

NO. 64154-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BOARD OF TRUSTEES OF THE NORTHWEST IRONWORKERS
HEALTH & SECURITY FUND, NORTHWEST IRONWORKERS
RETIREMENT TRUST, NORTHWEST FIELD IRONWORKERS
ANNUITY TRUST FUND, NORTHWEST IRONWORKERS-
EMPLOYERS VACATION TRUST, NORTHWEST
IRONWORKERS & EMPLOYERS APPRENTICESHIP &
TRAINING FUND,

Respondents,

v.

SOUTH-N-ERECTORS, LLC, et al., a Washington Limited Liability
Company,

Appellant,

and

OHIO CASUALTY INSURANCE CO., Bond No. 3-904-997,

Additional Appellant,

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE JOHN ERLICK

BRIEF OF RESPONDENTS

McKENZIE ROTHWELL BARLOW
& KORPI, P.S.

By: Noelle E. Dwarzski, WSBA #40041
Attorneys for Respondents

500 Union St., Suite 700
Seattle, WA 98101
(206) 224-9900

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant Ohio Casualty Insurance Co. (hereafter “Ohio Casualty”) issued a \$25,000 fringe benefit bond to South-N-Erectors, LLC, (hereafter “South-N-Erectors”), an employer liable to the respondent Trusts for employee benefit contributions under a collective bargaining agreement. The terms of the bond guaranteed South-N-Erectors’s contributions to the respondent Trust Funds, the obligees on the bond. After repeated rounds of summary judgment motions to determine the full extent of South-N-Erectors’s liability to the respondent Trust Funds, the trial court determined that South-N-Erectors was liable to the Trust Funds for \$13,865.95. Ohio Casualty has wrongfully failed to release \$13,865.95 in bond proceeds in accordance with its surety agreement.

Ohio Casualty did not appeal the summary-judgment order in a timely manner, thereby precluding the Court of Appeals from reviewing it. Further, Ohio Casualty’s allegations that the trial court did not consider the claim against the bond are incorrect, so the trial court’s determination that Ohio Casualty was liable under the terms of the bond should be affirmed. In addition, Ohio Casualty’s argument that the trial court erred in failing to award sanctions against the Trust Funds is without merit. Finally, the respondent Trust Funds are entitled to attorney fees on appeal.

II. STATEMENT OF ISSUES

A. Statement of Issues

1. RAP 5.2(a) requires that a Notice of Appeal be filed within 30 days from the entry of the Order to be appealed. Failure to file within the 30-day period precludes appellate jurisdiction. The Notice of Appeal from the July 24, 2009 Order Granting Summary Judgment was not filed until September 14, 2009, 52 days after the entry of the order. Should this appeal be dismissed as untimely?

2. A surety's liability derives from that of its principal. On the date of the scheduled trial, the respondent Trusts were still litigating the liability of South-N-Erectors. Until the respondents received the trial court's order on June 30, 2009, the parties were unaware of the court's determination of South-N-Erector's liability to the Trust Funds. Was trial of the Trusts' claims against the surety precluded until the employer's liability was established?

3. The interpretation of an insurance contract, such as a performance bond, is a question of law. The trial court had a copy of the bond and the Trusts' declaration that South-N-Erectors had not paid anything toward the outstanding amounts due to the Trust Funds. Should the trial court's interpretation of the bond issued by Ohio Casualty in favor of the Trust Funds be affirmed?

4. The trial court has vast discretion in determining whether to issue sanctions. Only if there is a clear abuse of discretion

should the trial court's determination be disturbed. The trial court was aware of the ongoing litigation between the parties when it made its determination not to issue sanctions. Should the trial court's decision not to issue sanctions be affirmed?

5. The Trust Funds are the obligees on the bond issued by Ohio Casualty to South-N-Erectors. Ohio Casualty has wrongfully withheld the bond proceeds from the Trust Funds. *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) authorizes the award of attorney fees when the insured has to assume the burden of legal action. Are the respondents entitled to attorney fees under RAP 18.1 and *Olympic Steamship*?

