74938-2

No. 74938-2

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

TITAN EARTHWORK, LLC,

Appellant/Cross-Respondent,

vs.

THE CITY OF FEDERAL WAY,

Respondent/Cross-Appellant.

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State of Washington

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

This case is about an excavator who failed to comply with statutory duties imposed on excavators resulting in damage to an underground power line. Respondent/Cross-Appellant City of Federal Way ("City") engaged in an intersection improvement project and contracted with Appellant/Cross-Respondent Titan Earthwork, LLC ("Titan") to perform the work. The project involved excavation. Titan, through its subcontractor, Transportation Services, Inc. ("TSI"), performed the excavation after first requesting that USIC, a third party locator, come to the project site and locate underground utilities. Different utilities were physically marked on the ground with different colors. The underground power line of Puget Sound Energy ("PSE") was located and marked in "red" at the project site.

Once marked, Titan and TSI, as excavators, had a statutory duty under the Underground Utility Damage Prevent Act ("UUDPA" or "Act") to "precisely locate" the utilities prior to digging. Despite the red markings, TSI did not precisely locate the utilities as required under statute, and dug where marked. Not surprisingly, TSI struck and damaged the PSE power line. PSE made a claim against Titan for the damage. In response, Titan sued the City claiming that the City was responsible for the damage, not Titan.

An excavator who ignores a marked power line, fails to precisely locate the utility, digs, and then strikes that power line, does so in violation of the UUDPA. Under the Act, an excavator who fails to perform a duty imposed on it is responsible for damage to the underground utility, not the project owner (here, the City).

The UUDPA and the contract between the parties both provide for the award of attorney fees to the City where the City is sued, forced to defend itself, and then prevails. The trial court properly awarded attorney fees to the City, but cut the requested amount in half without analysis or explanation. The City requests that the full amount of its fees, as requested, be awarded, as well as its fees associated with this appeal.

II. RE-STATEMENT OF THE ISSUES

A. Whether the trial court correctly entered summary judgment in favor of the City where there was no dispute as to any material fact and based upon the application of the UUDPA to those facts.

B. Whether an excavator's failure to follow its duties under the UUDPA provides a basis for establishing liability.

C. Whether an excavator who failed to comply with its duties under the UUDPA can argue that it, nevertheless, exercised reasonable care and should not be held liable for damage to an underground utility.

D. Whether an excavator can escape liability under the UUDPA by contracting out of that liability.

E. Whether the City of Federal Way is entitled to statutory and contractual attorney fees as the prevailing party in this matter.

III. RE-STATEMENT OF THE CASE

A. Introduction – UUDPA Duties - Physically Marking the Location of Underground Utilities and Precisely Locating Utilities Prior to Digging.

In response to several high-profile, fatal, natural gas pipeline accidents occurring where excavators (including one in Bellingham), struck underground pipelines, the United States Congress in 2009 mandated that each state adopt an effective underground utility damage prevention program. The Washington State Legislature amended RCW 19.122, its existing Underground Utility chapter, in 2011 to incorporate the 2011 Underground Utilities Damage Prevention Act, thereby providing for the clear imposition of specific statutory duties on parties involved in projects requiring excavation.

The clear intent of the 2011 amendments is to protect underground utilities and the public from damage by uninformed or careless excavators. The Act provides specific duties for the various parties involved in excavations. RCW Chapter 19.122 provides, in relevant part:

> Intent.
>
> 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;

RCW 19.122.010(1) (emphasis added).

Here, the parties involved in the project were the "project owner" (the City), the "facility operator" (PSE), and the "excavators" (Titan and TSI). Each of these terms has significance relative to statutorily imposed obligations and duties, and they are defined in RCW 19.122.020, along with other definitions applicable to this matter. In pertinent part, RCW 19.122.020 provides as follows:

> Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.
> . . .
> (8) "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.
> . . .

> (10) "Excavator" means any person who engages directly in excavation.
>
> (11) "Facility operator" means any person who owns an underground facility or is in the business of supplying any utility service or commodity for compensation. . . .
>
> . . .
>
> (16) "Locatable underground facility" means an underground facility which can be marked with reasonable accuracy.
>
> . . .
>
> (19) "One-number locator service" means a service through which a person can notify facility operators and request marking of underground facilities.
>
> . . .
>
> (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. . . .

The City, as project owner, was required to indicate in bid or contract documents the existence of known underground facilities within the project area. RCW 19.122.040(1). The City fully met this duty, as discussed further below.

The Act requires that physical marks be made on the surface where utilities are located. The colors used for these markings are significant (e.g., red designates electric power lines; yellow designates gas, oil, or petroleum lines; orange designates telephone or cable television lines; blue designates drinking water lines; green designates sewer lines; purple

designates non-drinking water lines; pink designates survey marks; and white are the marks an excavator must place on the affected area showing the project dimensions).

Here, after the markings for the PSE power line were made, Titan and TSI, as excavators, had the statutory duty and obligation to "precisely locate" the line prior to digging. They had a statutory duty to plan the excavation such that the power line would not be damaged. RCW 19.122.040(2) provides in relevant part:

> (2) An excavator shall use reasonable care to avoid damaging underground facilities. An excavator 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; . . . [Emphases added.]

Titan and TSI had a statutory duty to precisely locate the PSE line and to plan to excavate so as not to injure the line. Those statutory duties applied in conjunction with the contractual requirements imposed upon Titan and TSI.

Titan inquires at page 26 of its brief, "How does a contractor 'determine the precise location?'" It argues that because "precise location" is not defined under the Act, that something less than actually

locating the line is sufficient to meet its duty to find the "precise location" after marking. The Merriam-Webster dictionary defines "precise" as meaning "very accurate and exact — used to refer to an exact and particular time, location, etc.; very careful and exact about the details of something." Merriam-Webster.com. Merriam-Webster, n.d. Web. 31 Aug. 2016. An excavator has a duty to accurately and exactly (precisely) find the location of a line.

