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Court of Appeals No. 344801

Supreme Court No. 95085-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SPECIALTY ASPHALT & CONSTRUCTION LLC,
and LISA JACOBSEN, Appellants

v.

COUNTY OF LINCOLN, Respondent

APPELLANTS' SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

A. Assignments of Error.

No. 1. The Court of Appeals deviated from established law when it affirmed the entry of summary judgment on the sex discrimination claim.

No. 2. The Court of Appeals erroneously concluded as matter of law Specialty could not establish appropriate monetary damages as a consequence of its reasonable reliance on the county's negligent misrepresentation.

No. 3. The Court of Appeals erred when it permitted the County to avoid liability for its post-award misconduct and breach of its contractual duty simply because those duties arose in a public works project

B. Statement of the Case.

Petitioners Specialty Asphalt & Construction, LLC ("Specialty"), and Lisa Jacobsen ("Jacobsen"), its female majority owner, have set forth in Appellants' Brief, Reply Brief, and the mistitled Motion for Discretionary Review detailed facts pertinent to this Court's review of the decision by the Court of Appeals in favor of the Respondent Lincoln County ("County). Rather than repeating a statement of those facts, this Supplemental Brief will cite to the Clerk's Papers ("CP") to support facts and other information that appear in the following arguments.

C. Argument.

GENDER DISCRIMINATION.

This Court's recent ruling in *Mikkelsen v. Pub. Util. Dist. No. 1 of*

Kittitas Cty., 189 Wn.2d 516, 528, 404 P.3d 464, 471 (2017), is the controlling authority regarding summary judgment in a discrimination case. The Washington Law Against Discrimination ("WLAD") provides the same protection against sex discrimination to independent contractors that it does to employees. *Marquis v. City of Spokane*, 130 Wn.2d 97, 113-14, 922 P.2d 43, 52 (1996). Summary judgment is seldom appropriate in discrimination cases. *Mikkelsen,* 189 Wn.2d at 527, 404 P.3d at 471.

A discrimination claim can be established either by direct evidence, by satisfying the three-part test in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), or by some other method of proving the essential elements of a discrimination claim. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 363, 753 P.2d 517, 521 (1988), *abrogated on other grounds by Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516, 404 P.3d 464 (2017). To avoid summary judgment, Jacobsen only needed to produce evidence a reasonable jury could use to find discrimination was a substantial factor in the County's adverse actions. *Mikkelsen,* 189 Wn.2d at 528, 404 P.3d at 474.

Direct Evidence of Sex Discrimination: When a discrimination claim is supported by direct evidence, the claim is not analyzed using the

McDonnell Douglas test. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 359, 172 P.3d 688, 698 (2007). A plaintiff can establish a prima facie case by providing direct evidence (1) the County, through its agent or agents, acted with a discriminatory motive and (2) gender discrimination was a substantial factor in the adverse action against Jacobsen and Specialty. *Kastanis v. Educ. Emps.' Credit Union*, 122 Wn.2d 483, 491, 859 P.2d 26, *amended*, 122 Wn.2d 483, 865 P.2d 507 (1994).

Direct evidence exists that the County discouraged Jacobsen from bidding on the Courthouse parking lot paving project ("the Project"). *CP 281, ¶ 11.* Efforts to discourage or intimidate female applicants from applying for jobs is direct evidence of sex discrimination. *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 873 (11th Cir. 1986); *Catlett v. Missouri Highway & Transp. Comm'n*, 589 F. Supp. 929, 944 (W.D. Mo. 1983); *Equal Employment Opportunity Comm'n v. Ball Corp.*, 661 F.2d 531, 537 (6th Cir. 1981). The County neither denied discouraging Jacobsen from bidding nor gave a nondiscriminatory reason for discouraging her. Without such evidence, the effort to dissuade Jacobsen is direct evidence of discrimination. This evidence is significant because while the County discouraged Jacobsen from bidding, it helped a male-owned bidder submit a bid by providing a private

walkthrough of the Project. *CP 303, 319-20.*

By helping the male bidder with a private walkthrough, the County violated its policy of giving bidders the same information by conducting a single project walkthrough. *CP 320-21.* The County offered no explanation for its favorable treatment of the male-owned bidder. *CP 321.* This admission is direct evidence of a preference for male-owned bidders.

