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This Brief with Motion to Dismiss is submitted by Nowicki & Associates, Inc. (“Nowicki”), one of two Defendants below and both being Respondents to this appeal; the other is NOW Environmental Services, Inc. (“NOW”).

I. RESTATEMENT OF ISSUES ON APPEAL

The following two issues pertain to the motion to dismiss:

A. Does the Court of Appeals lack jurisdiction to review the September 18, 2009 summary judgment dismissing this litigation and awarding fees and costs as a result of no timely Notice of Appeal?

B. Did the trial court abuse its discretion with the method used to determine the amount of fees and costs awarded on October 30, 2009 to Nowicki?

The District’s contingent issues on the merits of the trial court’s summary judgment entered September 18, 2009 are restated as follows:

C. Are the fees and costs awarded to Nowicki under RCW 39.04.240 unenforceable against the Tacoma School District No. 10 (“District”) because this is not litigation arising out of a public works contract where the District is a party?

D. Is the District’s responsibility to pay prevailing party attorney fees under RCW 39.04.240 precluded by the District being a Third Party Defendant rather than a named losing Plaintiff?

E. Are Nowicki's contingent equitable claims for fees in the untried Third Party Complaint ripe for review on this appeal?

II. FACTS

A. Jurisdictional Facts Pertaining to the Motion to Dismiss (based on District's Notice of Appeal CP 775-796/ Appendix 1 ("App. 1") and other CP citations).

On September 18, 2009, the trial court granted Defendant Nowicki's third motion for summary judgment: This lawsuit was dismissed in its entirety and Nowicki and NOW were awarded attorney fees and costs under RCW 39.04.240 against the District and Eastwood. App.1/CP 789-792. The date of October 2, 2009 was established by the judgment for determining the amounts of fees and costs to be awarded. App.1/CP 792. It also brought to an end the action initiated earlier by Eastwood in Pierce County Cause No. 05-2-14065-3, which essentially was transferred over into this lawsuit through an assignment by the District to Eastwood of claims against Nowicki. A Settlement Agreement was used for the assignment. CP 237-242.

On September 24, 2009, Stewart Sokol & Gray, LLC ("Stewart Sokol") sent the trial court a letter on behalf of both Eastwood and the District. (Copies were provided to counsel for Nowicki and NOW). CP 731-735. It identifies a changed date for the October 2, 2009 hearing over to October 30, 2009. However, the purpose is one of reminding the court

of issues raised by the law firm but left unaddressed in the text of the September 18, 2009 summary judgment. One being no ruling by the court on Nowicki's motion to amend pleadings for including a request for attorney fees under RCW 39.04.240, and another the fact neither Nowicki's nor NOW's contingent Third and Fourth Party Claims against the District for fees based on equitable principles have been tried.

On October 29, 2009, K&L Gates, LLP ("K&L") entered their Notice of Appearance on behalf of the District to co-counsel with Stewart Sokol. CP 1783-1784. The next day at the hearing, Mr. Franklin of K&L argued there was no legal basis allowing the trial court to order the District to pay Nowicki's and NOW's attorney fees as was done on September 18, 2009. RP 10/30/09 p.20 ln.4-16. He gave two reasons. First, that the District was released of all fee paying responsibility under RCW 39.04.240 by the assignment of claims to Eastwood since the new litigation then arose from private contracts, not the public works contract in the first action where the District was a party. RP 10/30/09 p.20, ln.17 to p. 22, ln.19. Second, because unlike Eastwood, the District is a Third and Fourth Party Defendant rather than a named losing Plaintiff as is Eastwood. RP 10/30/09, p.11, ln.16 to p.17, ln.4 and p.12, lns.4-8. As to the reasonableness of the amount of fees and costs to be awarded Nowicki

and NOW, Mr. Franklin said these were matters for the court and the Defendants to decide. RP 10/30/09, p.12, lns.23-24.

The trial court disagreed with Mr. Franklin's assertion of this being a lawsuit arising out of private contracts rather than the District's public works contract. RP 10/30/09 p. 23, ln.22 to p.27, ln.10. At the conclusion of arguments, the court approved orders granting fees and costs to Nowicki of \$177,079.89 and to NOW of \$58,283.75 calculated by using the Lodestar Method. App.1; CP 761-769; 771-774; 779-792. The order finds all hours billed Nowicki to be reasonable without the necessity of further segregating among the numerous issues argued It reads:

The court finds that the **legal work necessary to defend Nowicki was interrelated** and could not be reasonably segregated in a manner to determine what aspects of the defense were more important than others. **The court finds that all of the legal work done was reasonable** in order to achieve the success that Nowicki did as a matter of law.

(Emphasis Added)

App.1; CP 783, ln.2-6

On November 24, 2009, the District filed a Notice of Appeal as to both the September 18, 2009 summary judgment and the October 30, 2009 order. App.1. On January 8, 2010, Stewart Sokol withdrew as legal counsel for both Eastwood and the District, leaving Eastwood a nominal party pro se on this appeal. CP 1785-1788.

B. Facts Addressing the Merits of the District's Contingent Issues.

Eastwood subcontracted with general contractor Garco Construction, Inc. ("Garco") to remove asbestos for the District out of Foss High School prior to remodeling. CP 404-405; 1082-1091. Its scope of work was to follow specifications Nowicki prepared for the District and for which Eastwood was required to fully address in its bid given to Garco. CP 255-266, 404 §7; 1092-1119; 2111-2115; 2145-2149.

However, unbeknownst at the time to both the District and Nowicki, Eastwood had decided to only bid the abatement of asbestos work for which estimated quantities were given in the specifications. CP 308-309; 406 §13-14. Also unknown was that Eastwood, after becoming the low bidder, negotiated these limits into the terms of its subcontract. CP 101-103; 406 §14; 1442.