B. The City's Contract with Titan and Damage to the PSE Power Line.

The City sought to make improvements at the intersection of South 320th Street and 20th Avenue South within the City of Federal Way. The intersection improvements included the installation of a new utility pole, which required the relocation of underground utility lines, among other things. The City put the project out to bid. In putting the project out to bid, the City produced 677 pages of Bid and Contract documents applicable to the project ("Contract Documents"). CP 17. The description of the work for the project is found at page 1 of the City of Federal Way Request for Bids. CP 40.

Titan was the lowest responsible bidder. As such, the City entered into a contract with Titan for the work ("Contract"). The Contract was entered into on April 30, 2013. CP 18, 37, 41-53. Included in the

Contract Documents provided to Titan were maps showing marked utility lines, depicting the location of lines that had previously been relocated, and the location of lines that had not yet been relocated. CP 18, 37, 54-56. The legend for the maps show "- **p** -" as powerlines. CP 18, 54-56. The maps clearly showed the presence of powerlines at the site where improvements were to be made. CP 56. This included identification of the probable location of both the "southern" grouping and "northern" grouping of conduits which Titan refers to at page 6 of its brief. Although, the City had requested that PSE relocate its lines, it was contemplated, as indicated in bidding documents (discussed further below) that there still could be a necessity to relocate the PSE lines prior to excavation. CP 23-25, 36-37, 40-41. PSE did relocate some of its lines, but at the time of TSI's excavation, the lines had been clearly re-marked showing their then-current locations.

By providing bid documents and maps identifying underground utilities affected within the project area, the City, as the project owner, met its duty imposed under the Act. RCW 19.122.040 provides, in relevant part:

> Underground facilities identified in bid or contract—Excavator's duty of reasonable care—Liability for damages—Attorneys' fees.

> (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. . . .

In May 2013, Titan subcontracted with TSI to perform the excavation work on the project. Consistent with its duties as an excavator under the Act, on July 10, 2013, TSI made a request for an underground utility locate with USIC, LLC, a company that performs underground utility location services. CP 393. Affected 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. USIC physically marked the locations of PSE's power utilities on July 10, 2013. CP 84-85. Counsel for the City focused the trial court's attention to three photographs during the summary judgment hearing on February 26, 2016. RP 4, ll. 21-25; RP 5, ll. 1-2. Because the Clerk's Papers provided to this Court depict the photographs in black and white, the City is providing, within an appendix hereto, a color copy of each of those photographs showing the red marking for power lines. With respect to the July 12, 2013 photographs showing markings, a color copy of CP 134 is attached hereto in the Appendix for the Court's reference. Appendix at A-1. PSE as "facility owner" met its duty under the Act to physically mark on the

surface the approximate location of its power line after receiving a request to do so. CP 18. RCW 19.122.030(3)(a) provides:

> (3) Upon receipt of the notice provided for in 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 by marking their location. . .

After July 10, 2013, PSE had need for a steel plate it had placed over its power line in the project area, so it removed the steel plate and backfilled the hole over the line. CP 410-411. Because there was new fill on the site, the site needed to be re-marked. At TSI's request, USIC and PSE returned to the site and re-marked the underground power line on July 19, 2013 with the required red paint at the northeast corner of the South 320th and 20th Avenue South intersection ("Intersection"). CP 86-87, 73, 134, 243. These lines were situated near a Taco Time restaurant. Id. For the July 19, 2013 photographs showing markings, a color copy of CP 243 is attached hereto in the Appendix for the Court's reference. Appendix at A-2. Photographs were taken of the physical markings. CP 73, 134, 243. The re-marked lines were the latest and best information Titan and TSI had concerning the actual location of the power lines, regardless of whether they had been previously moved, and regardless of any oral representations made to Titan or TSI.

These lines were also clearly depicted in the maps provided to Titan as part of the contract documents. CP 19, 37, 54-56. Titan and TSI began working in the northeast corner of the Intersection and either did not maintain the markings as statutorily required under RCW 19.122.030(6), or dug without regard for the markings and before precisely locating the power line as required under RCW 19.122.040(2)(a).

Specifically, on August 21, 2013, TSI performed augering (digging) at the northeast corner of the Intersection utilizing an auger three feet in diameter. TSI did not precisely locate the marked power line and struck the energized PSE line. CP 19. As indicated, the location of the PSE power lines were clearly marked in red at this location.

PSE took photographs on August 21, 2013, the date that the power line was hit. CP 19, 37, 69-81. For the August 21, 2013 photographs showing markings, a color copy of CP 73 is attached hereto in the Appendix for the Court's reference. *See* Appendix at A-3. USIC engaged in its own investigation concerning the damage to the PSE power line and concluded that the power line was clearly marked, and that TSI dug without first locating the line and then hit it. CP 19, 88-89.

The photographs taken of the markings before and after the line was hit, conclusively depict and demonstrate that TSI dug where the lines had been marked. Titan argues for the first time on appeal that the lines

had been "indiscriminately" marked and there was no showing that the markings on the surface correlated to the northern grouping of utilities. It asserts for the first time on appeal that there is a ". . . 'material question of fact' as to whether the struck utility was 'marked' . . . ." Appellant's brief at page 20. Clearly, however, the markings correlated with the northern group of conduit, because TSI dug where marked and struck the power line.

Utilities must be marked with "reasonable accuracy," which means "location within twenty-four inches of the outside dimensions of both sides of an underground facility." RCW 19.122.020(23). Once marked, Titan and TSI, as excavators, had a statutory duty to precisely locate PSE's line and avoid striking it.

PSE's lines were damaged and it sought recovery from Titan. Titan has sought to recover the damages and costs from the City. Titan filed this lawsuit in its efforts to recover damages and costs from the City. Titan's claim against the City is that the City made representations to Titan that PSE's underground lines had been relocated.