A sexist remark made at the project walkthrough about Jacobsen's heeled shoes contributes to the direct evidence of discrimination. *CP 280, ¶ 9.* Discriminatory remarks are generally considered direct evidence of discrimination. *Mikkelsen*, 189 Wn.2d at 526, 404 P.3d at 470; *Alonso v. Qwest Commc'ns Co., LLC*, 178 Wn. App. 734, 744, 315 P.3d 610, 616 (2013). The County neither denied the remark was made nor gave a nondiscriminatory reason for the sexist statement.

The direct evidence, coupled with the totality of circumstantial evidence described below, provides sufficient evidence that Jacobsen's gender was a substantial factor in the County's adverse action. The trial court ruled Jacobsen presented "no corroborating evidence showing" she was treated differently (*CP 525*), but at summary judgment, the plaintiff's uncorroborated testimony must be accepted as true. *Mikkelsen*, 189 Wn.2d

at 526, 404 P.3d at 470; *Sutton v. Tacoma School District No. 10*, 180 Wn. App. 859, 866, 324 P.3d 763, 767 (2014).

The McDonnell Douglas Test: Under the *McDonnell Douglas* test, Jacobsen and Specialty may show (1) membership in a protected class; (2) she was qualified to perform the work; and (3) because of plaintiff's gender she was treated in a manner that made the performance of the work more difficult than similarly situated members of the opposite sex. *Marquis*, 130 Wn.2d at 113-14, 922 P.2d at 52.

The first two elements of proof have been satisfied. Jacobsen is the female owner of Specialty and it was the successful bidder. Furthermore, no dispute exists that the County made the bidding process more onerous and performance of the contract more expensive and difficult by discouraging Jacobsen and demanding a bond. The comparative evidence in the record also displays a pattern of behavior supporting an inference of animus for Jacobsen as a female and a preference for males.

The effort to discourage Jacobsen from bidding and the criticism of her shoes were discriminatory when contrasted with the concurrent decision to give a private walkthrough to a male-owned bidder. This departure from the normal County procedure was suggestive of discrimination. *Morrison v.*

Booth, 763 F.2d 1366, 1374 (11th Cir. 1985). The walkthrough policy was designed to treat all bidders equally by giving them the same information. *CP 321.*

The County checked and tracked Specialty's status with the Department of Labor and Industries ("L&I") while admitting no other successful bidders were checked or tracked after an award was made. *CP 331-33.* Normally bidders were checked with L&I before an award was made. *CP 333, 342.* The County had no nondiscriminatory reason for the L&I check and tracking of Specialty. *CP 344.* The County Operations and Permit Coordinator admitted he was not even sure the County checked the male-owned bidder's status with L&I. *CP 330.* This evidence creates a reasonable inference the County was looking for a reason to prevent Specialty from performing the awarded contract because it was a female-owned business.

The Court of Appeals disregarded each action because there was no identical comparison to a similarly situated male-owned business. *Appendix to Petition For Review ("Petition Appx"), pp. 7-8.* The holding imposed an impossible burden of proof and prevented a jury from considering the totality of the evidence in the light most favorable to Jacobsen and Specialty.

Specialty could never place itself in the identical position as the male-

owned bidder by seeking a private walkthrough. Specialty attended the scheduled walkthrough and did not know a private walkthrough occurred or that one was possible.

By trying to make rigid comparisons, the Court of Appeals ignored the holding in *Grimwood* forbidding such comparisons. The court ignored evidence of disparate treatment, of male preference, and of animus against Specialty and Jacobsen as a female-owned business.

