No. 95085-7

FILED

FEB 0 3 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 344801-III

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

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SPECIALTY ASPHALT & CONSTRUCTION, LLC, a Washington Company, and LISA JACOBSEN, an individual,

Plaintiffs/Appellants,

v.

LINCOLN COUNTY, a Washington State County,

Defendant/Respondent.

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# RESPONDENT'S BRIEF

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## I. IDENTITY OF THE PARTIES

Respondent Lincoln County was the defendant in Spokane County Superior Court Cause No.: 14-2-01715-9. Appellants are Specialty Asphalt & Construction, LLC and Lisa Jacobsen (hereinafter "Specialty" unless Ms. Jacobsen is specifically identified).

## II. STATEMENT OF THE ISSUES

1. Did the trial court error when it granted summary judgment to Lincoln County with regard to Specialty's sex discrimination claim?

**Answer**: *No. Specialty failed to produce admissible evidence sufficient to establish a prima facie case of gender discrimination.*

2. Did the trial court error when it granted summary judgment to Lincoln County on Specialty's negligent misrepresentation claim?

**Answer**: *No. The plain language of RCW 39.08.010 requires a contractor to obtain a bond when performing a public works contract. As such, Specialty's "reliance" upon the bid request when it omitted a statutory requirement was not justified. Further, the public duty doctrine precludes liability against Lincoln County for this claim.*

3. Did the trial court error when it struck portions of Specialty's materials which violated the Rules of Evidence and disregarded opinions and conclusory allegations which were not facts pursuant to CR 56(e)?

**Answer**: *No. The trial court did not abuse its discretion by striking materials which did not comply with the Rules of Evidence and by further disregarding opinions and conclusory allegations which did not comply with Civil Rule 56(e).*

4. Did the trial court error when it denied Specialty's Motion for Reconsideration when that Motion did not conform to CR 59?

**Answer**: *No. Specialty failed to carry the burden set forth in CR 59. Specialty further merely attempted to reargue its argument in response to Lincoln County's Motion for Summary Judgment.*

5. Did the trial court error when it denied Specialty's Motion to File a Second Amended Complaint?

**Answer**: *No. Specialty's proposed Second Amended Complaint attempted to add futile claims which had no basis in law or fact. The Court did not abuse its discretion by denying the Motion.*

6. Did the trial court error when it entered an order requiring Specialty to either avail itself of the sole remedy available or have its lawsuit dismissed?

**Answer**: *No. The Court had already properly determined that Specialty's sole available relief at the time of the hearing was an injunction. Specialty did not wish to avail itself of that remedy, and therefore the case was no longer a justiciable controversy.*

For the reasons set forth herein, Lincoln County respectfully requests the Court affirm the trial court on each of these issues.

## III. STATEMENT OF THE CASE

### A. Introduction

The lawsuit arises out of a bid proposal to perform a public works contract to replace and repair the parking lot area surrounding the Lincoln County Courthouse in Davenport, Washington. Lincoln County sent out an invitation to bid the project which mistakenly did not include a bond requirement pursuant to RCW 39.08.010. Specialty submitted a bid to perform the public works project without a bond. When the oversight regarding the bond was recognized, Lincoln County asked Specialty to obtain the bond and resubmit a bid to the County. Lincoln County went so far as to offer to pay Specialty the costs of the bond. Specialty refused to obtain a bond and subsequently refused to perform the work.

### B. Factual History

On July 16, 2013, Lincoln County sent out a proposal for bids for a paving project in the general proximity of the Lincoln County Courthouse. CP 34. The form used was a simpler form than the standard bid proposal used for larger projects. *Id.* Lincoln County's Public Works Department Operations and Permit Coordinator is Phil Nollmeyer. CP 28. Mr. Nollmeyer held the same position at all times relevant to this lawsuit. *Id.*

When Mr. Nollmeyer was preparing the bid proposal in this case, he used a template form that was designed for less complex projects. *Id.* The template form that Mr. Nollmeyer used contained the language "no bid bond or performance bond is required for this bid" on pages two and six. *Id.* This language is included in this particular template because performance bonds are not required for the purchase of materials or on simple maintenance contracts. *Id.* However, on public works contracts, a bond is in fact required (by RCW 39.08.010). CP 29.

The language was overlooked and mistakenly included in the bid documents. *Id.* It should have been deleted prior to the template form being sent out. *Id.*

The bid proposal further stated that "the bidder certifies that he/she will comply with all the assurances and certifications issued by Lincoln County and conform to all applicable state and federal laws." CP 53. Lincoln County received two bids to perform the contract – one from Specialty and one from Arrow Concrete & Asphalt Specialties. CP 56. The Specialty bid was approximately $15,000.00 less than the Arrow Concrete bid. *Id.*

On August 6, 2013, Lincoln County determined that Specialty Asphalt would be awarded the project. CP 35. An award letter was set to Specialty on or about August 12, 2013, which included a contract and

contract bond. *Id.* On or about August 16, 2013, the documents were sent back, with Lisa Jacobsen's signature on behalf of Specialty on the contract, and "bond not required" written onto the bond document. *Id.* The Lincoln County Commissioners did not sign the contract. *Id.*

Upon discovering the error as to the bond requirement, the Lincoln County Commissioners withdrew the bid award on August 19, 2013. *Id.* Shelly Johnston, the Lincoln County Auditor, contacted Ms. Jacobsen and informed her that, based on Lincoln County's mistake in failing to include a bond requirement in the bid proposal, the bid was being withdrawn and the current bidding process was going to be terminated and rebid. CP 32; CP 35. Specialty objected. CP 35. Lincoln County then offered to maintain the original award so long as Specialty obtained the necessary bond (at Lincoln County's expense). *Id.* Specialty did not respond. *Id.*

Having not heard back from Specialty, Lincoln County contacted Specialty on April 16, 2014 to inquire as to whether Specialty would agree to the original award provisions and obtain the statutorily mandated bond at Lincoln County's expense. *Id.* Specialty refused, and claimed that the County's suggestion constituted "collusion or bid-rigging." CP 557.

