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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TITAN EARTHWORK, LLC, a)
 Washington limited liability corporation,)
)
 Appellant/Cross-Respondent,)
)
 v.)
)
 CITY OF FEDERAL WAY, a)
 Washington municipal corporation,)
)
 Respondent/Cross-Appellant.)
 _____)

No. 74938-2 -I

DIVISION ONE

PUBLISHED OPINION

FILED: August 14, 2017

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MANN, J. — In 2011, the Washington State Legislature amended the State’s existing underground utility laws to create the 2011 Underground Utilities Damage Prevention Act (UUDPA), ch. 19.122 RCW. The UUDPA imposes clear and specific statutory duties on parties involved in projects requiring excavation. The UUDPA mandates that excavators take reasonable care to avoid damaging underground facilities, including a mandate that excavators “determine the precise location of underground facilities that have been marked.” RCW 19.122.040(2)(a). The City of Federal Way (City) contracted with Titan Earthwork (Titan) to perform street improvements, including installation of a new traffic signal. In the process of excavating for the traffic signal, Titan drilled into an energized underground Puget Sound Energy

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(PSE) power line. After PSE sought damages from Titan, Titan sued the City claiming breach of contract and seeking indemnity. Titan appeals the trial court's decision on summary judgment finding Titan violated the UUDPA and dismissing its claim against the City. Because there is no question of material fact as to Titan's liability, we affirm the trial court's decision. But because the underlying contract requires each party to bear its own attorney fees, we vacate the trial court's order granting attorney fees to the City.

FACTS

In 2012, the City sought to make improvements at the intersection of South 320th Street and 20th Avenue South. The improvements included the addition of a second left-turn lane in each direction, storm drainage, paving, street lighting, and the relocation of a traffic signal. The City's design team identified potential utility conflicts between the proposed location for the new traffic signal and PSE underground power lines.

The City contacted PSE to consider moving its power lines. PSE hired Applied Professional Services, Inc. (APS) to locate the utilities by "potholing." APS's potholing data showed that there were two groups of conduits buried beneath the northeast corner: a southern group and a northern group. According to APS, there were three PVC conduits in the northern group (two 2-inch conduits and one 3-inch conduit) and two 6-inch conduits in the southern group. The northern group was 5 to 6 feet below grade, but the southern group was only 4 to 4.5 feet below grade. PSE's contractor told the City that it could accommodate the design plans by moving a conduit in the southern group. In April 2013, PSE's contractor trenched and moved a power line conduit in the southern group of conduits.

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The City then put the project out to bid. The request for bids stated that the project included “utility relocation.” Titan was the lowest responsible bidder. In April 2013, the City entered into a contract with Titan to perform the work. The contract specified that the work included utility relocation, required all work be done in accordance with applicable laws, and specified that the contractor, Titan, was “responsible for locating any underground utilities affected by the Work as is deemed to be an excavator for purposes of Chapter 19.122 RCW, as amended.” The contract further specified that Titan “shall be responsible for compliance with Chapter 19.122 RCW, including utilization of the ‘one call’ locator system before commencing any excavation activities.” The contract documents included maps showing marked utility lines, including the location of the PSE power lines. The maps showed the location of both the southern and northern grouping of power line conduits.

In May 2013, Titan subcontracted with Transportation Systems, Inc. (TSI) to install the traffic signal pole footing/base in the northeast corner of the intersection. Before construction began, the City and Titan reviewed the project at a preconstruction conference. At this meeting, the City represented to Titan that “[PSE] has relocated [its] below ground utilities for this project prior to beginning work.” Titan and TSI inspected the site, including the PSE trench prior to construction. But because PSE only trenched to the southern group of power line conduits, the northern group, which was buried deeper than the southern group, remained covered. This meant that Titan and TSI did not see the northern group of power line conduits.

On July 10, 2013, Titan and TSI requested an underground utility locate. USIC, a utility-locating company, located and marked the buried power lines. A few days after

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this, PSE removed its steel plate and backfilled its trench. This disrupted USIC's first markings. At Titan and TSI's request, USIC and PSE then returned to the site and remarked the location of the underground power lines.

TSI first used a vactor (vacuum) to excavate the pole's base. But once TSI reached the depth of the shallower southern conduits, TSI switched to a three-foot-wide auger. TSI contends that the City's on-site inspector told TSI that the City would not pay for vactoring to excavate deeper than the southern conduits. Soon after TSI switched from the vacuum excavator to an auger, it struck the northern grouping of power lines.

USIC, the company that had marked the utilities, investigated the accident. It concluded that the power line was clearly marked and that TSI dug "within the tolerance zone of the marks."

Because PSE owned the power lines, it sought damages from Titan. Titan, in turn, filed this action to recover damages and costs from the City claiming that the City represented that PSE's underground utilities had been relocated. The City moved for summary judgment arguing that, as a matter of law, Titan was liable for violating both the contract and the UUDPA. The trial court agreed with the City and dismissed all claims against the City. The City then sought \$41,825.25 in attorney fees. The trial court granted this motion, but reduced the attorney fees award to \$21,705.