B. Standard of Review

1. **This Appeal Is Untimely and Should Be Dismissed.** This appeal should be dismissed as untimely for failure to appeal the summary-judgment order of July 24, 2009 within 30 days as required by RAP 5.2(a). A final judgment is an order that adjudicates all the claims, counts, rights, and liabilities of all the parties. RAP 2.2(d); *see also* CR 54. Further, a final judgment is a judgment that ends the litigation and settles all of the issues in a case. *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 79 Wn.App. 221, 225, 901 P.2d 1060 (1995); *Rhodes v. D & D Enter., Inc.*, 16 Wn.App. 175, 178, 554 P.2d 390 (1976). It must be "in writing and signed by the judge and filed forthwith." CR 54(a)(1). An order granting

summary judgment can be a final judgment if it meets these requirements. *Lee v. Ferryman*, 88 Wn.App. 613, 622, 945 P.2d 1159 (1997). RAP 5.2(a) provides that an appeal must be filed within 30 days from the entry of the order to be appealed. Failure to file within the 30-day period after entry of the order results in a loss of appellate jurisdiction requiring dismissal. *Kelly v. Schorzman*, 3 Wn.App. 908, 911, 478 P.2d 769 (1970).

2. Review of Summary Judgment Is De Novo.

The Court of Appeals reviews the grant of summary judgment de novo. “We review a trial court’s grant of summary judgment de novo. We will review the facts and reasonable inferences from those facts in a light most favorable to the nonmoving party.” *Valencia v. Reardan-Edwall School Dist. No. 1*, 125 Wn.App. 348, 350, 104 P.3d 734, 735 (2005). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Miller v. Likins*, 109 Wn.App. 140, 144, 34 P.3d 835, 837 (2001).

3. A Performance Bond Is an Insurance Contract and Its Interpretation Is a Question of Law.

The interpretation of an insurance contract is a question of law. Appellate courts review the interpretation of an insurance contract de novo. *Mutual of Enumclaw Ins. Co. v. Jerome*, 122 Wn.2d 157, 160, 856 P.2d 1095 (1993). The terms of an insurance contract must be given their

usual, ordinary meaning unless the entirety of the agreement demonstrates a contrary intent. If a contractual provision is ambiguous, it must be construed against the insurer even though the insurer may have intended another meaning. *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Northwest Youth Services*, 97 Wn.App. 226, 230, 983 P.2d 1144, 1147 (Wn.App. Div. 1, 1999).

4. The Standard of Review for Sanctions for Non-Compliance Is Abuse of Discretion. The trial court's denial of Ohio Casualty's Motion to Dismiss Claims Against Defendant Surety should be reviewed for abuse of discretion. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 684-685, 41 P.3d 1175, 1180 (2002). A discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Rivers*, 145 Wn.2d at 684-685, 41 P.3d at 1180.

5. Attorney Fees Should Be Awarded to the Trusts Under the *Olympic Steamship* Decision. In *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), the Washington Supreme Court held that "[a]n insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees." *Olympic Steamship*, 117 Wn.2d at 54, 811 P.2d 673. This Court retains jurisdiction to

award attorney fees, even though it may not have jurisdiction over the subject matter of the appeal. *Kalich v. Clark*, 215 P.3d 1049, 1051-52 (Wash.App. 2009).

III. STATEMENT OF THE CASE

The respondent Trust Funds are tax-qualified, jointly administered union-management employee benefit trust funds, organized and operated under the Employee Retirement Income and Security Act of 1974, as amended (“ERISA”), 29 U.S.C. § 1001 *et seq.*, and created under Section 302(c) of the Labor Management Relations Act, 29 U.S.C. §§ 185 and 186(c) (“LMRA”). CP 2-3.

The Trust Funds brought an action for breach of contract against the defendants South-N-Erectors, LLC and its surety, Ohio Casualty, because South-N-Erectors did not pay its employee benefit contributions due for work performed by South-N-Erectors’s employees. CP 3-4. At issue were two discrete time periods: (1) the audit period of July 2005 through September 2006; and (2) the delinquent period of August 2007 through November 2007. CP 33: lines 15-17, CP 38:14-15, CP 34 lines 18-20, CP 39 lines 15-17.

