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No. 74938-2-I

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

TITAN EARTHWORK, LLC,
a Washington limited liability corporation,

Appellant/Cross-Respondent,

v.

CITY OF FEDERAL WAY,
a Washington municipal corporation,

Respondent/Cross-Appellant.

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CLERK OF COURT
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

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

APPELLANT TITAN EARTHWORK LLC'S REPLY BRIEF

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A. INTRODUCTION

Titan Earthwork LLC's claims were dismissed at summary judgment. Titan submitted evidence that it reasonably interpreted the locate markings and that it excavated with reasonable care. The trial court stated that these facts were in dispute. However, the trial court and the City of Federal Way both redact the words "reasonable care" from Washington's Underground Utility Damage Prevention Act, Ch. 19.122 RCW ("UUDPA" or the "Act"). Further, the trial court and the city both ignore that the Act specifically preserves the contracting parties' right to allocate risk for differing site conditions. The trial court must give effect to the Act's language, and all reasonable inferences from the evidence must be construed in Titan's favor.

The central issue in this case is whether the UUDPA holds an excavator strictly liable for striking a utility regardless of whether the excavator has complied with the Act's threshold requirements. This is an issue of first impression.

Titan argues that the UUDPA requires an excavator to excavate with reasonable care after the excavator has complied with the Act's threshold requirements (marking the excavation boundary, calling for locates, waiting for the locate service to mark

utilities, and maintaining such markings). Further, whether the excavator has used reasonable care—given the entirety of the circumstances—is an issue of fact.

The City argues that when an underground utility is within the vicinity of a locate marking, the excavator is strictly liable for striking the utility regardless of what the property owner or the utility tells the excavator regarding the utility's location, and regardless of whether the locate markings were accurate or subject to interpretation. In effect, the City argues that the UUDPA absolves property owners and utilities from any liability for misrepresentations made to an excavator if any locate marking is near an excavation. This is not the law: the City's interpretation is contrary to public policy, and contrary to both the Act's express negligence language and the legislative intent behind it.

The Act requires contractors to excavate with "reasonable care"; whether the contractor exercised reasonable care is an issue of fact. Titan has presented sufficient evidence to raise a material issue of fact as to whether it excavated with reasonable care, and the trial court stated that there are disputed facts. This Court should reverse the Trial Court's summary dismissal of Titan's claims.

The second issue in this appeal is whether the City is entitled to attorney fees. Titan brought two contract causes of action against the City under a contract wherein both parties waived any right to attorney fees. While the City contends that a statutory right to fees cannot be waived, this contention conflicts with clear Washington precedent. Washington law permits a party to waive its statutory right to attorneys' fees where doing so is not unconscionable. Here, two commercial parties mutually waived any right to fees in a contract drafted by the City itself. Further, the UUDPA only entitles a party to fees when a party seeks damages under the Act—not contractual damages as done here. This court should uphold the parties' freedom to contract and reverse the trial court's order awarding the City its fees and costs.

The trial court found that there were facts in dispute. All inferences from such facts should have been construed in Titan's favor. Because the UUDPA does not hold excavators to a strict liability standard, such disputed facts are material and the City is not entitled to judgment as a matter of law. This Court should reverse the trial court's decision on the City's summary judgment motion, and set aside the trial court's fee decision accordingly.

B. RESPONSE TO CITY'S RESTATEMENT OF THE CASE

Titan and its subcontractor, Transportation System's Inc., ("TSI") excavated in reliance on the best information available: specific representations by both the property owner and the affected utility that all utilities conflicting with the surveyed location of the new signal pole base had been moved. CP 368, 391-92, 400-01. Apart from these verbal representations, Titan and TSI had the opportunity to visually confirm in PSE's open pit that there were no utilities that directly conflicted with PSE's conduit—giving Titan and TSI an unusually high level of knowledge regarding underground utilities in this location. CP 391-92, 400-01. Unbeknownst to all parties, PSE had misinterpreted the location of its utilities, and failed to dig the pit deep enough to uncover the conduits that TSI eventually struck—the northern grouping. CP 352-57, 392, 402.

The city states, with no factual support, that "[a]ffected utility providers came to the construction site and physically marked the locations of their respective underground utilities, including PSE, **which directed USIC** to physically mark the location of PSE's power utilities on July 10, 2013." Resp. Br. at 9 (emphasis added). However, PSE neither marked nor directed USIC where to mark PSE's underground conduits. See CP 85. PSE believed, as did the

City and the City's inspector (and Titan and TSI based, in part, on those parties' representations) that the northern grouping was outside of the trenched area—outside the excavation zone.

Why did TSI mechanically excavate in an area where locate markings were present? To this question, the City relies heavily on its photo of the locate markings at its Appendix 1 (A-2) and CP 243. TSI's excavation crews interpreted the markings on the ground to correspond with known conduits. CP 401. Significantly, every red locate marking in the City's photograph does not represent a separate conduit. The Common Ground Alliance publishes a "Best Practices" manual for utility locate markings.¹ The Best Practices manual provides that utility corridors, where the number of utilities are unknown, should be marked with a single line and the width of the corridor notated on the marking.² Here, USIC marked PSE's groupings with a line and two dots on either side, presumably representing the approximate corridor width in lieu of painting a width notation. For example, the southern grouping can be seen approaching the excavation area in the picture at CP 123-25. The

¹ Common Ground Alliance, *Best Practices 13.0* (Mar. 2016), <http://commongroundalliance.com/best-practices-guide>.

² *Id.* at App. B, <http://commongroundalliance.com/best-practices/best-practices-guide/guidelines-operator-facility-field-delineation>.

southern grouping is two conduits, and is marked by a line with dots on either side—three red markings corresponding to one corridor comprising two conduits. See CP 398 (the “Southern Grouping” is the group of two larger conduits on the left side of the photograph).

At trial, Titan will show that TSI’s locate marking interpretation was reasonable. The City’s photograph shows 3 utility line (or grouping) marks, with other markings in the rocks. The rocks, as seen in the auger picture in Resp. Br. App. 1 (A-3), are more than the two-foot zone of influence away from the excavation area (this can be determined by merely comparing the pictures—the auger bit’s diameter is 3 feet). CP 19.

The locate marking photograph shows there are three lines or corridors outside the rocky area. CP 243. TSI had seen the southern grouping in PSE’s open trench and confirmed it did not conflict with the surveyed signal pole location (plus these markings and the southern conduits themselves were over two feet from the excavation). CP 391-92, 400-02. This leaves two corridor markings that are even arguably within two feet of the excavation. CP 398. TSI vactored down and uncovered two groups of smaller conduits crossing the excavation. See CP 401. These two separate conduit corridors reasonably correlated to the remaining ground markings

in the excavation area. When TSI reached these smaller conduits, the City inspector directed TSI to stop vactoring at the City's expense because the inspector believed any potentially conflicting conduits had been uncovered. CP 401.

The City inspector's direction supports the reasonableness of how TSI interpreted the locate markings and underground conditions. The City's final representation—the inspector's direction to stop vactoring—was made after USIC marked the utilities for the second time. CP 401. It was made during the excavation, and was the “latest and best” information available.

C. ARGUMENT

The trial court erred by holding Titan strictly liable for striking an underground utility. The trial court also erred by awarding the City attorneys' fees in direct conflict with the parties' contract.

(1) The Trial Court Erred by Dismissing Titan's Claims Because the UUDPA Requires an Excavator to Act with Reasonable Care.

The UUDPA requires excavators to excavate with “reasonable care”—a negligence standard. This was the legislature's intent when it enacted the statute. The parties' contract required Titan to satisfy the UUDPA's requirements. The contract also required Titan to coordinate utility relocation, a duty which was

satisfied when the City informed Titan that such work had already been done. Further, Titan has submitted evidence that its interpretation of the locate markings was reasonable. Because Titan satisfied its obligations under the UUDPA, the trial court had no basis to dismiss Titan's contract claims.