Titan appeals the summary judgment order and the order awarding attorney fees to the City. The City cross-appeals the attorney fees order.

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ANALYSIS

Liability under the UUDPA

Titan argues first that the trial court erred in granting summary judgment in favor of the City and dismissing Titan's action. Titan argues that there were material issues of fact over whether the PSE power lines were marked, and that the trial court erred in holding Titan strictly liable under the UUDPA. We disagree.

A. Standard of Review

We review summary judgment orders de novo. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). "Summary judgment is appropriate only when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law." Keck, 184 Wn.2d at 370. When making this determination, we consider all the facts and make all reasonable, factual inferences in the light most favorable to the nonmoving party. Young v. Key Pharms. Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

Mere allegations or conclusory statements of facts unsupported by evidence are not sufficient to establish a genuine issue. Baldwin v. Sisters of Providence in Wash. Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Nor may the nonmoving party rely on "speculation" or "argumentative assertions that unresolved factual issues remain." Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). "On summary judgment review, we may affirm the trial court's decision on any basis within the record." Davidson Serles & Assocs. v. City of Kirkland, 159 Wn. App. 616, 624, 246 P.3d 822 (2011).

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B. Underground Utilities Damage Prevention Act

In 2011, the Washington State Legislature amended the state's existing underground utility laws to create the 2011 UUDPA. The stated intent of the UUDPA is to "protect public health and safety and prevent disruption of vital utility services through a comprehensive damage prevention program." RCW 19.122.010. This includes "assigning responsibility for providing notice of proposed excavation, locating, and marking underground utilities, and reporting and repairing damages." RCW 19.122.010(1).

The UUDPA requires "project owners" (the City) to "indicate in bid or contract documents the existence of underground facilities known by the project owner to be located within the proposed area of excavation." RCW 19.122.040(1). The duties for excavators (Titan) are also defined:

- (2) An excavator shall use reasonable care to avoid damaging underground facilities. An excavator must:
- (a) Determine the precise location of underground facilities which have been marked;
 - (b) Plan the excavation to avoid damage to or minimize interference with underground facilities in and near the excavation area; and
 - (c) Provide such support for underground facilities in and near the construction area, including during backfill operations, as may be reasonably necessary for the protection of such facilities.

RCW 19.122.040(2).

Finally, the UUDPA assigns liability for damages resulting from failing to perform a duty under the act:

- (3) If an underground facility is damaged and such damage is the consequence of the failure to fulfill an obligation under this chapter, the party failing to perform that obligation is liable for any damages. Any clause in an excavation contract which attempts to allocate liability, or requires indemnification to shift the economic consequences of liability,

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that differs from the provisions of this chapter is against public policy and unenforceable. Nothing in this chapter prevents the parties to an excavation contract from contracting with respect to the allocation of risk for changed or differing site conditions.

RCW 19.122.040(3).

C. Line Markings

Titan argues first that there was a question of fact as to whether the PSE power line that it hit was marked. Titan's argument fails.

It is undisputed that USIC visited the worksite twice to locate underground utilities. Photographs taken by USIC on December 12, 2013, show red paint markings for two sets of PSE power lines. The southern grouping was marked on top of the steel plates covering the existing PSE trench. The northern grouping was marked just north of the PSE trench. After PSE removed the steel plates and backfilled the trench, USIC returned again and marked the location of both sets of power line conduits.

Photographs taken on December 19, 2013, again, show red paint markings just north of the now backfilled trench. Finally, photographs taken on the day that the PSE power line was struck show a large auger located almost precisely in the same location as the northern set of red power line markings. Thus the photographic evidence demonstrates that the lines were marked and TSI excavated at the location of the markings. USIC also investigated the site on the day the PSE power line was severed. Its investigation confirmed that markings were visible at the site and that the excavation was within the tolerance zones of the marks.

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Based on the before and after photographs and inspection, reasonable minds can only conclude that Titan excavated in the location where the power lines were marked.

D. Strict Liability

Titan argues next that the trial court misinterpreted the UUDPA when it held that Titan was, in effect, subject to strict liability because it failed to precisely locate the marked PSE power lines prior to excavation. Titan argues that the trial court should have instead applied a reasonable care standard and because reasonable care is a question of fact, summary judgment was not appropriate. “We review questions of statutory interpretation de novo.” State v. Feely, 192 Wn. App. 751, 761, 368 P.3d 514 (2016), review denied, 185 Wn.2d 1042, 377 P.3d (2016).

Titan bases its argument for a reasonable care standard on legislative history,¹ policy, and interpretations by other states. But because the plain language of the statute is unambiguous, there is no reason for us to resort to other lines of statutory interpretation. When a statute’s meaning is plain on its face, a court gives effect to the statute’s plain meaning as an expression of legislative intent. In the Matter of Parental Rights to K.J.B., 187 Wn.2d 592, 597, 387 P.3d 1072 (2017). “Plain language that is not ambiguous does not require construction.” K.J.B., 187 Wn.2d at 597.