Intentionally excluded from the bid and the subcontract was other identified work, such as the removal of asbestos overspray for which all bidding companies had to estimate themselves in light of the specification asking for a performance bid. CP 255-266. Nowicki arranged two pre-bid site tours for this purpose but Eastwood had no one in attendance at either. CP 101 §8& 9; 291; 404 §6; 2116.

Nowicki knew Eastwood to be a small company who would likely have difficulty working a large nearly three (3) year project like the Foss

Remodel. Of course, it knew Eastwood had no one in attendance at either pre-bid site tour, but more importantly was Nowicki's knowledge of a State of Washington audit of Eastwood several years earlier where Eastwood was found to have overcharged for work at the University of Washington. CP 103 §12; 105-135; 2116-2119; 2149-2155; 2170-2193. With this information, Nowicki advised the District to consider disqualifying Eastwood. *Id*; 2097-2099. In response, Peter Wall, on behalf of the District, decided instead to contract with Nowicki for close monitoring of Eastwood's invoicing for overcharges and to assure compliance with asbestos safety regulations. *Id*; CP 405 §10&11; 407 §16&17.

From the beginning, Eastwood kept up a constant refrain of objections to Nowicki's oversight and contempt for this consultant. CP 1442. An example of Eastwood's attitude is evident in a letter to Tacoma School Board Members dated November 11, 2003 with a lambast at Nowicki for disallowing numerous charges invoiced by Eastwood. CP 1505-1510. Another is the diatribe written into a narrative Eastwood submitted with its claim mentioned in more detail elsewhere in this brief. CP 1505-1510.

In the spring of 2005, the Department of Labor & Industries issued 22 safety violations, 11 intentional, against Eastwood on the Foss project

along with a statement that its license to abate asbestos was to be revoked. CP 1730-1753. Within this same time frame, Eastwood had been stopping work to protest not being paid all invoiced work. CP 414 §2&3. In response, under Peter Wall's direction, Craig Johnson, the independent contractor hired to oversee the Foss Project, prepared a Manpower Study to learn just how well on an hourly basis Eastwood was being paid for all of its reported hourly work to date. His conclusion was of District overpayments approximating \$80,000.00. CP 412 §10.

On June 6, 2005, Peter Wall directed Garco to terminate Eastwood for cause based on the safety citations issued by the Department of Labor and Industries. CP 1755. Garco's letter to Eastwood dated June 10, 2005 implemented this decision. CP 1755, 1757-1758.

It was about then when the District first learned from Garco that Eastwood's subcontract was inconsistent with the abatement requirements of the District's Main Contract, but the record at the time provides none of the specifics as to the nature of inconsistencies which were learned through discovery in this litigation. CP 77 §2&3; 101-103; 406 §14; 1626 pp.91-92; 1627 pp.96-97; 1630 pp.108-109. On August 10, 2005, Eastwood served Garco with a claim for extra work totaling \$998,643.34. CP 1763; 1360. The basis cited is detrimental reliance by Eastwood on

defective abatement specifications and the wrongful rejection of all or parts of many of Eastwood's invoiced work. CP 935-937.

Two days earlier, on August 8, 2005, Eastwood had submitted the same claim to St. Paul Travelers, Garco's insurance carrier. CP 902-1559. On August 30, 2005, under terms of its subcontract with Eastwood, Garco forwarded the claim to the District. CP 1774.

On September 8, 2005, the District rejected it on the basis of not being in compliance with District's mandatory claim dispute procedures (CP 1776), these being part of the General Conditions incorporated into the District's public works contract signed by the District and Garco. CP 1082-1091; 1718-1722.

Following rejection, Eastwood initiated the lawsuit which eventually ended up in the settlement whereby the District assigned claims against Nowicki to Eastwood. CP 237-242. It first sued Garco to enforce the subcontract after having made clear to Garco its lack of contract privity with the District. CP 1334-1335. Garco then impleaded the District making demand on behalf of Eastwood and for an administrative mark-up payment to itself as allowed if monies eventually were paid to Eastwood. CP 1853-1858.

The District did not have any claims against Nowicki or NOW (the successor to Nowicki's business as of September, 2004). CP 1613, p.41;

407, §16, 17. K&L was retained to defend; one basis being the District not owing any monies to Garco and Eastwood because of their failure to comply with the District's claim dispute procedures. CP 1613 p.41; 1867. Attorney fees were requested under RCW 39.04.240. CP 868.

Later on, as required by the District's claim dispute procedures, the parties engaged in mandatory mediation. CP 140, §4.4.2. For assistance in helping to better understand questions about asbestos abatement, the specifications, and Eastwood's work at Foss High School, Robert Simons, former employee of Nowicki and then an employee of NOW, was put back on contract by the District. CP 99, Ins.3-16.

Following a few mediation sessions, negotiations at the last session turned to focus on what might be the specifics of an agreed settlement. At this point, Mr. Simons' services were terminated. CP 99, §3. He departed totally unaware, until told by Ron Nowicki in December of 2006, that part of the settlement included an assignment by the District of claims against Nowicki to Eastwood. *Id.* This meant §4.4.2 of the General Conditions had not been followed. Had the District done so, then Nowicki and NOW would have been made full participants in the mediation process with authority to settle. CP 1401.

