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No. 74938-2-I

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION I

TITAN EARTHWORK, LLC,
a Washington limited liability corporation,

Appellant/Cross-Respondent,

v.

CITY OF FEDERAL WAY,
a Washington municipal corporation,

Respondent/Cross-Appellant.

APPEALED FROM KING COUNTY SUPERIOR COURT
No. 15-2-02582-1 KNT
(THE HONORABLE VERONICA ALICEA GALVAN)

APPELLANT TITAN EARTHWORK LLC'S OPENING BRIEF

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STATE OF WASHINGTON

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I. INTRODUCTION

Appellant Titan Earthwork LLC (“Titan”) appeals from two trial court orders. The first order disposed of Titan’s case against the City of Federal Way (the “City” or “Federal Way”), and held Titan strictly liable for striking a utility after the City misrepresented the utility’s location on at least three separate occasions. This interpretation directly conflicts with the Underground Utility Damage Prevention Act’s (“**UUDPA**”) “reasonable contractor” standard. The second order awarded the City attorneys’ fees in direct conflict with the parties’ contractual bargain.

Titan respectfully requests that this Court reverse the trial court’s summary dismissal of Titan’s claims against the City. Alternatively, Titan respectfully requests that this Court enforce the parties’ contract, and reverse the trial court’s award of attorneys’ fees to the City.

II. ASSIGNMENTS OF ERROR

A. The trial court erred by entering its February 26, 2016 order granting the City’s motion for summary judgment, which dismissed all of Titan’s claims against the City. (CP 414-16.)

B. The trial court erred by entering its March 16, 2016 order granting the City's request for attorney fees and cost. (CP 550-51.)

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether the trial court erred by ruling that there was no triable issue of fact as to whether Titan and its subcontractor acted with reasonable care. (Assignment of Error 1.)

B. Whether the trial court erred by ruling that there was no triable issue of fact as to whether Titan's subcontractor struck a "marked" utility. (Assignment of Error 1.)

C. Whether the trial court erred by ruling that, as a matter of law, a contractor has not acted with reasonable care if it fails to "locate the precise area" of a marked utility, irrespective of what the contractor is told by either the project owner or the utility owner—i.e., whether a contractor is strictly liable for damaging a marked utility. (Assignment of Error 1.)

D. Whether the trial court erred in ruling that whether a contractor has acted with reasonable care is not an issue of material fact. (Assignment of Error 1.)

E. Whether the trial court erred by determining that the UUDPA prevents Titan from recovering under a contractual

changed or differing site condition clause when the UUDPA specifically reserves the parties' right to contractually allocate risk for changed or differing site conditions. (Assignment of Error 1.)

F. Whether the trial court erred by ruling that a commercial/public project owner is not held to a contract provision that waives a bilateral statutory right to prevailing party attorneys' fees. (Assignment of Error 2.)

G. Whether the contract's "Contractor's Indemnity" provision applied, to the extent an award of fees hinged on it. (Assignment of Error 2.)

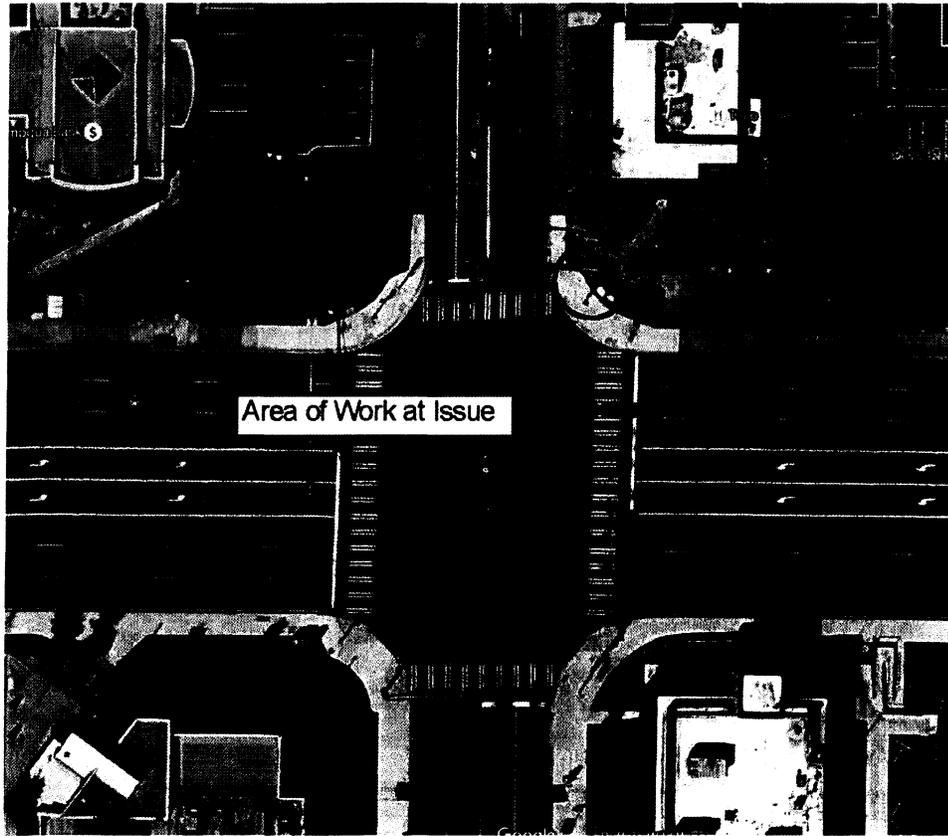
IV. STATEMENT OF THE CASE

A. Statement of Facts.

This case concerns Titan's differing site condition and contractual indemnification claims related to its work on the City of Federal Way's "South 320th Street at 20th Avenue South Intersection Improvement" project. (CP 17.) Federal Way hired BergerABAM to design the project. (See CP 336.) The work required, *inter alia*, the installation of a new street signal pole at the intersection of South 320th Street and 20th Avenue South. (CP 17.)

Two photographs are reproduced below to provide the court a reference to the areas at issue. The first image is captured from

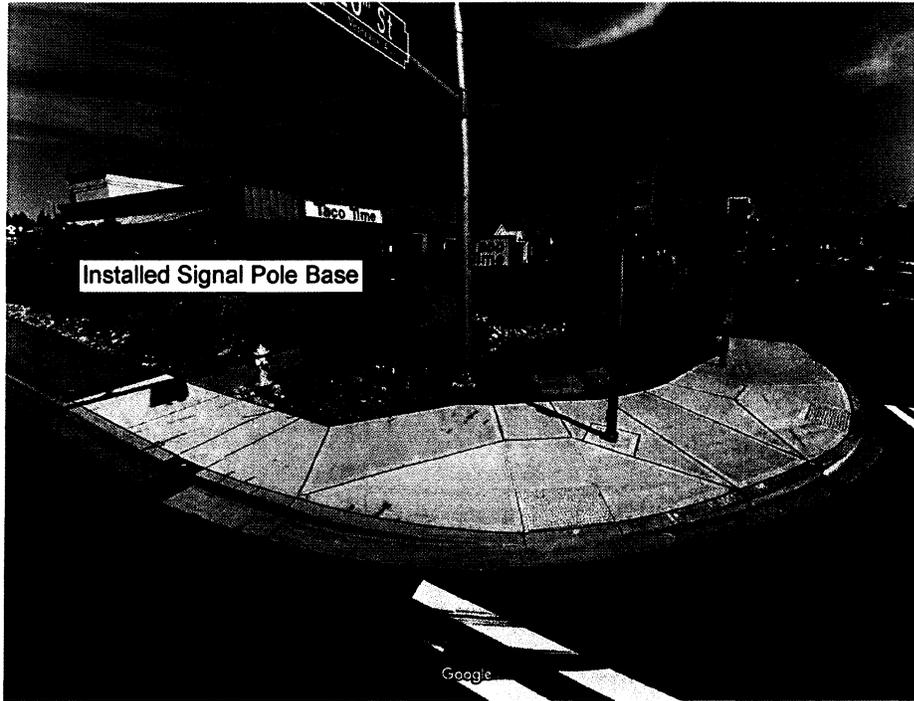
Google Maps, and shows the South 320th Street and 20th Ave South intersection. ¹



The second image is a Google Street View image, and depicts for the court the installed signal pole and base at issue.² This image was captured in September, 2015, after the project was completed.