C. Titan and TSI's Statutory and Contractual Obligations.

1. Statutory Obligations.

State law requires an excavator, here Titan and its subcontractor, to maintain any utility markings, to precisely locate any utility, and to avoid

damaging any utility. Titan and TSI were required, prior to commencing any excavation, to request that the area be marked for any utilities by the facility owners. RCW 19.122.030(1)(a) provides:

> **Excavator and facility operator duties before excavation.**
>
> (1)(a) Unless exempted under RCW 19.122.031, before commencing any excavation, 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 facility operators through a one-number locator service.

Titan and TSI could not legally begin digging until all known utilities were marked. RCW 19.122.030(5) provides:

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

After the area was marked, Titan and TSI were legally obligated to maintain the marked areas. RCW 19.122.030(6)(a)(i) and (ii) provide as follows:

> (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.

If Titan and TSI failed to comply with their duties under RCW 19.122.030, a facility operator (in this case PSE) could recover reasonable compensation for its costs. RCW 19.122.030(8) provides:

> (8) A facility operator has the right to receive 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.

State law places liability for damages upon an excavator where the excavator fails to take appropriate measures to maintain markings, precisely locate, and avoid hitting underground utilities. RCW 19.122.040(3). Any contract provisions that are contrary to the state law are void as against public policy (and thus, any oral modifications to the contract that would provide differently would also be contrary to state law and void as against public policy).

The City was obligated to and had a duty under the Act to identify any affected utilities within the project area; it did so. RCW 19.122.030. After the City met that duty, Titan then had specific duties under the Act. RCW 19.122.040 provides, in relevant part, as follows:

> 19.122.040 Underground facilities identified in bid or contract — Excavator's duty of reasonable care — Liability for damages — Attorneys' fees.
> ...
> (2) An excavator shall use reasonable care to avoid damaging underground facilities. An excavator 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. . . . [Emphases added.]

Where Titan and TSI failed to comply with a statutory duty, they are liable for the damages they caused. RCW 19.122.040(3). Contrary to law (as against public policy), Titan now seeks to shift the economic consequences of its failure to meet its duty under the Act upon the City.

2. Contractual Obligations.

Under the express terms of the Contract Documents, affected utilities were identified, and Titan was responsible for coordinating with those affected utilities and for locating underground utilities prior to

excavation. The Contract provides under paragraph 1.1, in pertinent part, as follows:

> 1.1 Description of Work.
> Contractor shall perform all work and furnish all tools, materials, supplies, equipment, labor and other items incidental thereto necessary for the construction and completion of the work, more particularly described as the South 320th Street at 20th Avenue South Intersection Improvements project, including without limitation:
>
> The addition of a second left-turn lane in each direction of S. 320th Street. Each turn lane will have 250 feet of storage. **Work will include utility relocation; . . .** [Emphasis added.]

CP 23-24, 37, 41.

Paragraph 1.8 of the Contract also unequivocally provides, with respect to utility relocations, as follows:

> 1.8 Utility Location.
> Contractor is responsible for locating any underground utilities affected by the Work and is deemed to be an excavator for purposes of Chapter 19.122 RCW, as amended. Contractor shall be responsible for Compliance with Chapter 19.122 RCW, including utilization of the "one call" locator system before commencing any excavation activities.

CP 24, 43.

In fact, when Titan submitted its bid proposal to the City, Titan specifically itemized and requested payment in the amount of $5000 for "Resolution of Utility Conflicts" and $5000 for "Utility Potholing." Both items contemplated work to be performed for the purpose of locating and addressing underground utilities in furtherance of and as contemplated under the Contract. CP 24, 37, 57-60.

In the City's Request for Bids, the City specifically provided:

> DESCRIPTION OF WORK:
> This project shall consist of:
>
> The addition of a second left-turn lane in each direction of South 320th Street. Each turn lane will have 250 feet of storage. Work will include **utility relocation**; storm drainage; paving; curb, gutter, and sidewalk, street lighting; traffic signal replacement; signing; channelization; and landscaping. [Emphasis added.]

CP 24-25, 36, 40.

The Contract Documents specifically provided that utilities needed to be addressed and moved prior to excavation, and as such, included the provision that Titan was responsible for complying with the Washington State Department of Transportation's Standard Specifications for Road, Bridge, and Municipal Construction (2012 M 41-10) ("Standard Specifications"). CP 25, 37, 61-62. In addition, Titan was also required to

comply with the "Special Provisions to the Standard Specifications – February 2013 ("Special Provisions"). Id.

Section 1-07.17 of the Standard Specifications provides:

> The Contractor shall protect all private and public utilities from damage resulting from the Work. Among others, these utilities include: telephone, telegraph, and power lines; pipelines, sewer and water lines; railroad tracks and equipment; and highway lighting and signing systems, and intelligent transportation systems (ITS). All costs required to protect public and private utilities shall be at the Contractor's expense, except at otherwise provided in this Section.
>
> RCW 19.122 relates to underground utilities. In accordance with this RCW, the Contractor shall call the One-Number Locator Service for field location of utilities. If no locator service is available for the area, notice shall be provided individually to those owners of utilities known to, or suspected of, having underground facilities within the area of the proposed excavation.

CP 25, 37, 61-62.

The Special Provision, which clearly contemplates the existence of affected utilities, supplements that Standard section as follows:

> 1-07.17 Utilities and Similar Facilities
>
> Section 1-07.17 is supplemented with the following:
>
> Locations and dimensions shown in the Plans for existing facilities are in accordance with

available information obtained without uncovering, measuring or other verification.

The following addresses and telephone numbers of utility companies **known or suspected of having facilities within the project limits are supplied for the Contractor's convenience**:

COMCAST Puget Sound Energy (Gas)

CenturyLink Puget Sound Energy (Power)

Lakehaven Utility District King County Traffic Operations

King County Metro

(Address, contact info. and phone numbers have been omitted in this pleading).

Locations and dimensions shown in the Plans for existing facilities are in accordance with available information obtained without uncovering, measuring or other verification.

