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No. 95085-7

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

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

Plaintiffs/Appellants,

v.

LINCOLN COUNTY, a Washington State County,

Defendant/Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

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I. IDENTITY OF THE PARTIES/INTRODUCTION

Respondent Lincoln County was the defendant in Spokane County Superior Court Cause No.: 14-2-01715-9, and the appellee in Court of Appeals, Division III. Appellants are Specialty Asphalt & Construction, LLC and Lisa Jacobsen (hereinafter “Specialty” unless Ms. Jacobsen is specifically identified) and were the plaintiffs in the Superior Court matter and the appellants in the Court of Appeals matter.

II. STATEMENT OF THE CASE

The Court of Appeals decision provides the proper review of the general facts of this case, which Lincoln County incorporates by reference.

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.* 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. CP 28. 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.

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.*

Lincoln County determined that Specialty Asphalt would be awarded the project, and an award letter was sent to Specialty on or about August 12, 2013, which included a contract and contract bond. CP 35. Specialty sent the documents back with a note, “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.*

In the initial Complaint, Specialty alleged a single cause of action: injunction. CP 3. 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. Over Lincoln County’s objection, Specialty was allowed to add claims of gender discrimination and negligent misrepresentation so that it could pursue monetary damages rather than solely injunctive relief. CP 560-61.

Lincoln County filed its Motion for Summary Judgment seeking dismissal of Specialty's and Ms. Jacobsen's claims. CP 232. In response, Specialty submitted 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.

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.

Specialty then 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. The trial

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

court determined that Specialty's Motion for Leave was futile and denied the motion. CP 526-27.

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.

The trial court issued a deadline of April 30, 2016 for Specialty to declare its intention of whether it intended to perform the work. CP 598. On May 2, 2016, Specialty filed a Notice declaring that it was **not availing itself of the injunction** available to it. CP 595 (emphasis added).

The trial court then dismissed this case as moot. CP 597-99. The Court of Appeals, Division III, affirmed the trial court's ruling. *Specialty Asphalt & Construction, LLC v. County of Lincoln*, 200 Wn. App. 1034 (2017) (unpublished).

III. ARGUMENT

A. SPECIALTY HAS WAIVED ANY CLAIMS AS TO AN INJUNCTION AND NEGLIGENT MISREPRESENTATION.

As noted above, Specialty has already given “notice that [it] is unable to perform the award” and declined to perform the project in this case. CP 595. Specialty has, therefore, waived any ability to claim that relief now on before the Supreme Court.

An issue that is not briefed to the Court is waived. *Kadoranian v. Bellingham Police Dep't*, 119 Wn. 2d 178, 191, 829 P.2d 1061 (1992); *see also, Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (declining to consider an inadequately briefed argument).

In addition to Specialty’s “Notice of Inability to Perform Work,” Specialty has failed to brief the issue to this Court. Specialty has manifested its intent to waive that claim to this Court.

Specialty has also waived its negligent misrepresentation claim. While Specialty takes exception to the trial court’s characterization of damages with regard to the negligent misrepresentation claim, Specialty does not contend that the trial court or the Court of Appeals erred in its dismissal of the claim itself. Indeed, Specialty dedicates only one paragraph to the negligent misrepresentation issue in its Petition, and even then, only discusses its “pecuniary losses.” *Petition*, at 17-18. Because Specialty is not claiming error with respect to the trial court or Court of Appeals’ dismissal

of its claim, Specialty has waived the claim and should be precluded from arguing the issue further.

Further evidencing Specialty's intention to waive all claims on appeal with the exception of its discrimination claim is the Conclusion section to the Petition for Discretionary Review:

This petition for review should be granted because discrimination is an issue of substantial public interest. The courts below committed reversible error when they made factual determinations on summary judgment and other legal errors that conflict with published appellate decisions. The judgment must be reversed and the case remanded for trial.

Petition, at 20.

If Specialty intended to truly appeal the issues other than the discrimination claim, surely it would have indicated as such in its request for relief in the Petition. As Specialty failed to do so, those claims should be deemed waived.