As an excavator, Titan’s duties under the UUDPA are defined by the plain language of the statute. RCW 19.122.040(2) states:

(2) An excavator shall use reasonable care to avoid damaging underground facilities. An excavator must:

¹ The legislative history cited by Titan predates the 2011 amendments that created the UUDPA. The statutory duties defined in RCW 19.122.040(2) were part of the 2011 amendments.

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- (a) Determine the precise location of underground facilities which have been marked;
- (b) Plan the excavation to avoid damage to or minimize interference with underground facilities in and near the excavation area; and
- (c) Provide such support for underground facilities in and near the construction area, including during backfill operations, as may be reasonably necessary for the protection of such facilities.

Titan argues that the first sentence in RCW 19.122.040(2)(a) imposes a reasonable care standard for excavators. But this contention is only partially correct. While RCW 19.122.040(2) requires excavators to use “reasonable care,” the statute continues by defining the actions that excavators “must” take in order to meet the standard of care. Thus, for example, if an excavator damages a marked utility line because of its failure to determine the utility line’s “precise location,” then the excavator has, by definition, failed to act with reasonable care. See RCW 19.122.040(2)(a).

Here, it is undisputed that the northern group of PSE power lines were marked. It is also undisputed that Titan did not precisely locate the buried power line before excavating into it.² Under RCW 19.122.040(2), Titan failed to act with reasonable care. Summary judgment was appropriate.

Attorney Fees

Titan argues finally that the court erred in awarding the City its attorney fees because the City waived its right to recover attorney fees in the contract. We agree.

² Titan argues that the phrase “precise location” is ambiguous. It argues that “precise location” means the location where a reasonable contractor would interpret the utility to be. This argument fails. The plain meaning of an undefined statutory term can be discerned from its dictionary definition. Hayfield, 187 Wn. App. at 918. “Precise” means “exactly delimited” and “exact to a point.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1784 (2002).

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“Whether a contract or statute authorizes an award of attorney fees is a question of law reviewed de novo.” McGuire v. Bates, 169 Wn.2d 185, 189, 234 P.3d 205 (2010). RCW 19.122.040(4) awards a party reasonable attorney fees if it prevails on an action brought under section .040. Under the statute, the award of attorney fees to the prevailing party is mandatory. Hayfield v. Ruffier, 187 Wn. App. 914, 920-21, 351 P.3d 231 (2015).

But provision 19.6 of the excavation contract requires each party to pay its own attorney fees in an action on the contract:

In the event the City or [Titan] defaults on the performance of any terms in this contract, and [Titan] or [the] City places the enforcement of the Contract or any part thereof, or the collection of any monies due, or to become due hereunder, or recovery of possession of any belongings, in the hands of an attorney, or file suit upon the same, each Party shall pay all its own attorneys’ fees, costs and expenses.

Here, the City cannot recover its attorney fees because it waived those fees in its excavation contract with Titan. Provision 19.6 of the contract limits a party’s ability to recover fees in actions that are brought to enforce the contract’s provisions. Provision 1.5 requires Titan to “perform the Work in accordance with all applicable federal, state and City laws.” Titan failed to comply with provision 1.5 when it failed to perform the work in accordance with an applicable law—RCW 19.122.040(2)(a). The City’s affirmative defense, that Titan failed to comply with RCW 19.122.040, is an action on the contract. Therefore, neither party can recover its attorney fees on the contract.

The City makes two arguments for recovering fees under RCW 19.122.040(4). The City argues first that although Titan based its action against the City on a breach of contract theory, Titan tried to impose liability on the City for the damages to PSE’s

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power lines. This, the City contends, constitutes an action brought under the UUDPA because the UUDPA governs liability for damaged utilities. To treat Titan's suit as a breach of contract claim would, in the City's view, elevate form over substance. The City argues second that pursuant to Superior Court Civil Rule 8(c), we can treat its affirmative defense that Titan violated the UUDPA, as a counterclaim.³ And because its counterclaim is an action brought under the UUDPA, it is entitled to fees under RCW 19.122.040(4).

We reject both of the City's arguments. Titan did not sue the City under RCW 19.122.040, it sued the City for breach of contract and contract indemnification. The contract required compliance with applicable laws including the UUDPA. Because Titan violated the UUDPA, the City's affirmative defense that Titan failed to comply with the UUDPA is not an "action brought under" RCW 19.122.040: it is an affirmative defense that the City is not liable to Titan because Titan breached the contract. Because the contract requires each party to bear its own attorney fees in an action brought on the contract, the City may not recover its attorney fees.⁴

³ CR 8(c) allows a court, "if justice so requires," to treat a party's pleaded affirmative defense as a counterclaim.

⁴ Accordingly, we need not reach the City's cross-appeal, that the trial court erred by failing to award the City all of its requested fees.

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CONCLUSION

The trial court properly granted summary judgment for the City, but it erred by awarding the City its attorney fees under RCW 19.122.040(4). Accordingly, we affirm the summary judgment order and vacate the order awarding the City its attorney fees. We also deny the City's request for its attorney fees on appeal.

Mann, J.

WE CONCUR:

Leach, J.

Cox, J.