stated therein.” The City objected to this declaration pursuant to KCLCR 56(e). CP 225 n. 1; RP 7:5-22. The lower court did not rule on the City’s objection.

<sup>9</sup> Further confusing the matter, in its briefing, Sun Lighting itself is termed the “sister company.” Appellant’s Brief at 14. (“Under protest, Appellant had a sister company, Sunlighting[,] prepare a bid.”) Although this may simply be a scrivener’s error, it helps illustrate these entities may not, in fact, be separate and are not consistently treated as such, even by Folgedalen.

“[robert@nwchristmaslighting.com](mailto:robert@nwchristmaslighting.com).” See, e.g., CP 64, 68-69. What Sun Lighting now calls a “sister” corporation clearly had the same person—Robert Folgedalen—acting in a principal’s capacity.

Sun Lighting next claims there was no action by the City “in reliance of the act by Appellant’s sister company.” Appellant’s Brief at 16. This argument ignores all of the conduct at issue. The bid submitted by Folgedalen (“sister company” or not) is not the sole act relevant in the estoppel analysis, nor has it ever been. At issue here is Sun Lighting’s series of acts and statements (and lack thereof) during the fall of 2010 and thereafter. First, Folgedalen did not protest when Kintner informed him that the City was under no obligation to contract with Sun Lighting for the 2010 holiday season and was accepting bids from other vendors. Instead, Folgedalen submitted a bid. CP 73. Second, after the City informed him another company was awarded the contract, Folgedalen only asked about the specifics of the other company’s (Hollywood Light’s) bid. CP 54, ¶¶23-25; CP 79. This evidence is not disputed by Sun Lighting. Kintner stated in his declaration he had no further contact with Folgedalen after that November 10, 2010 e-mail. CP 54, ¶25. Sun Lighting has not refuted this. Folgedalen did not formally protest the award to Hollywood Lights; rather, he merely “express[ed] disappointment.” CP 209. Sun Lighting provides no legal authority or analysis for how this suffices. Moreover,

the two voicemails left by attorney Richard Forsell, requesting the City Attorney call him “about the holiday décor contract with Sun Lighting,” do not rise to the level of a bid protest of the City’s decision to award the contract to the lower bidder. CP 212-13. Additionally, there is no evidence in the record that Forsell sent a letter detailing Sun Lighting’s claims against the City or threatening legal action as a follow up. *Id.* The City justifiably relied upon Sun Lighting’s conduct and lack thereof (silence) to its detriment for four years.

#### 4.5 There Are No Disputed Issues of Material Fact.

Sun Lighting contends there are two “disputed findings of fact.” Appellant’s Brief at 4. These contentions are separate from the discussion of laches and estoppel and are not disputed material facts upon which the litigation depends. Neither can defeat summary judgment.

Summary judgment will be granted unless there is a genuine issue as to a material fact. McDonald v. Murray, 83 Wn.2d 17, 19, 515 P.2d 151 (1973). A fact is material if it is “one that is essential to the claim or defense, application, etc. without which it could not be supported.” *Id.* To be a material fact, it must control the outcome of the case. Keck v. Collins, 181 Wn. App. 67, 90, 325 P.3d 306 (2014). See also Osborne v. Seymour, 164 Wn. App. 820, 859-862, 265 P.3d 917 (2011) (determining disputed facts were not material because even if supported by the record,

the facts would not be sufficient grounds to deny summary judgment); Brill v. Swanson, 36 Wn. App. 396, 399, 674 P.2d 211 (1984) (determining there were no disputed facts and the only issue before the court was a question of law); Wash. Imaging Servs., LLC v. Dep't of Revenue, 171 Wn.2d 548, 555, 252 P.3d 885 (2011) (upholding summary judgment because there were no disputed issues of material fact and the only issue was how the statute applied to the facts of the case).

4.5.1 The Court's Findings Are Supported by the Record and Are Not Disputed Material Facts.

Sun Lighting first challenges the lower court's finding that "[t]he Plaintiff then participated in a competitive bidding process for the work, lost out, and then went away quietly." Appellants Brief at 4; see also CP 231. Sun Lighting argues this is unsupported by the record because "facts must be construed in a light most favorable to a complaining [nonmoving] party." Appellant's Brief at 4. This challenge fails because the record fully supports the lower court's February 13, 2015 Order.