B. THE TRIAL COURT AND COURT OF APPEALS APPLIED THE APPROPRIATE STANDARD REGARDING SPECIALTY'S DISCRIMINATION CLAIM AND PROPERLY DISMISSED IT FOR FAILING TO ESTABLISH A PRIMA FACIE CASE.

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 v. Walker Chevrolet Co*, 120 Wn. 2d

57, 837 P.2d 618 (1992); *see also Marquis v. City of Spokane*, 130 Wn. 2d 97, 105, 922 P.2d 43 (1996). 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). Indeed, Specialty has misinterpreted its CR 56 burden throughout this lawsuit: that “[e]ven self-serving testimony must be treated as true and it creates a material issue of fact[.]” *Appellants’ Opening Brief at the Court of Appeals*, at 20 (said argument in Specialty’s brief does not contain a citation to any Washington law whatsoever to support that proposition). Washington law is actually inapposite to Specialty’s position: “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).

It is *Specialty's* burden to establish the prima facie case, not Lincoln County's burden to disprove. However, Specialty argues in its Petition: "The County had the opportunity to, but did not, offer such evidence." *Petition*, at 16. The County did not and does not have the burden of disproving a prima facie case. Rather, as the *Ellingson* court noted, the plaintiff has the burden of establishing a prima facie case through admissible evidence. *Ellingson v. Spokane Mortg. Co.*, 19 Wn. App. 48, 54, 573 P.2d 389 (1978). The Court of Appeals correctly noted that Specialty failed to satisfy the prima facie elements of the discrimination claim as those elements are set forth in *Marquis*.

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.

After realizing the mistake with regard to the bond requirement, Lincoln County offered to allow Specialty to keep the project, so long as it

acquired the necessary performance bond. CP 35. 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.*

The undisputed evidence in this case is:

- 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.

C. SPECIALTY DID NOT AND COULD NOT PROVE THAT IT JUSTIFIABLY RELIED UPON ANY MISREPRESENTATION BY LINCOLN COUNTY AND THE PUBLIC DUTY DOCTRINE FURTHER PRECLUDES ANY LIABILITY AGAINST LINCOLN COUNTY FOR THIS CLAIM.

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.

RESTATMENT (SECOND) OF TORTS § 552(1) (1977). Justifiable reliance is properly defined as reliance [that is] reasonable under the surrounding circumstances.” *ESCA v. KPMG Peat Marwick*, 135 Wn. 2d 820, 828, 959 P.2d 651 (1998).

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).

“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 has admitted that this was a public works project. *See, e.g. Petition*, at 18 (“Should the County be permitted to avoid liability for its post award misconduct and breach of its contractual duty simply because those duties arose out of a public works project?”).

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, and certainly does not qualify as justified reliance.

Furthermore, Specialty’s negligent misrepresentation claim is barred by the public duty doctrine because Lincoln County did not owe Specialty a duty in this case. 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.*

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).

D. SPECIALTY’S DISSATISFACTION WITH THE CURRENT STATE OF LAW REGARDING DAMAGES IS AN INSUFFICIENT JUSTIFICATION TO CREATE NEW LAW.

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 cites² 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

² *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).

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.

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.

V. CONCLUSION

For the reasons set forth herein, Lincoln County respectfully requests the Court affirm the Court of Appeals in all respects.

RESPECTFULLY SUBMITTED this 9 day of March, 2018.

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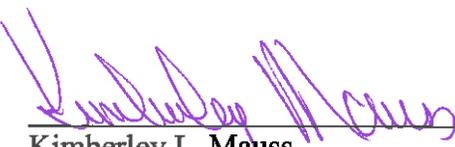
CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March, 2018, a copy of Respondent's Supplemental Brief was served on counsel at the following address via hand delivery:

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

DATED this 9th day of March, 2018, at Spokane, Washington.



Kimberley L. Mauss

EVANS, CRAVEN & LACKIE, P.S.

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