No. 95085-7

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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No. 344801

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Appellants,

v.

COUNTY OF LINCOLN,
a Washington State County,

Respondent.

APPELLANTS' REPLY BRIEF

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Disputed Facts and The Inferences From the Evidence Preclude Summary Judgment.

The Defendant Lincoln County (the "County") contends the Plaintiffs Lisa Jacobsen ("Jacobsen") and Specialty Asphalt ("Specialty") failed to produce admissible evidence of gender discrimination. The County ignores the facts that are indisputable evidence of disparate treatment.

For example, the County's brief does not mention Nollmeyer's inappropriate remark about Jacobsen's high heels at the walk through as evidence of discrimination. The County also hopes the court will ignore the evidence Nollmeyer called Jacobsen to persuade her not to bid the project. This evidence is ignored, but not disputed by the County.

Likewise, the County says nothing about Nollmeyer's decision to ignore the policy of giving all bidders the same information at the same time so he could give a male owned business a private meeting and project walk through. Neither the County nor Nollmeyer offered a nondiscriminatory reason for the special treatment given to male owned Arrow Construction.

The County points to the fact it contacted Specialty about bidding the project as evidence that it did not discriminate. However, there is no evidence the County knew Specialty was a female owned business when the

request to bid was made. At the project walk through it was apparent a female would be in charge of Specialty's work and the discrimination began.

While the County Commissioners did accept some of Jacobsen's suggestions regarding the project, Jacobsen does not have to prove everyone at the County discriminated against her. The evidence is Nollmeyer and perhaps a few others at the County discriminated by interfering with Jacobsen and ultimately blocking Specialty's performance of the contract. The fact that the County was required by law to award the project to Specialty as the low bidder also is not evidence there was no discrimination.

While Nollmeyer followed standard procedure and checked Specialty's status with the Department of Labor and Industries ("L&I") after the bid was received, he did not check out the male bidder. *CP 327-30, 333.* Then someone at the County tracked Specialty on the L&I website the day after the award was made though such tracking was never done on other contractors. *RP 287-8, ¶ 24, 302-3, 309.* Plaintiffs contend this is evidence the County was hoping to disqualify Specialty after the award was made. There was no explanation for why the County initiated tracking of Specialty after the contract was awarded. *CP 331-3.*

Next someone, perhaps Nollmeyer, told the County elected officials

for the first time a bond was required. When Specialty objected, the County tried to rebid the project. When Specialty's attorney objected, the County dropped the attempt to rebid the project, but it continued to insist that Specialty buy a bond. *CP 35, lines 17-27.*

The fact the County in tardy fashion offered to enter into an illegal agreement to reimburse Specialty for the cost of the bond does not mean there was no discrimination. The point is, initially the County did not want a bond. It only demanded the protection of a bond once Jacobsen's company was awarded the project.

Then once the County knew the passage of time made it impossible for Specialty to perform the contract, it was again willing to have the work done without a bond. *RP 391 ¶ 3.* If the County was demanding a bond in good faith for legal reasons, it would never have dropped its demand for a bond.

It Was Reversible Error to Find the County's Demand for a Bond Was Made in Good Faith.

The trial court's finding the County's demand for a bond was in good faith is improper at summary judgment. In a motion for summary judgment a trial court may not weigh evidence or testimonial credibility. *Renz v.*

Spokane Eye Clinic, P.S., 114 Wn. App. 611, 623, 60 P.3d 106, 112 (2002). The evidence the no bond language in the Bid Proposal was a mistake is disputed. The Bid Proposal was edited by three county officials before it was issued and a request for a bond was not added when the Bid Proposal was revised and issued for a second time.

It Is Reversible Error to Require the Nonmoving Party in a Summary Judgment Motion to Have Evidence Corroborating Her Fact Based Testimony Regarding Discrimination.

The trial court dismissed the discrimination claims because it found Specialty and Jacobsen did not establish a prima facie case that Specialty was treated differently than other contractors, and because plaintiffs did not have corroborating evidence of discrimination. The record does contain independent corroborating evidence establishing a pattern of disparate treatment. The private walk through, the L&I tracking, the attempt to rebid the project and other evidence all corroborate Jacobsen's testimony.