The District, Garco, Eastwood, and Travelers Insurance approved the Settlement Agreement in which Eastwood was paid \$165,000.00 by

the District and Garco \$85,000.00. CP 99; 86; 88-89. The assignment of claims provision reads:

The District shall assign to EEI all of its rights against Nowicki **related to Nowicki's performance on the project**. EEI shall have the right, but not the requirement, to assert such claims at its own expense and shall have the right to retain all recovery from such claims. **The District warrants that it will hold EEI harmless for any unpaid or owed amounts, if any, due Nowicki pursuant to its current contract with the District. EEI will hold the District harmless from any expense or liability associated with the prosecution of claims against Nowicki.** EEI will have until the close of business on Tuesday, November 7, 2006, to notify the District as to whether it accepts the assignment.

(Emphasis added.)

Eastwood sued Nowicki on March 16, 2007 as an assignee standing in the District's shoes, making demand to be indemnified for the total amounts of money the District had paid to Eastwood, Garco and whatever amount the District might end up paying to ACCO Engineering, another subcontractor who had filed suit for extra work. CP 31-39.

Eastwood alleged Nowicki's breach of the Consultant Agreement with the District by having prepared defective asbestos abatement specifications detrimentally relied upon by Eastwood and requested attorney fees under RCW 39.04.240. CP 35; 36-37.

Eastwood amended its Complaint to add NOW as an additional Defendant. Nowicki and NOW, with court approval, filed Third and

Fourth Party claims against the District asking for attorney fees based upon equitable principles. CP 58-63; 809-816.

Nowicki did not request attorney fees under RCW 39.04.240 in its pleadings. However, in its response brief to the District's summary motion dated July 7, 2008 to have the court strike the Third and Fourth Party Complaints, the District was put on notice that Nowicki was looking to RCW 39.04.240 to recover attorney fees against the District. CP 1952-1958. Similar notice was included in Nowicki's memorandum dated March 23, 2009 supporting its second summary motion. CP 895. Written notice was given in Nowicki's June 17, 2009 update of answers to Eastwood's interrogatories. CP 271; 578. Nowicki also requested permission to amend its pleadings so the statute could be referenced; it was filed at the same time as Nowicki's Third Motion for Summary Judgment, which also requested attorney fees under RCW 39.04.240. CP 272-276.

Nowicki's motion to amend pleadings was not ruled upon. Instead, the trial court granted Nowicki's third summary judgment and awarded fees to Nowicki and NOW against Eastwood and the District pursuant to Nowicki's request for fees under RCW 39.04.240. App.1/ CP 792.

Ending the case, the trial court dismissed Eastwood's Complaint with prejudice for three reasons. First, Eastwood was precluded from

seeking indemnification for economic loss due to the language of the District's hold harmless clause limiting indemnification to only monies paid for injuries to persons or property brought on by negligent acts or omissions. App.1/CP 790-791. Second, Eastwood's offered evidence was insufficient as a matter of law to prove Eastwood had detrimentally relied upon defective asbestos abatement specifications. CP 791. Third, Garco and Eastwood had failed to comply with the District's claims dispute procedures. *Id.*

III. STANDARDS OF REVIEW

The Appellate Court will only review the trial court's final judgment if timely appealed. *Bushong v. Wilsbach*, 151 Wn. App. 373, 375, 213 P.3d 42 (2009). The court lacks jurisdiction to review a final judgment when not timely appealed. RAP 2.2(a)(1); RAP 5.1(a); RAP 5.2(a)(1). Where the court lacks jurisdiction to review a case on the merits its only decision can be for the appeal to be dismissed. *Deschenes v. King County*, 83 Wn.2d 714, 716, 521 P.2d 1181 (1974); *Lakeside Industries vs. Thurston County*, 119 Wn. App. 886, 900, 83 P.3d 433 (2004). A party or the court "may raise at any time the question of Appellate Court jurisdiction." RAP 2.5(a).

The judgment of a trial court is final if it dismisses the case and grants attorney fees regardless of whether the amount of attorney fees and

costs will be decided at a subsequent hearing. *Bushong* at 376. A final decision granted by summary judgment is the equivalent of a final decision rendered after a full trial. *Ensley v. Pitcher*, 152 Wn. App. 891, 222 P.3d 99 (2009) at p.10 citing *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 892, 1 P.3d 587 (2000); *National Union Fire Ins. Co. of Pittsburgh v. Northwest Youth Services*, 97 Wn. App. 226, 233, 983 P.2d 114 (1999), rev. denied, 139 Wn.2d 1020 (2000). Furthermore, no timely appeal of the lower court's subsequent order setting the amount of attorney fees and costs deemed reasonable can work to confer appellate jurisdiction over the merits of an earlier final decision entered by the trial court, which was never timely appealed. *Bushong* at 376; *Carrara* at 826.

An award of attorney fees and costs to the prevailing party will not be disturbed on appeal unless Appellant establishes that the trial court clearly abused its discretion. *Allard v. First Interstate Bank*, 112 Wn.2d 145, 146, 768 P.2d 998, 733 P.2d 420 (1989); *Highland School District v. Racy*, 149 Wn. App. 307, 312, 202 P.3d 1024 (2009). Also, matters not raised before the trial court will generally not be reviewed for the first time on appeal. *Lewis Pacific v. Turner*, 50 Wn.2d 762, 770, 314 P.2d 625 (1957). An allowed exception is one challenging the Appellate Court's jurisdiction. *Crawford v. Wojnas*, 51 Wn. App. 781, 754 P.2d 1302 (1988).

When interpreting both statutes and civil rules of procedure, the court applies the same standard rules. *State v. West*, 64 Wn. App. 541, 544, 824 P.2d. 1266 (1992). The language of either statute or rule, including common terms, is interpreted according to the plain or usual meaning. *Absher Const. v. Kent School Dist.*, 77 Wn. App. 137, 148, 890 P.2d 1071 (1995). The primary goal of interpretation is to effectuate legislative intent. *City of Seattle v. St. John*, 166 Wn.2d 941, 947, 215 P.3d 194 (2009). A statute granting attorney fees to a prevailing party, if ambiguous, will be applied in a manner consistent with such intent. *Brand v. Dept. of Labor & Industries*, 139 Wn.2d 659, 667, 989 P.2d 1111 (1999).