On September 4, 2008 the Trusts filed their first motion for summary judgment. CP 36, line 20. The Trusts were awarded partial summary judgment in the amount of \$5,776.10 for the August 2007 through November 2007 time period at the January 23, 2009 hearing. CP 31, Line 5, Line 11. This judgment was amended on May 8, 2009

to include contractually mandated liquidated damages and interest on the contributions, which increased the judgment amount to \$13,865.95. CP 37-40. On May 22, 2009 the plaintiff Trust Funds moved to continue the trial date, CP 41-43, which motion the trial court denied on June 2, 2009. CP 44-45.

On June 12, 2009 South-N-Erectors and Ohio Casualty moved the court to vacate the summary-judgment orders entered on January 23, 2009 and May 11, 2009 in favor of the plaintiff Trust Funds. CP 61, line 12. On June 26, 2009 the court denied appellants' motion to vacate the summary judgment orders on the ground that appellants had failed to establish that *Chadwick Farms Owners Ass'n v. FHC LLC*, 166 Wn.2d 178, 194-195, 207 P.3d 1251, 1259 (2009) applied retroactively. CP 74-76, CP 93-94. The effect of this ruling was to leave standing the judgment against South-N-Erectors in the amount of \$13,865.95. CP 74-76, CP 93-94. The plaintiff Trust Funds did not receive a copy of the June 26 order until June 30, 2009. CP 74-76.

On June 30, 2009 the Trust Funds mailed a copy of the order to the appellants and inquired of Ohio Casualty how it would like to handle the bond proceeds. CP 72-74. On July 8, 2009 Ohio Casualty filed a Motion for Involuntary Dismissal. CP 48-59. On July 17, 2009 the Trust Funds filed Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss Claims Against Defendant Surety and Cross Motion

for Summary Judgment. CP 60-67, CP 72-76, and CP 68-71. As part of the response to the motion for dismissal, the Trust Funds submitted a copy of the bond for the court's review. CP 70-71. The Trust Funds conceded that Ohio Casualty is liable only up to the terms of the bond. CP 63, lines 18-21.

On July 24, 2009 the trial court found in favor of the respondent Trust Funds after reviewing the terms of the bond and the written pleadings of the parties. CP 95-97. The trial court refused to award sanctions against the Trust Funds. CP 95-97. The trial court found that Ohio Casualty was liable on the terms of the bond in the amount of \$13,865.95. CP 95-97.

On August 20, 2009 the trial court entered the Agreed Order of Judgment, CP 100-102, filed in response to the stipulated pleadings of the parties. CP 98-99. The appellants filed their Notice of Appeal from the Agreed Order on September 14, 2009. CP 81-88.

IV. LEGAL AUTHORITY AND ARGUMENT

A. This Appeal Should Be Dismissed as Untimely.

This appeal should be dismissed as untimely because the employer and the surety are appealing from the Court's July 24, 2009 summary-judgment decision in favor of the Trust Funds, and not from the Agreed Order entered on August 20, 2009. So, because the Notice of Appeal of the summary judgment order of July 24, 2009 was filed 52 days after the entry of the order granting summary judgment, and

not within the 30-day time period, as required by RAP 5.2(a), this appeal should be dismissed.

“The scope of review on appeal is determined by the type of judicial determination appealed from. CAROA 14 specifies three types of judicial determinations: order, final judgment, and final order. In deciding which of these labels applies to a particular determination substance controls over form, and the court looks to the content of a document rather than its title.” *Rhodes v. D & D Enterprises, Inc.*, 16 Wash.App. 175, 177, 554 P.2d 390, 392 (Wash.App.1976).

Although the enumeration of the Rules of Appellate Procedure has changed over time, their basic principles remain the same. The appellant has the burden of timely appealing the judgment at issue. RAP 5.2 provides:

[A] notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court which the party filing the notice wants reviewed, or (2) the time provided in section (e).