## C. Procedural History

Specialty filed the initial Summons and Complaint against Lincoln on May 12, 2014. CP 3. In that Complaint, Specialty alleged a single cause of action: injunction. Specialty's prayer for relief was as follows:

> 4.1 For an order for injunctive relief to enjoin the execution of a contract between Lincoln County and any other bidder for the Project;
> 4.2 For a mandatory injunction in favor of Specialty Asphalt to complete the Project without any requirement for a bond;
> 4.3 For a declaration judgment that the type of work requested for the for the Project, which is maintenance work and not contraction work, and does not require a bond;
> 4.4 For a declaration judgment that Lincoln County's payment of the bond does not constitute bid rigging or collusion;
> 4.5 For a judgment that Lincoln County pay the bond pursuant to RCW 39.08.015;
> 4.6 For an award of reasonable attorney fees and other costs permitted by law;
> 4.6 (sic) For such other relief the Court deems fair and equitable.

CP 7.

On October 1, 2015, after months of discovery, and approximately four months after the deadline to amend the pleadings and add parties, Specialty sought leave to add a plaintiff (Lisa Jacobsen) and to amend its Complaint for Injunction and Declaratory Relief. CP 125. Specialty sought to add claims of gender discrimination and negligent misrepresentation so that it could pursue monetary damages rather than solely injunctive relief.

CP 560-61. Over Lincoln County's objection, the Court granted the untimely request and allowed Specialty to file its Amended Complaint.

On December 18, 2015, Lincoln County filed its Motion for Summary Judgment seeking dismissal of both Specialty's and Ms. Jacobsen's claims. CP 232. In response, Specialty provided an Affidavit of Lisa Jacobsen which largely violated CR 56(e) and several evidence rules attempting to create a question of fact. CP 278-309. In Lincoln County's Reply memorandum, the County sought to strike the offending portions of Ms. Jacobsen's Affidavit and the materials in Specialty's memorandum which cited to those inadmissible portions of the Affidavit. CP 361-67.

After considering the parties' arguments, the Court granted in part and denied in part Lincoln County's Motion for Summary Judgment. CP 417-20. Specifically, the Court found that Specialty had failed to prove a genuine issue of material fact existed regarding Specialty's gender discrimination and negligence/negligent misrepresentation claims. CP 418. The Court dismissed those claims. CP 418-19. The Court denied Lincoln County's Motion for Summary Judgment on Specialty's breach of contract claim, finding that genuine issues of material fact existed and that summary judgment was therefore not appropriate. CP 418.

One week after the Court entered the Order Granting in Part and Denying in Part Lincoln County's Motion for Summary Judgment,

Specialty filed a Second Motion for Leave to Amend the Complaint. CP 430. That Motion sought to allow Specialty to amend its Complaint to seek "money damages" on the breach of contract claim against Lincoln County, even though Washington law is clear that a successful plaintiff can only obtain an injunction in such cases.[1] CP 444-45. Lincoln County filed a Response asserting that the Motion for Leave to Amend the Complaint was futile because Washington law recognizes an exclusive remedy in these cases: an injunction. CP 498-502.

In a letter decision denying Specialty's Motion for Leave, the trial court recognized the binding case law in Washington and agreed with Lincoln County that the Motion for Leave was futile. CP 526-27.

Specialty also filed a Motion for Reconsideration of the trial court's decision granting in part Lincoln County's Motion for Summary Judgment. CP 450. The trial court again issued a letter decision denying Specialty's Motion. CP 524-25. The Court found that Specialty was merely attempting to reargue the merits of the Motion for Summary Judgment. *Id.* The court also reiterated its findings that Specialty had failed to provide the court with sufficient prima facie evidence to preclude summary judgment on the discrimination claim. CP 525.

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[1] *See, e.g., Skyline Contractors, Inc. v. Spokane Housing Authority*, 172 Wn. App. 193, 201, 289 P.3d 690 (2012).

At that junction of the case, Specialty's only surviving claim against Lincoln County was for breach of contract. The trial court had already twice denied Specialty's attempts to add monetary damages to its prayer for relief because the sole avenue of relief for Specialty was for an injunction. CP 525; 527. Therefore, the *only* relief that was still available to Specialty was an injunction precluding Lincoln County from offering the contract to an entity other than Specialty. CP 527.

Conceding the breach of contract issue after the trial court's various findings and rulings, Lincoln County stipulated to allowing Specialty to complete the work. *Id.* Specialty did not respond with a clear answer, and Lincoln County was therefore forced to ask the trial court to intervene. CP 380. Lincoln County filed its Second Motion to Compel Performance, requesting that the Court order Specialty to 1) agree to perform the work or 2) to dismiss its lawsuit. CP 385. The County was willing to concede the injunction and allow Specialty to perform the work without a performance bond. CP 391-92. If Specialty chose not to avail itself of the only remaining relief, then no justiciable controversies remained for the court or fact-finder to decide, and the matter could properly be dismissed. CP 383-85.

The trial court agreed with the County and found that Specialty had only two options available to it: proceed with the project as Specialty requested in its prayer for relief or decline to proceed with the project in

which case the court could dismiss the matter as Specialty was choosing not to avail itself of the only relief available to it (rendering the lawsuit moot). CP 598. The trial court issued a deadline of April 30, 2016 for Specialty to declare its intention. *Id.* On May 2, 2016, Specialty filed a Notice declaring that it was not availing itself of the injunction available to it. CP 595.

At the presentment hearing on May 6, 2016 regarding the Order Granting Lincoln County's Motion to Compel Performance, the Court noted that Specialty was choosing not to perform the work, and therefore nothing remained for the Court or a jury to decide. CP 597-99. The case was dismissed as moot. *Id.*

Specialty filed a Notice of Appeal on June 3, 2016, seeking review of the following Orders:

- Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment;
- Order Denying Plaintiffs' Motion for Reconsideration Regarding Defendant's Motion for Summary Judgment;
- Order Denying Plaintiff's Motion for Leave to File Second Amended Complaint; and
- Order Granting Defendant's [Second] Motion to Compel Performance.

CP 600-16.

## IV. ARGUMENT

### A. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO LINCOLN COUNTY REGARDING SPECIALTY'S GENDER DISCRIMINATION CLAIM BECAUSE SPECIALTY FAILED TO PRODUCE SUFFICIENT ADMISSIBLE EVIDENCE TO ESTABLISH A PRIMA FACIE CASE.