(a) The Duty to Precisely Locate is Couched in Negligence Terms.

The UUDPA requires an excavator to comply with certain threshold requirements, which include marking the boundary of the excavation area, notifying the one-call service, waiting for the utility providers to mark their underground facilities, and maintaining such markings for the relevant period. RCW 19.122.030(1)-(3), (5), (6). Titan's and TSI's compliance with these requirements is not in dispute. Once an excavator has satisfied these "threshold requirements," the Act requires the excavator to use "reasonable care to avoid damaging underground facilities." RCW 19.122.040(2). How this standard should be interpreted and whether compliance with the standard presents an issue of fact is the heart of this dispute.

The City argues that any time there is a locate marking painted on the ground the excavator is strictly liable for striking any

utility, regardless of what information or representations either the property owner or the utility owner have made or conveyed to the excavator. The City also contends that it has no obligation to explain or refute a reasonable explanation as to whether a buried line correlates with a locate marking. To the City, a line clearly correlates to a utility if there is a marking, and a utility is struck.

The City's interpretation not only conflicts with the Act's reasonable care standard, but would also unnecessarily increase excavation costs and prevent an owner from having any ability to control such costs. For example, a contractor is hired to install a 5-foot deep utility line along the same alignment as an existing sewer line. The property owner tells the excavator that a sewer line has been installed 10 feet below the surface, and the locate company marks the sewer line on the surface. Is the excavator required to hand dig the 5-foot deep utility's entire alignment? The City says yes. Resp. Br. at 23 ("Once the markings were made, **any representations made became wholly immaterial** with respect to Titan's duties under the Act.").

Because the City argues that there is no such thing as reasonable care under the UUDPA, the owner in this example would have no way to reduce its costs, even though it knows the

sewer line is 10 feet deep. Under the City's interpretation, the excavator would be strictly liable for any strike to the utility, effectively forcing the excavator to hand dig the entire alignment because it could not rely on any information provided by the property or utility owner regarding the sewer line's depth after the marking had been painted on the ground. As done here by the City, any argument by the excavator that it relied on the owner's representation as to the sewer's depth would be characterized as an unlawful "shift" of liability in contravention of the UUDPA.

This is precisely why the reasonable care standard must apply: the excavator would only be liable in this scenario if it has not acted as a reasonable excavator given all the information available to it at the time of excavation (assuming the excavator has complied with the Act's threshold requirements).

The City contends that Titan "had a statutory obligation to precisely locate the line, notwithstanding any representations made prior to or after the markings." The City turns to Merriam-Webster to determine that "precisely locate" under the UUDPA means that the "excavator has a duty to accurately and exactly (precisely) find the location of a line." Resp. Br. at 7. Regardless of whether an excavator is required to "precisely," "exactly," or "accurately" locate

a line, the City's analysis still does not answer the question of whether "precisely locate" imposes a duty to physically locate the utility, or whether the requisite level of precision can be achieved through other means.

The City was attempting to control its costs when it directed TSI to stop vactoring under the bid item, and TSI relied on the information available to it at the time—including the City and PSE's verbal representations, seeing the open pit with no conflicting utilities, and seeing the red markings in the rocks over two feet from the excavation limits—in determining that the northern grouping was north of the excavation area. Whether TSI's interpretation was reasonable is ultimately a question for the trier of fact.

(b) 2011 Amendments to RCW 19.122 Did Not Affect the Scheme's Standard of Care.

The City ignores the UUDPA's statutory history. The City argues that because the UUDPA was modified, such modifications preempt any other statutory history. Resp. Br. at 28. ("[T]he legislative history Titan cites and relies upon all predate the 2011 amendments to RCW 19.122, which imposed specific statutory duties on excavators."). The 2011 amendments, however, did not modify an excavator's "specific statutory duties." As addressed in

Titan's Opening Brief, those duties remain unchanged from when the Act was originally enacted in 1984. The Senate Bill Report for the 2011 modifications notes: "Much of current law is maintained...." S.B. Rep. on Second Engrossed Substitute H.B. 1634, 62nd Leg., Reg. Sess., at 3 (Wash. 2011). An excavator's RCW 19.122.040(2) duty to excavate with reasonable care is part of the law that was maintained. In fact, the modifications made to RCW 19.122.040 in 2011 do not make any substantive change. The complete 2011 modifications to RCW 19.122 are attached hereto as Appendix 1. The only modification to RCW 19.122.040(2) (the clause governing an excavator's standard of care) was to change a "shall" to "must." Therefore, the 1984 legislative intent behind an excavator's standard of care is just as relevant today as it was then.

Even though the City contends that "negligence is not the standard here," the legislature believed it was when it enacted the statute:

An excavator will use **reasonable care** to avoid damaging underground [sic] facilities. A person whose **negligent acts** or omissions cause damage to facilities is liable for all repair or relocation costs.

S.B. Rep. on Substitute H.B. 857, 48th Leg., Reg. Sess. (Wash. 1984) (emphasis added).

The City goes on to argue that the legislature could have easily adopted negligence language if it chose to apply such a standard to an excavator's noncompliance with the act. However, the very duty the City asserts Titan violated is the duty to precisely locate, which is only included in a section beginning “[a]n excavator shall use reasonable care”—language that clearly imposes a negligence standard.

(c) The Contract Merely Reiterates Titan's Duties Under RCW 19.122.

The City argues that Titan is not contractually entitled to damages. At its core, the City's contractual arguments only demonstrate that Titan was obligated by contract to comply with the UUDPA's requirements. Apart from reiterating Titan's duties under the UUDPA, the City contends that the contract imposed a duty on Titan to coordinate utility relocation.³ However, any contractual requirement to coordinate utility relocation was waived through the

³ In a somewhat confusing manner, the City also cites contract provisions that lead to a possible conclusion that Titan may have had some duty to actually relocate the utilities. Resp. Br. at 15-16. However, to be clear, Titan was not required by the contract to relocate any utilities with its own forces. This point is not in dispute—the City is instead arguing that it was Titan's duty to identify conflicts and coordinate the utility's relocation.

City's multiple and continuing representations that such work had already been done. See *Reynolds Metals Co. v. Elec. Smith Constr. & Equip. Co.*, 4 Wn. App. 695, 700, 483 P.2d 880 (1971).

The City again argues that the City's "representations cannot be relied upon, are not part of the contract documents, and do not relieve Titan from its specific written contractual obligations." Resp. Br. at 21. The City bases this argument on the contract's integration and no oral modification clauses. However, this argument ignores precedent (cited in Titan's Opening Brief at 33-39) and the express provisions of Washington State Department of Transportation's Standard Specifications, which were expressly incorporated into the contract. CP 41.

An integration clause does not prevent a party from varying a contract's terms with extrinsic evidence of modifications made subsequent to the contract's execution. See 25 Wash. Prac., Contract Law and Practice § 4:6 (3d ed.). Here, the City varied Titan's duty to coordinate utility relocation after the contract was executed by representing that such work had already been done. See also WSDOT Standard Specifications Sections 1-05.1 (owner's engineer authorized to interpret plans and specifications; contractor must comply) and 1-04.4 (owner's engineer can change contract;

contractor must comply).⁴ Regarding the contract's no oral modification clause, such clauses are unenforceable in Washington. See, e.g., *Pacific NW Grp. A v. Pizza Blends, Inc.*, 90 Wn. App. 273, 281, 951 P.2d 826 (1998).

The City also cites the contract's "Resolution of Utility Conflicts" and "Utility Potholing" bid items as if the fact that Titan provided a price for these **force account** items somehow imposed an obligation on Titan to perform them. Resp. Br. at 17. The City contends that Titan "specifically itemized and requested payment for these items." Resp. Br. at 17. However, Titan would only be paid for these items if the work was approved by the City. CP 391. Instead of allowing TSI to continue vactoring under the utility pothole bid item, the City directed TSI to change its means and methods—to stop vactoring—once the shallower conduits were uncovered; it is an issue of fact as to what impact such direction had on the reasonableness of TSI's actions.