Public and private utilities, or their Contractors, will furnish all work necessary to adjust, relocate, replace, or construct their facilities unless otherwise provided for in the Plans or these Special Provisions. Such adjustment, replacement, or construction will be done during the prosecution of the work for this project. It is anticipated that utility adjustment, relocation, replacement or construction within the projects will be completed as follows:

PSE

> Adjust to grade or relocate existing power vaults at STA 'M' 15+15, 47' RT.
>
> Adjust existing conduit near the NE corner of the intersection at STA 'M' 20+40, 63.5'.
>
> Adjust Gas valves to grade as required at STA 'P' 7+76, 8.25' LT.
>
> . . .

CP 25-27, 37-38, 63-66. Thus, it was specifically set forth that PSE lines were affected by the project and that those lines had to be adjusted, relocated, or replaced as part of the project.

Further, at sections 8-31.1 through 8-31.5 of the Special Provisions provide that Contractor (here, Titan) will locate and seek to resolve utility conflicts. Where a utility is not identified in the Plans (which was not the case here as PSE had clearly been identified as an affected utility) or where a utility is not located and marked during the one-call locator process (which was also not the case here as the PSE lines were clearly marked), then a mechanism exists by which Titan can be paid additional amounts to resolve a conflict which is discovered under these sections. These sections provide:

> 8-31 Resolution of Utility Conflicts
>
> 8-31.1 Description
>
> This work involves the identification and resolution of utility conflicts not identified in the plans between proposed improvements and existing utilities. The Contracting Agency will pay these costs by

> force account if the work proves to be acceptable and the Contractor had performed the work with the authority of and due notice to the Engineer.

CP 27, 38, 67.

These provisions, however, do not address the situation where a utility is identified as being affected, where the utility is marked, and where, despite identification and markings, the excavator nevertheless hits the utility while excavating. That scenario is addressed in the RCWs and within the other applicable provisions of the contract.

Despite Titan's assertion that the City made representations to it that the PSE lines had been relocated (whether made prior to contracting, at a pre-construction meeting, or while work was being performed under the contract), such representations cannot be relied upon, are not part of the Contract Documents, and do not relieve Titan from its specific written contractual obligations. The Contract provides at paragraphs 19.1 and 19.2 as follows:

> Entire Contract. The Contract Documents contain all of the agreements of the Parties with respect to any matter covered or mentioned in this Contract and no prior agreements or understandings pertaining to any such matters shall be effective for any purpose.
>
> Modification. No provisions of this Contract, including this provision, may be

> amended or added to except by agreement in writing signed by the Parties or their respective successors in interest.

CP 28, 37, 51.

Section 1-05.17 of the Special Provisions provides as follows:

> No oral agreement or conversation with any officer, agent or employee of the Contracting Agency, either before or after execution of the contract, shall affect or modify any of the terms or obligations contained in any of the documents comprising the contract. Such oral agreement or conversation shall be considered as unofficial information and in no way binding upon the Contracting Agency unless subsequently put in writing and signed by the Contracting Agency.

CP 28, 38, 68.

Contractually, Titan had an obligation to address the location or and relocation of utilities. It failed to meet these contractual requirements. Any argument that it makes indicating that it "relied" upon representations of the City is of no import. Those representations could not modify the terms of the Contract. The utility lines were physically marked showing their actual location prior to excavation.

Further, as previously indicated, and as required by the Contract Documents, Titan was required to comply with the duties imposed upon it under RCW 19.122. When a facility operator (here PSE) comes to the

project site and marks its power line, Titan must, in accordance with RCW Chapter 19.122, precisely locate the line prior to digging. Titan cannot avoid this duty by arguing that it relied upon oral representations. Once the markings were made, any representations made became wholly immaterial with respect to Titan's duties under the Act. The markings compellingly provided Titan with the latest and best information concerning the location of the lines. Titan and TSI were then required to precisely located those lines.

IV. ARGUMENT

A. Standard of Review on Appeal.

Appellate review of a decision to grant summary judgment is de novo. An appellate court engages in the same inquiry as the trial court, which is to determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 278, 937 P.2d 1082 (1997) (*quoting* CR 56(c)). A material fact is one on which the outcome of the case depends. Atherton Condo. Ass'n. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

B. The Trial Court Correctly Entered Summary Judgment in Favor of the City as There Was No Dispute on Material Facts, Its Proper Application of the UUDPA to the Facts, and the Application of the Provisions of the Contract Between the Parties.

1. No Issue of Material Fact.

There were no material issues of fact presented in this matter. Although Titan asserts that it could rely on and did rely on representations made by the City, such assertions are of no legal import. The undisputed material facts demonstrate that on July 19, 2013, after any asserted misrepresentations occurred, USIC and PSE marked the PSE power line. Titan then had a statutory obligation to precisely locate the line, notwithstanding any representations made prior to or after the markings. RCW 19.122.040. Contractually, Titan was obligated to follow the mandates of RCW Chapter 19.122. As a consequence, those allegations do not constitute material facts, and the trial court properly did not consider those as raising an issue of material fact when entering summary judgment in this matter.

Titan further argues that there was a material fact concerning where the markings for the PSE line were made in relation to the digging that TSI performed. This argument is raised for the first time on appeal. These assertions are unfounded and are readily resolved by resort to review of the photographs presented to the trial court. Photographs

showed the utility lines as marked prior to excavation, and the lines as marked immediately following the excavation, as well as the location of the auger used for the excavation when it hit the power line. CP 31, 73, 134, 243 (more generally, 82-314). More compelling is the fact that TSI dug where the markings were made and struck the PSE line – clearly demonstrating a correlation between the markings and the line. Because this issue is raised for the first time on appeal, it should be discarded for that reason alone, but moreover, it does not present a material issue of fact that would have precluded entry of summary judgment.