¹ Imagery ©2015 Google, Map data ©2015 Google, <https://www.google.com/maps/place/Federal+Way,+WA/@47.315235,-122.3087968,97m/data=!3m1!1e3!4m5!3m4!1s0x54905817fd0d36db:0xd4d9d813280ec095!8m2!3d47.3223221!4d-122.3126222>.

² Image Capture Sept, 2015, ©2016 Google, https://www.google.com/maps/@47.3152314,-122.3085034,3a,75y,63.76h,74.81t/data=!3m6!1e1!3m4!1s_ITwy08RI272A861gW8FAQ!2e0!7i113312!8i6656!6m1!1e1



These photographs are not in the record, and are produced here only for the convenience of the court to help it understand the location at issue.

1. Federal Way Directed PSE to Relocate Utilities before the Project Started.

Records obtained in discovery (which were unavailable to Titan and its subcontractors during the project) show that BergerABAM identified potential utility conflicts during its design work, including a conflict in the intersection's northeast corner between the proposed base/footing for the new signal pole and PSE's underground utilities. (See CP 338-41.) Federal Way—

presumably to avoid re-design costs—directed PSE to relocate its utilities to eliminate the conflict. (See CP 343.) Only Federal Way could direct PSE to do so; a contractor like Titan cannot. (See CP 394.)

Federal Way's records show that PSE then hired another company, APS, to locate the utilities by "potholing."³ (See CP 350.) APS's potholing data revealed conduits near the signal pole base area, arranged in two groups—a "southern" group and a "northern" group—each consisting of several conduits. (See CP 355-56.) PSE's service contractor (Potelco) informed Federal Way that it could create a six-foot clear area (which was twice as large as the signal pole base) for the signal pole base excavation by relocating a single conduit in the southern group. (CP 353.)⁴ Potelco's interpretation of the APS data proved to be dangerously incorrect; yet, both PSE and Federal Way adopted Potelco's interpretation as their own, and conveyed the same to Titan and its subcontractors, as discussed more thoroughly below. See *id.*; (CP 397-99).

³ Potholing is a technique used to visually locate underground utilities, often by vacuum excavation. "Vacuum excavators use air or water pressure to quickly dig small, precisely controlled potholes to uncover utilities." George Kennedy, *Potholes that Enhance Utility Damage Prevention*, UTILITY CONTRACTOR ONLINE (Aug. 2012), <http://utilitycontractoronline.com/archives/NUCA/2012/08-12NucaSafetyManagement.html>.

⁴ Potelco's diagram shows one conduit in the "northern" grouping, but that conduit is only the most southerly conduit within the group. See CP 356.

Notwithstanding Potelco's apparent error, Federal Way demonstrated some concern for the signal pole base's proximity to existing utilities. In its pre-project preparations, Federal Way directed BergerABAM to "[u]se a plan note to alert the Contractor to the proximity of the underground facilities and that **vactoring is the advised excavation method**" for construction.⁵ (CP 359.) This information comes from Federal Way's discovery records and was not known to Titan or its subcontractors during the bid or throughout project. (See CP 392.) For reasons that are unclear, Federal Way issued a bid package that did not include this instruction—failing to disclose its superior knowledge. *Id.*

PSE (through Potelco) started work to relocate the utilities in April 2013. (See CP 363.) PSE dug a trench to expose utilities in the area. (See CP 365.) However, because PSE apparently misinterpreted the APS locate data, its trench (which Titan and its subcontractor, Transportation Systems, Inc. ("**TSI**") later examined before excavation work) did not go deep enough to uncover the northern conduits—the northern conduits remained buried below the soil at the bottom of the trench, unbeknownst to all parties. (See

⁵ Vactoring is the process of using vacuum excavation, as defined in n.1, and can also be used to excavate areas larger than a pothole, albeit more expensively than traditional methods.

CP 402.) Due to Potelco's error, Potelco, PSE, and Federal Way believed and represented to Titan and its subcontractors that the southern conduit group was PSE's only conduit within the trench boundary. (See CP 368, 391, 400-01.) Due to this belief, PSE relocated only the southern conduit grouping and covered the trench with a steel plate. (See CP 353-57, 365.)

2. Federal Way Awards the Project to Titan; Misdirects it as to Utility Location.

Having arranged to have conflicting utilities moved, Federal Way then requested contractor bids for the project. (CP 40, 363.) After competitive bid, Federal Way awarded the project to Titan. (See CP 393.) Titan then subcontracted TSI to install the signal pole footing. See *id.* At the preconstruction conference on April 24, 2014, the City made its first misrepresentation regarding utility location: the City told Titan that, in order to eliminate conflicts, "PSE has relocated their below ground utilities for this project prior to beginning work..." (See CP 368, 394.) In other words, Federal Way represented to Titan that it had reviewed potential utility conflicts and any conflicting utilities were already relocated.

Federal Way issued Titan a Notice to Proceed on May 6, 2013, allowing it to start construction. (CP 379.) After Titan

mobilized, PSE asked Titan to survey the precise location of the proposed signal pole base. (CP 394.) Titan did this. *See id.* Once surveyed, PSE requested that Titan (who, in turn, requested that TSI) examine the open trench to verify that PSE's conduits did not conflict with the surveyed location of the signal pole base. (See CP 400-01.) TSI observed that the visible utilities—which were represented as the only utilities in the trench—had been relocated out of the excavation area. (CP 401.)

In July 2013, as the signal pole base installation work neared, Titan and TSI called the One-Call service to request utility locates. (See CP 391, 394.) The locate company, USIC, first marked the power lines on or about July 12. (CP 84-85.) Pictures from USIC's first locate only reasonably show what could be considered the Northern grouping outside, or at the extreme limits of, the trenched area (where the signal pole base was located), which was still covered by PSE's steel plate at that time. (See CP 130-34.) On July 16, 2013, PSE notified Federal Way that it needed the steel plate covering the trench and would have to backfill the hole. (See CP 381.) PSE (or its agents) then pulled the steel plate and backfilled its trench (after the first locate markings were made). (CP 401.) Titan (TSI) then installed new signal conduit near the

new signal pole footing (CP 398 (these conduits are the small, shallower conduits which are clearly visible in the photograph)). After TSI installed this signal conduit, Titan again requested locates, and USIC marked the utilities a second time on or about July 19. (CP 86-87.)