An order granting summary judgment is reviewed de novo, and the reviewing court engages in the same inquiry as the superior court. *Hiatt v. Walker Chevrolet Co.*, 120 Wn. 2d 57, 65, 837 P.2d 618 (1992). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 463, 98 P.3d 827 (2004). The Court of Appeals considers all facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Kirby*, 124 Wn. App. at 463, 98 P.3d 827. If reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment is proper. *Haubry v. Snow*, 106 Wn. App. 666, 670, 31 P.3d 1186 (2001). Appellate courts may affirm a superior court's ruling on any grounds the record adequately supports. *LaMon v. Butler*, 112 Wn. 2d 193, 200–01, 770 P.2d 1027, cert. denied, 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989).

### 1. Specialty failed to produce admissible evidence which created a prima facie case of gender discrimination.

Plaintiff has the initial burden of proving a prima facie case. *Marquis v. City of Spokane*, 130 Wn.2d 97, 113, 922 P.2d 43 (en banc 1996). In any gender discrimination action based on disparate treatment, the plaintiff must demonstrate that she or he was treated differently than persons of the opposite sex who are otherwise similarly situated. *Ellingson v. Spokane Mortgage Co.*, 19 Wn. App. 48, 54, 573 P.2d 389 (1978). Therefore, in an action for discrimination in the making and performance of an employment contract, the plaintiff in a sex discrimination case must show (1) membership in a protected class; (2) plaintiff was similarly situated to members of the opposite sex, (3) because of plaintiff's sex she was treated differently than members of the opposite sex, i.e. she was offered a contract only on terms which made the performance of the job more onerous or less lucrative than contracts given to members of the opposite sex, or, once offered the contract, was treated in a manner that made the performance of the work more difficult than that of members of the opposite sex who were similarly situated. *Id.*

To defeat an employer's motion for summary judgment in a discrimination case, an employee "must do more than express an opinion or make conclusory statements." *Hiatt*, 120 Wn. 2d at 66; *see also Marquis*,

130 Wn. 2d at 105. The claimant must establish *specific and material facts* to support each element of her prima facie case. *Hiatt*, 120 Wn. 2d at 66 (emphasis added).

Affidavits made in support of, or in opposition to, a motion for summary judgment must be based on personal knowledge, set forth admissible evidentiary facts, and affirmatively show that the affiant is competent to testify to the matters therein. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 183 P.3d 283 (2008). A non-moving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, ***or in having its affidavit considered at face value to avoid summary judgment***. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn. 2d 1, 13, 721 P.2d 1 (1986) (emphasis added).

In opposition to Lincoln County's Motion for Summary Judgment, Specialty resorted to self-serving, conclusory statements which were inadmissible pursuant to CR 56(e). In derogation of the above-cited case law, Specialty argues in its opening brief (without citation) that "[e]ven self-serving testimony must be treated as true and it creates a material issue of fact[.]"*Appellants' Brief*, at 20. This uncited and unsupported statement is in direct conflict with Washington law: "a party's own self-serving opinions and conclusions are insufficient to defeat a motion for summary judgment." *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn. 2d 355, 359-61, 753 P.2d

517 (1988). This premise is also true for declarations based upon pure speculation. *Ziebarth v. Manion*, 161 Wn. 201, 206, 296 P. 561 (1931).

Here, the trial court properly excluded the self-serving conclusory statements that violated CR 56(e) such as "[a]lthough Mr. Nollmeyer did not explicitly say the words, his comments and attitude made it very clear to me that he did not believe that my company, owned and operated by a woman, could do this complexity of a job." CP 281.

Even when the facts and inferences are viewed in the light most favorable to Specialty, the facts as alleged by Specialty do not make a prima facie case of gender discrimination. Quite to the contrary, the facts and inferences in this case are clear that Lincoln County went out of its way to ensure that Specialty *received* the bid. *See, e.g.*, CP 34-36. The trial court agreed. CP 525.

Ms. Jacobsen testified at her deposition that she first learned of the project when "somebody from Lincoln County called [her] office to ask if [Lincoln County] was in their work area." CP 210. She testified that her assistant then called the County back and gave somebody Ms. Jacobsen's email address. CP 211. Soon thereafter, Ms. Jacobsen received an email from Marci Patterson that said "Here is an RFP attached." *Id.* The admissible evidence clearly demonstrates that Lincoln County *sought out* Specialty to solicit a bid, not prevent Specialty from bidding.

There was a site walk-through that took place on or about July 16, 2013. CP 212. Ms. Jacobsen testified that she was the only contractor that attended the site walk-through. CP 213. Ms. Jacobsen then admitted that Lincoln County issued a project addendum *based upon recommendations she made* during the walk-through. CP 214-15. Ms. Jacobsen even went so far as to testify that during the walk-through the commissioners would ask "What would your recommendation be in this position, in this situation?" CP 216. The site walk-through took approximately two-hours. CP 217.

Not only did Lincoln County seek out Specialty to submit a bid for this work, but Lincoln County then asked for, received and implemented recommendations from Ms. Jacobsen for issues that arose during the site walk-through. Shortly thereafter, an award letter was sent to Ms. Jacobsen advising that the project was going to be awarded to Specialty pending the final contractual exchanges. CP 55. Approximately six days after this, Lincoln County sent correspondence to Ms. Jacobsen with the contract documents enclosed, including the "Contract Bond" paperwork. CP 57. Ms. Jacobsen did not sign the bond document, instead writing no bond required across the top and returning it to the County. CP 58-59. It was only after this document was returned unsigned that Lincoln County realized the mistake on the initial RFP paperwork. CP 35.

Lincoln County offered to allow Specialty to keep the project, so long as it acquired the necessary performance bond. *Id.* When Specialty refused, Lincoln County offered to cover the cost of the statutorily mandated performance bond so as to ensure Specialty still retained the project! *Id.*

There is no evidence in this case that Specialty was discriminated against because of Ms. Jacobsen's gender. In fact, the undisputed evidence in this case shows:

> • Lincoln County sought out Specialty to perform the project;
> • Ms. Jacobsen was the only contractor to attend a site walk-through with several County commissioners and employees;
> • Ms. Jacobsen made suggestions and recommendations to Lincoln County;
> • Lincoln County applied the suggestions and recommendations that she suggested;
> • Lincoln County awarded the project to Specialty;
> • Lincoln County discovered the scrivener's error with regard to the bond requirement;
> • Lincoln County offered to maintain the original award if Specialty obtained the statutorily mandated performance bond;
> • When Specialty refused, Lincoln County even went so far as to offer to compensate Specialty for the bond.