RAP 5.2 (a) provides that an appeal must be filed within 30 days from the entry of the order to be reviewed. Failure to file within this time frame results in a loss of appellate jurisdiction, requiring dismissal. *Kelly v. Schorzman*, 3 Wn.App. 908, 911, 478 P.2d 769 (1970). The July 24, 2009 order granting the Trust Funds summary judgment against Ohio Casualty clearly and finally resolved

all of the issues in this case and constituted the final judgment. CP 95-97, lines 14-15. In the July 24, 2009 order, the trial court determined that in accordance with the terms of the bond, Ohio Casualty was liable for the \$13,865.95. CP 95-97, line 14-15. The August 20, 2009 Agreed Order was merely a ministerial filing that restated the information in the summary-judgment order and did not decide any issue of law or fact. CP 100-102.

Because RAP 5.2 (e) does not apply in this case, the appellant Ohio Casualty was required to file the notice of appeal within 30 days from the July 24, 2009 order granting the Trust Funds summary judgment. Because this appeal is untimely, the Court of Appeals lacks jurisdiction to review the summary judgment proceedings and the motion for dismissal, and should dismiss this appeal.

B. Because Ohio Casualty's Liability as a Surety Is Derivative to the Liability of South-N-Erectors, the Trial Court Needed to Determine the Liability of South-N-Erectors Before It Could Address The Liability of Ohio Casualty.

It is well established that a surety's liability derives from that of the principal. "The principal of the bond surely could not be held liable if the conditions for which it was given were not performed, and undoubtedly the surety cannot be held where his principal could not." *Kanters v. Kotick*, 102 Wash. 523, 528, 173 P. 329, 331 (1918). While a surety bond is a condition precedent for a contractor's license,

the underlying liability is that of the contractor, not that of the surety company. *Lybecker v. United Pac. Ins. Co.*, 67 Wash.2d 11, 18, 406 P.2d 945 (1965).

A bond is interpreted using general principles of contract construction and performance. *Colorado Structures, Inc. v. Insurance Co. of the West*, 125 Wn.App. 907, 915, 106 P.3d 815, 820 (2005). A surety's liability on its bond is determined by the terms of the bond. *Joint Administrative Bd. of Plumbing and Pipefitting Industry v. Fallon*, 89 Wn.2d 90, 94, 569 P.2d 1144 (1977). A surety has the right to stand strictly on the express terms of its contract of suretyship, and to insist that it be not held responsible for any liability or obligation not directly expressed within the contract. *Grand Lodge of Scandinavian Fraternity of America, Dist. No. 7 v. U.S. Fidelity & Guar. Co.*, 2 Wn.2d 561, 570, 98 P.2d 971 (1940). Although the surety may be sued independently of the principal, the nature of the obligation is derivative to that of the principal.

Until the trial court issued the order of June 26, 2009, CP 75-76, CP 93-93, which determined the total liability of South-N-Erectors to the Trust Funds, neither party could have litigated the liability of Ohio Casualty because the liability of the surety is based on the liability of the principal. It is undisputed that a party can sue a surety independently; but the liability of the principal would have to be fixed and ascertainable. Until the trial court issued the June 26, 2009

order in which the court reaffirmed South-N-Erectors's liability, neither party could have litigated Ohio Casualty's liability.

C. Because Interpretation of the Bond Is an Issue of Law for the Court, the Trial Court Did Not Err When It Held the Surety Liable in Its July 24, 2009 Order.

The appellants argue that the trial court, in its July 24, 2009 order, incorrectly determined the liability of Ohio Casualty based on the prior orders against South-N-Erectors. This argument is incorrect, however, because the court considered the bond in reaching its decision to grant judgment in favor of the Trust Funds. The trial court reviewed the bond, which was attached to the Declaration of Lee Worley, Collection Coordinator for the Trust Funds, CP 68-71, to find that Ohio Casualty was liable in accordance with the terms of the bond. CP 95-97.

The trial court's interpretation of the bond was appropriate because the interpretation of an insurance contract is a question of law.

The undertakings of compensated sureties are regarded as "in the nature" of insurance contracts, and subject to the rules "applicable to simple contract law." Interpretation of an insurance contract is a question of law, reviewed de novo. *Colorado Structures, Inc. v. Insurance Co. of the West*, 161 Wn.2d 577, 586, 167 P.3d 1125, 1130 (2007).