The project plans indicated that there were two conduits (or sets of conduit) in the area where the new signal pole was to be installed. (See CP 56.) Titan and TSI had physically seen the southern grouping in the open trench (which Titan/TSI verified did not conflict). Red locate (power) markings were also visible north of the trench area following both locates—markings which could be interpreted as the second, northern grouping. (CP 158 (first locate—looking west); 242 (second locate—looking east)). USIC indiscriminately marked the area during the second locate, and Titan and TSI were forced to attempt to correlate the markings with known utilities in the area. Federal Way admits that markings are general indicators, open to interpretation, and can deviate from actual utility location by two feet. See RCW 19.122.020(23). Any marking more than two feet from the signal pole base did not indicate a conflict. No evidence in the record demonstrates how far

north the red markings were from the signal pole base, but it appears to be more than two feet.

Federal Way had consistently told Titan that conflicting utilities in the excavation area were moved (the whole point of PSE's work—not to relocate just some of the conflicting conduits, but all of them). Further, Federal Way's inspector also told TSI during this time that USIC's locate markings were based on incorrect and outdated as-built information—another material misrepresentation. (CP 391.) Titan and TSI reasonably interpreted (based on all available information) the markings near the signal pole to refer to the signal conduit and the southern grouping (which in itself was two separate conduits, and could relate to at least two of USIC's markings); any other markings outside the area (more than two feet away from the excavation) indicated utilities *outside* the excavation zone. (CP 401.)

On August 21, 2013, TSI began potholing at the signal pole base location, as directed by Federal Way. (See CP 401.) Once TSI uncovered the shallower signal conduits, Federal Way's on-site inspector said Federal Way would not pay for any additional potholing/vactoring. (See CP 401.) In other words, Federal Way believed TSI found the only possible conflicting conduits and could

safely start mechanically excavating (contrary to what it had told its own designer)—and represented as much to TSI by refusing to pay for additional factoring. This Federal Way’s third material misrepresentation made with regard to conflicting utilities.⁶

As Federal Way watched, TSI brought in an auger—a large helical drill—and continued. (CP 401.) TSI soon struck the additional, undisclosed conduit—the northern grouping. (See CP 401.) Contrary to what Federal Way represented on at least three separate occasions, what its plans or the utility locate markings (augmented by visual examination of the open trench) showed, and what the utility itself represented, the northern conduit directly conflicted with the surveyed (and designed) signal base location. (See CP 401.) Titan and TSI promptly submitted a differing site conditions claim under the WSDOT Standard Specifications Section 1-04.7,⁷ which directs an owner to equitably adjust a

⁶ With the benefit of hindsight, Federal Way argues that Titan should have kept potholing anyway: “Titan specifically itemized and requested payment in the amount of \$5,000 for ‘Resolution of Utility Conflicts’ and \$5,000 for ‘Utility Potholing.’ Both items contemplate work to be performed for the purpose of locating and addressing underground utilities...” (CP 24.) These bid items, however, were “force account” work items; Federal Way had to specifically approve the work in advance for Titan to receive payment. (See CP 391.) Here, Federal Way refused to authorize such work, despite its own statement that factoring was its recommended method of excavating in the area. (CP 359.)

⁷ Washington State Department of Transportation, Standard Specifications for Road, Bridge, and Municipal Construction (2012),

construction contract if the contractor encounters pre-existing subsurface or latent physical conditions differing materially from those indicated in the contract. (CP 5.) Titan sought delay and standby expenses caused by the utility strike, as well as increased costs, including the cost to repair the utility. (CP 4.) Federal Way rejected Titan's claim. (See CP 386.)

3. The Parties Waived Their Rights to Attorney Fees in the Contract.

Titan and Federal Way executed a written construction contract for the project. (See CP 483-96.) As is typical in public works contracting, the contract was a Federal Way form, and Titan could not negotiate its terms prior to bid or award. Federal Way's contract eliminated the right of either party to recover attorneys' fees, costs, and expenses. (CP 494.)

Specifically, Contract Section 19.6 ("Attorney Fees") read:

In the event the City or the Contractor defaults on the performance of any terms in this Contract, and the Contractor or 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. The venue for any dispute

<http://www.wsdot.wa.gov/publications/manuals/fulltext/M41-10/SS2012.pdf>
(incorporated through Contract Provision 1.1, see CP 41.)

related to this Contract shall be King County, Washington.

Id. (emphasis added).

B. Procedural History

Titan filed its complaint against the City on January 30, 2015. (CP 1-7.) The City filed its Motion for Summary Judgment on December 24, 2016. (CP 15-35.) The trial court heard arguments on the City's motion on February 26, 2016, and entered its order granting the City's Motion for Summary Judgment that day. (CP 414-16). On March 16, 2016, the court granted the City's request for attorney's fees, and ordered Titan to pay the amount within 10 business days, despite a judgment not having been entered. (CP 550-51.) Titan filed a timely notice of appeal from the court's February 26 and March 16 orders on March 23, 2016. (CP 552-58.)

V. LEGAL ARGUMENT

A. The Trial Court Committed Prejudicial and Reversible Error by Granting Summary Judgment On Titan's Claims.

Federal Way made several arguments in support of its motion for summary judgment. Federal Way argued: (1) that Washington's Underground Utility Damage Prevention Act ("**UUDPA**"), or the "**Act**," colloquially referred to as the "call before you dig" or "One-Call" statute)—Chapter 19.122—holds excavators

strictly liable simply if they strike a “located” utility, regardless of whether an excavator complied with the statute’s requirements; (2) Titan was contractually responsible for locating and coordinating with affected utilities prior to excavating; (3) that Titan was contractually barred from relying on any representation made by Federal Way with regard to utility location; and (4) that any other interpretation would be viewed as shifting liability in contravention with the UUDPA provisions, with is barred by the Act. While Titan provided defenses to each argument, the trial court did not specify in either its oral or written ruling the grounds upon which it granted summary judgment; nonetheless, the applicable standard of review requires Titan to address each argument in turn.

1. Standard of Review.

The Court of Appeals reviews decisions on summary judgment de novo, engaging in the same inquiry as the trial court. *International Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512, 519, 309 P.3d 654 (2013). Summary judgment should be denied unless “there is no genuine issue as to any material fact” and “the moving party is entitled to a judgment as a matter of law.” CR 56(c). The burden is on the movant (Federal Way) to demonstrate that there is no genuine dispute as to any

material fact, with all reasonable inferences construed against it. *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 500 P.2d 88 (1972). When there are genuine issues of material fact, “[t]he trial court has no discretion; if there is any justifiable evidence supporting a verdict in favor of the nonmoving party, the question is for the jury.” *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 521, 20 P.3d 447 (2001). Furthermore, the law must support such judgment, and questions of statutory interpretation are also reviewed de novo. CR 56(c); *Clipse v. Michels Pipeline Constr., Inc.*, 154 Wn. App. 573-76, 225 P.3d 492 (2010).

Here, Federal Way admitted facts are disputed (CP 30.) Further, the trial court also found that there were disputed facts. (RP 28.) However, the trial court held that those disputed facts were not material for the purposes of summary judgment because Federal Way was entitled to judgment as a matter of law. The UUDPA requires Titan to excavate with reasonable care. Contrary to the trial court’s assumption, whether the contractor used reasonable care is a question for the fact finder given the disputed facts at issue. Because Federal Way’s other contract arguments in support of its motion for summary judgment also fail for reasons

discussed below, this court should reverse the trial court's summary dismissal of Titan's claims.