IV. SUMMARY

Nowicki requests dismissal of the District's appeal in its entirety owing to the court's lack of jurisdiction. No timely appeal was made of the summary judgment entered on September 18, 2009 and, although there was a timely appeal of the order entered October 30, 2009, setting the amounts of fees and costs, the record provides no support for the District's claim of these amounts having been awarded by a trial court abusing its discretion.

Also analyzed are contingent issues the District wants reviewed on the merits. Nowicki reviews how the District's interpretation of RCW

39.04.240 limits its application to only cases where the District is a named party and a public works contract is involved, very much like Eastwood's first lawsuit. The District's logic is examined in light of its analysis giving near exclusion to the important term "an action arising out of a public works contract". It is a term, when given its usual interpretation, easily provides RCW 39.04.240 with a scope of coverage more than sufficient to be applicable to this case which is also "an action arising out of a public works contract" to which the District is a party.

The District's argument of having transferred all of its responsibilities under RCW 39.04.240 to Eastwood through an assignment of claims against Nowicki is shown to be a void transfer pursuant to the language of the statute. This is because the statute gives Nowicki and NOW the right to collect attorney fees from the District, which in Nowicki's case, has never been waived. Furthermore, the statute declares any imposed unilateral waiver, in this case by the assignment of claims agreed to by the District and Garco, is void as a matter of law for reason of violating public policy.

Also, Nowicki requests costs allowed by RAP 14.3 and attorney fees as allowed by RAP 18.1.

V. MOTION TO DISMISS WITH ANALYSIS

Nowicki moves pursuant to RAP 10.4(d) and 17.4(d) for an order dismissing this appeal for the two reasons stated next:

- A. The trial court summary judgment granted on September 18, 2009 is not reviewable because appellate jurisdiction was not obtained by a timely Notice of Appeal.**

RAP 5.2(a) sets a thirty (30) day requirement to file the Notice of Appeal for a final judgment. Judgment finality, which includes a summary judgment, occurs when it dismisses the entire case with prejudice, to include, as was done here, the granting of attorney fees. If the judgment does grant fees it is not made less final should the trial court, as also done here, set over for a separate hearing the decision as to the amount of fees to be awarded. *Id.* Accordingly, the judgment granted on September 18, 2009 is final for purposes of an appeal, but it is not reviewable since the Notice of Appeal was filed on November 24, 2009, a date well beyond the allowed thirty (30) days for doing so.

RAP 2.4(b) allows no excuses for an untimely appeal of a final judgment; for example, filing problems resulting from an unintentional misleading of the appellant as to the date the final judgment was filed. *Isom v. Olympia Oil & Wood Products Co.*, 200 Wn. 642, 645, 94 P.2d, 482 (1939). Furthermore, the rule precludes any request for reinstatement

of lost appeal rights by reason of a timely Notice of Appeal of a subsequent order establishing the amount of fees. RAP 2.4(b) states:

A timely notice of appeal of a trial court decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise appealable under Rule 2.2(a) unless a timely notice of appeal has been filed to seek review of the previous decision.

(Emphasis added.)

Twice the Court of Appeals, Division I, has enforced these rules and denied an appeal sought for a final judgment where there was no timely Notice of Appeal. *Carrara, supra* and *Bushong, supra*. For each case, there was also a timely appeal of a subsequent decision regarding attorney fees. In both cases, however, the court enforced RAP 2.2 and 2.4(b) and held the missed opportunity to timely appeal the final judgment cannot be overcome by a timely appeal of a later order setting fees. In other words, the failure to timely appeal the final judgment absolutely removes the courts jurisdiction to review such a decision.

The more recent case of the two, *Bushong*, is exactly on point with the facts here. The final judgment came by way of a motion for summary judgment. The judgment awarded attorney fees to the prevailing party and there was a subsequent decision setting the amount of the fees and costs, which was the only decision to be timely appealed. There was no appellant

challenge to the amount of fees and costs awarded, but there was as to the basis for granting attorney fees as the trial court did in the earlier summary judgment. The court applied RAP 2.2 and 2.4(b) and held it lacked authority to review the summary judgment because it was a final judgment not timely appealed.

The decision in *Bushong* quotes from 2A KARL B. TEGLAND WASHINGTON PRACTICE: RULES PRACTICE RAP 2.4 AT 183 (6TH ED. 2004), as included in *Carrara*. These comments are:

RAP 2.4(b) allows a timely appeal of a trial court's attorneys' fees decision but makes clear that such an appeal does not allow a decision entered before the award of fees to be reviewed (i.e., it does not bring up for review the judgment on the merit) unless timely notice of appeal was filed on *that* decision. RAP 2.4(b); 2A Karl B. Tegland Washington Practice: Rules Practice RAP 2.4 at 183 (6th Ed. 2004)...The practical lesson is clear – counsel should appeal from the judgment on the merits, even if the issue of attorney fees is still pending. 2A Tegland, *supra*, at 181. (Emphasis added.)

The District here is attempting to follow the same misguided path as the appellants in *Bushong* and *Carrara*. Appeal is not permitted in this case on the merits of the trial court's decision granting Nowicki and NOW attorney fees under RCW 39.04.240 against both Eastwood and the District.

B. The record on review supports the trial courts method of determining the amounts of fees and costs awarded to the

defendants by falling within the broad scope of discretion given to the trial court.