The Evidence Taken Together: Jacobsen and Specialty satisfied their burden at summary judgment by presenting a mosaic of evidence that, when taken together, would allow a jury to find sex discrimination was a substantial factor in the County's adverse action. Rather than considering the cumulative evidence, the Court of Appeals erroneously considered each incident of discriminatory conduct individually. *Petition Appx, pp. 7-8.* This Court made it clear in *Mikkelsen* that the evidence is to be "taken together" and viewed in the light most favorable to the plaintiff. 189 Wn.2d at 534-35, 404 P.3d at 474. A jury is entitled to consider the evidence in the context of the record as a whole. *Stern v. Trustees of Columbia Univ. in City of New York,* 131 F.3d 305, 314 (2d Cir. 1997). " [A] discriminatory purpose may often be inferred from the totality of the relevant facts,...." *Washington v.*

Davis, 426 U.S. 229, 242 (1976).

Nondiscriminatory Reasons: The County did not submit evidence of nondiscriminatory reasons for discouraging Jacobsen from bidding and several other of its actions. According to the County, however, the post-award demand for a performance bond, the attempt to rebid the project (*CP 346*), and the refusal to allow Specialty to perform the work were not discriminatory. The County asserted it did not discriminate because it gave Specialty the award and its demand for a bond was made because the "no bond" language in the Notice of Call for Bid ("Bid Proposal") was a mistake. It also claimed it was legally required to have a bond, offered to pay for the bond, and then in 2016, wanted Specialty to do the work without a bond.

Evidence of Pretext: Jacobsen and Specialty may use the same evidence to prove both the prima facie case and to prove pretext. *Milligan v. Thompson*, 110 Wn. App. 628, 637, 42 P.3d 418, 423 (2002). They do not need to disprove each of the County's stated reasons for its actions; they only need to present evidence creating material issues of fact. *Mikkelsen*, 189 Wn.2d at 534, 404 P.3d at 474.

Jacobsen and Specialty have the burden of production of showing a pretext. *Id.* Pretext is established by showing the County's nondiscriminatory

reasons are unworthy of credence. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 195, 23 P.3d 440, 454 (2001), *abrogated on other grounds by Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516, 404 P.3d 464 (2017). Specialty got the award because it was the low bidder, not because the County selected the female-owned business over a male-owned one. The County also demanded that Specialty provide a bond as an added requirement after the project was awarded.

Likewise, the offer to pay for a bond was made after the County attempted to rebid the Project and began post-award monitoring of Specialty. A jury could find the offer to pay for a bond is evidence the County imposed the bond requirement as extra protection against the female-owned business doing the work. Acquiring a bond involves more than paying the premium. *CP 284, ¶ 18.* An entity cannot impose additional performance requirements because a contractor is female-owned.

Substantial evidence exists that the no bond language was not a mistake, but instead represented an effort to limit costs on the Project. The no bond language appeared twice in the Bid Proposal (*CP 279, ¶ 6*) and the proposal was reviewed by three county officials before it was issued. CP *326*. The Bid Proposal was modified and an addendum was issued without adding

a request for a bond. *CP 280, ¶ 10.* Only after Specialty got the award did the County Auditor inform Jacobsen a bond was needed. *CP 284, ¶ 17.* After the County knew Specialty could no longer do the work (*CP 411-13*), the County no longer insisted on a bond. *CP 391, ¶ 3.*

The County's inconsistent positions regarding a bond shifted from twice writing no bond was required, to demanding a bond, and to reverting years later to not wanting a bond. Conflicting positions create doubt about the accuracy or believability of a nondiscriminatory reason, and are evidence of pretext that preclude summary judgment. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 624, 60 P.3d 106, 112 (2002).

When there are competing inferences of both discrimination and lawful action, it is up to the trier of fact to determine whether discriminatory intent was a substantial factor in the County's actions. *Mikkelsen*, 189 Wn.2d at 528, 404 P.3d at 471. Summary judgment was inappropriate and the discrimination claim should be remanded for trial.

NEGLIGENT MISREPRESENTATION ISSUES.