2. The Underground Utility Damage Prevention Act's Background and Requirements.

The Underground Utility Damage Prevention Act ("UUDPA"), Ch. 19.122 RCW, was primarily enacted to relieve utility contractors from being forced to contractually accept complete liability for damage to underground utilities. As summarized in the Senate Bill Report for SHB 857:

Underground utility contractors report being obliged to accept contracts assigning them full risk for encountering any underground facilities whether known or unknown. They report that this situation makes them either take chances, with attendant risks and liabilities, or dig in a slow and uneconomical manner. Damage to underground facilities causes monetary loss and may create a hazard to public health and safety as well as possibly cutting off service to utility or cable TV customers.

S.B. Rep. on Substitute H.B. 857, 48th Leg., Reg. Sess. (Wash. 1984). Prior to the UUDPA, a majority of Washington's counties were served by a "one-step locator service," and excavator arrangements were "voluntary" and "covered in individual contracts." H.B. Rep. on H.B. 857, 48th Leg., Reg. Sess. (Wash. 1984). This prior system required utility contractors to "bear disproportionate and unfair risks." *Id.*

The UUDPA established statewide procedures for notifying utilities of upcoming excavations and assigned liability in certain circumstances for resultant damage. Significantly, as reported in the Senate Bill Report for SHB 857:

An excavator will use reasonable care to avoid damaging underground [sic] facilities. A person whose **negligent acts or omissions** cause damage to facilities is liable for all repair or relocation costs. No person may seek indemnification in an excavation contract for its negligent acts or omissions provided this does not interfere with rights of the parties to a contract to contract regarding unforeseen risks.

S.B. Rep. on Substitute H.B. 857, 48th Leg., Reg. Sess. (Wash. 1984) (emphasis added). The legislature amended the Act in 2011, but these amendments do not affect either the UUDPA's requirements or its interpretation for the issue at hand.

The UUDPA imposes liability only when a party fails to perform an obligation imposed by the Act's statutory scheme (such as not requesting a locate at all):

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.

RCW 19.122.040(3). The UUDPA places five obligations on an excavator that are relevant here:

- (1) mark the boundary of the excavation area (RCW 19.122.030(1));
- (2) provide notice to the one-number locator service (RCW 19.122.030(2));
- (3) not excavate until known facility operators have “marked or provided information regarding underground facilities” (RCW 19.122.030(5));
- (4) maintain the markings for the relevant period (RCW 19.122.030(6)); and
- (5) use “reasonable care to avoid damaging underground facilities.” (RCW 19.122.040 (2)).

If an excavator fails to comply with one of the first four obligations, it may be strictly liable for the resultant damage; however, that is not the issue presented here. Here, there is no genuine dispute Titan and TSI marked the excavation boundary, called for locates (multiple times), the utilities were “marked,” and Titan and TSI maintained those markings. The question here is whether Titan (and its subcontractor—TSI) used “reasonable care to avoid damaging underground facilities.” In the words of the Senate Bill report, whether Titan’s “negligent acts or omissions cause[d] damage to facilities”—Titan is not strictly liable for any damage.

3. The Trial Court Erred Because There is a Material Question of Fact as to Whether the Struck Utility Was “Marked.”

When TSI began excavating, there were several ground markings in the area from USIC’s multiple locates. (See, e.g., CP

241.) After receiving a contractor's notice of its intent to excavate, a facility owner must "provide the excavator with reasonably accurate information by marking" the location of the facility operator's "locatable underground facilities." RCW 19.122.030 (3). "Reasonable accuracy" is defined as "location within twenty-four inches of the outside dimensions of both sides of an underground facility." RCW 19.122.020(23). With its motion for summary judgment, the City did not submit any evidence to demonstrate that the surface markings correlated to the struck northern grouping. Therefore, material questions of fact remain as to whether the struck utility was "marked," and whether Titan's interpretation of the markings was reasonable. The facts must be construed in Titan's favor for the purposes of summary judgment.

At oral argument, the City's counsel used a picture from the second locate to argue that Titan should never have mechanically excavated in the area. (RP 4-5.) This argument ignores the UUDPA's "locatable" and "reasonable accuracy" requirements. In fact, the City failed to address the fact that there were red markings—indicating power conduits—that appear to be more than two feet north of the trench. (See CP 158, 242.) Titan should not be at the mercy of the third party locating service to be responsible for

the time-consuming and expensive vactor-excavation or hand digging because the utility service indiscriminately marks an entire area. Titan, as would any excavator, must reasonably interpret the locate markings in relation to known facilities in the area.

Federal Way also submitted hundreds of photographs with its motion, some from across the street—others from separate areas of the project—in an attempt to argue that these locate markings somehow made it unreasonable for Titan to proceed. (CP 90-314.) Again, this argument is untenable: it fails to address how the markings relate to the individual utilities, fails to provide any information related to the distance between the markings and the struck utility, and ignores the fact that Federal Way itself believed it was safe to proceed with an auger. Not only did Federal Way watch the excavation, refuse to pay for additional vactoring, and tell TSI some of the markings were incorrect and based on outdated as-builts, but Federal Way also told Titan and TSI that PSE had moved any conflicting utilities. (CP 368, 391, 401.) That representation and design change is directly related to evaluating whether Titan and TSI acted with ‘reasonable care’ and/or encountered a contract change or differing site condition. Additionally, why did no one—including PSE or Federal Way—believe additional relocation work

was needed? Obviously because no one interpreted the locate markings as showing a conflict.

A contractor's need to interpret ground markings in relation to known and represented conditions is a clear reason why the UUDPA holds contractors who comply with the Act's threshold requirements to a reasonable contractor standard. If excavators are held liable for striking utilities, regardless of whether an owner can demonstrate that the markings actually correlate to the struck conduit or are even within the conduit's tolerance zone (and regardless of whether the excavator acts with reasonable care), it disincentives excavators from complying at all with the statute's threshold requirements.

Here, the contract indicated that there were two power conduits in the vicinity of the signal pole base. (CP 56.) Titan visually located the southern grouping in PSE's trench. (CP 391, 401.) The fact that there were red locate markings north of the trench, which appear to be more than two feet away from the signal pole base location (i.e., outside of what would be considered "reasonably accurate") raises a material issue of fact as to whether the northern grouping was marked with "reasonable accuracy" in the first place. The UUDPA does not impose liability on the

contractor unless the markings are reasonably accurate. See RCW 19.122.030 (3), .040(2).

4. The Trial Court Erred Because Underground Utility Damage Prevention Act Does Not Hold Excavators Who Comply with the Act's Threshold Requirements Strictly Liable.

In her oral ruling, the trial court judge stated:

In this case, the plaintiff raises several facts in terms of the statements made by the City with regards to the location [of the conduit]. The question before this Court is whether these facts are material in light of the undisputed fact that the ground was marked and there was a failure to locate the precise area where the cable was prior to digging.

The Court finds that those statements are not material to the case before me, and will grant summary judgment in favor of the defense.

(RP 28:14-22.) Through this ruling, the trial court judge held that an excavator's actions are per se unreasonable if the excavator fails to "precisely locate" a "marked" conduit. The trial court's UUDPA interpretation conflicts with the Act's plain language, legislative history, and public policy behind utility construction projects, especially those performed by public agencies. Furthermore, other jurisdictions interpreting similar statutes have refused to hold excavators strictly liable.

a. The Act's Plain Language Imposes a Reasonable Care Standard.