In both *Bushong* and *Carrara*, neither appellant made an appropriate proper challenge to the reasonableness of the fee and cost of amounts awarded. Accordingly, even though a timely appeal had been filed as to these orders the court dismissed their appeals because the offered grounds for reviewing the reasonableness of the fees was insufficient as a matter of law. *Bushong* at 376. *Carrara* at 826-827.

Here, the record shows no challenge by the District to either the amount of fees and costs awarded or the reasonableness of those amounts. The District declared those decisions were for the court and the Defendants to resolve. Mr. Franklin said:

Now, whether or not they are entitled to or the amount they are entitled to is up to them and the court.

RP 10/30/09, Ins.23-24.

However, on appeal the District argues it was an abuse of the courts discretion in not requiring Nowicki and NOW to segregate their fee requests between causes of action allowing fees and those which do not. App.Br. p.46. On the other hand, Nowicki was awarded fees under RCW 39.04.240, a statute granting attorney fees to a prevailing Defendant for all work performed for a successful defense where the Plaintiff receives nothing. In other words, there is no need for a prevailing Defendant to

segregate issues as the District argues since the defense of all issues was necessary in order to prevail.

The District argues it was an abuse of discretion on the trial court's part to have awarded 100% of the fees Nowicki and NOW billed their clients. For authority the District cites *Hume v. American Disposal Co.*, 124 Wn.2d 656, 672-73, 880 P.2d 988 (1994). However, this case holds otherwise. Where claims cannot easily be separated due to the intertwining of issues and defense work involved, the trial court is permitted to make a finding to this effect. When there is such a finding then no segregation or further break out of work into categories is necessary.

Here, as stated earlier, the trial court did enter such a finding. Also, the court adopted the independent findings of attorney Thomas Gallagher who reviewed the fee billings to Nowicki. His report includes the following:

Prior to preparing this Declaration and forming my opinion herein, I have done the following: (a) **I met with Mr. Hudson... on two occasions** to discuss the many legal and factual complexities in this case, discovery difficulties, as well as the need to prepare for trial two times... (b) **I personally reviewed the twenty-one (21) banker boxes of documents Mr. Hudson's office has amassed in this case** that relate to legal research, discovery, pleadings, trial preparation, the Plaintiffs assigned claims, the prior claims made by Plaintiff against the Tacoma School District, and the Plaintiffs work for the Tacoma School District; (c)...I did not have the time to review each of the 331 separate pleadings and documents filed...but **I personally reviewed**

one bankers box of pleadings... (d) I reviewed the detailed billing statements from Mr. Hudson's firm to Nowicki & Associates, Inc. 3. It is my opinion that **631 hours was a reasonable number of hours spent over the last two and one-half (2-1/2) years by Edward Hudson,** the lead attorney for Nowicki... 4. **202 hours was a reasonable number of hours spent by legal interns...**5. **4.7 hours was a reasonable number of hours spent by associates...**6. **\$240 per hour was a reasonable rate for the lead attorneys time...**7. **\$175 per hour was a reasonable hourly rate for the time spent by associate attorneys...**

The trial court entered other findings to show the process it went through in establishing the amount of fees under Washington's "clearly preferred" Lode Star method. *In Re the Settlement/Guardianship of AGM and LLM*, 154 Wn. App.558, 579, 223 P.3d, 1276 (2010). The court did not go beyond making a basic calculation. In other words, the court neither considered the need for an increase or a decrease of amounts once calculated. The court determined the number of hours reasonably billed, established a reasonable hourly rate for each time keeper, and then multiplied the hours times the court's approved rate. The resulting products were then added together to arrive at the total amount of fees awarded.

Accordingly, the record shows no abuse of the trial court's discretion. Therefore, Nowicki requests an order affirming the trial court's decision as to the amounts of fees and costs awarded on October 30, 2009.

VI. ARGUMENT ON MERITS

- A. **RCW 39.04.240 mandates that the District pay Nowicki's attorney fees and costs because this is "an action arising out of a public works contract in which the [District]...is a party."**

We turn now to the District's contention that in this action RCW 39.04.240 denies attorney fees to Nowicki and NOW because this is an action arising out of a Settlement Agreement along with several Consultant Agreements rather than the needed public works contract to which the District must also be a party. App.Br. pp.16-19. The text of the first section of RCW 39.04.240 contains the grammatical construct interpreted by the District to this end; it reads:

(1) **The provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works is a party, except that: (a) The maximum dollar limitation in RCW 4.84.250 shall not apply;** and (b) in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.

(Emphasis added.)

A strong historical legislative purpose is drafted into the statute by virtue of an inclusion by reference to existing statutes, RCW 4.84.250 through RCW 4.84.280. For example, *McGuire v. Bates*, 147 Wn. App. 751, 756, 198 P.3d 1038 (2008), declares these are statutes for

encouraging “early settlements and the **avoidance of protracted litigation**.” (Emphasis added). Also, Nowicki and NOW obtained prevailing party status under RCW 4.84.270 by winning while Eastwood got nothing. *Lowery v. Nelson*, 43 Wn. App. 747, 752, 719 P.2d 594 (1986).

The legislature has also greatly expanded the scope of covered disputes by eliminating from all the included statutes their limit to coverage of only cases where damages are pled of \$10,000.00 or less. As a result, all actions arising out of public works contracts in which public entities are parties retain a role for RCW 39.04.240 to encourage settlements regardless of the complexity, the number of parties or the amounts of money pled.

Grudgingly, the District accepts the conclusion of Nowicki and NOW being prevailing parties, but denies all responsibility to pay their fees as ordered. Its basis for doing so is that neither a public works contract is directly involved nor is the District a losing named Plaintiff as is Eastwood. RP 10/30/09, p.8, ln.20 to p.9, ln.4; p.12, lns. 18-22.