The Court of Appeals ruled that although "the parties have genuine factual disputes concerning other elements of the [negligent misrepresentation] tort, this case fails on the damages element." *Petition*

Appx, p. 11. The County's motion for summary judgment on the negligent misrepresentation claim did not raise damages as an issue. *CP 228-30.* Instead, the motion argued Specialty could not reasonably rely on the no bond language in the Bid Proposal and the County did not owe Specialty a duty under the public duty doctrine. *Id.* Specialty tackled the County's two arguments, but had no reason to present evidence about damages in response to the motion. *CP 270-75.* There was no briefing or argument on the issue of damages.

Nevertheless, the Court of Appeals ruled *sua sponte* that the proposal to pay for a bond and, later, its recision of the demand for a bond, prevented Specialty from incurring pecuniary damages. *Petition Appx, p. 11.* These bookend rulings were inconsistent with the facts and the law.

Whether or not Specialty was damaged is a disputed issue of fact. Specialty incurred pecuniary losses to prepare its bid based on an inaccurate Bid Proposal. Jacobsen traveled to Davenport, spent about two hours participating in the walkthrough, and prepared a bid. *CP 280, ¶¶ 7-8.* When Specialty was the low bidder and received the award (*CP 55, 302-03*), it also sustained damages because it began mobilizing resources and materials for the Project and stopped accepting other jobs for the season. *CP 282-83, ¶ 15.*

Washington adopted the *Restatement (Second) of Torts § 552 (1977)* to govern negligent misrepresentation claims. *See Lawyers Title Insurance Corp. v. Baik,* 147 Wn.2d 536, 545, 55 P.3d 619, 623-24 (2002). Section 552B precludes recovery on a negligent misrepresentation theory of "the benefit of the plaintiff's contract with the defendant", that is, profits, but does provide for damages "necessary to compensate the plaintiff for the pecuniary loss . . . of which the misrepresentation is a legal cause." *Restatement (Second) of Torts § 552B.* Those damages include, "pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation." *Id.* A comment explains that Section 552B uses "as the measure of damages for negligent misrepresentation . . . the rule of out-of-pocket loss that is stated as to fraudulent misrepresentation in Subsection (1) of § 549. *Id. at § 552B, comment a.*

Specialty's bid preparation costs and damages from the mobilization and turning away of other jobs satisfy the Restatement's standard for damages as set forth in Sections 549 and 552B. The recovery of bid preparation expenses under the facts of this case promotes the future protection of the public treasury by discouraging negligent conduct in the preparation of bid documents and ensuring the public gets the benefit of the lowest responsible

bidder performing the contract. *Cf. Ritchie Paving, Inc. v. City of Deerfield, Kansas,* 275 Kan. 631,632-33, 636, 642, 67 P.3d 843, 844-45, 846-47, 850 (2003) (lowest responsible bidder could recover costs of preparing and submitting a bid under promissory estoppel cause of action where city failed to disclose commencement and completion dates in its bid documents and plaintiff could not comply with those dates); *Peabody Construction Co., Inc. v. City of Boston,* 28 Mass. App. 100, 546 N.E.2d 898 (1989) (bidder wrongfully deprived of a contract may recover bid preparation costs). This Court has explained "the established principle that 'the doctrine respecting the matter of certainty, properly applied, is concerned more with the *fact of damage than with the extent or amount of damage*.' *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 42 Wn.2d 705, 712-13, 257 P.2d 784 (1953)." *Lewis River Golf v. O.M. Scott & Sons*, 120 Wn.2d 712, 717, 845 P.2d 987, 990 (1992) (emphasis in original).

The Court of Appeals relied on an illustration in the commentary to Section 552 that approved recovery of damages where the defendant provided incorrect information and the plaintiff incurred additional costs in the performance of the contract. *Petition Appx, p. 11.* Noting that "Specialty never performed on the contract," the court concluded that Specialty did not

incur the type of damage that the Restatement recognizes. *Id.* Illustrations provide guidance, but are not exclusive.