Federal Way argued that RCW 19.122 makes an excavator strictly liable for damages “where the excavator fails to take appropriate measures to locate, maintain markings, and avoid hitting underground utilities.” (CP 22.) The trial court appeared to adopt this position in its oral ruling. (RP 28.) However, even under Federal Way’s summary, strict liability would not apply because the question, as spelled out in the statute, is whether an excavator took *appropriate measures*.

Here, Titan and TSI used the One-Call service and obtained locates. (CP 84-87.) Whether they acted ‘appropriately’ thereafter necessarily involves a question of fact for the fact-finder. This is the only analysis consistent with RCW 19.122.040 (“excavator shall use reasonable care...”) and Washington law (*see, e.g.*, 16 Wash. Prac., Tort Law And Practice § 2:28 (4th ed.) (reasonable care typically question for fact finder)). The trial court cannot ignore the statute’s “reasonable care” requirement on summary judgment.

- (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) (emphasis added). Reasonable care is a negligence concept. The court's focus should be whether a reasonable excavator would have acted as TSI did in the same or similar circumstances, knowing what TSI knew at the time of the strike. See, e.g., *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 553, 192 P.3d 886 (2008). It is not enough to show that an excavator hit a utility—an excavator must not have acted with reasonable care for it to be liable.

The trial court focused on (2)(a)'s requirement that an excavator "determine the precise location of underground utilities which have been marked." *Id.* As discussed in Part V.A.3, *supra*, there is a material question of fact in this case whether the struck utilities were "marked" given that there were additional red markings north of the trench area, in addition to the changes between the first and second locates given that Titan installed additional signal conduit in the interim.

Additionally, the Act does not define what “precise location” means. How does a contractor “determine the precise location”? Must a contractor visually locate a utility that corresponds to every ground marking prior to mechanically excavating—irrespective of what other ground markings represent and what both the property owner and utility itself represents? Surely not. At least that is not what the Act says. Given that the “precise location” requirement falls under the “reasonable care” standard—a well-defined negligence concept—the “precise location” is the placement where a reasonable contractor would interpret the utility is located, given all the information available to it, taking into account contractual indications, ground markings, and representations made by parties with supposed superior knowledge—the project owner and the utility itself. Whether Titan/TSI excavated with “reasonable care” is an issue of fact that the trial court did not decide.

b. The Act’s Legislative History Suggests that the Legislature Intended the Act to Hold Excavators to a Negligence Standard.

In addition to the Act’s plain language holding contractors to a reasonable care standard, the Act’s legislative history supports finding that the Act does not hold contractors strictly liable for any utility damage as well. The court’s “primary duty in interpreting any

statute is to discern and implement the intent of the legislature.” *Nat’l Elec. Contractors Ass’n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). Here, the legislative history provides that “[a]n excavator will use reasonable care to avoid damaging underground [sic] facilities. A person whose negligent acts or omissions cause damages to facilities is liable for all repair or relocation costs.” S.B. Rep. on Substitute H.B. 857, 48th Leg., Reg. Sess. (Wash 1984). This clearly establishes that the legislature, when enacting the UUDPA, believed that excavators would only be liable for damage if they failed to excavate with reasonable care.

This position is further supported by the UUDPA’s purpose, which was enacted to protect contractors from unreasonable and unfair contractual allocations of liability and costs. The legislature did not intend to hold contractors strictly liable unless the contractor visually located all marked utilities at their own expense prior to excavating.

c. Public Policy.

Under the trial court’s ruling—holding an excavator strictly liable for striking a “marked” utility—a project owner (and even a utility company) can negligently or even intentionally lead others into scenarios where workers can be seriously injured or killed

without any fear of liability. This cannot be what the Legislature intended—it certainly is not what RCW 19.122 says.

Holding an excavator strictly liable for striking a utility (after otherwise complying with the Act's threshold requirements) not only ignores the imprecise nature of utility location services, but also dangerously absolves all other parties, including project owners and utility owners, from any and all misrepresentations the party makes with regard to utility location or even mismarking them.

As discussed above, the UUDPA was enacted to decrease contractors' exposure for utility damage and force both utility owners and project owners to assume a fair allocation of responsibility. Holding a contractor strictly liable for damage resulting from these parties' misrepresentations only serves to increase the safety risks associated with underground utility construction (if project owners and utilities have no liability for representations made as to utility location) or substantially increase costs of both public and private construction projects (if contractors are forced to hand dig or vactor-excavate in the vicinity of any third-party locate markings, regardless of the contractor's reasonable interpretation of such markings or what the property and utility owners tell the contractor regarding the utility's location).

d. Other States with Similar Laws Do Not Hold Excavators Strictly Liable in Similar Circumstances.

While Washington's appellate courts have not addressed whether the UUDPA imposes strict liability, other jurisdictions have interpreted similar call-before-you-dig statutory schemes to not hold excavators strictly liable. Washington courts look to law from other jurisdictions when it is helpful to interpret Washington statutes. *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 638, 278 P.3d 173 (2012). State courts which have specifically addressed whether a call before you dig statutory scheme imposes strict liability on an excavator in similar circumstances have gone to great lengths to avoid conferring such liability. See, e.g., *Brd. of Cnty. Com'rs of Garrett Cnty., Md. v. Bell Atlantic-Md., Inc.*, 695 A.2d 171 (Md. 1997); *Vill. of Hallam v. L.G. Barcus & Sons, Inc.*, 798 N.W.2d 109 (Neb. 2011).

The Maryland Supreme Court held that Maryland's utility locate statute did not impose strict liability because the excavator is required to "[e]xercise due care to avoid interference with or damage to an underground facility that an owner has marked" in accordance with the statute, even though the statute also provides that "any person or contractor who violates any section of

[Maryland's statute] 'shall be deemed negligent and shall be liable to the owner of the underground facility for the total cost of the repair.'" *Bell Atlantic-Md.*, 695 A.2d at 179. A "statute couched in negligence terms is not a strict liability statute." *Id.* (citing *Mayor and City Council of Baltimore v. Blibaum*, 374 A.2d 1152, 1158 (Md. 1977); *cf. Sedona Self Realization Grp. v. Sun-Up Water Co.*, 598 P.2d 987, 989 (Ariz. 1979) (holding excavators strictly liable only if they do not comply with the statute's threshold requirements, similar to Washington: "If a person obtains the necessary information and excavates in a careful and prudent manner, he can then escape liability for damages").

Other state statutory schemes establish a rebuttable presumption of negligence, but do not hold excavators strictly liable in similar contexts. *See, e.g., A & L Underground, Inc. v. City of Port Richey*, 732 So. 2d 480, 481 (Fla. Dist. Ct. App. 1999).

5. The Trial Court Erred Because Titan/TSI Complied with the UUDPA's Threshold Requirements and Excavated with Reasonable Care.

Titan and TSI complied with the One-call statute's threshold requirements. Federal Way's motion does not dispute that Titan and TSI marked the excavation area and requested locate markings—so these facts are to be resolved in Titan's favor. *See*

CR 56. Federal Way suggests that Titan and TSI “removed markings or did not maintain the markings as statutorily required under RCW 19.122.030 (6)” but does not specifically say how or cite evidence. (CP 19.) This should also be construed in Titan’s favor. In any event, Titan and TSI *did* maintain locate markings. (See CP 392-401.) At the very least, it is another disputed fact that should have prevented summary judgment.