Specialty cannot meet the prima facie burden set forth in *Ellingson*:

> [B]ecause of plaintiff's sex she was treated differently than members of the opposite sex, i.e. she was offered a contract only on terms which made the

> ***performance of the job more onerous or less lucrative*** than contracts given to members of the opposite sex, ***or***, once offered the contract, ***was treated in a manner that made the performance of the work more difficult than that of members of the opposite sex who were similarly situated.***

*Ellingson*, 19 Wn. App. at 54.

Even when the evidence and inferences therefrom are taken in a light most favorable to Specialty, Specialty has failed to produce sufficient admissible evidence that it endured disparate treatment at the hands of Lincoln County. This claim was merely another failed attempt at the trial court level to create an avenue to obtain monetary damages rather than an injunction.

Lincoln County respectfully requests this Court affirm the dismissal of Specialty's gender discrimination claim.

## B. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO LINCOLN COUNTY REGARDING SPECIALTY'S NEGLIGENT MISREPRESENTATION CLAIM BECAUSE SPECIALTY FAILED TO PRODUCE SUFFICIENT ADMISSIBLE EVIDENCE TO ESTABLISH THAT ITS RELIANCE ON A STATUTORILY PROHIBITED BID DOCUMENT WAS "JUSTIFIED" AND THE PUBLIC DUTY DOCTRINE PRECLUDES LIABILITY.

Washington has adopted the definition of negligent misrepresentation set forth in the RESTATEMENT (SECOND) OF TORTS[2]:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has

[2] *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998).

> a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1) (1977).

Thus, to prevail on a claim of negligent misrepresentation, a plaintiff must prove by clear, cogent, and convincing evidence that he or she justifiably relied on the information that the defendant negligently supplied. *Id.* Justifiable reliance is properly defined as reliance [that is] reasonable under the surrounding circumstances." *ESCA*, 135 Wn. 2d at 828.

In the present case, the bid request referred to the Standard Specifications manual which ***requires*** compliance with "all applicable statutes." The applicable statute ***requires*** contractors to obtain a bond in order to obtain a public works contract. RCW 39.08.010 (emphasis added). "It is immaterial whether the contract with the city to construct the bridge was executed before or after the execution of the bond required by statute for the protection of material men and laborers." *Spokane & I. Lumber Co. v. Loy*, 21 Wn. 501, 508, 58 P. 672 (1899).

Ms. Jacobsen testified at her deposition that she had "20 years of experience" in the construction industry. CP 206. She further testified that she is a majority owner at Specialty and that she is the sole person at

Specialty responsible for preparing bids for work. CP 207-08. Specialty cannot then claim that it was unaware that a bid was required on a public works project that clearly does not meet the definition of "ordinary maintenance."

A performance bond in this case was mandatory pursuant to Washington statute:

> Whenever any board, council, commission, trustees, or body acting for the state or ***any county*** or municipality or any public body ***must contract with any person or corporation to do any work*** for the state, ***county***, or municipality, city, town, or district, ***such board, council, commission, trustees, or body must require*** the person or persons with whom such contract is made to make, execute, and deliver...***a good and sufficient bond***, with a surety company as surety....

*RCW 39.08.010* (emphases added).

This was unquestionably a public works project. "Public work" means all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein. *RCW 39.04.010(4)*. Further, all public works, ***including maintenance***, when performed by contract shall comply with RCW 39.12, *et seq.*

Specialty alleges that the contract in this case was an "ordinary maintenance" contract, not public work, and therefore a bond was not

required pursuant to RCW 39.04.010. CP 7. Ordinary maintenance is not defined in chapter 39 of the Revised Code of Washington. It is, however, defined at WAC 296-127-010:

> (b) The term "public work" shall not include:
> (iii) Ordinary maintenance which is defined as work ***not performed by contract*** and that is performed on a ***regularly scheduled basis (e.g., daily, weekly, monthly, seasonally, semiannually, but not less frequently than once per year***), to service, check, or replace items that are not broken; or work not performed by contract that is not regularly scheduled but is required to maintain the asset so that repair does not become necessary.

*WAC 296-127-010(7).*

Specialty *un*justifiably relied on a typographical error in a request for bid proposals, and sought a "gotcha" ruling from the trial court. Ms. Jacobsen is a very experienced and competent construction business owner, and she testified that approximately half of the work Specialty Asphalt performs falls into the public arena. CP 209. She is therefore familiar with the processes, and any assertion that she was not aware that a bond would be required on this type of public works project is disingenuous at best.

### 1. The public duty doctrine precludes Specialty's negligence claims.

The public duty doctrine prevents Specialty's negligent misrepresentation claim because Lincoln County did not owe Specialty a duty. Under the public duty doctrine, "a government entity will not be liable for

negligence unless the entity owes a duty to the plaintiff as an individual, rather than to the public in general." *W. Coast Inc. v. Snohomish Cnty.*, 112 Wn. App. 200, 207-208, 48 P.3d 997 (2002). There are four recognized exceptions to the public duty doctrine. *Id.* They are: 1) legislative intent; 2) failure to enforce; 3) the rescue doctrine; and 4) a special relationship. *Id.*

Specialty cannot cite to any legislative intent, failure to enforce, or any application of the rescue doctrine. Further, any special relationship argument fails. A special relationship arises when: "(1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) give rise to justifiable reliance on the part of the plaintiff." *Id.*

In the present case, Lincoln County and Specialty were not in privity during the call for bids. Nor was there evidence of direct inquiry between Specialty and Lincoln County regarding the bond. Instead, the call for bids was put out to the general public with the bid requirements incorrectly stating there was no bond requirement. Since the bid was published to the general public Lincoln County owed a duty of care to no one. "A duty to all is a duty to none." *Babcock v. Mason Cnty. Fire Dist. No. 6*, 144 Wn. 2d 774, 785, 30 P.3d 1261 (2001).

Lincoln County respectfully requests the Court affirm the trial court's ruling granting Lincoln County judgment as a matter of law regarding Specialty's negligent misrepresentation claim.

## C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN STRIKING HEARSAY EVIDENCE OF THIRD PARTIES NOR BY REFUSING TO CONSIDER EVIDENCE WHICH VIOLATED CR 56(e).