The Differing Site Condition ("DSC") examples in RCW 19.122.040(1)(a)-(b) list two situations where a condition is, by statute, a DSC. However, this is not an exhaustive list. Even though

⁴ WSDOT, Standard Specs. for Road, Bridge, and Municipal Construction (2012), <http://www.wsdot.wa.gov/publications/manuals/fulltext/M41-10/SS2012.pdf>.

these two examples are “deemed” DSCs by the statute, an owner can still place liability for a DSC on a contractor if it so chooses: “Nothing in this chapter prevent the parties to an excavation contract from contracting with respect to the allocation of risk for changed or [DSCs].” RCW 19.122.040(4); WSDOT, *supra* note 4 at § 1-04.7. Here, the City accepted liability for DSCs by including such a clause in its contract.

It is unclear how the City’s cited contract provisions would entitle it to a complete dismissal of Titan’s claims. Even if Titan had failed to coordinate utility relocation as required by the contract, Titan would still be entitled to recover damages under the contract’s indemnity provision to the extent that the City’s negligence—through its misrepresentations—caused Titan to be liable for direct damages to third parties. The trial court’s complete dismissal further demonstrates that the trial court believed Titan was strictly liable under the Act.

Whether Titan complied with the contract’s requirements is an issue of fact. Titan had no duty to coordinate utility relocation in the area after the City’s Engineer stated that such work had already been done. Titan was entitled to recover costs for a DSC for striking a utility the city indicated had been relocated. Under its contract,

Titan is entitled to rely on such indications. Finally, the City must indemnify Titan for damages it incurred from third parties due to the City's negligence.

(d) The City Introduced No Evidence that the Utilities Were Marked with "Reasonable Accuracy."

The City produced no evidence that the locate markings accurately represented the underground conditions apart from conclusory statements that "the markings correlated with the northern group of conduit, because TSI dug where marked and struck the power line." Resp. Br. at 12. The City argues that Titan has raised this issue for the first time on appeal. Resp. Br. at 25. However, this issue is central to whether TSI excavated with reasonable care. TSI argued before the trial court that it interpreted the locate markings to correspond with other conduits. RP 15; CP 401. The City did not dispute this fact; rather, it relied upon one photo showing lots of red markings as evidence that any interpretation that TSI made of the markings must have been unreasonable. However, the reasonableness of TSI's interpretation is a question for the trier of fact.

Titan agrees with the City that the UUDPA requires utilities be marked with "reasonable accuracy"—within 24" of the outside

diameter. RCW 19.122.020(23), .030(3). The fault in the City's argument is that it presented no evidence this was actually done.

(e) Titan is Not Seeking to Shift the Economic Consequences of its Liability.

Finally, the City argues that Titan is seeking to “shift the economic consequences of its failure to meet its duty under the Act upon the City.” Resp. Br. at 15. The City contends that such a “shift” is voided by RCW 19.122.040(3). *Id.* at 28. However, Titan has presented sufficient evidence to demonstrate that it has no liability under the UUDPA: it complied with the Act's threshold requirements and excavated with reasonable care. Further, the City's liability is contractual, and does not arise from the UUDPA either. Thus, there is no “failure to meet [a] duty under the Act,” and no “economic consequences” stemming therefrom for which to shift. Resp. Br. at 15.

(2) The Trial Court Erred in Awarding Fees Because the Parties Waived Right to Fees by Contract.

Titan is contractually entitled to additional compensation from the City, and brought this lawsuit to enforce its rights. Federal Way's contract waived any right by either party to recover attorneys' fees, costs, and expenses in suits such as this. This waiver does not violate public policy under the facts of this case.

Additionally, given that Titan brought two direct causes of action against the City, and because the City failed to plead indemnity or establish such damages, Titan does not have to indemnify the City for its fees. Finally, this action is not frivolous because it presents an issue of first impression and Titan presented sufficient facts to demonstrate that it reasonably interpreted the locate markings and that it excavated with reasonable care. The trial court's decision awarding fees should be reversed.

(a) The Contract's Fee Waiver is Valid and Enforceable.

The parties' contract specifically and unambiguously waives each parties' right to recover attorneys' fees, costs, and expenses in any action brought to enforce the contract's terms. Here, Titan brought this action to recover compensation it was due under the contract. Thus, the fee waiver applies. The City raises several arguments as to why the provision it drafted should not apply, even arguing that its own contract provision is void against public policy.

The City asserts that "where fees under statute are mandatory, they cannot be bargained away," citing to *Singleton v. Frost*, 108 Wn.2d 723, 742 P.2d 1224 (1987). *Singleton* does not hold this. *Singleton* actually explains that under Washington's

bilateral fees statute, RCW 4.84.330, a party cannot waive its *contractual* attorney fee right (creating a unilateral fee provision). *Id.* at 727. The *Singleton* court did not address the situation at hand, where a statute provides for fees, but the parties have **mutually** waived such a right. That question was addressed in *Yakima Cty. v. Yakima Cty. Law Enforcement Officers Guild*, 157 Wn. App. 304, 342-45, 237 P.3d 316 (2010).

Yakima Cty. specifically held that a party can bargain away a mandatory statutory right to fees. *Id.* In *Yakima Cty.*, the prevailing party was entitled to fees under the wage recovery statute, RCW 49.48.030, which provides that reasonable attorney's fees "**shall** be assessed." (Emphasis added.) However, the parties had mutually waived any right to fees under a collective bargaining agreement, and the court determined that this specific fee waiver trumped the prevailing party's mandatory statutory right to fees. *Id.*

The City also argues that the contract provision waiving attorney fees "does not apply to physical 'damages' caused by the actions of one of the parties or statutory attorney's fees associated with such damages." Resp. Br. at 40. The City provides no support for this statement, and the contract provision itself does not exclude "physical" damages from the waiver's scope.

Again, Titan asks: given the American rule—that each party bears its own fees and costs—what purpose does a contractual fee waiver serve if not to waive a statutory right to fees? A party’s freedom to waive mandatory statutory attorney fees is only trumped where such a contractual provision would violate public policy.

(b) The City’s Decision to Waive its Fees Does Not Violate Public Policy.

Titan set forth why it is not against public policy for the City to waive attorney fees in its Opening Brief. App. Op. Br. at 43-45. The City did not respond. The City merely argues that since attorney fees are the “economic consequences of liability” associated with liability for damages found under the UUDPA,” allowing them to be bargained away through contract would be contrary to public policy. However, liability for attorney fees is always an “economic consequence” of a party’s liability—this fact, by itself, does not establish that bargaining such fees away would violate public policy.

Fee waivers have been held to be unconscionable and void as against public policy when they involve a party in a weaker bargaining position waiving a unilateral statutory right to fees. See, e.g., *Alder v. Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.3d

773 (2004). This simply is not the case here. Federal Way and Titan are both sophisticated commercial parties that, under these facts, contractually waived a bilateral fee provision (in a contract drafted by Federal Way, which Titan had no opportunity or ability to negotiate).

(c) Awarding Fees Based On the Contractor Indemnity Provision is Improper.

The Contractor Indemnity provision has no application under the facts involved in this dispute, and the City did not plead indemnity and has no basis to recover damages.

First, the “Contractor Indemnity” provision applies to third party claims—not a direct suit against the owner by the contractor. The City never demanded that Titan indemnify it from PSE’s damages, and presented no evidence that PSE made a direct claim against the City—a situation where the contractor indemnity provision would operate. The City conveniently forgets that a portion of Titan’s damages are its own direct costs for the utility strike. CP 4. This action does not merely pass-through PSE’s damages.