Moreover, performance is not required where the breaching party prevents that performance. In *A-J Marine, Inc., v. Corfu Contractors, Inc.*, 660 F. Supp. 2d 85 (D.D.C. 2009), the court denied a motion for summary judgment where "A-J Marine immediately mobilized its crew and equipment, as the subcontract required," on a bridge project, but the general contractor blocked performance arguing that the person who signed the subcontract lacked authority and the subcontractor failed to obtain adequate insurance coverage. *Id.* at 86-88, 94. Requiring expert testimony on the standard of reasonable care in the construction industry for preventing an agent from signing a contract without authority, the court noted that although it "does not now rule on damages, . . . the damages available under an estoppel theory of liability may be more limited than the damages available in an ordinary breach of contract case. *See* Restatement (Third) of Agency § 2.05, comment d; Restatement (Second) of Torts § 552B." 660 F. Supp. 2d at 93-94 & n.15.

To allow the County to escape liability because the County prevented Specialty from performing the contract by making a post-award demand for a performance bond makes no sense and would be unjust. Furthermore, the

law did not require Specialty to accept the County's proposed unilateral modification of the contract to require a bond. *Jones v. Best,* 134 Wn.2d 232, 240, 950 P.2d 1, 5 (1998), *as corrected* (Feb. 20, 1998). The notion that one party to a contract can refuse to let the other party perform in order to force the other party to agree to a contract modification is unheard of in our jurisprudence.

The Court of Appeals also assumed, contrary to the evidence, that Specialty would have been made whole if it had accepted the County's offer to pay for the bond. It would cost the company more than the bond premium to acquire a bond for the Project and Specialty's cap on its bonding authority could be compromised. *CP 284-86, ¶¶ 18-19, 21.* Altering the contract terms to provide additional consideration to Specialty for a bond also would have forced Specialty to take the risk of incurring legal costs and penalties for collusion or bid-rigging. *Id.* Heeding warnings in the County's own Bid Proposal and guidance from its insurance agent, Specialty informed the County that the County's post-award proposal would expose the parties to a potential collusion or bid-rigging charge. *CP 285-86, ¶¶ 19, 21; 296.*

The Court of Appeals' other erroneous assumption, that the County removed the potential for damage to Specialty when it "later rescinded the

need for a bond," ignores that the County let two and a half years pass before it dropped its demand for a bond. CP *279,* ¶ 6, *293, 297, 422 n.1, 469.* Two and a half years of weather and use caused significant deterioration to a parking lot that already had failed pavement and potholes. *CP 411-12,* ¶¶ *6, 8.* The Project that Specialty bid no longer existed by the time the County dropped its demand for a bond because the scope of work had increased. *CP 412,* ¶¶ *8-10.* Specialty had little practical choice but to refuse to do the work on the original contract terms. *CP 595-96.* Neither of the County's "solutions" that the Court of Appeals felt would protect Specialty from any damages was viable at the point in time when the County proposed them. The Court of Appeals assumed away issues of fact regarding damages.

POST AWARD MISCONDUCT.

There is no dispute Specialty had a valid contract with the County to repair the Courthouse parking lot and the County prevented Specialty from performing the contract. *CP 527, 592.* The County has not cross appealed, so these rulings are the law of the case. *Sunland Investments v. Graham, 54* Wn. App. 361,364, 773 P.2d 874 (1989).

Specialty filed a Complaint requesting "a mandatory injunction . . . to complete the Project without any requirement for a bond." *CP 7.* The

County's Answer alleged a bond was statutorily required and the contract with Specialty was illegal, void and unenforceable. *CP 12.*

Specialty could not obtain an injunction compelling performance while the County was contending the contract was illegal. If the contract was illegal, the County could refuse to pay once the work was completed and ask the court to leave the parties where it found them. Jacobsen was also concerned about retaliation, discrimination, and bad faith. *CP 412-13.*

