

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
DEPUTY

No. 37784-5 -II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

TNT EXCAVATING, LLC, a Washington Limited Liability Company,

Appellant.

vs.

CARA CREEK, LLC, a Washington Limited Liability Company;
et al.,

Respondent.

APPELLANT'S REPLY BRIEF

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I. REVIEW OF TRIAL COURT'S DECISION NOT TO
AWARD ATTORNEY'S FEES SHOULD BE DENIED

Respondent CARA'S assignment of error and request for review of the trial court's decision not to award fees should be denied on the following grounds: (1) CARA failed to file a cross appeal and to argue grounds for review, (2) a prevailing party has not yet been determined as cross claims have not yet been decided, and (3) the trial court's oral ruling on fees was not a final order subject to review.

1. Court's Decision Not to Award Fees Should Not be Reviewed Because CARA Failed to File a Cross Appeal and Argue Grounds For Review.

CARA'S failure to file a cross appeal in this matter and to argue grounds for review precludes CARA from seeking appellate review of the trial court's decision not to award fees.

RAP 5.1(d) provides that "a party seeking cross review must file a notice of appeal or a notice for discretionary review within the time provided by rule 5.2." RAP 5.2(f) requires a respondent seeking relief from a trial court's decision to file a notice of appeal, or notice for discretionary review, within the later of 14 days after

receiving Appellant's Notice of Appeal, or within 30 days after the entry of the decision by the trial court.

Appellant timely filed a Notice of Appeal in this case on May 30, 2008. (CP 301-309). CARA was served with the Notice of Appeal on June 25, 2008. (Appellate Court Record - Declaration of Mailing filed June 26, 2008). The trial court's final decision on TNT'S Motion for Summary Judgment in this matter was entered on May 9, 2008. (CP 297-300).

In assigning error to the trial courts decision not to award fees, CARA seeks a partial reversal of the trial court's decision; and therefore, seeks affirmative relief.

Under the rules of Appellate procedure, a notice of cross appeal is essential if the CARA seeks affirmative relief as distinguished from additional grounds for affirmance. In re Doyle, (93 Wn.App.120, 127, 966 P.2d 1279 (1998); review denied Doyle v. Mutual of Enumclaw Ins. Co., 139 Wn.2d. 1022, 994 P.2d 847 (2000). (See also Waagen v. Gerde, 36 Wn.2d 563, 577, 219 P.2d 595 (1950) State Supreme Court finding that a Respondent, who failed to file a cross appeal, is in no position to claim any error regarding the amount of a judgment in his favor).

Because CARA failed to file a notice of cross appeal as required by the rules of appellate procedure and failed to offer any argument or authority in support of allowing review, CARA'S assignment of error and claim for relief should not be reviewed and should be denied.

2. Trial Court's Decision Not to Award Fees Should Not be Reviewed Because a Prevailing Party Has Not Yet Been Determined.

On April 10, 2008, CARA filed a Motion and Memorandum in Support of Attorney's Fees. [CP 269-272]. Oral arguments on the Motion were heard on April 18, 2008 [RP, April 18, 2008]. Judge Mills ruled that the issue of fees was not properly before the court because the counterclaims have not been dismissed and there remains an issue as to who will be the prevailing party. [RP, April 18, 2008, Pages 10-11, 20]. As no prevailing party has been determined in this case, the issue of fees was not properly before the trial court and review is not appropriate at this time.

3. Trial Court's Decision Not to Award Fees Should Not be Reviewed Because a Final Order Has Not Been Entered on the Issue of Fees.

Judge Mills' oral ruling on the issue of fees has not been entered, and is therefore, not a final appealable order. State v. Collins, 112 Wn.2d 303, 308, 771 P.2d 350 (1989); Hubbard v. Scroggin, 68 Wn. App. 883, 887, 846 P. 2d 580, review denied, 122 Wn.2d 1004, 859 P.2d 602 (1993). As stated in Collins, "a ruling is final only after it is signed by the trial judge in the journal entry or is issued in formal court orders." Collins at 308. A trial court's oral opinion is considered to be no more than an expression of its informal opinion at the time it is rendered. Id.