Even if this corroborating evidence was not in the record, self serving eye witness testimony like Jacobsen's must be viewed as true. *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 866, 324 P.3d 763, 767 (2014). In *Sutton,* the plaintiff was a limited guardian who provided self serving eye

witness testimony about an alleged assault on her granddaughter. The court ruled Sutton's self serving testimony must be taken as true during a summary judgment hearing.

The County relies heavily on *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517, 519 (1988) to support the trial court's erroneous conclusion plaintiffs' evidence was deficient because of a lack of corroborating evidence. In *Grimwood*, the problem was not a lack of corroborating evidence or the fact the plaintiff's testimony was self serving, the problem was the testimony was conclusory because it did not describe an event, an occurrence or something that took place. *Id at 360.*

Jacobsen and Specialty presented ample evidence of specific events and occurrences of disparate treatment by agents of the County. All of the things Nollmeyer said and did are specific events that took place. The County has not denied its policy of equal treatment was broken to help a male contractor. It does not deny Specialty was singled out for L&I tracking. Nollmeyer also volunteered he was not even sure he checked on Arrow Construction's status with L&I before the award was made like he did with Specialty. *RP 330.*

Unlike the evidence described in *Grimwood*, the foregoing evidence

is specific and it is not merely an expression of opinion. The facts in the record demonstrate a pattern of disparate treatment that create inferences of sexual discrimination.

Specialty Justifiably Relied On The County's Statements No Bond Was Required.

The County contends Specialty could not reasonably rely on the County's statements that no bond was required because RCW 39.08.010 requires a bond on all public works. The only case interpreting RCW 39.08.010's language regarding bonds states:

> Sections 1159, 1159–1, 1160, 1161 and 1161–1, Rem. Code, are in regard to bonds to be required on public work, and provide that the town shall require bonds with two or more sureties, or with a surety company as surety, that the contract shall be faithfully performed, and that all laborers, etc., shall be paid, and provide that when a municipal corporation shall fail to take such bond, it shall be liable to the full extent of the contract liability. They also provide that bonds shall be equal in amount to the full contract price. The bond here does not meet any of the requirements of the statute. It had but one surety, and was not for the full amount of the contract price. The bond is therefore not a statutory bond, and the question is whether it is good as a common-law bond. **We take it that the statutes cited do not compel the municipality to exact the bond there provided for, but that it may elect to proceed with the work under other guaranties of its performance, taking the risk incident to failure to secure the statutory bond.** (*Emphasis added.*)

Smith v. Town of Tukwila, 118 Wash. 266, 269-70 (1922). The *Smith* court

was addressing a former version of the statutes, but the statutes have not changed significantly.

RCW 39.08.010 is and always has been tempered by RCW 39.08.015 which provides that in the absence of a bond, the public entity is liable to workers and suppliers for labor and material used in the project. RCW 39.08.015 states:

> If any board of county commissioners of any county, or mayor and common counsel of any incorporated city or town, or tribunal transacting the business of any municipal corporation shall fail to take such bond as herein required, such county, incorporated town, or other municipal corporation, shall be liable to the persons mentioned in RCW 39.08.010, to the full extent and for the full amount of all such debts so contracted by such contract.

The County urges the court to ignore the holding in *Smith* and rule RCW 39.08.010 renders any public works contract without a bond void and unenforceable. The County's argument would have the effect of nullifying RCW 39.08.015. When statutes seem to conflict, the rules of construction direct the court to reconcile them so as to give effect to both statutory provisions. *Bailey v. State*, 147 Wn. App. 251, 262, 191 P.3d 1285, 1291 (2008).

Performance bonds are not free and the substantial cost associated with a bond is passed onto the public entity in the bidding process. The

statutory scheme permits a public entity to reap the financial benefits of proceeding without a bond, but it imposes the liability for unpaid wages on the public entity. These two statutes work together to accomplish the purposes of the legislation.

The purpose of a public works bond is to protect laborers and suppliers, because public property is not subjected to a mechanics liens in this state. *Hall & Olswang v. Aetna Cas. & Surety Co.*, 161 Wn. 38, 296 P. 162 (1931); *Rounds v. Whatcom County*, 22 Wn. 106, 60 P. 139 (1900) (purpose of the statute is to afford security to laborers and materialmen engaged in the prosecution of public improvement). The bonding requirement is not to protect agencies.