The trial court had before it the a copy of the bond issued by Ohio Casualty in favor of the Trust Funds and a declaration by Lee Worley, the Collection Coordinator for the Trusts, in which he declared that South-N-Erectors had not paid any amounts due and owing from the orders granting summary judgment. CP 69-70. Because the interpretation of a surety contract is an issue of law for the court, the trial court's finding of Ohio Casualty's liability, in accordance with the terms of the bond, for the unpaid obligations to the Trust Funds was correct as a matter of law. The trial court decision should therefore be affirmed.

D. The Order Denying Defendant's Motion to Vacate Summary Judgments Against South-N-Erectors Did in Fact Determine the Extent of Ohio Casualty's Liability to the Trust Funds.

The Trusts concede that Ohio Casualty's liability is based on the terms and conditions of the bond. But in this case, after South-N-Erectors's liability to the Trusts was determined by the trial court in its June 26, 2009 Order, Ohio Casualty failed to tender the bond proceeds to the Trusts in accordance with the bond's own terms.

The appellants claim that the Trusts failed to establish that their claims meet the terms and conditions of the bond, but this argument is also incorrect. This action was brought against South-N-Erectors, LLC and Ohio Casualty for South-N-Erectors's failure to contribute to the Trust Funds in accordance with the collective bargaining agreements. The bond was issued by Ohio Casualty in

favor of the Boards of Trustees of the Northwest Ironworkers Trust Funds, as obligees, in the sum of \$25,000 for payment of “employee benefit contributions.” CP 70-71. Appellants’ argument that the trial court failed to interpret and construe the language of the bond is without merit, because the court had before it a copy of the bond, CP 70-71, and the declaration of Lee Worley, in which he indicated that South-N-Erectors had not paid anything towards the summary judgment orders. CP 69.

Furthermore, in Ohio Casualty’s Reply, CP 77-80, the appellants never addressed or raised the alleged bond defenses in response to the plaintiffs’ counter-motion for summary judgment, CP 60-67. According to RAP 9.12, “on appeal of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.” Therefore, since the surety neither addressed the counter-motion nor raised any defenses in its response to the counter-motion for summary judgment against Ohio Casualty, it cannot raise these defenses now on appeal.

The Trusts have conceded that they are subject to the terms of the bond, but Ohio Casualty has never raised any specific defenses to payment of the bond. Further, Ohio Casualty has repeatedly stated that the respondents are subject to the terms of the bond, but has failed to raise any specific defenses to payment of the

bond proceeds. CP 77-80. These defenses have been raised for the first time on appeal, and this Court should not consider them. CP 77-80.

E. Because the Trial Court's Decision Not to Issue Sanctions Was Not Manifestly Unreasonable, It Cannot Be Overturned.

The only issue unresolved at the time of trial was the liability of the surety, which is a question of law for the court. Thus, a witness list in anticipation of trial was not required in order to resolve the Trusts' claim against the surety. Furthermore, a trial court's decision regarding whether to issue sanctions for failure to comply with a court order is reviewed for abuse of discretion. "The abuse of discretion standard governs review of sanctions for noncompliance with discovery orders. A trial court has broad discretion as to the choice of sanctions for violation of a discovery order. Discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Rivers v. Washington State Conference of Mason Contractors*, 145 Wash.2d 674, 684-685, 41 P.3d 1175, 1180 (Wash., 2002).

The appellant argues that *Allied Fin. Servs. v. Magnum*, 72 Wn.App. 164, 167-168, 864 P.2d 1 (1993) is substantially analogous to the case at hand. *Allied* is flatly inapposite. In *Allied*, the trial court

entered an order prohibiting the Magnums from calling any witnesses as a sanction for failure to adhere to the scheduling order. In this case, by contrast, the trial court decided *not* to order sanctions. The trial court was aware of the ongoing litigation and the Trusts' attempts to conclude it. CP 96, lines 4-7. It was discretionary with the trial court whether to issue sanctions. "[T]he trial court has vast discretion in deciding whether and how to sanction a party's willful violation of a court order by the exclusion of testimony. Hence, in the absence of prejudice to the other side, the trial court does not necessarily abuse its discretion when it *refuses to exclude* witness testimony for a willful violation of a court order" *Allied Financial Services, Inc. v. Magum*, 72 Wash.App. 164, 169 n. 4, 871 P.2d 1, 3, n. 4 (1994) (emphasis in original).