Sun Lighting cites "CP 313-14" to support its contention that the lower court's finding of fact is in error. Appellant's Brief at 4. However, this citation is to a Declaration of Robert Folgedalen, submitted in support of Sun Lighting's response to the City's second summary judgment, dated May 21, 2015. The only order before this Court and cited to in this

argument is dated February 13, 2015.<sup>10</sup> A declaration submitted after the order was entered cannot now be used to argue the finding is “unsupported by the record.” Id. In addition, a nonmoving party cannot preclude a summary judgment order by having its declarations considered at face value. Zobrist, 18 Wn. App. at 637-38. Instead, the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s [City’s] contentions. Id. Folgedalen’s May 21, 2015 declaration contains only conclusory statements offered without any supporting documentation. CP 313-14. For these reasons alone, this Court should not entertain this challenge.

Furthermore, nothing in this sentence is disputed. There is no question that Folgedalen participated in a competitive bidding process for the 2010 holiday lighting contract. CP 53-54, ¶¶19-24. Although Sun Lighting claims a “sister corporation” completed the bid, the legal effect of an alleged “sister corporation” bidding on the 2010 holiday lighting project is a question of law, not fact.<sup>11</sup> Sun Lighting cannot, nor does it, dispute that it “lost out” on the 2010 holiday lighting work at the City.

Finally, the finding that Sun Lighting “went away quietly” is also well-established by the record. The record clearly establishes that Sun

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<sup>10</sup> See supra n. 4-5.

<sup>11</sup> Sun Lighting has presented no legal argument as to why a “sister corporation” is significant to the issues of laches and estoppel. See supra Section 4.4.

Lighting took no action against the City between early November 2010 and May 2014 and Counsel told Judge Downing that Sun Lighting waited nearly four years to file suit against the City because “. . .that’s just when – you know, when [Sun Lighting] got around to doing it. . .” RP 17:2-6. Sun Lighting has failed to present the court with argument as to why specific findings of the lower court are not supported by the evidence.

4.5.2 Sun Lighting’s Second Challenged Factual Finding Is Not Material.

Sun Lighting next challenges the lower court’s statement in the February 13, 2015 Order that “[t]he document the plaintiff now proffers as purportedly showing the City had obligations to it was not produced until several years after the City had entered into a contract with another vendor and paid for the services it provided.” *Id.*; CP 231. This statement is partially supported by the record, and more importantly, it is not material. Sun Lighting attached several agreements to its Claim for Damages form. CP 36-44. They are all dated October 2, 2009. *Id.* Kintner testified in his declaration that these forms appear to be the ones Folgedalen faxed him in October 2010. CP 53, ¶13. The lower court is correct that the document Sun Lighting bases its claim upon was produced four years after the City had entered into a new holiday lighting contract and paid for the services it provided. However, it does appear from the record that Sun Lighting

faxed these documents (or similar ones) to Kintner in October 2010.

Notwithstanding, Sun Lighting has made no showing that the production of contract documents before the Claim for Damages form was filed is a material fact upon which the outcome of litigation depends. Sun Lighting cites no legal authority to support its argument and merely asserts: “the Court is required to view the evidence in the light most favorable to the moving (sic) party.” Appellant’s Brief at 4. Sun Lighting then cites the entire declarations of Richard Forsell, James Folgedalen, Robert Folgedalen, and its response to the City’s Summary Judgment motion. *Id.* at 4-5. This is legally insufficient. “A sprinkling of citations to the record” is not enough to make the appellant’s brief legally adequate. Murphy v. Lint (In re Estate of Lint), 135 Wn.2d 518, 531-532, 957 P.2d 755 (1998) (citing RAP 10.3).

The date the contract documents were produced is not a material fact because it is not essential to the defenses of laches or estoppel. Indeed, where laches bars an action, the court must avoid substantive issues altogether. Carlson, 50 Wn. App. at 429. Accordingly, specific provisions of a contract and the date of production are irrelevant. Sun Lighting fails to articulate how the production date of documents relates to the issues of laches and estoppel. Overturning the lower court’s decision would undermine the purpose of summary judgment—to avoid an

unnecessary trial (or arbitration in this case). Young, 112 Wn.2d at 225. For all of these reasons, this challenge by Sun Lighting should be rejected and the lower court's ruling upheld.

#### 4.5.3 The Prior Contract Is Irrelevant to the Estoppel and Laches Analysis.

Sun Lighting contends the lower court erred when it referenced written provisions in a previous contract entered into by the City and Sun Lighting. Appellant's Brief 8-10. Sun Lighting asserts that as a result, the lower court construed the facts "in frankly an absurd fashion that the current relevant contract that the parties entered into somehow was subject to the prior contract, which it was not and there is no clause that would so indicate." Appellant's Brief at 10.