If every contract performed without a bond were deemed to be illegal or void, as the County here suggests, the purpose of the statute would be thwarted. If a project was undertaken without a bond, a public entity could refuse to pay the illegal contract, leaving the suppliers and workers unpaid. A court will leave the parties to an illegal contract where it finds them with no legal remedy. Recognizing this, the legislature decided a no bond contract can be enforced "...to the full extent and for the full amount of all such debts so contracted by such contract." RCW 39.08.015.

Even if a contract for public work without a bond would otherwise be illegal, such a contract is still enforceable because the legislature provided an alternate remedy for any harm that might occur. In *Sienkiewicz v. Smith*, 97 Wash. 2d 711, 716-17, 649 P.2d 112, 115 (1982), the court ruled a contract that is not criminal or immoral but violates a statute is enforceable if the statute contains an adequate remedy for its violation. *Evans v. Luster*, 84 Wn. App. 447, 450, 928 P.2d 455, 457 (1996) is in accord. Because the contract in this case is not immoral or criminal and there is a statutory remedy, Specialty's contract is enforceable and Specialty could justifiably rely on the County's statements that no bond was required.

In *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 828, 959 P.2d 651, 655 (1998), the Supreme Court rejected an argument a bank could not reasonably rely on a draft audit as a matter of law. The court ruled the issue of justifiable reliance is a question of fact. *Id.* Even though the jury found the bank was contributorily negligent, the court held the bank proved it justifiably relied on the draft audit report. If a negligent bank could justifiably rely on a draft audit report, a jury certainly could find Specialty justifiably relied on the written Bid Proposal that was reviewed by three county officials before it was issued. This is especially true because of RCW

39.04.015 and Specialty's experience doing no bond public work.

Specialty has also raised a question of fact about whether or not this project is "ordinary maintenance" that is not public work as defined by RCW 39.04.010(4). The definitions in RCW 39.04.010 apply to the entire chapter of the statutes and thus "maintenance" is excluded from the "work" that is subject to bonding under RCW 39.08.010. The County's reliance on provisions of RCW 39.12 subjecting maintenance work to the prevailing wage law does not mean maintenance work requires a bond.

Specialty has produced evidence in the record describing the nature of the maintenance work to be done and the County has not disputed that evidence. Instead the County merely asserts the opinion the work is not maintenance because it says so.

The County's reliance on WAC 296-127-010 is also misplaced because that chapter of the Administrative Code is dedicated exclusively to the prevailing wage law. The rule recites the statutory authority on which it is based and RCW 39.08 is not mentioned. The rule is expressly based on the prevailing wage law.

Whether or not the work at issue here is maintenance, will depend on the evidence presented at trial regarding the nature of the work and

circumstances involved. The question of whether or not this work is maintenance cannot be resolved as a matter of law.

The Public Duty Doctrine Does Not Apply Because The County Was Performing A Proprietary Function.

Specialty cited both *Bailey v. Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987) and *Stiefel v. City of Kent*, 132 Wn.App. 523, 529, 132 P.3d 1111 (2006) to establish the public duty doctrine does not apply to when a County engages in a proprietary function as it did in this case. The County does not dispute the fact it was engaged in a proprietary function and that should resolve the public duty doctrine issue.

Even if the public duty doctrine is applicable here, there is ample evidence of a special relationship between the County and Specialty. The County touts the fact it asked Specialty to bid, it met with Jacobsen during the project walk through, and it followed her advice. At the same time it disavows any relationship with Specialty claiming it merely made a public request for bids. The County does not address *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wash. 2d 107, 159, 744 P.2d 1032, 1065 (1987), *amended,* 109 Wash. 2d 107, 750 P.2d 254 (1988), that holds issuing information to solicit money, is not a request to the public in general. For the

same reason, the Bid Proposal here was not a request to the public at large.

The County cites a three part test to determine if a special relationship existed between the parties. In this case, the presence or absence of each of those tests would depend on the facts and circumstances. For instance, whether or not Specialty could justifiably rely on the County's representations would be a question of fact. Hence even if the public duty doctrine might apply here, there are material issues of fact precluding summary judgment.