Titan argues that the burden of marking the location was on the facility operator, PSE, and that once the markings were made, the City then had the burden of telling it or TSI that additional relocation of the line was necessary prior to digging. This is nonsensical since the markings were visible on the ground showing the location of the lines, and it is further contrary to statutory requirements. It makes no sense to require the City to then advise Titan and TSI that they may need to relocate that line before digging where the line is marked. As previously indicated, after the markings were made, Titan had a very specific statutory duty to precisely locate the line before digging. The Supreme Court has acknowledged the same and held, "[t]he Underground Utility Damage Prevention Act, chapter 19.122 RCW, sets forth a series of obligations for excavators that

are intended to protect existing underground facilities and to protect the public health and safety from interruption in utility services caused by damage to such facilities. Former RCW 19.122.010 (1984)." Hayfield v. Ruffier, 187 Wn. App. 914, 918, 351 P.3d 231 (Div. II 2015). Such requirements are imposed on the excavator, not the project owner, and are embodied in RCW 19.122.040.

2. Summary Judgment as a Matter of Law.

As described herein, the material uncontroverted facts in this case establish that Titan had both a statutory duty and contractual obligations to precisely locate and avoid hitting undergrounded utilities.

a. Summary judgment as a matter of law pursuant to state statute.

As a matter of law Titan and TSI, as excavators, were required to comply with RCW 19.122.040. Titan failed to do so. In fact, Titan and TSI clearly disregarded physical utility locates (markings) and chose to auger without precisely locating and without regard for PSE's underground line.

Titan was required to mark the entire area where excavation would occur with white paint and then call the one-locate number. RCW 19.122.030. The facility owners (utilities) were then required to mark within that area. Titan and TSI could not legally begin digging until all

known utilities were so marked. RCW 19.122.030(5). Power lines within the area would be marked in red paint. Once the area was marked, Titan and TSI were legally obligated to maintain the markings within the area. RCW 19.122.030(6)(a)(i) and (ii).

Here, Titan and TSI did have the excavation area marked with all utilities (including red paint markings for power lines), however they failed to heed or maintain the markings and they failed to precisely locate the line, which resulted in damage to the PSE line. State law places liability for damages under these circumstances upon an excavator where the excavator fails to take appropriate measures to maintain markings, precisely locate, and avoid hitting underground utilities as required under RCW 19.122.030(8) and RCW 19.122.040(3).

Titan argues that the City must establish negligence on Titan's part and that the only way to do this is to establish that Titan and TSI did not act with reasonable care. Negligence is not the standard here. An excavator's failure to meet a statutory obligation or duty triggers liability under the statute. RCW 19.122.040. If negligence was the standard, as Titan argues with resort to statutory history, then the legislature could have easily adopted language indicating that, notwithstanding an excavator's noncompliance with the requirements imposed under the Act, an injured party must still establish that an excavator acted with

negligence before the excavator can be held liable for resultant damage. The legislature did not do this. Moreover, the legislative history Titan cites and relies upon all predate the 2011 amendments to RCW 19.122, which imposed specific statutory duties on excavators. All of the legislative history Titan refers to came about in 1984 – 27 years before the 2011 Underground Utilities Damage Prevention Act amended the Underground Utilities title of the Revised Code of Washington.

Titan not only argues that it is not liable because it did not act negligently, but it alleges, through its Complaint, that the City is instead liable for TSI striking the PSE line. As indicated in the express language of RCW 19.122.040(3), public policy does not permit a shift of liability for damages through contract language or any provision of a contract.

b. Summary judgment as a matter of law pursuant to contract.

As indicated, there is nothing in the Contract Documents placing liability upon the City (and even if there were any such language, it would be void as against public policy – RCW 19.122.040(3)). Instead, in this case, as a matter of law, Titan and its subcontractor were contractually obligated to precisely locate and avoid hitting underground utilities, not the City. The contract provisions indicated the existence of underground utilities, indicated that those utilities may need to be moved, and placed

the obligation on Titan to coordinate and ensure that the utilities had been moved. Under clear provisions of the Contract Documents, Titan, as a matter of law, cannot rely on any oral representations that the City may have made concerning the movement of PSE lines. The Contract has integration provisions and was intended to embody the entire agreement of the parties and specifically intended to exclude any other matters outside of the Contract, oral or otherwise. "It is settled that a fully integrated agreement of a contractual nature may not be varied by extrinsic evidence, written or oral, so as to add to, subtract from, or contradict its provisions." Lynch v. Higley, 8 Wn. App. 903, 908, 510 P.2d 663 (Div. I 1973), citing Truck-Trailer Equip. Co. v. S. Birch & Sons Constr. Co., 38 Wn.2d 583, 231 P.2d 304 (1951). The contractual provisions also required Titan to specifically comply with all provisions of Chapter 19.122 RCW.

Titan's argument here fails because its assertion that the City represented to it that the PSE line had been relocated relieves Titan from its contractual obligations, constitutes a significant variation from the express language of the contract, and directly contradicts the express obligations Titan had under the contract, including Titan's statutory duties.

C. An Excavator's Failure to Follow the Duties Imposed under the UUDPA Provides a Basis for Liability.

As indicated above, an excavator who fails to comply with the duties imposed under RCW 19.122.030 and RCW 19.122.040 is liable for any resultant damage to an underground facility. *See* RCW 19.122.030(8) and RCW 19.122.040(3). RCW 19.122.040(3) plainly provides in pertinent part:

> (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 is liable for any damages.

Here, Titan had a duty to precisely locate the marked power line. It did not do so, and thus failed to perform that obligation. The result is liability for the damage to the line.

D. An Excavator Who Failed to Follow its Duties under the UUDPA Cannot Argue that it Was, Nevertheless, Exercising Reasonable Care and Should Not Be Held Liable for Damages to an Underground Utility.

Titan argues that the trial court erred in granting summary judgment because there were material issues of fact concerning whether it and TSI exercised reasonable care when excavating. The statute itself defines what constitutes reasonable care. If one of the requirements that the Act sets forth as constituting reasonable case is not present, then

"reasonable care" under the statute cannot be established. RCW 19.122.040 provides:

> Underground facilities identified in bid or contract—Excavator's duty of reasonable care—Liability for damages—Attorneys' fees.
>
> . . . (2) An excavator shall use reasonable care to avoid damaging underground facilities. **An excavator 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.
>
> . . .
>
> [Emphases added.]