Federal Way similarly suggests, without proof, that Titan violated the UUDPA because: “Utilities must be marked with ‘reasonable accuracy,’ which means location within 24 inches of the outside dimensions of both sides of an underground facility” and it argues that “Titan and TSI were required to avoid excavating within those parameters.” (CP 20 (citing RCW 19.122.020(23)).) Again, the statute does not say this. Here Federal Way confuses the concept of a ‘tolerance zone’—where the marking may be within two feet of the underground facility’s outer dimension—with some sort of statutory prohibition on excavation. Some states prohibit mechanical excavation in the tolerance zone. See, e.g., Cal. Gov. Code § 4216.4 (requiring hand digging within in the area of the subsurface installation; however, the utility operator can agree to allow mechanical excavation to proceed prior to visually locating

the utility). Washington's One-Call statute does not; it instead requires an excavator to proceed with "reasonable care." RCW 19.122.040(3). Again, whether Titan and TSI proceeded with 'reasonable care' is a question of fact that cannot be resolved by way of Federal Way's motion for summary judgment.

TSI reasonably interpreted the ground markings to indicate the signal conduits installed after PSE dug its trench and relocated the South grouping—which Titan and TSI visually confirmed did not conflict with the surveyed signal pole base location, as well as the southern grouping itself. Significantly, the red markings TSI reasonably associated with the northern grouping appear to be more than two feet north of the excavation. These markings were clearly visible at the time of the excavation. (See markings in the rocks at right (north) side of photograph on CP 156 (looking west) and left side of photograph on CP 242 (looking east after the second locate)).

6. Summary Judgement Is Improper Because the UUDPA Specifically Preserves the Parties' Contractual Remedies.

While the trial court appeared to hold Titan and TSI strictly liable for striking the utility, Federal Way's other arguments for summary judgment fail as well. In its motion, Federal Way argued

that the UUDPA eliminates any contract provisions that entitle Titan to relief. (See CP 23.) First, Federal Way argues that its own contract's provisions are void as a matter of public policy. (CP 32.) Second, Federal Way argues that Titan was contractually responsible for utility relocation and locating. (CP 32.) Third, Federal Way argues that its misrepresentations about the utilities are excluded from evidence based on the parol evidence rule and contract restriction on oral modifications. (CP 32-33.) All three arguments fail, and summary judgment was not proper.

a. Federal Way's Contract Provisions Are Not Voided by RCW 19.122.

Federal Way argues that holding it liable for design error and misleading Titan would be tantamount to a contractual agreement to indemnify for excavator non-compliance with the UUDPA, and is thereby void. This is incorrect. Holding Federal Way accountable for design error and misleading Titan is not indemnity—it simply seeks recompense for a contract breach and/or design error. Nothing in the UUDPA overrides or precludes this. In fact, RCW 19.122.040 specifically preserves an excavator's right to claims for contract change or differing site conditions. Federal Way uses the UUDPA to argue that because Titan is (it argues) liable to PSE,

Federal way is not liable for its own design failures and misrepresentations, despite the Act's specific preservation of contractual risk allocations for changed and differing site conditions.

Further, nothing in the statute would eliminate normal contracting duties imposed by Washington law such as good faith, non-interference, or the implied accuracy of design information. *See, e.g., Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991) (all Washington contracts have an implied duty of good faith and fair dealing); *Bignold v. King County*, 65 Wn.2d 817, 825, 399 P.2d 611 (1965) ("In every construction contract there is an implied term that the owner or person for whom the work is being done will not hinder or delay the contractor..."); *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 29, 442 P.2d 621 (1968); *Hoye v. Century Builders, Inc.*, 52 Wn.2d 830, 833, 329 P.2d 474 (1958) ("Where a person holds himself out as qualified to furnish, and does furnish, specifications and plans for a construction project, he thereby impliedly warrants their sufficiency for the purpose in view."). Federal Way breached these implied duties, damaging Titan, and the UUDPA does not absolve Federal Way of its liability.

Here, Federal Way, the party responsible for project design, specifically represented to Titan that conflicting PSE conduits had been relocated. This representation had the same effect as a contract change or clarification, because Federal Way was telling Titan where the utilities were (or, more specifically, were not). Under any reasonable contract interpretation, Federal Way cannot, on one hand, issue incorrect design information and restrict Titan's means and methods yet, on the other hand, argue that Titan should have ignored this information. See, e.g., *Bigbold v. King County*, 65 Wn.2d 817, 823 (1965) ("The insistence of the appellant that the order of its engineer... should have been disobeyed... comes, it seems to us, with exceptionally bad grace.").

Federal Way's Contract Section 1.1 (CP 41) also specifically incorporated the Washington State Department of Transportation's Standard Specifications, which gives Federal Way's project engineer the power to make binding directions and issue contract interpretations, and Titan must comply with such direction and interpretation. See WSDOT Standard Specifications Section 1-05.1 (owner's engineer authorized to interpret plans and specifications;

contractor must comply); 1-04.4 (owner's engineer can change contract at any time; contractor must comply).⁸

Again, RCW 19.122.040 (3) states: "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." Here, the contract contains change and differing site conditions clauses that entitle Titan to relief when "preexisting subsurface or latent physical conditions are encountered at the site, differing materially from those indicated in the Contract." WSDOT Standard Specifications Section 1-04.7. The contract, as augmented by Federal Way's interpretations, indicated that the northern grouping did not conflict with the proposed signal base. As such, Titan is entitled to contractual relief for encountering a differing site condition, and summary judgment is not proper.

b. Titan Was Complied with the Contract's Utility Requirements.

Federal Way next argues that Titan was responsible for utility relocation (or coordination thereof) and utility locating, so, regardless of how Federal Way took that task on, Titan is to blame. (See CP 23-29.) For example, Federal Way cites contract Contract

⁸ WSDOT Standard Specifications, *supra*, note 7.

¶ 1.1 and its Request for Bids, which states that the “[w]ork will include utility relocation.” (See CP 23-25.)

Federal Way’s argument makes little sense given that it told Titan before work started that the utilities were already relocated, rendering any such contract requirement pointless. Contracting parties are free to act contrary to wording of their contract, in which instance, the Court should find waiver by way of subsequent conduct. *See Reynolds Metals Co. v. Elec. Smith Constr. & Equip. Co.*, 4 Wn. App. 695, 700, 483 P.2d 880 (1971).

Federal Way also argues that Titan was “responsible for locating underground utilities prior to excavation.” (CP 24.) It cites Contract ¶ 1.8, which reads:

Contractor is responsible for locating any underground utilities affected by the Work and is deemed to be an excavator for purposes of Chapter 19.122 RCW, as amended. Contractor shall be responsible for Compliance with Chapter 19.122 RCW, including utilization of the "one call" locator system before commencing any excavation activities.

(CP 24.) This provision merely obligates Titan to comply with RCW 19.122, which it did, as discussed above. If Federal Way is arguing that it requires something more, then, again, the analysis would return to disputed facts about what Federal Way said, how it

directed Titan's means and methods, and whether Titan encountered a compensable change and/or differing site condition.

c. Neither the Parol Evidence Rule nor The Contract's 'No Oral Modification' Clause Eliminate Federal Way's Liability.