Although Judge Downing did reference an earlier contract, Sun Lighting takes this passage at the hearing out of context and ignores other, later statements made by Judge Downing in direct support of his decision to dismiss the contractual claims based upon estoppel and laches. This argument also disregards the written February 13, 2015 Order issued later that day by Judge Downing and is unsupported by legal authority.

At the February 13, 2015 hearing, Judge Downing did discuss the terms of a prior written contract between the City and Sun Lighting on a City standard contract form. RP 25-26. However, Judge Downing's ultimate conclusion that the contractual claims are barred by estoppel and

laches, which was subsequently captured in the February 13, 2015 Order, was not based upon contract provisions within the City's standard form or any prior contract. Specifically, Judge Downing reasoned Sun Lighting submitted a bid for the 2010 holiday season:

. . . that was considered and ultimately rejected by the City. Nothing more was heard from them until the summer of 2014, when the claim was made and this lawsuit was filed.

In the meantime the City had gone ahead and had entered into contracts with other entities to provide the service and had expended public funds to obtain those services.

So the Court would find that the plaintiff had changed its position from a claim that – or a position that it had taken earlier, that Mercer Island had relied upon the earlier position, and they – and there would be injury to Mercer Island if the plaintiff were allowed to take a different position today.

So the Court would grant the contractual claims primarily, as I say, on the estoppel and laches bases.”

RP 28:2-17. In the written order, Judge Downing was more clear and succinct: “The Court does conclude that the doctrines of estoppel and laches preclude the contractual claims.” CP 231. This ruling is supported by the record and the application of the facts to the elements of laches and estoppel. Sun Lighting has provided no legal basis that a statement by the court taken out of context constitutes a reversible error.

## 5. CONCLUSION

Sun Lighting's claims were properly barred by the equitable doctrines of laches and estoppel to prevent the injustice of forcing the City to pay twice for work that Sun Lighting never completed. All elements of the doctrines have been met. The City presented undisputed evidence that it unequivocally informed Sun Lighting no valid contract between the parties existed for the 2010 holiday season. Then, the City invited Sun Lighting to bid the project. Sun Lighting's principal, Robert Folgedalen submitted a bid that was approximately 25% higher than the lowest bidder, Hollywood Lights. The City awarded the project to Hollywood Lights and neither Folgedalen nor Sun Lighting protested this award. There is undisputed evidence that the City moved on and changed its position by hiring Hollywood Lights to complete the holiday lighting project and paying for this work. The record undeniably establishes that Sun Lighting did nothing for nearly four years and then suddenly and inexplicably claimed the City owed it over forty thousand dollars. Sun Lighting offers no excuse or reason for the delay, except to tell the lower court "that's just when they got around to doing it."

It was appropriate for the lower court to bar Sun Lighting's suit on the bases of equitable doctrines that seek to avoid injustice. In challenging this ruling, Sun Lighting offers arguments that are not well-grounded in

fact or law. Sun Lighting has also failed to demonstrate a genuine issue of material fact exists. Consequently, the superior court's decision should be affirmed.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of December, 2015.

OFFICE OF THE CITY ATTORNEY  
CITY OF MERCER ISLAND  
Kari L. Sand, City Attorney

By 

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Christina M. Schuck,  
WSBA No. 44436  
Assistant City Attorney

**DECLARATION OF SERVICE**

I, Mary Swan declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 21<sup>st</sup> day of December, 2015, I served a true copy of the *Brief of Respondent City of Mercer Island*, together with a copy of this *Declaration of Service* on the following counsel of record using the method of service indicated below:

<p><i>Attorney for Appellant Integrated Facilities Management, d/b/a Sun Lighting:</i></p> <p>E. Allen Walker  Attorney at Law  2607 Bridgeport Way West  Suite 2C  Tacoma, WA 98466</p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid</p> <p><input type="checkbox"/> Legal Messenger</p> <p><input type="checkbox"/> Overnight Delivery</p> <p><input type="checkbox"/> Facsimile</p> <p><input checked="" type="checkbox"/> E-Mail (by agreement)  <a href="mailto:awalker@tacomalegal.com">awalker@tacomalegal.com</a></p>
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of December, 2015, at Mercer Island, Washington.

  
Mary Swan