Here is the colloquy between District’s counsel and the trial court laying this argument out:

THE COURT: **You’re saying it’s not a public contract, so they don’t get attorney’s fees**, is what –

MR. FRANKLIN: I don't believe they're entitled. If you look at the agreements that are between the district and the Nowicki entity, before they sold their assets to NOW, **that is a Consultant Agreement. It is a stand-alone agreement as to a series of services** performed by Nowicki in their consulting arena.

(RP 10/30/09, p.21, lns.11-16; emphasis added.)

THE COURT: Counsel, **this arises out of a public works contract.**

MR. FRANKLIN: **I don't dispute that there was a public works effort that went forth at the Foss High School.** Nobody disputes the fact that Garco, through a public bidding process, was awarded the right to do the construction work related to design prepared by another architecture firm. That is all a true statement. However, **they're asking specifically for attorney's fees under a statute that defines a public contract.**

(*Id.* at p.23, ln.22 to p.24, ln.6; emphasis added.)

THE COURT:...**The whole thing arises out of the circumstances surrounding the work that the district wanted done, doesn't it?**

MR. FRANKLIN: **It does not, Your Honor. There is no contract that is a public – a qualifying public contract, whatever way we would like to say it, that is the foundation upon which a claim for attorney's fees under 39.04 can be had. If the Court disagrees with me, I will respect your decision. That decision relates entirely as to EEI. The school district has not proceeded against these two defendants...So, the district has no exposure, whatsoever, independent of EEI's responsibility to these two clients [Defendants].** If they are unable to recover or have some concern about that, they're going to have to pursue that downstream, or pursue their third and fourth party claims. **There has not been a**

finding against the district. There has been a finding against EEI.

(*Id.* at p.24, ln.16 to p.25, ln.1 & p.25, ln.7 to ln.13; emphasis added.)

Counsel for Nowicki commented to the affect that the District was indicating an acceptance of the statute having applicability only had the District, instead of Eastwood, been Plaintiff. However, the District's counsel denied this was true. He asserted there still would be no obligation under the statute for the District to pay Defendants' attorneys' fees and costs. Here is the exchange:

MR. HUDSON: I think it is helpful just to see how this has gone, because **I think counsel is stating that, if the District had brought the claims themselves, then Nowicki would be entitled to attorney fees against the District.**

MR. FRANKLIN: I'm not saying any such thing. **The same arguments in terms of entitlement remain, which is Mr. Hudson needs to establish that the contracts upon which the claims by EEI were brought against Nowicki and NOW were public contracts.** I've yet to see him say that the District-Nowicki Consultant Agreement is a public contract, or that the Settlement Agreement that was reached between the District, Garco, and EEI, is a public contract. They're not.

If he gets over the public contract hurdle, you then get into the obligation to determine whether or not the fees are reasonable or not.

THE COURT: You're saying it's not a public contract, so they don't get attorneys' fees, is what --

MR. FRANKLIN: **I don't believe they're entitled.** If you look at the agreements that are between the District and the Nowicki entity, before they sold their assets to NOW, that is Consultant Agreement. It is a stand-alone agreement as to a series of services performed by Nowicki in their consulting arena.

THE COURT: But, isn't it true that this whole thing is because of the School District?

MR. FRANKLIN: The whole thing is because of the School District?

THE COURT: Mm-hm (indicating affirmatively).

MR. FRANKLIN: I'm not sure exactly what the court means. **The School District did, in fact, assign claims to EEI, however, the District is not the Plaintiff. If you award fees against EEI it is their sole responsibility to address those fees,** right?

THE COURT: **Aren't you saying that I can't [award fees to the defendants] because it is not a public contract? Is that what you are saying?**

MR. FRANKLIN: **That's true.** I don't want to re-argue it. **I don't think they're entitled to attorney's fees other than through the settlement agreement or the Consultant Agreement. I believe the Consultant Agreement doesn't award attorney's fees. The settlement agreement clearly does not award attorney's fees.**

THE COURT: **And it's not a public contract.**

MR. FRANKLIN: **Yes, sir, that's true.**

RP 10/30/09, p.20, ln.17 to p.22, ln.12 (emphasis added).

Mr. Franklin's argument is based on an interpretation of the statute reflective of a legislative policy that gives public entities a free hand in how best to go about settling disputes involving public works contracts. For this reason he speaks of the District's Settlement Agreement as being exactly in step with what the legislature wants accomplished. App.Br.p27.

In other words, the legislative policy argued for by the District legitimizes "protracted litigation" as long as RCW 39.04.240 works as an instrument to settle cases in a manner to let public entities avoid trial. Mr. Franklin contends if RCW 39.04.240 is interpreted as requiring the District pay Nowicki and NOW's attorney fees as ordered, then the District, given an opportunity to revisit its settlement process, would have been deterred from assigning claims to Eastwood as it did. *Id.*

Overlooked by the District is the fact that legislative policy as currently held opposes these kinds of settlements because of the encouragement they give to "protracted litigation". *McGuire* at 756. Had the assignment of claims been left out of the Settlement Agreement Eastwood could not have sued Nowicki due to there being no privity of contract. Also the assignment, having been agreed upon in the mediation process after Mr. Simons was sent home, constitutes a breach of the District's prelitigation requirement to have all consultants, if they are

going to consider as being responsible, involved in the mediation process with authority to settle. §4.4.2

There is an unfortunate irony about the District's settlement because rather than resolving the issues in the settled lawsuit, it merely transferred the same unresolved issues over to Eastwood's next lawsuit against Nowicki. Standing in the shoes of the District, Eastwood once again needed to prove monies were owed by the District to itself and Garco, otherwise it would be barred from requesting indemnification. *Moen Co. v. Island Steel*, 120 Wn.2d 745, 763-764, 912 P.2d 472 (1996). And the untried District's defenses became the surprise burden placed on the shoulders Nowicki/NOW, consultants to the District and for whom the District itself had no claims against. Accordingly, the District also is supporting a policy change that will discourage specialized asbestos inspection firms, such as Nowicki, often needed by School Districts, from ever wanting to serve as consultants to the District or possibly any other public entity. CP 1976-2332.