Federal Way also argues that its misrepresentation in the preconstruction meeting that the utilities were relocated should be excluded from the Court's consideration by the parol evidence rule and the contract's restriction on oral modifications. The parol evidence rule bars the admission of extrinsic evidence to add to, modify, or contradict the terms of an integrated contract. *Max L. Wells Trust by Horning v. Grand Cent. Sauna & Hot Tub Co. of Seattle*, 62 Wn. App. 593, 602, 815 P.2d 284 (1991). However, it does not prevent a party from presenting evidence that interprets or changes the contract scope in a mutually agreed way. *Id.* Here, Federal Way's misrepresentation explains why Titan never had to relocate utilities—because Federal Way said it was already done. Also, the parol evidence rule only applies to prior or contemporaneous statements—not statements made during the course of work. See 25 Wash. Prac., Contract Law And Practice § 4:6 (3d ed.). Therefore, it would not exclude misrepresentations made after the pre-construction conference in any event, such as

Federal Way's statement that the locate markings were based on outdated as-built information (CP 391) or its implied representation that the conflicts had been removed when it stopped TSI's vector-excavation. (CP 401.)

Federal Way's 'no oral modification' argument also fails because Washington courts generally do not enforce "no oral modification" clauses because parties can orally agree to waive them. See, e.g., *Pacific NW Grp. A v. Pizza Blends, Inc.*, 90 Wn. App. 273, 281, 951 P.2d 826 (1998) ("[N]o-oral-modification clauses have consistently been deemed unenforceable in this state."); see also 25 Wash. Prac., Contract Law And Practice § 11:2 (3d ed.).

d. Federal Way's Interpretation of the Contract Violates RCW 4.24.115.

Finally, affirming the trial court's dismissal of Titan's claim and relieving the City from any liability for its misrepresentations requires Titan to indemnify the City for its sole or concurrent negligence. RCW 4.24.115 provides:

A covenant, promise or understanding in, or in connection with or collateral to, a contract or agreement relative to ... construction... of[] any road... excavation... or improvement attached to real estate... purporting to indemnify, including the duty and cost to defend, against liability for damages

arising out of such services or out of bodily injury to persons or damage to property:

- (a) Caused by or resulting from the sole negligence of the indemnitee, his or her agents or employees is against public policy and is void and unenforceable;
- (b) Caused by or resulting from the concurrent negligence of (i) the indemnitee... and (ii) the indemnitor... is valid and enforceable only to the extent of the indemnitor's negligence and only if the agreement specifically and expressly provides therefor....

Interpreting the contract so as to make Titan strictly liable, regardless of Federal Way's negligent design or misrepresentation, would violate this statute. It would also allow a contracting party to act negligently, if not dangerously, without penalty. And how could any contractual changes and differing site conditions clause survive if the statute was read in the way proposed by Federal Way's motion? The Legislature established a protocol to help avoid utility strikes and reduce contractors' unfair contractual exposure to liability. Contrary to Federal Way's motion, the Legislature did not declare that excavators are always liable for utility strikes or have no remedies against a project owner simply because the facts involve utilities. Anything less than reversing the trial court's order would create new, dangerous, and irreconcilable law.

7. The Court's Error was Prejudicial.

An erroneous order that grants summary judgment on a claim is inherently prejudicial and requires reversal. *Beers v. Ross*, 137 Wn. App. 566, 569, 154 P.3d 277, 279 (2007) (“because the record reveals material issues of disputed fact, we reverse the trial court’s award of summary judgment and remand the matter for trial”). The trial court’s order dismissing Titan’s claims should be reversed. Such a reversal should also reverse the trial court’s fee award.

B. The Trial Court Erred by Awarding the City Attorney Fees Because the Parties Explicitly Waived any Right to Recover Fees Under the Terms of Federal Way’s Contract.

If this Court determines that the trial court properly granted summary judgment, Titan respectfully requests that it reverse the trial court’s improper award of fees, which was made in direct conflict with the parties’ contractual bargain.

1. Standard of Review.

Whether a party is entitled to attorney fees is a question of law that the Court of Appeals reviews de novo. *King Cnty. v. Vinci Constr. Grands Projets*, 191 Wn. App. 142, 183, 364 P.3d 784

(2015) (citing *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007)).

2. Federal Way's Contract Waives its Right to Recover Fees and Costs in Litigation.

The parties' contract provided at Section 19.6 that "each Party shall pay all its own attorneys' fees, costs and expenses." (CP 494.) Washington law requires that this language be given its facial and intended effect as a waiver of fees and costs, even if Federal Way also seeks statutory fees. Washington courts enforce the "American Rule" on attorney fees, which provides that "litigants must bear their own legal expenses." *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 649, 272 P.3d 802 (2012). However, the American Rule is not absolute: fees can be awarded in some circumstances, such as when the parties specifically allow for such an award by contract. See 14A Wash. Prac., Civil Procedure § 37:1 (2d ed.). Some statutory provisions, such as the UUDPA, also allow a party to recover fees in certain contexts. However, parties are permitted to waive such statutory rights when the waiver does not conflict with the public policy behind the right. See *Motor Contract Co. v. Van Der Volgen*, 162 Wash. 449, 454, 298 P. 705, 707 (1931).

In Washington, courts have held that parties can bargain away a statutory right to fees. For example, in *Yakima Cnty. v. Yakima Cnty. Law Enforcement Officers Guild*, 157 Wn. App 304, 342-45, 237 P.3d 316 (2010), the appellate court held that a party that prevailed at arbitration was not entitled to statutory fees under the wage recovery statute (RCW 49.48.030) because the parties waived their right to fees and costs by contract in a collective bargaining agreement. Similar to ours, that contract read: “Each party shall pay the expenses of their own representatives, witnesses and other costs associated with the presentation of their case. The cost and expense of the arbitrator shall be borne equally by the parties.” *Id.* at 337. Here, the language is no different and any award of fees or costs to Federal Way would improperly render this aspect of the parties’ contract (again, something Federal Way itself proposed) meaningless. Further, given the American rule—that each party bears their own fees and costs—what purpose did Federal Way’s waiver serve if not to also waive any statutory right to fees?

Washington courts have ruled that parties cannot contractually waive statutorily mandated fees when such a waiver would violate public policy. For example, in a civil rights case

involving employment discrimination, the court held that an arbitration agreement clause that provided that each party bear their own respective costs and attorney's fees was unconscionable because it required the plaintiff to waive his unilateral⁹ statutory right to attorney's fees. *Alder v. Fred Lind Manor*, 153 Wn.2d. 331, 354-55, 103 P.3d 773 (2004). The court held that not only did the provision undermine the plaintiff's statutory right to recover attorney's fees, it also "helps...the party with a substantially stronger bargaining position and more resources, to the disadvantage of an employee needing to obtain legal assistance." *Id.* at 355 (quoting *Alexander v. Anthony Intern, L.P.*, 341 F.3d 256 (3rd Cir. 2003)).