Second, the City cannot recover damages under the Contractor Indemnity provision because it failed to plead a

counterclaim for indemnity and has no right to damages. See *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 86, 102-04, 285 P.3d 70 (2012) (“[A]ttorney fees sought pursuant to a contractual indemnity provision are an element of damages that must be proved to the trier of fact.”). This point alone is fatal to the City’s claim.

Finally, the Contractor Indemnification provision only applies to liabilities caused by the contractor’s “negligent acts, errors or omissions....” CP 47. Here, Titan was not found to be negligent—the court applied a strict liability standard. Therefore, the provision cannot apply to this situation because the City argued that Titan was strictly liable; whether Titan or TSI acted negligently is a question of fact that was not decided.

(d) Titan’s Action is Not Frivolous.

Finally, the City persists in its request for sanctions an alternative to its other fee arguments, arguing that because it prevailed at the trial court, Titan’s action must have been frivolous. Nothing in the record suggests that the trial court even considered the City’s sanction request. Sanctions are intended to prevent attorneys from filing actions when it is “patently clear that a claim has absolutely no chance of success.” *Skimming v. Boxer*, 119 Wn.

App. 748, 754-55, 82 P.3d 707 (2004). Titan's action presents an issue of first impression. There is no precedent interpreting the standard of care under RCW 19.122—a statute that includes clear negligence language. Further, the Washington Supreme Court has “caution[ed] that the sanctions rules are not ‘fee shifting’ rules.” *Wash. State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993).

The City also relied heavily on the fact that it “made a formal request that Titan voluntarily dismiss its lawsuit against the City before the City engaged in the effort of preparing and noting a summary judgment motion for hearing.” However, this claim was demonstrably false. The City's attorneys' billings demonstrate that it had drafted the motion five months earlier. CP 471.

The City has failed to meet its heavy burden, especially given the lack of precedent, statutory negligence language, and the City's clear misrepresentations to Titan regarding the location of utilities on its property.

(3) The Trial Court Properly Reduced the City's Requested Fees.

The City cross-appealed the trial court's decision to reduce its attorneys' fees. Even though the City had no basis for fees

because it contractually waived such right, the City nevertheless presented the court with a significant fee request clearly out of proportion with the work product submitted, the case progress, and the amount in dispute. The City requested \$42,530.73 in attorneys' fees and costs, nearly a third of Titan's total damage claim. The City had conducted none of its own discovery, apart from issuing a subpoena duces tecum to USIC. The trial court's reduction of the City's fees was more than justified: the City billed thousands for clerical tasks, unsuccessful and untried legal strategies, duplication, and general overbilling.

D. CONCLUSION

The trial court dismissed Titan's claims on summary judgment. The trial court found that there were disputed facts as to the reasonableness of Titan's actions; however, the trial court found that such facts were not material—holding Titan strictly liable for striking the utility despite the Act's clear negligence language.

Because the Act does not hold excavators that have complied with the Act's threshold requirements strictly liable, the trial court's summary dismissal should be reversed, and the trial court's award of fees should also be reversed accordingly.

DATED this 5th day of October, 2016.

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By  _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of October, 2016, I caused a true and correct copy Statement of Arrangements to be served on the following attorneys of record in the manner(s) indicated below:

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Dated: October 5, 2016

By: 
Paul B. Mora
Legal Assistant

FILED
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OCT 5 2016 PM 4:28

APPENDIX 1

2011 Wash. Legis. Serv. Ch. 263 (S.S.H.B. 1634) (WEST)

WASHINGTON 2011 LEGISLATIVE SERVICE

62nd Legislature, 2011 Regular Session

Additions are indicated by **Text**; deletions by
~~Text~~ .

Vetoed are indicated by ~~Text~~ ;
stricken material by ~~Text~~ .

CHAPTER 263

S.S.H.B. No. 1634

OMNIBUS BILL--UNDERGROUND FACILITIES

AN ACT Relating to underground utilities; amending RCW 19.122.010, 19.122.020, 19.122.027, 19.122.030, 19.122.033, 19.122.035, 19.122.040, 19.122.050, 19.122.055, 19.122.070, 19.122.075, 19.122.080, 19.122.100, and 19.122.110; adding new sections to chapter 19.122 RCW; creating a new section; repealing RCW 19.122.060; prescribing penalties; providing an effective date; and providing expiration dates.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 19.122.010 and 1984 c 144 s 1 are each amended to read as follows:

<< WA ST 19.122.010 >>

It is the intent of the legislature in enacting this chapter to assign responsibilities for locating and keeping accurate records of utility locations, protecting and repairing damage to existing underground facilities, and protecting the public health and safety from interruption in utility services caused by damage to existing underground utility facilities. **In this chapter, the underground utility damage prevention act, the legislature intends to protect public health and safety and prevent disruption of vital utility services through a comprehensive damage prevention program that includes:**

- (1) Assigning responsibility for providing notice of proposed excavation, locating and marking underground utilities, and reporting and repairing damage;**
- (2) Setting safeguards for construction and excavation near hazardous liquid and gas pipelines;**
- (3) Improving worker and public knowledge of safe practices;**
- (4) Collecting and analyzing damage data;**
- (5) Reviewing alleged violations; and**
- (6) Enforcing this chapter.**

Sec. 2. RCW 19.122.020 and 2007 c 142 s 9 are each amended to read as follows:

<< WA ST 19.122.020 >>

Unless the context clearly requires otherwise, The definitions in this section apply throughout this chapter: **unless the context clearly requires otherwise.**

- (1) "Business day" means any day other than Saturday, Sunday, or a legal local, state, or federal holiday.
- (2) "Damage" includes the substantial weakening of structural or lateral support of an underground facility, penetration, impairment, or destruction of any underground protective coating, housing, or other protective device, or the severance, partial or complete, of any underground facility to the extent that the project owner or the affected ~~utility-owner~~ **facility operator** determines that repairs are required.
- (3) "Emergency" means any condition constituting a clear and present danger to life or property, or a customer service outage.
- (4) "Excavation" **and "excavate"** means any operation, **including the installation of signs**, in which earth, rock, or other material on or below the ground is moved or otherwise displaced by any means, ~~except the tilling of soil less than twelve inches in depth for agricultural purposes, or road and ditch maintenance that does not change the original road grade or ditch flowline~~ .
- (5) "Excavation confirmation code" means a code or ticket issued by ~~the~~ **a** one-number locator service for the site where an excavation is planned. The code must be accompanied by the date and time it was issued.
- (6) "Excavator" means any person who engages directly in excavation.
- (7) "Gas" means natural gas, flammable gas, or toxic or corrosive gas.
- (8) "Hazardous liquid" means:
 - (a) Petroleum, petroleum products, or anhydrous ammonia as those terms are defined in 49 C.F.R. Part 195 as in effect on March 1, 1998; ~~and~~
 - (b) Carbon dioxide. ~~The utilities and transportation commission may by rule incorporate by reference ; and~~
 - (c) Other substances designated as hazardous by the secretary of transportation **and incorporated by reference by the commission by rule.**
- (9) ~~"Identified facility" means any underground facility which is indicated in the project plans as being located within the area of proposed excavation.~~
- ~~(10)~~ "Identified but unlocatable underground facility" means an underground facility which has been identified but cannot be located with reasonable accuracy.
- ~~(11)~~ (10) "Locatable underground facility" means an underground facility which can be ~~field-marked~~ **marked** with reasonable accuracy.
- ~~(12)~~ (11) "Marking" means the use of stakes, paint, or other clearly identifiable materials to show the field location of underground facilities, in accordance with the current color code standard of the American public works association. Markings shall include identification letters indicating the specific type of the underground facility.

(13) **(12)** “Notice” or “notify” means contact in person or by telephone or other electronic methods ~~that~~ , **and, with respect to contact of a one-number locator service, also** results in the receipt of a valid excavation confirmation code.

(14) **(13)** “One-number locator service” means a service through which a person can notify ~~utilities~~ **facility operators** and request ~~field-marking~~ **marking** of underground facilities.