The appellants argue that the trial court should have dismissed the case, but dismissal is considered a harsh remedy. "A trial court abuses its discretion when it resorts to the harsh remedy of dismissal of an action without making the explicit record that is required for appellate review." *Rivers*, 145 Wn.2d at 686-687, 41 P.3d at 1186. Furthermore, it is the general policy of Washington courts not to resort to dismissal lightly. *Rivers*, 145 Wn.2d at 686. Considering the considerable effort all parties have expended in litigating these issues, the trial court did not abuse its discretion in refusing to award sanctions.

In addition to the trial court's discretion on whether to award sanctions, there were no factual issues requiring witnesses. The interpretation of the surety agreement is a question of law. Whether Ohio Casualty is liable for South-N-Erectors's unpaid contributions is a question of law. There were no fact witnesses necessary to proceed to trial, since the liability of the surety was a question of law for the court in accordance with the terms of the bond.

F. Ohio Casualty's Request for Attorney Fees Should Be Denied and the Trust Funds' Request for Attorney Fees Should be Granted.

Ohio Casualty's request for attorney fees under RAP 18.1 should be denied, and the Trust Funds' request for attorney fees in accordance with RAP 18.1(b), RCW 4.84.010(6), and *Olympic Steamship* should be granted.

Olympic Steamship attorney fees are mandated for wrongful denial of insurance claims, which includes performance bonds. *Colorado Structures, Inc. v. Insurance Co. of the West*, 161 Wash.2d 577, 608, 167 P.3d 1125, 1142 (Wash. 2007). According to the Washington Supreme Court:

In *Olympic Steamship*, this court held that an insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees.

Colorado Structures, 161 Wash.2d at 597, 167 P.3d at 1136, citing *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wash.2d 37, 54, 811 P.2d 673,673 (1991). Here, the Trust Funds have been compelled

to litigate in order to obtain the benefit of Ohio Casualty's obligation to the Trust Funds.

Further, the Trusts tried to avoid litigation by handling the bond claim outside of court. CP 74. Ohio Casualty has forced this continued litigation for the payment of bond proceeds, in derogation of the terms of the bond written to ensure South-N-Erector's contributions to the Trust Funds.

Although this Court lacks jurisdiction to consider the appeal of the July 24, 2009 order, this Court retains jurisdiction to award attorney fees and costs:

[A] court has jurisdiction to award costs, including attorney fees, even where it determines that it lacks personal jurisdiction over a party or subject matter jurisdiction over the claim, as long as a statute authorizes the award. This rule applies regardless of whether the trial court or the appellate court awards the fees; both courts can award fees as long as a statute authorizes the award *Kalich v. Clark*, 215 P.3d 1049, 1051 -1052 (Wash.App. Div. 3, 2009)(internal citations omitted).

Because Ohio Casualty has required the Trust Funds, the obligees on the bond, to continue to litigate these issues, the Trust Funds hereby request the award of statutory or *Olympic Steamship* attorney fees, or both.

V. CONCLUSION

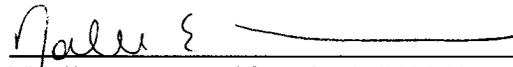
The respondent Trust Funds respectfully request that this Court dismiss the appellant's claims as untimely and award the Trust Funds

statutory or *Olympic Steamship* attorney fees, or both. Alternatively, in accordance with the law and argument listed above, the Trust Funds respectfully request that this Court affirm the decisions of the trial court with respect to Ohio Casualty's liability to the Trust Funds, and with respect to the trial court's decision not to award sanctions against them.

DATED this 18th day of December, 2009.

Respectfully Submitted,

McKENZIE ROTHWELL BARLOW & KORPI, P.S.



Noelle E. Dwarzski, WSBA #40041
Attorneys for Respondent Trust Funds