The Statement of the Woman Accompanying Jacobsen When Nollmeyer Called to Discourage Jacobsen from Bidding Is Not Hearsay.

The County admits the only evidence excluded from the record by the trial court was the statement by Jacobsen's friend who was present when Nollmeyer called to discourage her from bidding the project. *Respondent's Brief p. 25.* This evidence is relatively insignificant, but it is not hearsay under *ER 801 (c).* The only statement attributed to Jacobsen's companion is, "What is wrong." *CP 242 line 3.* In order to be hearsay, the statement must be offered to prove the matter asserted and this statement is not offered to prove any particular thing is wrong. Rather it is offered as evidence of Jacobsen's anger and agitated mental state at the time. It is not hearsay under

ER 801 and 803.

More important is the County's argument Jacobsen contradicted her deposition testimony rendering inadmissible her description of Nollmeyer's statement that her high heels were not appropriate for the project walk through. The County relies on *Marshall v. AC & S, Inc.*, 56 Wash.App. 181, 782 P.2d 1107 (1989), which holds answers to unambiguous deposition questions that rule out any factual dispute may not be contradicted in a summary judgment affidavit.

However, in this case Jacobsen did not contradict her deposition. When asked about disparate treatment, she described several instances of adverse treatment and then Jacobsen said she was sure there were other events she was trying to recall. Opposing counsel moved on by asking questions about the specific events Jacobsen described. CP 354-5. A witness does not contradict deposition testimony when he or she was unable to come up with specific evidence in a deposition. *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 699, 106 P.3d 258, 266 (2005).

Specialty Compiled With CR 59.

The County's claim Specialty did not identify a specific reason for its motion for reconsideration is completely without merit. Specialty compiled

with CR 59 (7) and (9) identified and listed eight specific instances of adverse treatment that constituted a prima facie case . CP 451-2. Specialty pointed out an inference of discrimination arises once a prima facie case has been made by showing Specialty was in a protected class, was seeking work and was treated differently than members of the opposite sex. CP 453-4. Specialty also showed the County failed to come forward with legitimate nondiscriminatory reasons for the instances of disparate treatment. CP 454-9.

Specialty Cites Ample Authority in Support of its Appeal Including the Assignment of Error to the Trial Court's Denial of Reconsideration.

Specialty cited at least six cases describing the burden of proof and the nature of evidence necessary to overcome a motion for summary judgment in a discrimination case. Much of this authority appears in the portion of the Plaintiffs' brief regarding the erroneous order granting summary judgment. In addition to legal authority, a great deal of briefing is devoted to the disputed facts presented in the record.

Focusing on the facts is appropriate because on appeal the court must "...determine whether there is any issue of material fact which the nonmoving party might prove, which would entitle it to relief." *Gen. Ins. Co. of Am. v.*

Chopot, 28 Wn. App. 383, 385, 623 P.2d 730, 732 (1981). Briefing regarding the inferences from those facts is essential because the appellate court considers all facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Lange v. Nature Conservancy, Inc.*, 24 Wn. App. 416, 419, 601 P.2d 963, 965 (1979).

So the law and facts detailed under the assignment of error regarding the grant of summary judgment is part of and supports the portions of the brief regarding the denial of reconsideration. Obviously, because disputed issues of fact preclude the initial grant of summary judgment, the failure to grant the motion for reconsideration is also erroneous.

The fact the court denied reconsideration because there was no corroborating evidence supporting the plaintiff's case stands alone as an error worthy of reversal. If that is not enough, the fact that the court failed to recognize obvious corroborating evidence from Nollmeyer and L&I proving Specialty was treated differently than a male owned business is decisive. It is almost laughable for the County to argue Jacobsen's affidavit cannot be taken at face value as evidence of discrimination when the evidence from Nollmeyer and L&I was so damaging.

Again, affidavits containing "specific facts" will defeat a motion for

summary judgment. *Rothwell v. Nine Mile Falls Sch. Dist.*, 173 Wn. App. 812, 819, 295 P.3d 328, 331 (2013). Specialty is not relying on bare allegations, it has provided specific facts from Jacobsen and the County's witnesses to prove disparate treatment.

Specialty's Proposed Amendment Was Not Futile.