Review of the trial court's oral ruling not to award fees is not a final order on the issue of fees, and therefore, should not be reviewed on appeal.

II. JARPA WORK WAS PERFORMED UNDER THE CONTRACT BUT NOT PAID

The JARPA work performed by TNT has not been paid by CARA. The amounts invoiced and paid clearly demonstrate that CARA still owes TNT for the JARPA work.

The Appendix to TNT'S Brief of Appellant tables all of the invoices relating to the work done by TNT for CARA. The Appendix also tables all of the payments made and tendered by CARA. The

Appendix, citing all invoices and payments to the record in this case, is incorporated herein by this reference as though fully set forth.

The total invoiced amount by TNT to CARA was \$424,523.43. The total amount paid and tendered by CARA on the invoiced amounts was \$417,514.17.¹ The difference between the TNT invoiced amount and the CARA paid and tendered amount is \$6,999.36, which is the amount of the billed JARPA work.

The unpaid JARPA balance owing is also clearly established when the final payment, in the amount of \$57,757.61, tendered by CARA as payment in full (CP 168); is subtracted from the sum of TNT'S final invoice amount of \$34,609.48 (Invoice# 100187, CP 93) plus the \$30,147.39 amount CARA held back under the contract holdback provision (see holdback provision identified in CARA Response Page 6).² This analysis is set out as follows:

¹ CARA paid TNT \$359,756.56. CARA tendered an additional \$57,757.61 as payment in full but the payment was rejected by TNT as full payment and was subsequently tendered to the registry of the court. $\$359,756.56 + \$57,757.61 = \$417,514.17$.

² Contract holdback of \$27,760.03 plus tax \$2,387.36 = \$30,147.39.

Unpaid JARPA Balance Owed

	\$34,609.48	TNT final Invoice# 100187 owed by CARA
+	<u>\$30,147.39</u>	Contract holdback, plus tax, owed by CARA
	\$64,756.87	Subtotal amount owed by CARA
-	<u>\$57,757.61</u>	Amount of CARA'S final tendered payment
	\$ 6,999.26	Total unpaid JARPA balance owed

The JARPA work has not been paid as shown by applying CARA'S payments to the amounts invoiced for the work.

III. TNT RAISED AN ARGUMENT OF ISSUE OF MATERIAL FACT IN ITS MOTION FOR RECONSIDERATION TO THE TRIAL COURT

Contrary to CARA'S response argument that TNT is raising an issue for the first time on appeal (CARA Response, pages 7-8), TNT argued issue of material fact as an alternate argument in its Motion for Reconsideration. (CP 257 - 264). On Reconsideration, TNT sought summary judgment in favor of TNT or, alternately, denial of CARA'S motion on summary judgment for the reason that TNT had at least raised an issue of material fact with regard to the effect of the JARPA credit on Invoice# 100158. (CP 257 – 264 at CP 264).

Furthermore TNT'S Motion for Summary Judgment, cited in CARA'S Response at page 7, only stated that there was no dispute that CARA entered into contracts with TNT; that CARA acknowledged that payments under the contract were due to TNT, and that CARA failed to make those payments. CARA'S citation to the record does not address the JARPA issue.³

Contrary to CARA'S own argument, CARA raises an issue of material fact as to the JARPA credit, in its Response at page 13, when it argues that it did not receive the benefit of the Credit for the JARPA work.

IV. JARPA CREDIT BENEFITED CARA BY REDUCING THE AMOUNT CARA OWED ON THE ORIGINAL CONTRACT AND ALLOWING APPLICATION OF THE CREDIT TO OTHER WORK

The JARPA credit given by TNT on the original contract after the JARPA work was delayed clearly benefited CARA by reducing the amount owed on the original contract and allowing application

³ Page 27 of the February 15, 2008 Report of Proceeding (also cited by CARA'S Response in arguing against raising an issue of material fact) shows that what TNT argued was that the invoices were negotiated and agreed. (RP, February 15, 2008, page 27). Even the trial court questioned whether there was a material issue of fact in the case. Id.

of the credit to other work billed on a subsequent invoice, Invoice# 100158. (CP 158-160, credit shown at CP 160).