In 2016, four paving seasons later, the County decided it wanted Specialty to do the work without a bond. *CP 422, n.1, 469, 527, 592.* The Project that Specialty bid no longer existed. *CP 412, ¶¶ 8-10.* Deteriorated conditions made it impossible to complete the project at 2013 prices. *CP 411-12, ¶¶ 6, 8-10.* Specialty moved to amend its Complaint to seek damages rather than injunctive relief. *CP 411-12, 595-96.* The trial court denied the motion to amend, and dismissed the contract claim as moot when Specialty declined to perform the original contract. *CP 527, 591-93.*

The Court of Appeals erred by affirming the trial court's refusal to permit Specialty to pursue some form of damages. This case is distinguishable from disappointed bidder cases relied on by the courts below. *Mottner v. Town of Mercer Island*, 75 Wn.2d 575, 579-80, 452 P.2d 750,

753 (1969), and *Skyline Contractors, Inc. v. Spokane Housing Authority*, 172 Wn. App. 193, 205, 289 P.3d 690, 696 (2012), are cases that applied the judicially created principle that injunctive relief is the exclusive remedy for aggrieved bidders. *Petition Appx, p. 13.*

In *Mottner*, the plaintiff was an unsuccessful bidder that only sought damages and not injunctive relief. 75 Wn.2d at 577, 580, 452 P.2d at 752-53. Likewise, in *Skyline,* the Housing Authority ultimately awarded the contract to another bidder and the plaintiff pursued damages rather than following through on injunctive relief it had already won. 172 Wn. App. at 199-200, 289 P.2d at 694. The appellate court held that "[a] disappointed bidder on a public works project is limited to suing to enjoin execution of the contract with another." *Id.* at 205, 289 P.2d at 696. Similarly, this Court's decision in *Peerless Food Products, Inc. v. Washington*, 119 Wn.2d 584, 588-89, 835 P.2d 1012, 1014 (1992), involved an unsuccessful bidder that did not pursue legal action for nearly a year and only sought damages.

This case is more like *Scoccolo Construction, Inc. ex rel. Curb One, Inc., v. City of Renton*, 158 Wn.2d 506, 145 P.3d 371 (2006), where a contractor obtained damages for delays in performance caused by a city. Noting that "Specialty chose not to proceed with the project," the Court of

Appeals said Specialty's case is more like *Skyline* than *Scoccolo*. *Petition Appx, p. 14*. Unlike the *Skyline* case, a jury could find Specialty was prevented from performing. Also in contrast with *Skyline,* there is no doubt Specialty was the qualified low bidder and it had a valid contract. This is not a bidding dispute claim. This is a classic breach of contract case where one party attempted to unilaterally modify the contract. Specialty at a minium, should recover reliance and consequential damages from the County's breach. *Restatement (Second) of Contracts §§ 347, 349.*

Where a public agency awards a contract to the low bidder but then engages in post-award misconduct that delays performance, the contractor should recover its bid preparation costs and other damages, especially when the motivation for the public agency's misconduct is discrimination violating public policy. Interestingly, this Court in *Mottner* noted that some courts had allowed a claim for reimbursement of bid preparation costs "in cases of extreme bad faith or fraud practiced by the public officials." 75 Wn.2d at 579, 452 P.2d at 753. The public treasury benefits in the long run by deterring improper, post-award conduct by a public agency. *Cf. Kajima/Ray Wilson v. Los Angeles Metropolitan Transportation Authority*, 23 Cal.4th 305, 312-20, 96 Cal.Rptr. 747, 751-57 (2003) (recovery of bid preparation

costs where public agency wrongfully denied lowest responsible bidder a contract, injunctive relief no longer was available, and an award would deter future misconduct by public agencies).

D. Request for Award of Attorney's Fees and Costs on Appeal

Pursuant to RAP 18.1(a) & (b), Plaintiffs request an award of reasonable attorney's fees and costs on appeal under WLAD and as otherwise permitted by law.

E. Conclusion

The courts below improperly made factual determinations and made errors of law. The judgment of the Court of Appeals must be reversed and the case remanded for trial.

DATED: March 9, 2018.

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