### 1. The trial court properly struck the hearsay statement of a third party who has not testified in this case.

Generally, the Court of Appeals reviews the trial court's admission of evidence for abuse of discretion, but whether a rule of evidence applies in a given factual situation is a question of law that is reviewed de novo. *State v. Chambers*, 134 Wn. App. 853, 858, 142 P.3d 668 (2006). As with either standard of review, an erroneous evidentiary ruling does not result in reversal unless the party was prejudiced. *State v. Thomas*, 150 Wn. 2d 821, 871, 83 P.3d 970 (2004). For evidentiary errors not implicating a constitutional mandate, we reverse only if, "'within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.' " *Id.* (*quoting State v. Tharp*, 96 Wn. 2d 591, 599, 637 P.2d 961 (1981)). " 'The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.' " *Id.* (*quoting State v. Bourgeois*, 133 Wn. 2d 389, 403, 945 P.2d 1120 (1997)).

Specialty is mistaken as to the statements that were stricken. The trial court did not strike any statements of Lincoln County representatives. The Court's findings with regard to the statements that were stricken is unambiguous: "[t]he Court finds that the alleged statements of other *third parties* are hearsay and should be stricken." CP 419 (emphasis added).

Lincoln County sought to exclude the hearsay statements of an unnamed individual included in Ms. Jacobsen's Affidavit:

> The woman who was accompanying me that day in the truck could see how angry the call made me and asked: "What was wrong?"

CP 281.

This is not only hearsay as this unnamed woman has never testified in this case, but it is also impermissible speculation regarding how Ms. Jacobsen was feeling at the time of the phone call. This statement of the unnamed woman is the only third party statement that the Court struck. The statement is classic hearsay, is speculation on the part of this unnamed woman and is inadmissible. Thus, the trial court did not abuse its discretion in excluding the statement.

**2. The trial court did not abuse its discretion by refusing to consider "facts" which clearly violated CR 56(e).**

Affidavits shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence. *CR 56(e)* (emphasis added).

An adverse party may not rest upon mere allegations or denials of a pleading, but a response must set forth specific facts showing that there is a genuine issue for trial. *Id.* (emphasis added). If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. *Id.*

Further, a nonmoving party may not rely on speculation, argumentative assertions, or in having its affidavits considered at face value; rather, after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions. *Becker v. Wash. State Univ.*, 165 Wn. App. 235, 266 P.3d 893, review denied, 173 Wn.2d 1033, 277 P.3d 668 (2011); *State v. Kaiser*, 161 Wn. App. 705, 254 P.3d 850; *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 178 P.3d 1054, *review denied*, 165 Wn. 2d 1004, 198 P.3d 511 (2008); *Greenhalgh v. Dept. of Corrections*, 160 Wn. App. 706, 248 P.3d 150 (2011).

Ultimate facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient to create a question of fact. *Snohomish Co. v. Rugg*, 115 Wn. App. 218, 61 P.3d 1184; *Lane v. Harborview Med. Ctr.*, 154 Wn. App. 279, 227 P.3d 297 (2010).

A trial court may not consider inadmissible evidence when ruling on a motion for summary judgment. *Cano-Garcia v. King Co.*, 168 Wn. App.

223, 277 P.3d 34, *review denied*, 175 Wn. 2d 1010, 287 P.3d 594 (2012). If a non-moving party attempts to respond using "facts" prohibited by CR 56(e), summary judgment, if appropriate, shall be entered against the adverse party. *CR 56*.

Specialty also tried to create questions of fact when it submitted affidavit testimony from Ms. Jacobsen which contradicted her previous deposition testimony. At her deposition, Ms. Jacobsen was asked to describe each and every way she was treated differently by Lincoln County because she was female. CP 354. She responded with two or three vague descriptions, none of which had anything to do with the site walk-through or her attire on that day. CP 354-56. However, in her Affidavit in Response to Lincoln County's Motion for Summary Judgment (which was filed a mere three months after her deposition), Ms. Jacobsen conveniently remembered that "Mr. Nollmeyer had made a comment that the shoes with heals [sic] that I was wearing was [sic] not the most appropriate attire for a walk-through." CP 280.

Pursuant to the *Marshall* rule[3], this evidence is inadmissible and is insufficient to create a genuine issue of material fact on summary judgment. *See, e.g. Marthaller v. King Co. Hosp. Dist. No. 2*, 94 Wn. App. 911, 973

[3] *Marshall v. AC & S. Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989).

P.2d 1098 (1999) (Affidavit testimony submitted in response to motion for summary judgment which conflicts with previous deposition testimony does not create a genuine issue of material fact sufficient to defeat that motion for summary judgment).

The trial court did not abuse its discretion by refusing to consider statements and allegations which were not facts at all, but rather conclusory opinions by Ms. Jacobsen. Pursuant to CR 56(e), these opinions and the resulting inferences are insufficient to create issues of fact to survive summary judgment. Further, all of the statements made by Ms. Jacobsen in her Affidavit which conflict with her previous deposition testimony were insufficient to create a question of fact pursuant to the *Marshall* rule.

## D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED SPECIALTY'S MOTION FOR RECONSIDERATION BECAUSE 1) SPECIALTY FAILED TO COMPLY WITH CR 59, AND 2) SPECIALTY MERELY REARGUED THE INITIAL ARGUMENTS AGAINST SUMMARY JUDGMENT.

Motions for reconsideration under CR 59 are reviewed for an abuse of discretion. *Holaday v. Merceri*, 49 Wn. App. 321, 324, 742 P.2d 127 (1987). A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn. 2d 12, 26, 482 P.2d 775 (1971). The Court of Appeals reviews a trial court's denial of a motion for reconsideration and its decision to consider

new or additional evidence presented with the motion to determine if the trial court's decision is manifestly unreasonable or based on untenable grounds. *Martini v. Post*, 178 Wn. App. 153, 313 P.3d 473 (2013).

### 1. Specialty's Motion for Reconsideration did not comply with CR 59.

Civil Rule 59(a) authorizes a trial court to grant reconsideration on limited grounds:

> 1. Irregularity in the proceedings;
> 2. Misconduct;
> 3. Accident or surprise which ordinary prudence could not have guarded against;
> 4. Newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced;
> 5. Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;
> 6. Error in the assessment of the amount of the recovery whether too large or too small;
> 7. That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;
> 8. Error in law occurring at the trial and objected to at the time by the party making the application; or
> 9. That substantial justice has not been done.