As more fully argued by TNT in the Appeal Brief at pages 16-17, the credit was applied to extras and other charges not in the original Contract. Therefore, CARA actually paid less on the original Contract than agreed because CARA'S obligation on other amounts was reduced by the JARPA credit: the JARPA credit was applied to reduce the amount owing for ancillary agreements/extras, which were additions to the original Contract. (CP 82, CP 85-87).

V. CONCLUSION

TNT agrees that \$227,600.25 in payments was initially made toward the original contract price prior to Invoice# 100158 (CP 206, see also Appendix to TNT Appeal Brief), *however*, the JARPA credit back on Invoice# 100158 reduced the amount previously paid by CARA.

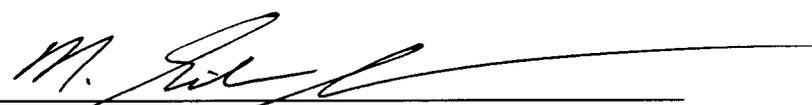
In TNT'S response to CARA'S Memorandum in Support of Motion for Summary Judgment, TNT summed up this case by arguing that if a customer purchases a product from Wal-Mart and then returns it receiving a refund; that customer cannot later come

back to purchase the product and claim that because Wal-Mart accepted his earlier payment, Wal-Mart must now give the product for free. (CP 205-207, AT 206-207). CARA contracted for the JARPA work, then put the work on hold and received a credit in the interim (which was applied to additional work). The JARPA work was subsequently completed by TNT and billed. CARA has not paid and it not entitled to receive the work for free.

The JARPA work was completed as contracted between TNT and CARA. CARA has not paid, or tendered payment, for the JARPA work. CARA owes TNT \$6,999.27, in addition to the \$57,757.61 tendered to the registry of the court.

Dated this 8th day of December, 2008.

Respectfully submitted by:



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Attorneys for Appellant TNT

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II -TACOMA**

TNT EXCAVATING,LLC, a Washington
Limited Liability Company,

NO. 37784-5

Appellant,

DECLARATION OF SERVICE

vs.

CARA CREEK, LLC, a Washington
Limited Liability Company; CARA
GROUP, LLC, a Washington Limited
Liability Company; CARA LAND
COMPANY, LLC, a Washington Limited
Company; LEADER INTERNATIONAL
CORPORATION, a Washington
Corporation; WEST SOUND
TREATMENT CENTER, a Washington
Non-Profit Corporation; WELLS FARGO
BANK, a National Banking Association;
1997 PORT ORCHARD INDUSTRIAL
PARK LIMITED PARTNERSHIP, a
Washington Limited Partnership; and
KITSAP BANK, a Washington State
Chartered Bank.

Respondents.

ORIGINAL

1 I declare that on the 8th day of December, 2008, copies of the Appellant's Reply Brief
2 and copies of this Declaration of Service were delivered to the offices of each of the following
3 attorney's of record:

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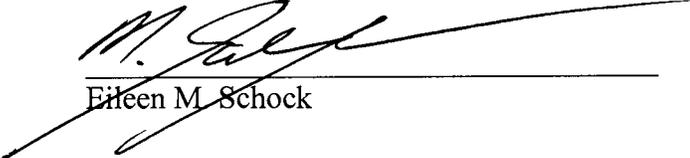
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21 I also declare that on the 8th day of December, 2008, I filed the original Appellant's
22 Reply Brief with the Clerk of the Court, Washington State Court of Appeals, Division II, 950
23 Broadway, Suite 300, Tacoma, WA 98402-4454.

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

DATED this 8th day of December, 2008, at Bremerton, Washington.


Eileen M. Schock