(15) ~~“Operator” means the individual conducting the excavation.~~

(16) **(14)** “Person” means an individual, partnership, franchise holder, association, corporation, ~~a~~ **the** state, a city, a county, ~~a~~ **town**, or any subdivision or instrumentality of ~~a~~ **the** state, **including any unit of local government**, and its employees, agents, or legal representatives.

(17) **(15)** “Pipeline” or “pipeline system” means all or parts of a pipeline facility through which hazardous liquid or gas moves in transportation, including, but not limited to, line pipe, valves, and other appurtenances connected to line pipe, pumping units, fabricated assemblies associated with pumping or compressor units, metering and delivery stations and fabricated assemblies therein, and breakout tanks. “Pipeline” or “pipeline system” does not include process or transfer pipelines.

(18) **(16)** “Pipeline company” means a person or entity constructing, owning, or operating a pipeline for transporting hazardous liquid or gas. ~~A~~ **“Pipeline company”** does not include:

(a) Distribution systems owned and operated under franchise for the sale, delivery, or distribution of natural gas at retail; or

(b) Excavation contractors or other contractors that contract with a pipeline company.

(19) **(17)** “Reasonable accuracy” means location within twenty-four inches of the outside dimensions of both sides of an underground facility.

(20) **(18)** “Transfer pipeline” means a buried or aboveground pipeline used to carry hazardous liquid between a tank vessel or transmission pipeline and the first valve inside secondary containment at ~~the~~ **a** facility, provided that any discharge on the facility side of ~~that~~ **the** first valve will not directly impact waters of the state. ~~A~~ **“Transfer pipeline”** includes valves, and other appurtenances connected to the pipeline, pumping units, and fabricated assemblies associated with pumping units. ~~A~~ **“Transfer pipeline”** does not include process pipelines, pipelines carrying ballast or bilge water, transmission pipelines, or tank vessel or storage tanks.

(21) **(19)** “Transmission pipeline” means a pipeline that transports hazardous liquid or gas within a storage field, or transports hazardous liquid or gas from an interstate pipeline or storage facility to a distribution main or a large volume hazardous liquid or gas user, or operates at a hoop stress of twenty percent or more of the specified minimum yield strength.

(22) **(20)** “Underground facility” means any item buried or placed below ground for use in connection with the storage or conveyance of water, sewage, electronic, telephonic or telegraphic communications, cablevision, electric energy, petroleum products, gas, gaseous vapors, hazardous liquids, or other substances and including but not limited to pipes, sewers, conduits, cables, valves, lines, wires, manholes, attachments, and those parts of poles or anchors **that are** below ground. This definition does not include pipelines as defined in subsection (17) **(15)** of this section, but does include distribution systems owned and operated under franchise for the sale, delivery, or distribution of natural gas at retail.

(21) "Bar hole" means a hole made in the soil or pavement with a hand-operated bar for the specific purpose of testing the subsurface atmosphere with a combustible gas indicator.

(22) "Commission" means the utilities and transportation commission.

(23) "End user" means any utility customer or consumer of utility services or commodities provided by a facility operator.

(24) "Equipment operator" means an individual conducting an excavation.

(25) "Facility operator" means any person who owns an underground facility or is in the business of supplying any utility service or commodity for compensation. "Facility operator" does not include a utility customer who owns a service lateral that terminates at a facility operator's main utility line.

(26) "Large project" means a project that exceeds seven hundred linear feet.

(27) "Service lateral" means an underground water, storm water, or sewer facility located in a public right-of-way or utility easement that connects an end user's building or property to a facility operator's underground facility, and terminates beyond the public right-of-way or utility easement.

(28) "Unlocatable underground facility" means, subject to the provisions of RCW 19.122.030, an underground facility that cannot be marked with reasonable accuracy using available information to designate the location of an underground facility. "Unlocatable underground facility" includes, but is not limited to, service laterals, storm drains, and nonconductive and nonmetallic underground facilities that do not contain trace wires.

(29) "Utility easement" means a right held by a facility operator to install, maintain, and access an underground facility or pipeline.

Sec. 3. RCW 19.122.027 and 2005 c 448 s 2 are each amended to read as follows:

<< WA ST 19.122.027 >>

(1) The utilities and transportation commission ~~shall cause to be established~~ **commission must establish** a single statewide toll-free telephone number to be used for referring excavators to the appropriate one-number locator service.

(2) The ~~utilities and transportation~~ commission, in consultation with the Washington utilities coordinating council, ~~shall~~ **must** establish minimum standards and best management practices for one-number locator services.

(3) One-number locator services ~~shall~~ **must** be operated by nongovernmental agencies.

(4) All facility operators within a one-number locator service area **must subscribe to the service.**

(5) Failure to subscribe to a one-number locator service constitutes **willful intent to avoid compliance with this chapter.**

Sec. 4. RCW 19.122.030 and 2000 c 191 s 17 are each amended to read as follows:

<< WA ST 19.122.030 >>

(1)(a) ~~Unless exempted under section 5 of this act, before commencing any excavation, excluding agriculture tilling less than twelve inches in depth, the excavator shall~~ **an excavator must mark the boundary of the excavation area with white**

paint applied on the ground of the worksite, then provide notice of the scheduled commencement of excavation to all owners of underground facilities facility operators through a one-number locator service.

(b) If boundary marking required by (a) of this subsection is infeasible, an excavator must communicate directly with affected facility operators to ensure that the boundary of the excavation area is accurately identified.

~~(2) All owners of underground facilities within a one-number locator service area shall subscribe to the service. One-number locator service rates for cable television companies will be based on the amount of their underground facilities. If no one-number locator service is available, notice shall be provided individually to those owners of underground facilities known to or suspected of having underground facilities within the area of proposed excavation. The notice shall be communicated to the owners of underground facilities~~ **An excavator must provide the notice required by subsection (1) of this section to a one-number locator service not less than two business days or and not more than ten business days before the scheduled date for commencement of excavation, unless otherwise agreed by the parties by the excavator and facility operators. If an excavator intends to work at multiple sites or at a large project, the excavator must take reasonable steps to confer with facility operators to enable them to locate underground facilities reasonably in advance of the start of excavation for each phase of the work.**

~~(3) Upon receipt of the notice provided for in this section, the owner of the underground facility shall~~ **subsection (1) of this section, a facility operator must, with respect to:**

(a) The facility operator's locatable underground facilities, provide the excavator with reasonably accurate information as to its locatable underground facilities by surface-marking the location of the facilities. ~~If there are~~ **by marking their location;**

(b) The facility operator's unlocatable or identified but unlocatable underground facilities, the owner of such facilities shall provide the excavator with the best available information as to their locations. ~~The owner of the underground facility providing the information shall respond~~ **location; and**

(c) Service laterals, designate their presence or location, if the service laterals:

(i) Connect end users to the facility operator's main utility line; and

(ii) Are within a public right-of-way or utility easement and the boundary of the excavation area identified under subsection (1) of this section.

(4)(a) A facility operator must provide information to an excavator pursuant to subsection (3) of this section no later than two business days after the receipt of the notice ~~or before the excavation time~~ **provided for in subsection (1) of this section or before excavation commences,** at the option of the owner **facility operator,** unless otherwise agreed by the parties. ~~Excavators shall not excavate until all known facilities have been marked. Once marked by the owner of the underground facility, the excavator is responsible for maintaining the markings. Excavators shall have the right to receive compensation from the owner of the underground facility for costs incurred if the owner of the underground facility does not locate its facilities in accordance with this section.~~

~~(4) The owner of the underground facility shall have~~

(b) A facility operator complying with subsection (3)(b) and (c) of this section may do so in a manner that includes any of the following methods:

(i) Placing within a proposed excavation area a triangular mark at the main utility line pointing at the building, structure, or property in question, indicating the presence of an unlocatable or identified but unlocatable underground facility, including a service lateral;

(ii) Arranging to meet an excavator at a worksite to provide available information about the location of service laterals; or

(iii) Providing copies of the best reasonably available records by electronic message, mail, facsimile, or other delivery method.