CR 15(a) permits a party to amend his or her pleading by leave of court and leave shall be freely given. *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 100 Wn. 2d 343, 349, 670 P.2d 240, 243 (1983). The rule permitting amendment of pleadings is to "facilitate a proper decision on the merits" and it is "designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result." *Id.* Here the County did not and does not alleged it would be prejudiced by an amendment. *CP 592, line 10-12.* Instead it argues the amendment is futile.

The County hangs its argument on *Peerless Food Products, Inc. v. State*, 119 Wn.2d 584 (1992) and its progeny, to support the contention that an injunction preventing the County from allowing another bidder to do the work is the "exclusive remedy" available to Specialty. *Respondent's Brief p. 35. Peerless* and the other cases cited by the County pertain to a different

situation altogether.

The *Peerless* court clearly describes its reach: "By restricting the remedy **available to disappointed low bidders** to the parameters outlined in *Mottner* and *Bellingham Am.*, **we allow relief to bidders** that does not compete with the public interest and is consistent with a mutual public interest in public contracts being performed by the lowest bidder." *Id.* at 596-97 (*emphasis added*). In other words, the relief is available to make sure the disappointed low bidder is allowed to do the work.

The cases cited by the County all involved disappointed bidders in a dispute about their right to do the work. In *Mottner v. Town of Mercer Island*, 75 Wn.2d 575, 577 (1969), *Peerless Food Products, Inc. v. State*, 119 Wn.2d at 596, *BBG Grp., LLC v. City of Monroe*, 96 Wn. App. 517, 518, (1999), and *Gostovich v. City of W. Richland*, 75 Wn.2d 583, 585 (1969), each of the plaintiffs did not receive an award and no contractual duties arose. In *Skyline Contractors, Inc. v. Spokane Housing Authority*, 172 Wn. App. 193, 195 (2012) the disappointed low bidder was deemed not qualified to do the work and the public entity attempted to award the work to another contractor.

None of cases involved a public entity that misrepresented the

contract terms or intentionally altered the contract terms in a bad faith attempt to modify or terminate the contract. In this case, Specialty was not a disappointed low bidder and there was no question about its status verses other bidders. Specialty legitimately received an award and it immediately began to perform the contract by refusing other jobs and by mobilizing resources. *CP 283 lines 1-5.* Specialty is not damaged because the wrong bidder got the job, it is damaged because the County refused to let it do the job.

Holding a County liable for its post bidding breach of a contract is not a violation of public policy and it is not an unusual burden. Washington law permits a contractor to recover money damages when a public entity wrongfully interferes with the performance of a public works contract. In *Scoccolo Construction, Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wn.2d 506 (2006), the Supreme Court of Washington affirmed a trial court's award of damages and prejudgment interest to a contractor on a public works project where the city and its agents interfered with and delayed the contractor's performance. The County interfered with Specialty's performance by refusing to allow it to do the work. Specialty made a written demand that it be allowed to perform, and the County refused to allow

performance to go forward without a bond. *CP 35, ¶7&8.*

The decision in *Lester N. Johnson Co., Inc. v. City of Spokane*, 22 Wn. App. 265, 271 (1978), also stands for the proposition that a contractor can collect damages for delay caused by a municipality in a public works project. When a public entity interferes with the lowest responsive bidder's performance, money damages are available. In such a case, there is no risk of the wrong contractor doing the work while the low bidder sues for damages. The public is not subject to paying the public work twice. Damages for breach of contract put the injured party in as good a position as that party would have been in had the contract been performed. *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 155, 43 P.3d 1223, 1227 (2002). A damage recovery here would not be any different than any other tort or breach of contract recovery against the government.

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

Once the County insisted on a bond, the only way for Specialty to perform the contract and still be made whole, would be to renegotiate the

contract price. However, such a negotiation is illegal under RCW 39.04.015 which only allows an adjustment in price when all the bids exceed available funds. 33 *Washington Practice, Construction Law Manual § 8:14 (2015-2016 ed.)* makes it clear further negotiation is not allowed:

> Ordinarily, the bid price must remain the same; **no further negotiation is allowed by either the government agency or the service provider**. If the bids are not satisfactory, the remedy is to call for new bids. (*Emphasis added.*)

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

There is one last reason the amendment must be permitted. Having waived sovereign immunity, the government is not free to impose arbitrary limitations on a citizen's right to recover damages. Once sovereign immunity has been waived, even partially, any legislative classifications made with reference thereto will be constitutional only if they conform to the equal protection guarantees of the state and federal constitutions. *Jenkins v. State*, 85 Wn.2d 883, 890, 540 P.2d 1363, 1368 (1975). There is no rational basis to treat Specialty any differently than any contractor when a public entity interferes with performance of any contract.