By taking Nowicki and NOW out of the mediation process, the District left its consultants less prepared than Eastwood to pick up the lawsuit the District chose to abandon. By becoming an assignor of claims the District was no longer in a position to assist Nowicki with even such

basic information as confirming the lack of any waiver by the District of its requirements for settling claim disputes.

Summarizing the effect of the District calling the settlement agreement a private contract is to say it worked like a virus, by carrying forward the issues in one lawsuit to another. The other private contracts identified by the District are the several Consultant Agreements. Although not necessarily acting like a virus, these contract rights assigned to Eastwood provided nothing but a ticket to a no good ending. As the trial court held in the summary judgment, the hold harmless or indemnification provision in every Consultant Agreement, denies Eastwood, just as it would have the District, indemnification rights for the economic losses Eastwood has sought to recover.¹

Their point remains one more consequence of the District's policy argument to review. In a nutshell, the District's positions with highlighting given for the next topic reads:

Awarding fees against the District in this instance would discourage settlements involving public entities. Settlements such as the District-EEI agreement would be impossible because the District would incur potential liability for claims it had validly assigned to a third party,

¹ The District wants this holding reviewed. In response, Nowicki hereby adopts by reference its arguments addressing this issue and incorporates also the arguments on the same issue made for the District by Stewart Sokol. These were made in conjunction with Nowicki's third motion for summary judgment. CP 375-379; 354-386.

and over which it had no further control. **The legislative intent of RCW 39.04.240 is not served by allowing private parties to implead a public body solely for the purpose of securing attorney fees.**

App.Br. p.27. (Emphasis Added)

The District argues for a legislative mandate giving public entities a free hand in settling public works contract disputes. But it has forgotten that public entities are not always the prevailing parties and that the legislature also wants the statute to be available to parties other than public entities. *Coluccio v. King County* 136 Wn. App. 751, 779-780, 150 P.3d 1147 (2007). So what dire consequence is the District foretelling by saying Nowicki's interpretation of RCW 39.04.240 violates legislative intent by allowing "private parties to implead a public body solely for the purpose of securing attorney fees"? *Id.*

First, the comment does not describe Eastwood's lawsuit here against Nowicki/NOW. It is true the District was impleaded into this case but not to address RCW 39.04.240 but rather instead for the reason of requesting attorney fees based on equitable principles. On the other hand, the comment is somewhat descriptive of the first lawsuit. There the District was impleaded by Garco with a request to be paid attorney fees as allowed by statute although RCW 39.04.240 is not identified. CP 1853-

1859. In the District's response, it too includes a request for attorney fees but mentions specifically RCW 39.04.240. CP 1868.

It's possible, as Mr. Franklin warns, that Garco impleaded the District "solely for the purpose of securing attorney fees". More likely, however, Garco was concerned about the consequences to itself in defending against Eastwood's claim based upon a non responsive bid it had mistakenly let become a provision in the subcontract. So it decided to involve the District and hopefully get a settlement where the District paid Eastwood and Garco in the process collects an administrative over-ride charge. On the other hand, Garco may have felt Eastwood really had a legitimate claim that needed a fair hearing. But this third reason seems unlikely given Garco's harsh comments to Eastwood by letter August 24, 2005 pointing out the likelihood of the claim being rejected because of non compliance with the District's claim dispute procedures. CP 1765-1768.

But whatever Garco's motive might have been the record shows the District had the upper hand regarding the outcome and getting paid attorney fees. The District, as Nowicki proved, knew or should have known it had an absolute defense because of Garco's non-compliance with the District's claim dispute procedures. *Absher Const. v. Kent School Dist*, 77 Wn. App. 137, 890 P.2d 1071 (1995); *American Safety Casualty Ins.*

Co. v. City of Olympia, 162 Wn.2d 762, 174 P.3d 43 (2007); *Mike M. Johnson, Inc. v. City of Spokane* 150 Wn. 2d 375, 78 P.3d 161 (2003) and *Nelse Mortensen v. Group Health* 17 Wn. App. 703, 766 P.2d 560 (1977) affirmed on appeal 90 Wn. 2d 843, 586 P.2d 469 (1978).

In other words, by going to trial or prevailing by summary motion, either way, the District would have been a winning defendant with Garco a loosing plaintiff receiving nothing. Like Nowicki and NOW in this litigation, the District would have been entitled to attorney fees under RCW 39.04.240.

In hindsight, it can be seen that the District's decision of settling as it did with Eastwood was most likely a clever way of concluding the lawsuit to avoid the expense of trial. Possibly the District found it too tempting not to take advantage of Eastwood's contemptuous attitude towards the District's consultants.

In the best light, the District's argument on the statutory interpretation to be given to RCW 39.04.240 hints at no more than an ambiguity in the statutory language. Accordingly, the court must interpret the statute in support of the legislative intent to encourage early settlements so as to avoid "protracted litigation". *Brand* 139 Wn.2d at 667; 139 Wn.2d at 667; *Lowery* 43 Wn. app. at 752.