E. An Excavator Cannot Escape Statutory Liability by Arguing that it Contracted Out of that Liability.

As indicated above, the Act specifically prohibits and declares any attempt to contract out of liability as against public policy and void. Titan failed to comply with both contractual and statutory obligations as an "excavator," and there can be no liability imposed against the City where

Titan/TSI strikes a PSE power line after Titan failed to meet its statutory duty.

Titan does not dispute that a locate was requested, that PSE power lines were marked in red, and that, notwithstanding the markings, TSI dug where the lines had been marked and then struck the PSE powerline. Titan argues, however, that there are additional disputed facts that the trial court should have considered that precluded entry of summary judgment dismissing its claim against the City. Titan offers alleged disputed facts in an effort to explain why TSI dug where it did. The Court should conclude that none of these additional "disputed" facts are of any legal import. Titan does not dispute that it failed to precisely locate the power line before digging. What constitutes reasonable care is set forth by statute, and the undisputed facts demonstrate that Titan did not meet this standard – it failed to precisely locate the line.

The City was not the "excavator" in this matter. The City contracted with Titan, who in turn contracted with TSI to engage in the act of excavating. The Contract Documents squarely placed the job, burdens, and obligations of excavating on Titan. These obligations are set forth contractually and are imposed on an excavator by operation of statute. Titan argues that the City dictated how it should conduct its excavation. It argues that the City would not permit vactoring and that it had no option

but to employ a mechanical auger when digging where marking showed the location of a power line. This, as indicated above, is not material to whether or not Titan and TSI met their statutory obligation to precisely locate the line. Moreover, the City hired the contractor for its expertise and does not dictate means or methods by which the contractor completes the work. CP 412.

Here, as previously indicated, the City is a "project owner," PSE is a "facility operator," Titan and TSI are "excavators," and the PSE powerline is a "locatable underground facility." Each of these terms has significance relative to statutorily imposed duties.

Under RCW 19.122.020(16), because the PSE lines were marked, they were clearly "locatable underground facilities." The City's obligation under RCW 19.122.040(1) as a "project owner" was to indicate the "existence of underground facilities known by the project owner to be located within the proposed area of excavation" in the bid documents. The City did this. Once the City met this obligation, the excavators then had an obligation to "use reasonable care to avoid damaging underground facilities." RCW 19.122.040(2).

RCW 19.122.040(2)(a)-(c) provides what constitutes reasonable care to avoid damaging utilities. Here, Titan and TSI requested a locate and the power lines were marked. Titan and TSI then had an obligation to

"determine the precise location of underground facilities which have been marked." RCW 19.122.040(2)(a). This language does not provide that the City, as the project owner, must determine the precise location of the utility; it provides that the excavator must do so.

RCW 19.122.040(2)(b) then requires the excavator, not the project owner, to "[p]lan the excavation to avoid damage to or minimize interference with underground facilities in and near the excavation area". Titan was required statutorily and contractually to conduct the excavation work in a manner that would not damage a power line. As indicated, the City does not dictate means or methods; Titan and TSI had control over those aspects of their work.

Regardless, the contractual language between the parties and the Act both required Titan and TSI to determine the precise location of any utilities, and to reconcile any conflicts or make relocates where necessary. They did not do so. Where Titan and TSI fail to meet their statutory duties and the result is damage to an underground facility, they are liable, not the City. RCW 19.122.040(3).

Titan further argues that the location of the power line constituted a "changed or differing site condition," and therefore, the risk associated with striking the powerline should be allocated between the parties. However, because the location of the power lines does not constitute a

changed or differing site condition, there should be no such allocation here. The City identified in bid documents that the PSE power lines were within the project area. The Contract Documents required that the lines be located and relocated, if necessary. Titan argues that because the City orally represented that the lines were already relocated this constitutes a "changed or differing site condition." Titan ignores, however, that the written contract, as well as Chapter 19.122 RCW, placed additional obligations on the excavator to have utilities marked and precisely located, and then to avoid damaging the located utilities.

The existence of the PSE line was not some unforeseen change or differing site condition. The existence of the PSE line was known and identified in the Contract Documents. The PSE line was marked. Contractually, it was anticipated that there might be a need to relocate utilities, and Titan was obligated to coordinate such a relocation. RCW 19.122.040 provides with respect to "changed or differing site conditions":

> Underground facilities identified in bid or contract—Excavator's duty of reasonable care—Liability for damages—Attorneys' fees.
> (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 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; 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 facility operator. [Emphasis added.]

Here, the power line was identified as required under RCW 19.122, and the line does not meet the provisions of RCW 19.122.040(1)(b) to constitute a changed or differing site condition.

F. The City of Federal Way Is Entitled to Statutory Attorney's Fees as the Prevailing Party in this Matter.

The City is statutorily entitled to recover its attorney fees and costs. RCW 19.122.040(4) provides:

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

Additionally, the City is entitled to recover its attorney fees under the terms of the contract it had with Titan. CP 33, 37, 47.

On February 3, 2015, Titan served the City with a Summons and Complaint alleging causes of action against the City. CP 1-7. There was neither a factual nor a legal basis to support Titan's claims. The City answered the Complaint and asserted numerous defenses, including Titan's failure to comply with the provision of RCW 19.122, the UUDPA.

CP 8-14. Thus, Titan knew that the City was affirmatively defending itself with reliance on the provisions of that Act. On November 12, 2015, the City 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. The City indicated that, in the event a voluntary dismissal was not forthcoming, it would seek recovery of its attorney fees under RCW 19.122.040(4) or CR 11. CP 33, 417, 418. Titan did not voluntarily dismiss the lawsuit. Federal Way prepared and filed its Motion for Summary Judgment on December 24, 2015. The summary judgment motion was heard before Judge Galvan on February 26, 2016, and the Court entered summary judgment dismissing the lawsuit in favor of the City.