(c) A facility operator's good faith attempt to comply with subsection (3)(b) and (c) of this section:

(i) Constitutes full compliance with the requirements of this section, and no person may be found liable for damages or injuries that may result from such compliance, apart from liability for arranging for repairs or relocation as provided in RCW 19.122.050(2); and

(ii) Does not constitute any assertion of ownership or operation of a service lateral by the facility operator.

(d) An end user is responsible for determining the location of a service lateral on their property or a service lateral that they own. Nothing in this section may be interpreted to require an end user to subscribe to a one-number locator service or to locate a service lateral within a right-of-way or utility easement.

(5) An excavator must not excavate until all known facility operators have marked or provided information regarding underground facilities as provided in this section.

(6)(a) Once marked by a facility operator, an excavator is responsible for maintaining the accuracy of the facility operator's markings of underground facilities for the lesser of:

(i) Forty-five calendar days from the date that the excavator provided notice to a one-number locator service pursuant to subsection (1) of this section; or

(ii) The duration of the project.

(b) An excavator that makes repeated requests for location of underground facilities due to its failure to maintain the accuracy of a facility operator's markings as required by this subsection (6) may be charged by the facility operator for services provided.

(c) A facility operator's markings of underground utilities expire forty-five calendar days from the date that the excavator provided notice to a one-number locator service pursuant to subsection (1) of this section. For excavation occurring after that date, an excavator must provide additional notice to a one-number locator service pursuant to subsection (1) of this section.

(7) An excavator has the right to receive reasonable compensation from a facility operator for costs incurred by the excavator if the facility operator does not locate its underground facilities in accordance with the requirements specified in this section.

(8) A facility operator has the right to receive compensation for costs incurred in responding to excavation notices given less than two business days prior to the excavation from the excavator reasonable compensation from an excavator for costs incurred by the facility operator if the excavator does not comply with the requirements specified in this section.

(5) An owner of underground facilities is not required to indicate the presence of existing service laterals or appurtenances if the presence of existing service laterals or appurtenances on the site of the construction project can be determined

from the presence of other visible facilities, such as buildings, manholes, or meter and junction boxes on or adjacent to the construction site.

~~(6) Emergency excavations are exempt from the time requirements for notification provided in this section.~~

~~(7) If the excavator, while performing the contract,~~ **(9) A facility operator is not required to comply with subsection (4) of this section with respect to service laterals conveying only water if their presence can be determined from other visible water facilities, such as water meters, water valve covers, and junction boxes in or adjacent to the boundary of an excavation area identified under subsection (1) of this section.**

(10) If an excavator discovers underground facilities which that are not identified, the excavator shall must cease excavating in the vicinity of the facility underground facilities and immediately notify the owner or facility operator of such facilities; or the a one-number locator service. If an excavator discovers identified but unlocatable underground facilities, the excavator must notify the facility operator. Upon notification by a one-number locator service or an excavator, a facility operator must allow for location of the uncovered portion of an underground facility identified by the excavator, and may accept location information from the excavator for marking of the underground facility.

NEW SECTION, Sec. 5. A new section is added to chapter 19.122 RCW to read as follows:

<< WA ST 19.122 >>

(1) The requirements specified in RCW 19.122.030 do not apply to any of the following activities:

(a) An emergency excavation, but only with respect to boundary marking and notice requirements specified in RCW 19.122.030 (1) and (2), and provided that the excavator provides notice to a one-number locator service at the earliest practicable opportunity;

(b) An excavation of less than twelve inches in depth on private noncommercial property, if the excavation is performed by the person or an employee of the person who owns or occupies the property on which the excavation is being performed;

(c) The tilling of soil for agricultural purposes less than:

(i) Twelve inches in depth within a utility easement; and

(ii) Twenty inches in depth outside of a utility easement;

(d) The replacement of an official traffic sign installed prior to January 1, 2013, no deeper than the depth at which it was installed;

(e) Road maintenance activities involving excavation less than six inches in depth below the original road grade and ditch maintenance activities involving excavation less than six inches in depth below the original ditch flowline, or alteration of the original ditch horizontal alignment;

(f) The creation of bar holes less than twelve inches in depth, or of any depth during emergency leak investigations, provided that the excavator takes reasonable measures to eliminate electrical arc hazards; or

(g) Construction, operation, or maintenance activities by an irrigation district on rights-of-way, easements, or facilities owned by the federal bureau of reclamation in federal reclamation projects.

(2) Any activity described in subsection (1) of this section is subject to the requirements specified in RCW 19.122.050.

Sec. 6. RCW 19.122.033 and 2000 c 191 s 18 are each amended to read as follows:

<< WA ST 19.122.033 >>

(1) Before commencing any excavation, ~~excluding agricultural tilling less than twelve inches in depth,~~ an excavator ~~shall~~ **must** notify pipeline companies of the scheduled commencement of excavation through a one-number locator service in the same manner as is required for notifying ~~owners of underground facilities~~ **facility operators** of excavation work under RCW 19.122.030. Pipeline companies ~~shall~~ have the same rights and responsibilities as ~~owners of underground facilities~~ **facility operators** under RCW 19.122.030 regarding excavation work. Excavators have the same rights and responsibilities under this section as they have under RCW 19.122.030.

(2) Project owners, excavators, and pipeline companies have the same rights and responsibilities relating to excavation near pipelines that they have for excavation near underground facilities as provided in RCW 19.122.040.

(3) The state, and any subdivision or instrumentality of the state, including any unit of local government, must, when planning construction or excavation within one hundred feet, or greater distance if required by local ordinance, of a right-of-way or utility easement containing a transmission pipeline, notify the pipeline company of the scheduled commencement of work.

(4) Any unit of local government that issues permits under codes adopted pursuant to chapter 19.27 RCW must, when permitting construction or excavation within one hundred feet, or greater distance if required by local ordinance, of a right-of-way or utility easement containing a transmission pipeline:

(a) Notify the pipeline company of the permitted activity when it issues the permit; or

(b) Require, as a condition of issuing the permit, that the applicant consult with the pipeline company.

(5) The commission must assist local governments in obtaining hazardous liquid and gas pipeline location information and maps, as provided in RCW 81.88.080.

Sec. 7. RCW 19.122.035 and 2000 c 191 s 19 are each amended to read as follows:

<< WA ST 19.122.035 >>

(1) After a pipeline company has been notified by an excavator pursuant to RCW 19.122.033 that excavation work will uncover any portion of the **pipeline company's** pipeline, the pipeline company shall ensure that the pipeline section in the vicinity of the excavation is examined for damage prior to being reburied.

(2) Immediately upon receiving information of third-party damage to a hazardous liquid pipeline, the company that operates the pipeline shall terminate the flow of hazardous liquid in that pipeline until it has visually inspected the pipeline. After visual inspection, the ~~operator of the hazardous liquid~~ pipeline **company** shall determine whether the damaged pipeline section should be replaced or repaired, or whether it is safe to resume pipeline operation. Immediately upon receiving information of third-party damage to a gas pipeline, the ~~company that operates the~~ pipeline **company** shall conduct a visual inspection of the pipeline to determine whether the flow of gas through that pipeline should be terminated, and whether the damaged pipeline should be replaced or repaired. A record of the pipeline company's

inspection report and test results shall be provided to the ~~utilities and transportation~~ commission, consistent with reporting requirements under 49 C.F.R. **Parts 191 and 195**, Subpart B.

(3) Pipeline companies shall immediately notify local first responders and the department of **ecology** of any reportable release of a hazardous liquid from a pipeline. Pipeline companies shall immediately notify local first responders and the commission of any blowing gas leak from a gas pipeline that has ignited or represents a probable hazard to persons or property. Pipeline companies shall take all appropriate steps to ensure the public safety in the event of a release of hazardous liquid or gas under this subsection.