*CR 59(a).*

"A motion for a new trial or for reconsideration ***shall*** identify the specific reasons in fact and law ***as to each ground on which the motion is based***." *CR 59(b)* (emphases added); *Davies v. Holy Family Hosp.*, 144

Wn. App. 483, 496-97, 183 P.3d 283 (2008). Specialty failed to identify a single CR 59(a) ground for reconsideration, leaving Lincoln County and the trial court to speculate as to the foundation for which Specialty sought relief. According to the canons of construction, "shall" is mandatory, not permissive. *Agnew v. Lacey Co-Ply*, 33 Wn. App. 283, 289, 654 P.2d 712 (1982); *State ex rel. Billington v. Sinclair*, 28 Wn. 2d 575, 183 P.2d 813 (1947); *Spokane County ex rel. Sullivan v. Glover*, 2 Wn. 2d 162, 97 P.2d 628 (1940); *United States v. Two Hundred & Sixty-Seven Twenty-Dollar Gold Pieces*, 255 F. 217 (W.D. Wash. 1919); *Natural Resources Defense Council, Inc. v. Berklund*, 458 F. Supp. 925 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979).

The only *possible* ground upon which Specialty could have moved was CR 59(a)(9). Washington courts have often emphasized that a motion under CR 59(a)(9) will be rarely granted because of the other broad grounds for relief contained in CR 59(a). *See, McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 260 P.3d 967 (2011); *Lian v. Stalick*, 106 Wn. App. 811, 825, 25 P.3d 467 (2001); *Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010).

**2. Even if Specialty had complied with CR 59 by identifying the grounds upon which it sought reconsideration, Specialty did not carry its burden because it merely reargued the merits of the Motion for Summary Judgment.**

In its letter decision dated March 2, 2016, the trial court explained that Specialty had failed to set forth evidence sufficient to establish a prima facie case of discrimination. CP 525.

The entirety of Specialty's argument on appeal consists of three statements, only one of which contains a citation:

> 1. In this case the trial court denied the motion to reconsider because Plaintiffs did not have corroborating evidence of adverse treatment. (No citation)
> 2. A plaintiff does not need to present corroborating evidence in order to overcome a summary motion. (No citation)
> 3. Even self serving testimony must be treated as true. *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 866, 324 P.3d 763 (2014).

*Appellants' Brief*, at 27.

Argument which is unsupported by citation to the record or authority will not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992); *McKee v. American Home Prods. Corp.*, 113 Wn. 2d 701, 705, 782 P.2d 1045 (1989). As such, the Court need not consider the first two statements, and need only look at the third.

Specialty's reliance on *Sutton* is misplaced and further ignores Washington *Supreme Court* jurisprudence to the contrary. In *Sutton*, the plaintiff, Rose Sutton, was appointed guardian ad litem for a minor child who was alleging claims against a teacher of the Tacoma School District. *Sutton*, 180 Wn. App. at 862. Ms. Sutton submitted deposition and declaration testimony regarding her eyewitness account of the alleged confrontation which led to the lawsuit. *Id.* at 864. Ms. Sutton submitted her sworn testimony without any "skin in the game." She was merely serving as a guardian for the minor.

In the case at bar, Ms. Jacobsen stands to gain substantially if the Court was forced to accept her unsupported and self-serving statements as true. Further, the Washington Supreme Court has consistently rejected Specialty's position:

> A nonmoving party in a summary judgment ***may not rely on*** speculation, argumentative assertions that unresolved factual issues remain, or in ***having its affidavits considered at face value***; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.

*Seven Gables Corp. v. MGM/UA Entertainment Corp.*, 106 Wn. 2d 1, 13, 721 P.2d 1 (en banc 1986); *see also Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn. 2d 355, 359-61, 753 P.2d 517 (1988) (a party's own self-

serving opinions and conclusions are insufficient to defeat a motion for summary judgment).

Finally, Specialty does not even attempt to provide this Court with an explanation for how CR 59 offers Specialty relief in this Court, much less how the trial court abused its discretion below. For all of the reasons set forth herein, Specialty has failed to demonstrate that the trial court abused its discretion in denying the Motion for Reconsideration. Lincoln County respectfully requests the Court affirm that denial.

## E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED SPECIALTY'S MOTION TO AMEND ITS COMPLAINT A SECOND TIME BECAUSE THE PROPOSED AMENDMENT WAS FUTILE.

A "trial court appropriately denies a motion to amend if an amended claim is . . . futile." *Nakata v. Blue Bird*, 146 Wn. App. 267, 278, 191 P.3d 900 (2008); *see also Syputa v. Druck Inc.*, 90 Wn. App. 638, 649, 954 P.2d 279 (1998) ("a trial court appropriately denies a motion to amend when a claim is without merit"). A court's denial on a motion to amend a complaint "will not be disturbed on appeal absent a manifest abuse of discretion or failure to exercise discretion." *Orwick v. Fox*, 65 Wn. App. 71, 88, 828 P.2d 12 (1992). Here, the trial court did not abuse its discretion when it denied Specialty's Second Motion for Leave to Amend the Complaint because the proposed amendments to the Complaint were the epitome of futility.

As with many of Specialty's arguments on appeal, Specialty provides this Court with unsupported legal assertions in support of the request for reversal: "When a public entity prevents a low bidder with an award from performing the contract, relief is not limited to injunctive remedy." *Appellants' Brief*, at 32. This is not surprising, especially on this particular issue, because at the trial court level, Specialty attempted on numerous occasions to convince the trial court that monetary damages for the contract price were available to it under Washington law. Specialty thus had numerous occasions to provide the trial court with *some* authority which supported the proposition that Specialty could pursue a breach of contract under these circumstances for monetary damages. Despite the numerous opportunities, Specialty provided the trial with exactly *zero* authorities which supported its proposition. This is the definition of futility, and is precisely the grounds upon which the trial court denied Specialty's Motion.

### 1. Well-settled Washington law precludes Specialty from recovering money damages in this case, and therefore, Specialty's proposed amendment is the very definition of futility.