Federal Way incurred $41,825.25 in attorney fees and $705.00 in costs in this matter. CP 418, 426, 439-465. Under CR 54(d), the trial court had authority to grant the City its costs and expenses incurred pursuant to statutory authority, RCW 19.122.040(4). Titan brought this action seeking to impose liability upon the City for damages to a PSE power line. Titan asserted throughout the lawsuit that the City essentially breached the contract by negligently directing TSI to dig. The contract requires compliance with RCW Chapter 19.122, and under the statute the City, as a project owner, must "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." RCW 19.122.040(1). Further, RCW 19.122.040(3) provides that "[i]f 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 is liable for any damages. . . ."

The City is the prevailing party in this action. An award of attorney fees pursuant to RCW 19.122.040(4) is mandatory and not permissive. In a recent case, Hayfield, supra, 187 Wn. App. 914, the Court examined this issue and concluded that an award of attorney fees under RCW 19.122.040(4) is mandatory as follows:

> The statute also provides that: "In any action brought under this section, the prevailing party is entitled to reasonable attorneys' fees." RCW 19.122.040(4). The parties do not dispute that the Hayfields are the prevailing party under RCW 19 .122.040(4). *See Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997) (prevailing party is generally one who receives affirmative judgment). Rather, the parties disagree on whether the language in the statute stating that the prevailing party "is entitled to" attorney fees requires or merely allows an award of attorney fees to the prevailing party.
>
> The Ruffiers rely on the dictionary definition of "entitled" in arguing that the language of RCW 19.122.040(4) is

permissive. They assert that the legal meaning of the term is "[t]o grant a legal right to or qualify for," while the more common meaning is to "furnish with proper grounds for seeking or claiming something." Br. of Cross–Resp't at 12 (citing Black's Law Dictionary 612 (9th ed.2009); Webster's Third New Int'l Dictionary 758 (3d ed.1969)). The Ruffiers contend that these definitions show that "entitled" should be read as permissive and that RCW 19.122.020(4) should be read as allowing the Hayfields to seek fees while not requiring the trial court to award them. We disagree with relying on a single word in determining the meaning of a phrase.

The phrase "is entitled to" is defined as meaning "has a right to." Bryan A. Gamer, A Dictionary of Modern Legal Usage 942 (2d ed.1995). Consistent with this definition, Washington courts have interpreted other statutes providing that a party "is entitled to" attorney fees as mandatory. In referring to RCW 4.24.510, which provides that the person prevailing on an immunity defense "is entitled to" recover attorney fees, we stated that the trial court did not err "when it followed this statute's mandatory authority to award attorney fees." *Segaline v. Dep't of Labor & Indus.*, 144 Wn. App. 312, 327, 182 P.3d 480 (2008), *rev'd on other grounds*, 169 Wn.2d 467, 238 P.3d 1107 (2010). Similarly, the provision in RCW 26.18.160 stating that the prevailing party "is entitled to" attorney fees renders an award of fees mandatory. *In re Marriage of Cummings*, 101 Wn. App. 230, 235, 6 P.3d 19, *review denied*, 141 Wn.2d 1030 (2000); *see also In re Marriage of Nelso*n, 62 Wn. App. 515, 520, 814 P.2d 1208 (1991) (award

> of fees required because terms of RCW 26.18.160 are not discretionary); see also *Transpac Dev., Inc. v. Young Suk Oh*, 132 Wn. App. 212, 217, 130 P.3d 892 (2006) (where lease provided that prevailing party in any litigation is entitled to attorney fees, award of fees was mandatory under RCW 4.84.330). The phrase "is entitled to" makes an award of attorney fees to the prevailing party mandatory rather than permissive.

Hayfield, 187 Wn. App. at 919-20.

Titan asserts that the fees were bargained away because of a contractual provision that should there be contract disputes, each party shall bear its own attorneys' fees and costs. CP 468. That provision does not apply to physical "damages" caused by the actions of one of the parties or statutory attorney's fees associated with such damages. Where fees under statute are mandatory, they cannot be bargained away. Singleton v. Frost, 108 Wn.2d 723, 728, 742 P.2d 1224 (1987). Attorney fees under the UUDPA are "economic consequences of liability" associated with liability for damages found under UUDPA. RCW 19.122.040(4) and those cannot be bargained away through contract because to do so would be contrary to public policy.

As indicated, the attorney fees provision in the contract relates to actions brought for alleged defaults under the contract between the parties. It does not apply to third party damage claims. There is another provision

in the contract that applies to PSE's third party damage claim. That provision specifically requires Titan to indemnify and hold the City harmless from all liabilities (including attorney fees) for PSE's claim. It provides:

> 8.1 Contractor Indemnification. The Contractor agrees to indemnify, defend, and hold harmless the City, its elected officials, officers, employees, agents, and volunteers harmless from any and all claims, demands, losses, actions and liabilities (including costs and all attorney fees) to or by any and all persons or entities, including, without limitation, their respective agents, licensees, or representatives, arising from, resulting from, or connected with this Contract to the extent caused by the negligent acts, errors, or omissions of the Contractor, its partners, shareholders, agents, employees, or by the Contractor's breach of this Contract. . . .

CP 47.

Contractually, Titan is required to indemnify, defend, and hold the City harmless against PSE's damage claim where Titan's errors and omissions in complying with the UUDPA led to the damage.

Titan's assertion that because its Complaint did not allege a cause of action under RCW 19.122, there can be no award of attorney fees under RCW 19.122.040, is without merit. This is an action under the Act. Titan sued the City because Titan and its subcontractor received a bill from PSE requesting payment for damage to PSE's power line. Although

fashioned as a cause of action under the prime contract between the parties, the main thrust of Titan's lawsuit against the City is an attempt to impose liability for the damage on the City. The lawsuit falls squarely within the four corners of actions covered under RCW 19.122. RCW 19.122.010 provides in relevant part:

> Intent.
> 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; . . .