(4) No damaged pipeline may be buried until it is repaired or relocated. The pipeline company shall arrange for repairs or relocation of a damaged pipeline as soon as is practical or may permit the excavator to do necessary repairs or relocation at a mutually acceptable price.

Sec. 8. RCW 19.122.040 and 1984 c 144 s 4 are each amended to read as follows:

<< WA ST 19.122.040 >>

(1) Project owners shall indicate in bid or contract documents the existence of underground facilities known by the project owner to be located within the proposed area of excavation. The following ~~shall be~~ **are deemed to be changed** or differing site conditions:

(a) An underground facility not identified as required by this chapter or other provision of law; ~~and~~ **or**

(b) An underground facility not located, as required by this chapter or other provision of law, by the project owner, **facility operator**, or excavator if the project owner or excavator is also a ~~utility~~ **facility operator**.

(2) An excavator shall use reasonable care to avoid damaging underground facilities. An excavator ~~shall~~ **must**:

(a) Determine the precise location of underground facilities which have been marked;

(b) Plan the excavation to avoid damage to or minimize interference with underground facilities in and near the excavation area; and

(c) Provide such support for underground facilities in and near the construction area, including during backfill operations, as may be reasonably necessary for the protection of such facilities.

(3) If an underground facility is damaged and such damage is the consequence of the failure to fulfill an obligation under this chapter, the party failing to perform that obligation ~~shall be~~ **is** liable for any damages. Any clause in an excavation contract which attempts to allocate liability, or requires indemnification to shift the economic consequences of liability, ~~different~~ **that differs** from the provisions of this chapter is against public policy and unenforceable. Nothing in this chapter prevents the parties to an excavation contract from contracting with respect to the allocation of risk for changed or differing site conditions.

(4) In any action brought under this section, the prevailing party is entitled to reasonable attorneys' fees.

Sec. 9. RCW 19.122.050 and 1984 c 144 s 5 are each amended to read as follows:

<< WA ST 19.122.050 >>

(1) An excavator who, in the course of excavation, contacts or damages an underground facility shall notify the ~~utility owning or operating such~~ facility **operator** and the ~~a~~ one-number locator service, **and report the damage as required under section 20 of this act.** If the damage causes an emergency condition, the excavator causing the damage shall also alert the appropriate local public safety agencies and take all appropriate steps to ensure the public safety. No damaged underground facility may be buried until it is repaired or relocated.

(2) ~~The owner of the underground facilities damaged~~ **A facility operator notified in accordance with subsection (1) of this section** shall arrange for repairs or relocation as soon as is practical, or ~~may~~ permit the excavator to do necessary repairs or relocation at a mutually acceptable price.

Sec. 10. RCW 19.122.055 and 2005 c 448 s 3 are each amended to read as follows:

<< WA ST 19.122.055 >>

(1)(a) Any excavator who fails to notify the ~~a~~ one-number locator service and causes damage to a hazardous liquid or gas ~~pipeline~~ **underground facility** is subject to a civil penalty of not more than ten thousand dollars for each violation.

(b) The civil penalty in this subsection may also be imposed on any excavator who violates RCW 19.122.090.

(2) All civil penalties recovered under this section ~~shall~~ **must** be deposited into the ~~pipeline safety~~ **damage prevention** account created in ~~RCW 81.88.050~~ **section 12 of this act.**

Sec. 11. RCW 19.122.070 and 2005 c 448 s 4 are each amended to read as follows:

<< WA ST 19.122.070 >>

(1) Any person who violates any provision of this chapter not amounting to a violation of RCW 19.122.055, ~~and which violation results in damage to underground facilities,~~ is subject to a civil penalty of not more than one thousand dollars for each violation. ~~All penalties recovered in such actions shall be deposited in the general fund~~ **an initial violation, and not more than five thousand dollars for each subsequent violation within a three-year period. All penalties recovered in such actions must be deposited in the damage prevention account created in section 12 of this act.**

(2) Any excavator who willfully or maliciously damages a ~~field-marked~~ **marked** underground facility ~~shall be~~ **is** liable for treble the costs incurred in repairing or relocating the facility. In those cases in which an excavator fails to notify known ~~underground~~ facility ~~owners~~ **operators** or the ~~a~~ one-number locator service, any damage to the underground facility ~~shall be~~ **is** deemed willful and malicious and ~~shall be~~ **is** subject to treble damages for costs incurred in repairing or relocating the facility.

(3) This chapter does not affect any civil remedies for personal injury or for property damage, including that to underground facilities, nor does this chapter create any new civil remedies for such damage.

NEW SECTION. **Sec. 12.** A new section is added to chapter 19.122 RCW to read as follows:

<< WA ST 19.122 >>

The damage prevention account is created in the custody of the state treasurer. All receipts from moneys directed by law or the commission to be deposited to the account must be deposited in the account. Expenditures from the account may

be used only for purposes designated in section 13 of this act. Only the commission or the commission's designee may authorize expenditures from the account. The account is subject to allotment procedures under chapter 43.88 RCW.

NEW SECTION. **Sec. 13.** A new section is added to chapter 19.122 RCW to read as follows:

<< WA ST 19.122 >>

The commission may use money deposited in the damage prevention account created in section 12 of this act to:

- (1) Develop and disseminate educational programming designed to improve worker and public safety relating to excavation and underground facilities; and
- (2) Provide grants to persons who have developed educational programming that the commission and the safety committee created pursuant to section 18 of this act deem appropriate for improving worker and public safety relating to excavation and underground facilities.

Sec. 14. RCW 19.122.075 and 2000 c 191 s 23 are each amended to read as follows:

<< WA ST 19.122.075 >>

Any person who willfully damages or removes a permanent marking used to identify an underground facility or pipeline, or a temporary marking prior to its intended use, is subject to a civil penalty of not more than one thousand dollars for each act **an initial violation, and not more than five thousand dollars for each subsequent violation within a three-year period.**

Sec. 15. RCW 19.122.080 and 1984 c 144 s 8 are each amended to read as follows:

<< WA ST 19.122.080 >>

The notification and marking provisions of this chapter may be waived for one or more designated persons by ~~an underground~~ **a facility owner operator** with respect to all or part of that ~~underground~~ **facility owner's own operator's** underground facilities.

Sec. 16. RCW 19.122.100 and 2005 c 448 s 6 are each amended to read as follows:

<< WA ST 19.122.100 >>

If charged with a violation of RCW 19.122.090, an **equipment operator** ~~will be~~ **is** deemed to have established an affirmative defense to such charges if:

- (1) The **equipment** operator was provided a valid excavation confirmation code;
- (2) The excavation was performed in an emergency situation;
- (3) The **equipment** operator was provided a false confirmation code by an identifiable third party; or
- (4) Notice of the excavation was not required under this chapter.

Sec. 17. RCW 19.122.110 and 2005 c 448 s 7 are each amended to read as follows:

<< WA ST 19.122.110 >>

Any person who intentionally provides an **equipment** operator with a false excavation confirmation code is guilty of a misdemeanor.

NEW SECTION. Sec. 18. A new section is added to chapter 19.122 RCW to read as follows:

<< WA ST 19.122 >>

(1) The commission must contract with a statewide, nonprofit entity whose purpose is to reduce damages to underground and above ground facilities, promote safe excavation practices, and review complaints of alleged violations of this chapter. The contract must not obligate funding by the commission for activities performed by the nonprofit entity or the safety committee under this section, and is therefore exempt under RCW 39.29.040(1) from the requirements of chapter 39.29 RCW.

(2) The contracting entity must create a safety committee to:

(a) Advise the commission and other state agencies, the legislature, and local governments on best practices and training to prevent damage to underground utilities, and policies to enhance worker and public safety; and

(b) Review complaints alleging violations of this chapter involving practices related to underground facilities.