An Injunction Was Not an Adequate Remedy for Specialty.

The County refused to allow Specialty to perform the paving contract in the fall of 2013. Late in August of 2013, Specialty was fighting to prevent the County from rebidding the job. Winter quickly closed in and it was not possible to do the project until the Spring of 2014. Because the County made a misrepresentation in the Bid Proposal, a case could not be filed until a notice of a tort claim was filed under RCW 4.92.100. In 2014, the costs of the job and prevailing wage rates changed and the condition of the parking lot was different. *CP 283, 411-2.*

Moreover, in the spring of 2014, the County claimed the contract

between the parties was void and unenforceable because it did not provide for a performance bond. In order to obtain injunctive relief a party has to prove hat he has a clear legal or equitable right to the injunction. *Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63, 68 (2000). The defense that the contract was void coupled with the fact the County had stated in writing no bond was required, meant discovery regarding justifiable reliance was necessary. It was impossible to do the project for the same contract price. Specialty was also scheduling other work for 2014 so it could not just do the job at any time. *CP 283, lines 1-5.*

Discovery revealed additional evidence of the County's discriminatory conduct and raised concerns of retaliation by the County if Specialty did the job over the County's objection. *CP 412.*

Bidding disputes can be resolved quickly without discovery as a matter of law. This was not one of those cases. Factual disputes, changed circumstances and other issues made injunctive relief an inadequate remedy.

The County is Not Immune From Liability.

The County's position is that it enjoys complete immunity from liability for its misrepresentations and delay tactics. There is evidence that the County intentionally delayed and manipulated Specialty by waiving a

bond, attempting to rebid the job, demanding a bond, and then admitting it did not need a bond after all. It is unreasonable to hold there is no set of facts a contractor can prove that will trigger liability for a public entity simply because its misconduct is preceded by a bidding process.

The County Is Not Entitled to an Order Granting Specific Performance.

The trial court found a binding contract exists and eventually the County acquiesced and agreed to that ruling. *CP 422,577,578.* The County moved for and trial court entered an order compelling Specialty to perform the contract between the parties. *CP 380,381,531,599.* The County is not entitled to demand anything from Specialty because Specialty did nothing wrong. Specialty should have been given a judgment against the County.

The County Is Not Entitled to Attorney Fees.

An Appellate court uses the following principles to decide if an appeal is frivolous and an award of attorney fees should be made:

> (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Rice v. Holy Family Hosp., 84 Wn. App. 1072 (1997).

There no basis to claim this appeal is frivolous. The trial court misstated the summary judgment standard and overlooked corroborating evidence. The trial court incorrectly used the public duty doctrine to dismiss the negligent misrepresentation claim.

The County cannot explain why it should be permitted to interfere with and delay Specialty's performance without any liability for the damage it causes. The issues here are not just debatable, in some instances they are the product of a failure to follow basic summary judgment standards. This appeal is not frivolous and the County is not entitled to attorney fees.

Specialty Is Entitled to Attorney Fees on Appeal.

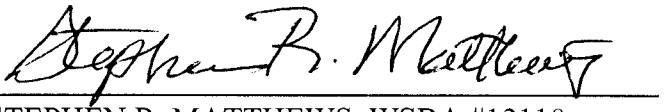
RAP 18.1(a) provides for attorney fees on appeal if timely request is made. Attorney fees should be ordered in favor of the appellant if it is ultimately the prevailing party in the trial court.

CONCLUSION

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

DATED: March 6, 2017.

Respectfully submitted by:



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CERTIFICATE OF SERVICE

I, LORIE MATTHEWS, hereby certify that on March 6, 2017, I caused to be served a true and correct copy of the preceding document by hand delivery to the following:

Michael E. McFarland Jr.
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LORIE MATTHEWS