Moreover, RCW 19.122 explicitly indicates that it applies to situations where damage to an underground utility has occurred and liability must be assigned notwithstanding any contract that may exist. RCW 19.122.040(3) provides:

> 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 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, that differs from

> the provisions of this chapter is against public policy and unenforceable.

The statute does not direct how the cause of action must be captioned or fashioned, but clearly it is intended to apply to those situations where responsibility for striking an underground utility is an issue regardless of any contract or actions under any contract. Treating the manner in which a plaintiff fashions its causes of action as dispositive on whether or not the action falls under RCW 19.122 elevates form over substance and serves to abrogate the intent of RCW 19.122.

Along this same line of reasoning Titan asserts that the City's affirmative defense asserting noncompliance with RCW 19.122 is not sufficient to render this a case under the UUDPA for an award of attorney fees. Titan asserts that the City should have plead its affirmative defense as a counterclaim instead.

The City did not initiate this action; it was forced to defend. Arguing that the City's failure to plead its affirmative defense as a counterclaim (failure to comply with RCW 19.122) precludes an award of attorney fees under RCW 19.122 again elevates form over substance. CR 8, General Rules of Pleading, addresses such an argument at subsection (c) as follows:

> (c) Affirmative Defenses: In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Because this was an action Titan initiated seeking to impose liability for damage to an underground utility, the City did not err by asserting an affirmative defense under RCW 19.122. To the extent that this Court is persuaded by Titan's argument that this lawsuit involves causes limited to the contract, then the City's affirmative defense asserting violation of RCW 19.122 should be treated as a counterclaim under this Court's discretion pursuant to CR 8(c). Moreover, the contract itself specifically requires compliance with the provision of RCW 19.122.

G. CR 11 Sanctions.

Regarding attorney fees under CR 11, the City was prepared to suffer all of the fees it had incurred (including any work or preparation done in anticipation of a summary judgment motion) in exchange for a

voluntary dismissal. When that dismissal was not forthcoming, the City moved forward with the motion for summary judgment and sought to recover all of its fees associated with defending against this action; inclusive of any work it may have done prior to the November 12, 2015 letter. Simply put, but for this lawsuit, the City would not have incurred any of those expenses. The City is not limited in its recovery to just those fees associated with the Summary Judgment motion after the date of the letter. Further, concerning timely notice, the City indicated it would seek CR 11 sanctions three months prior to hearing on the summary judgment motion.

Given the plain reading of RCW 19.122's provisions concerning excavator responsibilities and the undisputed facts concerning the marking of the PSE line, and augering in spite of those markings, it was not reasonable for Titan to continue with the lawsuit. To do so was frivolous – neither well-grounded in fact, nor supported by law. CR 11.

V. CROSS APPEAL

A. Reasonableness of Fees Requested.

The City sought recover of $41,825.25 in fees and $705.00 in costs as the prevailing party in this matter. The trial court awarded fees, but only awarded approximately half of what the City sought to recover. There was no indication by the Court that it engaged in a review related to

the reasonableness of the fees requested or how it arrived at the award amount it ordered. The trial court was required to do so. Eagle Point Condominium Owners Ass'n v. Coy, 102 Wn. App. 697, 715; 9 P.3d 898 (2000).

The City requests that the matter be remanded back to the trial court for consideration of the attorney fee award in light of the overall reasonableness of the billings when considered in light of the Lodestar Method – reasonable fees determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the matter. Edmonds v. John L. Scott Real Estate, Inc., 87 Wn. App. 834, 857, 942 P.2d 1072 (1997); McGreevy v. Oregon Mut. Ins. Co., 90 Wn. App. 283, 291, 951 P.2d 798 (1998).

VI. ATTORNEY FEES AND COSTS ON APPEAL

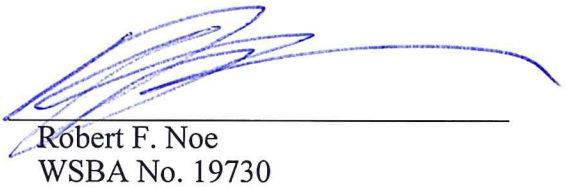
The City requests attorney fees in this matter pursuant to statutory authority and Court Rules. RCW 19.122.040(4) and RAP 18.1. As indicated above, attorney fees under RCW 19.122.040(4) to the prevailing party are mandatory. Recovery of the fees is not limited to just the fees incurred during the lower court proceedings, but is inclusive of this appeal matter as well.

VII. CONCLUSION

Based on the foregoing, this Court should deny this appeal and affirm the summary judgment entered in the lower court. This Court should remand this matter back to the lower court for reconsideration on the amount of the attorney fees to be awarded to the City as the prevailing party herein. The Court should award additional attorney fees and costs to the City as prevailing party pursuant to RAP 18.1.

The trial court's decision should be affirmed.

RESPECTFULLY SUBMITTED this 6th day of September, 2016.

By 

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VIII. APPENDIX

Appendix A: Color copies of CP 134, 243, and 73 ..... A-1 – A-3

DECLARATION OF SERVICE

I, Margaret C. Starkey, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 6th day of September, 2016, I served a true copy of the foregoing *Brief of Respondent/Cross-Appellant*, on the following counsel of record using the method of service indicated below:

Sean Dowell J. Craig Rusk OLES MORRISON RINKER & BAKER LLP 701 Pike Street, Suite 1700 Seattle, WA 98101	☐ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: dowell@oles.com Rusk@oles.com
Mark Orthmann Assistant City Attorney City of Federal Way 33325 Eighth Avenue South Federal Way, WA 98003	☐ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: Mark.orthmann@cityoffederalway.com

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

DATED this 6th day of September, 2016, at Issaquah, Washington.

Margaret C. Starkey

Property of United States Infrastructure Corporation
Photo taken on 7/12/2013 11:54:34 AM

Decl. of USIC Records Custodian, Ex. B

Property of United States Infrastructure Corporation
Photo taken on 7/19/2013 12:59:53 PM

Decl. of USIC Records Custodian, Ex. D

A-3

EXH. D, 5 of 13

Decl. of R. Noe