(3) The safety committee will consist of thirteen members, who must be nominated by represented groups and appointed by the contracting entity to staggered three-year terms. The safety committee must include representatives of:

(a) Local governments;

(b) A natural gas utility subject to regulation under Titles 80 and 81 RCW;

(c) Contractors;

(d) Excavators;

(e) An electric utility subject to regulation under Title 80 RCW;

(f) A consumer-owned utility, as defined in RCW 19.27A.140;

(g) A pipeline company;

(h) The insurance industry;

(i) The commission; and

(j) A telecommunications company.

(4) The safety committee must meet at least once every three months.

(5) The safety committee may review complaints of alleged violations of this chapter involving practices related to underground facilities. Any person may bring a complaint to the safety committee regarding an alleged violation.

(6) To review complaints of alleged violations, the safety committee must appoint at least three and not more than five members as a review committee. The review committee must include the same number of members representing excavators and facility operators. One member representing facility operators must also be a representative of a pipeline company or a natural gas utility subject to regulation under Titles 80 and 81 RCW. The review committee must also include a member representing the insurance industry.

(7) Before reviewing a complaint alleging a violation of this chapter, the review committee must notify the person making the complaint and the alleged violator of its review and of the opportunity to participate.

(8) The safety committee may provide written notification to the commission, with supporting documentation, that a person has likely committed a violation of this chapter, and recommend remedial action that may include a penalty amount, training, or education to improve public safety, or some combination thereof.

(9) This section expires December 31, 2020.

NEW SECTION. Sec. 19. A new section is added to chapter 19.122 RCW to read as follows:

<< WA ST 19.122 >>

(1) The commission may enforce the civil penalties authorized in RCW 19.122.070 or 19.122.075 when it receives written notification from the safety committee created under section 18 of this act indicating that a violation of this chapter has likely been committed by a person subject to regulation by the commission, or involving the underground facilities of such a person.

(2) If the commission receives written notification from the safety committee pursuant to section 18 of this act that a violation of this chapter has likely been committed by a person who is not subject to regulation by the commission, and in which the underground facility involved is also not subject to regulation by the commission, the commission may refer the matter to the attorney general for enforcement of a civil penalty under RCW 19.122.070 or 19.122.075. The commission must provide funding for such enforcement. However, any costs and fees recovered by the attorney general pursuant to subsection (3) of this section must be deposited by the commission in the fund that paid for such enforcement.

(3) In a matter referred to it by the commission pursuant to subsection (2) of this section, the attorney general may bring an action to enforce the penalties authorized in RCW 19.122.070 or 19.122.075. In such an action, the court may award the state all costs of investigation and trial, including a reasonable attorneys' fee fixed by the court.

(4) This section expires December 31, 2020.

NEW SECTION. Sec.20. A new section is added to chapter 19.122 RCW to read as follows:

<< WA ST 19.122 >>

(1) Facility operators and excavators who observe or cause damage to an underground facility must report the damage event to the commission.

(2) A nonpipeline facility operator conducting an excavation, or a subcontractor conducting an excavation on the facility operator's behalf, that strikes the facility operator's own underground facility is not required to report that damage event to the commission.

(3) Reports must be made to the commission's office of pipeline safety within forty-five days of the damage event, or sooner if required by law, using the commission's virtual private damage information reporting tool (DIRT) report form, or other similar form if it reports:

(a) The name of the person submitting the report and whether the person is an excavator, a representative of a one-number locator service, or a facility operator;

(b) The date and time of the damage event;

(c) The address where the damage event occurred;

(d) The type of right-of-way, where the damage event occurred, including but not limited to city street, state highway, or utility easement;

(e) The type of underground facility damaged, including but not limited to pipes, transmission pipelines, distribution lines, sewers, conduits, cables, valves, lines, wires, manholes, attachments, or parts of poles or anchors below ground;

(f) The type of utility service or commodity the underground facility stores or conveys, including but not limited to electronic, telephonic or telegraphic communications, water, sewage, cablevision, electric energy, petroleum products, gas, gaseous vapors, hazardous liquids, or other substances;

(g) The type of excavator involved, including but not limited to contractors or facility operators;

(h) The excavation equipment used, including but not limited to augers, bulldozers, backhoes, or hand tools;

(i) The type of excavation being performed, including but not limited to drainage, grading, or landscaping;

(j) Whether a one-number locator service was notified before excavation commenced, and, if so, the excavation confirmation code provided by a one-number locator service;

(k) If applicable:

(i) The person who located the underground facility, and their employer;

(ii) Whether underground facility marks were visible in the proposed excavation area before excavation commenced;

(iii) Whether underground facilities were marked correctly;

(l) Whether an excavator experienced interruption of work as a result of the damage event;

(m) A description of the damage; and

(n) Whether the damage caused an interruption of underground facility service.

(4) The commission must use reported data to evaluate the effectiveness of the damage prevention program.

NEW SECTION. Sec. 21. A new section is added to chapter 19.122 RCW to read as follows:

<< WA ST 19.122 >>

(1) The commission may investigate and enforce violations of RCW 19.122.055, 19.122.075, and 19.122.090 relating to pipeline facilities without initial referral to the safety committee created under section 18 of this act.

(2) If the commission's investigation of notifications received pursuant to section 19 of this act or subsection (1) of this section substantiates violations of this chapter, the commission may impose penalties authorized by RCW 19.122.055, 19.122.070, 19.122.075, and 19.122.090, and require training, education, or any combination thereof.

(3) With respect to referrals from the safety committee, the commission must consider any recommendation by the committee regarding enforcement and remedial actions involving an alleged violator.

(4) In an action to impose a penalty initiated by the commission under subsection (1) or (2) of this section, the penalty is due and payable when the person incurring the penalty receives a notice of penalty in writing from the commission describing the violation and advising the person that the penalty is due. The person incurring the penalty has fifteen days from the date the person receives the notice of penalty to file with the commission a request for mitigation or a request for a hearing. The commission must include this time limit information in the notice of penalty. After receiving a timely request for mitigation or hearing, the commission must suspend collection of the penalty until it issues a final order concerning the penalty or mitigation of that penalty. A person aggrieved by the commission's final order may seek judicial review, subject to provisions of the administrative procedure act, chapter 34.05 RCW.

(5) If a penalty imposed by the commission is not paid, the attorney general may, on the commission's behalf, file a civil action in superior court to collect the penalty.

(6) This section expires December 31, 2020.

NEW SECTION. Sec. 22. A new section is added to chapter 19.122 RCW to read as follows:

<< WA ST 19.122 >>

All penalties collected pursuant to section 21 of this act must be deposited in the damage prevention account created in section 12 of this act.

<< Repealed: WA ST 19.122.060 >>

NEW SECTION. Sec. 23. RCW 19.122.060 (Exemption from notice and marking requirements for property owners) and 1984 c 144 s 6 are each repealed.

NEW SECTION. Sec. 24. A new section is added to chapter 19.122 RCW to read as follows:

<< WA ST 19.122 >>

~~Nothing in this act may be construed to classify a consumer-owned utility, as defined in RCW 19.27A.140, to be under the authority of the commission.~~

<Sec. 24 was vetoed.>

NEW SECTION. Sec. 25. A new section is added to chapter 19.122 RCW to read as follows:

<< WA ST 19.122 >>

This act may be known and cited as the underground utility damage prevention act.

<< Note: WA ST 19.122 >>

NEW SECTION. Sec. 26. By December 1, 2015, the utilities and transportation commission must report to the appropriate committees of the legislature on the effectiveness of the damage prevention program established under chapter 19.122 RCW. The legislative report required under this section must include analysis of damage data reported under section 20 of this act.

NEW SECTION. Sec. 27. This act takes effect January 1, 2013.

Approved May 5, 2011, except for section 24, which is vetoed.
Effective January 1, 2013.