It has long been the generally accepted rule that, presented with a claim by a "bidder on a public work contract who feels aggrieved by the action of the government," the courts will interfere with the governmental body only by injunction; ***the remedy of monetary damages is not available***. *Mottner v. Town*

*of Mercer Island*, 75 Wn. 2d 575, 579-80, 452 P.2d 750 (1969) (emphasis added). In *Peerless Food Prods., Inc. v. State*, 119 Wn. 2d 584, 835 P.2d 1012 (1992), the Washington Supreme Court examined a case involving a low bidder whose bid was wrongly rejected as nonresponsive. *Peerless*, 119 Wn. 2d at 592. The Court held that the basic reasoning for denying a remedy for damages was:

> [W]hile equitable, extraordinary, or declarative relief may serve the public interest by preventing the award and execution of a contract for an excessive amount, permitting damages in such cases serves the bidder's interest alone, and is contract to the public interest which the competitive bidding laws were designed to protect, further burdening a treasury already injured by paying too high a price for the goods or services.

*Id.* at 591 (quoting James L. Isham, Annotation, *Public Contracts: Low Bidder's Monetary Relief Against State or Local Agency for Nonaward of Contract*, 65 A.L.R. 4th 93, 99 (1988)).

The *Peerless* Court continued:

> This policy seeks not to make the public suffer *twice*; first, for the award of an excessive contract to one not the lowest bidder; and second, for the additional payment of lost profits to an unsuccessful bidder who is not performing the contract…[P]rotecting the public treasury has priority over compensation for bidders wrongfully rejected.

*Peerless*, 119 Wn.2d at 591-92.

A disappointed bidder on a public works project is limited to suing to enjoin execution of the contract with another. *BBG Grp. LLC v. City of Monroe*, 96 Wn. App. 517, 521, 982 P.2d 1176 (1999). By restricting a bidder to the remedy of injunctive relief before a contract is signed, "all parties are interested in as quick and fair a settlement of the issue as possible" and courts "allow relief to bidders that does not compete with the public interest and is consistent with a mutual public interest in public contracts being performed by the lowest bidder." *Peerless*, 119 Wn. 2d at 596-97; *BBG Grp.*, 96 Wn. App. at 521. Public bidding is required for government contracts, amongst other objectives, to "prevent...improvidence in the administration of public business, as well as to insure that the [governing body] receives the best work or supplies at the most reasonable prices practicable." *Gostovich v. City of West Richland*, 75 Wn. 2d 583, 587, 452 P.2d 737 (1969) (quoting *Edwards v. City of Renton*, 67 Wn. 2d 598, 602, 409 P.2d 153 (1963)).

Although a secondary purpose for the requirement of public bidding is for the benefit of those interested in undertaking public projects, it is not for any bidder's individual financial benefit. *Skyline Contractors, Inc. v. Spokane Housing Authority*, 172 Wn. App. 193, 201, 289 P.3d 690 (2012). Rather it is "to provide a fair forum for those interested in undertaking public projects," such that "[i]f there are material irregularities in the bidding process, the [governing body] should not accept the offensive bid." *Id.*

*Skyline* is very instructive in the present case. *See Skyline Contractors, Inc.*, 172 Wn. App. at 201 (affirming summary judgment for the defendant because the plaintiff did not pursue its ***exclusive*** remedy of injunction). The *Skyline* Court held that plaintiff was not entitled to proceed with its claim for monetary damages because the remedy of monetary damages is not available on a public works contract. *Id.* at 204. The Court further held that the policy reason for requiring disputes to be resolved in an expedited proceeding "applies equally whether a competitor or the governing body itself first recognizes that a public works contract has been awarded in violation of the invitation for bids." *Id.* at 207.

The exclusive remedy here was for Specialty to obtain an injunction precluding Lincoln County from allowing another bidder to perform the work for which Specialty bid. Even the cases Specialty cites (*Scoccolo* and *Johnson Co.*) only support the proposition that a disappointed bidder can recover monetary damages 1) only ***after*** completing the project and 2) only in the amount in excess of the original contract price.

Specialty has yet to provide this Court, or the trial court below, with a single authority for the proposition that it is entitled to recover monetary damages for the award amount of the contract. Clearly then, the trial court did not abuse its discretion in finding that Specialty's proposed amended was futile

and subsequently denying the Second Motion for Leave to Amend the Complaint.

**2. Specialty's "policy" argument is wholly unpersuasive.**

In attempting to distinguish several binding precedents, Specialty asserts that the *Skyline* policy that "the public not suffer twice" does not apply here because "[n]o other contractor has an award and the County has not paid any other contractor to do the work." *Appellants' Brief*, at 35. Specialty wants this Court to award it monetary damages in the amount of the contract price, and relieve Specialty from performing any work under the contract. The public therefore "suffers" once because it has paid Specialty without any work being accomplished. Specialty then completely ignores the fact that Lincoln County would need to hire an additional contractor to *complete the work*, and unless said contractor was benevolently giving away nearly $80,000.00 worth of construction labor and materials, the public would indeed suffer a second time.

The policy set forth in *Skyline* plainly governs this situation and forcing taxpayers to suffer twice in this case patently violates that policy. Specialty has made it abundantly clear at both the trial court level and in its Opening Brief that Specialty is disappointed that the law does not allow the recovery of monetary damages in these instances. It is neither the trial court's duty, nor this Court's duty to remedy that disappointment by creating new law (which would directly conflict with well-settled Washington law).

Far from abusing its discretion, the trial court appropriately noted that Washington law is already clear on this issue and it sits squarely against Specialty's position. The trial court did not abuse its discretion by adhering to well-settled Washington law, and Specialty's Motion was properly denied.

## F. THE TRIAL COURT DID NOT ERR WHEN IT ORDERED SPECIALTY TO CHOOSE BETWEEN THE ONLY AVAILABLE RELIEF (INJUNCTION) AND DISMISSAL.

A plaintiff who elects "not to pursue [its exclusive] remedy" is not entitled to any relief from the Court. *Skyline*, 172 Wn. App. at 207. Specialty filed a Notice in this case declaring that it was choosing not to pursue its exclusive remedy of an injunction. CP 595.

Contrary to Specialty's claims, Lincoln County did not ask the Court for affirmative relief below. After motion practice resolved all of the disputes between the parties, the sole remaining issue was Specialty's decision whether it accepted the injunction and performed the work pursuant to the August 2013 contract, or chose not to avail itself of the injunction.