Unlike the Employer/Employee context, where fees waivers have been held to be unconscionable or void as against public policy because they force an employee to waive a ***unilateral*** statutory right to fees, the fees provision in RCW 19.122.040 is bilateral. Further, Federal Way and Titan are both sophisticated parties, and if anything, Federal Way had the greater bargaining

⁹ "RCW 49.60.030(2) provides that **prevailing plaintiffs** shall 'recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees.'" *Alder v. Fred Lind Manor*, 153 Wn.2d. 331, 354 n.12, 103 P.3d 773 (2004) (prevailing defendants—employers—are not entitled to fees under the statute).

power because Titan could not negotiate the terms of Federal Way's form contract. Nothing in the statute suggests a legislative intent to make the fee provision in RCW 19.122.040 nonwaivable. In this case, Federal Way specifically and unambiguously waived its rights to fees when it drafted the clause stating that "each party shall pay all its own attorneys' fees, costs and expenses." (CP 494.)

3. **No Action Was Brought Under RCW 19.122.040.**

Federal Way requested fees under Ch. 19.122 RCW, which provides that "[i]n any action brought under this section, the prevailing party is entitled to reasonable attorneys' fees." RCW 19.122.040(4). Titan filed this lawsuit in February, 2015, alleging two contract-based causes of action (breach of contract; indemnity). The action **was not** brought under RCW 19.122.040—the Complaint never mentioned it. (CP 1-7.) This statutory basis for fees only applies to "[an] action **brought under this section.**" (Emphasis added).

The language is clear. "Action" is a case; "brought under" means the statute is the vehicle for the complaint. That is exactly what happened in the only case Federal Way cited in its motion for fees (*Hayfield v. Ruffier*, 187 Wn. App. 914, 351 P.3d 231 (2015), CP 419-20): the plaintiff brought its complaint under the statute.

Here, that did not occur. Federal Way raised the contract and statute incorporated therein as a defense and, even then, did not style the argument as a counterclaim or seek any affirmative recovery under the statute.

Federal Way cannot dictate the type of action by simply making arguments. No Washington law allows a fee award in these circumstances.

4. Federal Way Improperly Seeks Fees Under the Contract's Indemnification Provision.

Federal Way also argued for the first time in its reply brief in support of its request for fees that its contract fee waiver only “relates to actions brought for alleged defaults under the contract between the parties,” and “does not apply to third party damage claims.” (CP 2-3.) Federal Way then argues that it is entitled to fees under the contract's indemnification clause, which provides:

8.1 Contractor Indemnification. The Contractor agrees to indemnify, defend, and hold the City... harmless from any and all claims, demands, losses, actions and liabilities (including costs and attorney fees) to or by any and all persons or entities... arising from, resulting from, or connected with this Contract to the extent caused by the **negligent acts**, errors or omissions of the Contractors... or by the Contractor's breach of this Contract.

(CP 47 (emphasis added).) Significantly, Federal Way did not plead a contractual indemnity claim in its answer, nor did it ever request Titan indemnify it from damages. “[A]ttorney fees sought pursuant to a contractual indemnity provision are an element of damages that must be proved to the trier of fact.” *Newport Yacht Basin Ass’n of Condo. Owners v. Supreme Nw., Inc.* 168 Wn. App. 86, 102-04, 285 P.3d 70 (2012). Because Federal Way failed to plead a counterclaim for indemnity, it has no avenue to damages and cannot recover damages under its indemnity argument.

Even if Federal Way had properly pleaded a right to indemnity, the clause it relies on does not provide it an avenue to relief in any event. “Indemnity agreements are subject to the fundamental rules of contract interpretation—the intent of the parties controls; this intent must be inferred from the contract as a whole; the meaning afforded the provision and the whole contract must be reasonable and consistent with the purpose of the overall undertaking; and if any ambiguity exists, it must be resolved against the party who prepared the contract.” *Newport Yacht Basin Ass’n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 86, 100, 285 P.3d 70, 79 (2012) (quoting *Knipschild v. C-J Recreation, Inc.*, 74 Wn. App. 212, 215, 872 P.2d 1102 (1994)). Federal Way’s

Contractor Indemnification clause only operates when the City is sued or a claim is made directly against it by a third party—not when it is sued by Titan, a party to the contract. Here, Titan sought contract damages—which are subject to the contract fee waiver.

Additionally, Federal Way’s Contractor Indemnification provision only requires the contractor to indemnify the City for third-party costs and attorney fees it is liable for—not the City’s own costs and attorney fees. The parenthetical providing for costs and attorney fees clearly modifies “liabilities” to others. This is the only reasonable interpretation that does not conflict with section 19.6, wherein the parties waived any right to recover their own fees. At the very least, there is an ambiguity between the provisions, which should be construed against the drafter—Federal Way. *Id.*

Finally, even if this Contractor Indemnification provision did apply to this situation, it requires the contractor indemnify “to the extent caused by the **negligent** acts, errors, or omissions of the Contractor....” The trial court never found Titan or TSI to have acted negligently—Federal Way argued for (and the trial court appeared to impose) strict liability. Whether Titan or TSI acted negligently is an issue of fact.

5. Federal Way's CR11 Request is Baseless.

Federal Way also requests fees by characterizing Titan's contract-based claims as frivolous under CR 11. While the trial court did not address this argument, Titan will briefly do so here out of an abundance of caution. Federal Way's premise is that it contacted Titan's counsel on November 12, 2015, and demanded Titan drop the case **before** Federal Way had to spend the time and money to prepare a summary judgment motion. The argument goes that Titan refused, thus leading Federal Way to incur this avoidable cost. (CP 418.) However, Kenyon Disend's billings show this is false. The Motion was drafted five months earlier, in July 2015 (see billings of at least 20.6 hours). (See CP 480-81.) In other words, the letter of November 12, 2015 was not sincere because the motion had been drafted for months. Further, Federal Way was not sincere when it presented this story to the trial court.

Federal Way fails to satisfy its heavy burden under CR 11, a sanctions rule. Federal way has failed to demonstrate that it was "**patently clear** that a claim has absolutely no chance of success." *Skimming v. Boxer*, 119 Wn. App. 748, 754-55, 82 P.3d 707 (2004) (emphasis added). Under an objective standard, the Court must focus on "whether a reasonable attorney in a like circumstance

could believe his or her actions to be factually and legally justified.” *Skimming* 119 Wn. App. at 754 (citing *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992)). Significantly, the “fact that a complaint does not prevail on its merits is not enough.” *Id.* at 755. In these circumstances, where Federal Way does not dispute that it misled Titan as to the location of utilities—which under Washington construction law is a breach of contract—Titan’s position cannot be characterized as frivolous.¹⁰

VI. CONCLUSION

For any or all of the foregoing reasons, the trial court’s summary judgment ruling should be reversed. Alternatively, the trial court’s fee award should be reversed, and the parties should bear their own attorneys’ fees and costs, as specifically and unambiguously provided in their agreement.

¹⁰ If the Court is at all inclined to consider CR 11, Federal Way’s request procedurally fails as it is untimely. It sought CR 11 sanctions only after it prevailed on summary judgment and more than a year into the case. “[A] party should move for CR 11 sanctions as soon as it becomes aware they are warranted. ‘Prompt notice of the possibility of sanctions fulfills the primary purpose of the rule, which is to deter litigation abuses.’” *North Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 649-50 (2007) (denied CR 11 fee request when made more than a year after the original pleadings (the reason for sanctions) were filed).

DATED this 4th day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 2016, I caused a true and correct copy Appellant Titan Earthwork LLC's Opening Brief to be served on the following attorneys of record in the manner(s) indicated below:

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