A justiciable controversy is one upon which the court's judgment will have some practical effect. *Daines v. Spokane County*, 111 Wn. App. 342, 350, 44 P.3d 909 (2002), *overruled on other grounds by Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn. 2d 702, 261

P.3d 119 (2001). The proceedings must be adversary, not merely argumentative. *Daines*, 111 Wn. App. at 350.

Within the requirements of judiciable controversy "are the traditional limiting doctrines of standing, mootness, and ripeness." *Superior Asphalt and Concrete Co., Inc. v. Washington Dept. of Labor and Indus.*, 121 Wn. App. 601, 606, 89 P.3d 316 (2004). The requirements of a justiciable controversy are: "(1) parties must have existing and genuine rights or interests; (2) these rights or interests must be direct and substantial; (3) the determination will be a final judgment and extinguishes the dispute; (4) the proceeding must be genuinely adversarial in character." *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn. 2d 173, 186, 157 P.3d 847 (2007). Unless all of the elements are present, the reviewing court steps into the prohibited area of advisory opinions. *Superior Asphalt*, 121 Wn. App. at 606.

Here, after motion practice resolved all of the issues except for the injunction, Lincoln County offered to allow Specialty to complete the project pursuant to the terms of the August 16, 2013 contract (including the provision that Specialty did not need to obtain a bond). Lincoln County's stipulation to the injunction removed the "genuinely adversarial" character of the lawsuit. Lincoln County was stipulating to the only relief available to Specialty pursuant to *Skyline*, *Peerless*, *Mottner*, etc. Specialty elected to

not avail itself of the only available relief, and therefore, there was no longer a justiciable controversy for the trial court to decide.

Specialty's feigned ignorance regarding the manner in which it could have recovered any "additional costs" for performance under the contract is unpersuasive. *See Appellants' Brief*, at 42. In its Reply in Support of the Second Motion for Leave to Amend its Complaint, Specialty cited two cases wherein a contractor recovered costs above and beyond the contract amount ***after performance of the work***: *Scoccolo Construction, Inc. ex rel. Curb One v. City of Renton*, 158 Wn. 2d 506 (2006) and *Lester N. Johnson Co., Inc. v. City of Spokane*, 22 Wn. App. 265, 271 (1978).

Specialty speciously claims in its Opening Brief: "Specialty was in an impossible position because it has to decide whether or not to perform the work with no way to recover added costs other than to bring a new suit and even then there would be no assurance how much Specialty would be paid for the added work." *Appellants' Brief*, at 42. The trial court, consistent with *Scoccolo* and *Johnson*, made it abundantly clear that if Specialty wanted to recover money damages for any amount above and beyond the agreed upon contract price, it would have to bring a separate lawsuit *after* the work was completed and the additional costs which were incurred could be proven. The trial court also reiterated that money damages were *not* available for the initial bid amount.

Specialty cannot argue at the trial court level that two court cases provide the avenue of relief it is seeking and then when the trial court agrees, throw up its proverbial hands and exclaim that there is no viable method for recovering the additional costs.

The trial court resolved this case by reconciling the jurisprudence cited by Lincoln County and the jurisprudence cited by Specialty. The trial court held that Specialty is entitled to an injunction if it so chose to perform the work for the agreed upon price. At such time that Specialty incurred additional costs that it could prove to a court, Specialty could then initiate a lawsuit seeking reimbursement for those additional costs. If Specialty did not wish to avail itself of this sole avenue of relief, then the matter would be dismissed because the trial court was no longer presented with a justiciable controversy to resolve.

Lincoln County respectfully requests the Court affirm the trial court's Order Granting Defendant's Motion to Compel Performance.

## V. ATTORNEY FEES ON APPEAL

Pursuant to Rule of Appellate Procedure 18.9, Lincoln County respectfully requests the Court impose sanctions for this frivolous appeal. An appeal is frivolous if it raises no debatable issues on which reasonable minds might differ and it is so totally devoid of merit that no reasonable possibility of reversal exists. *Protect the Peninsula's Future v. City of Port*

*Angeles*, 175 Wn. App. 201, 220, 304 P.3d 914, *review denied*, 178 Wn. 2d 1022, 312 P.3d 651 (2013); *Streater v. White*, 26 Wn. App. 430, 434, 613 P.2d 187 (1980).

Washington law is clear that the remedies available to an aggrieved bidder on a public works contract is an injunction, and an injunction only.

Further, even when the trial court indicated that based upon the motion practice and ensuing stipulation to the injunction by Lincoln County, Specialty then decided it did not want to pursue the work. Specialty has made numerous attempts in this case to circumvent this well-settled Washington law. First, Specialty attempted a meritless gender discrimination claim to try and obtain money damages. When that was unsuccessful, Specialty attempted to amend its Complaint for a second time to add "money damages" despite already being told by the trial court that such relief was unavailable.

After the trial court advised the parties that Specialty's breach of contract claim could proceed, Lincoln County offered to allow Specialty to complete the project. Only *then* did Specialty indicate that it no longer wished to perform the project, thereby admitting that its own lawsuit was moot.

This appeal is frivolous. For the reasons set forth herein, the trial court properly dismissed Specialty's claims in this case. Specialty is

unsatisfied with Washington law and the trial court's rulings, and has regrettably chosen to waste further time and resources pursuing an avenue of relief that is not available to it.

Lincoln County respectfully requests the Court award fees and cost to it for being forced to respond to this frivolous appeal. Lincoln County further respectfully requests the Court grant fees under any other applicable statute or rule as applicable, including RAP 18.1.

## VI. CONCLUSION

For the reasons set forth herein, Lincoln County respectfully requests this Court affirm each of the trial court's rulings and orders at issue on this appeal. Further, Lincoln County respectfully requests this Court award the County the reasonable attorney fees and costs incurred in defending this appeal.

RESPECTFULLY SUBMITTED this 3rd day of February, 2017.

EVANS, CRAVEN & LACKIE, P.S.

By: _____

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## CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2017, a copy of Respondent's Brief was served on counsel at the following address via hand delivery:

Stephen R. Matthews
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Spokane, WA 99201

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of February, 2017, at Spokane, Washington.

Kimberley L. Mauss