Had the District properly analyzed RCW 39.04.240, it would have applied the ordinary meaning commonly given to the term “arising out of” and discuss the impact the term has interpreting the language used elsewhere in the statute. Most certainly it would not have ignored the term as it has done in its opening brief. App.Br.p.16-19. In Washington this term is interpreted broadly. For example, and *Berschauer/Phillips v. Seattle School Dist.*, 124 Wn.2d 816, 881 P.2d 986 (1994), litigation similar to here, although more complex owing to the number of parties involved, is introduced by the Supreme Court near the opening of its opinion as follows:

This lawsuit arises out of a construction project for renovation work and new construction at the Lawton Elementary School...

Id. at 818 (emphasis added).

Berschauer, like the first lawsuit in this action which Eastwood initiated and later settled, involved a school district, a general contractor, a public works contract, consultants (one an architect), and several subcontractors. Similarly, the district settled with the general contractor by assigning not to a subcontractor as here, but to the general contractor, various claims against subcontractors, including one where it had apparently no privity of contract with the company whose claim it assigned. *Id.* at 819-820.

There were two main issues in *Berschauer*. The first was whether or not the economic loss rule applied and the second whether or not the assignment of claims by the District to settle the lawsuit violated public policy. The court held the economic loss rule applied and that the assignment of claims was supported by public policy and so returned the case for trial under the same cause number but with the parties newly rearranged due to the assignment of claims. *Id.* at 820.

There is no later appellate record to learn to what extent settlement may have taken place because of RCW 39.04.240, but, as mentioned, the opening line by the Court of Appeals, coming shortly after the enactment of RCW 39.04.240, does describe the suit as one which **“arises out of a construction project ...”** *Id.* at 818 (emphasis added). Certainly with this language in the case, it would be difficult for someone to make the argument, as the District does here, that the various assignment of claims by the District constitute private contracts preventing any of the parties from having an opportunity to use the statute in hopes of encouraging settlements.

Four times in *Fluor Enterprises v. Walter Construction*, 141 Wn. App. 761, 172 P.3d 368 (2007), language similar to the term “action arising out of” is used to describe various disputes between multiple parties with numerous claims and where several claims were consolidated

to form a highly complex lawsuit. There, the public works contract was for a project costing \$127,000,000.00 and the opinion summarizes the overall nature of the action as one “**arising out** of a construction dispute”. *Id.*, at 762 (emphasis added).

Berschauer and *Fluor* represent the kind of cases the legislature would have had in mind when adopting RCW 39.04.240. The statutory language “an action arising out of a public works contract” fits well the construction industry where litigation is expensive, complex, and ideal for having RCW 39.04.240 available to encourage settlements among all parties.

In *Ball-Foster v. Giovanelli*, 163 Wn.2d 133, 140-141, 177 P.3d 692 (2008), the Supreme Court describes the term “arising out of” as being similar but broader than the term “but for”, both being phrases used as a test for analyzing the scope of coverage in workman’s compensation claims. In *Toll Bridge Authority v. Aetna Insurance*, 54 Wn. App. 400, 773 P.2d 906 (1989), the court says “arising out of” is a term used to describe an action “**originating from, having its origin in, growing out of, or flowing from.**” *Id.*, at 404 (Emphasis Added). Additionally, this term is “**unambiguous**” with a meaning broader than “caused by” or “resulting from.” *Id.* (emphasis added).

RCW 39.04.240 should equally apply to all aspects of complex public works contract litigation, all parties involved, and all lawsuits beget by an assignment of claims from a public entity, including a school district. In *Coluccio Const.*, 136 Wn. App. 751, the attorney fees the county had to pay because it was the losing party included not only the fees incurred by the prevailing party but the fees incurred by a subcontractor not a party to the litigation. It was this decision the county appealed and lost. *Id.*, at 779.

Similarly the District's arguments for nullifying Nowicki's and NOW's rights to attorney fees under the statute because the Settlement Agreement and the Consultant Agreements are private contracts and not public works contracts. However, the language of RCW 39.04.240 reads with a much broader interpretation because of the term "an action arising out of a public works contract in which the [District]... is a party".

Furthermore, private contracts do not override fee statutes when there is an overriding public interest to be protected. *Herzog Aluminum v. General American Window, Corp.*, 39 Wn. App.188, 692 P.2d, 867 (1984); *Hangman Ridge v. Safeco Title*, 105 Wn.2d 778, 719 P.2d 531 (1986). For RCW 39.04.240 the public interest is one of encouraging settlements to avoid "protracted litigation". *Lowery* 43 Wn. App. At 752. It is this purpose that must be given effect by the court in its interpretation

of the statute. *Lakeside Industries*, 119 Wn. App. 896. Just as important, the statute is not to be read so narrowly as to nullify legislative intent.

Osborn v. Mason County, 122 Wn. App. 823, 831, 95 P.3d 1257 (2004).

B. RCW 39.04.240 prohibits the District's request for allowing its assignment of claims to effectuate a waiver of Nowicki's right to collect attorney fees from the District.

RCW 39.04.240, as mentioned, has an inherent purpose much different than the purpose pressed here by the District. Using plain language with unmixed terms, this public interest is protected as follows:

(2) **The rights provided for under this section may not be waived by the parties to a public works contract** that is entered into on or after June 11, 1992, and a provision in such a contract that provides for waiver of these rights is void as against public policy. However, this subsection shall not be construed as prohibiting the parties from mutually agreeing to a clause in a public works contract that requires submission of a dispute arising under the contract to arbitration.

(RCW 39.04.240 (emphasis added).)

Although the District denies any waiver on its part of Nowicki's and NOW's rights, it nevertheless argues to the same effect.

App.Br.pp.35-36. On one hand, the District says the assignment merely transfers all rights and burdens that the District had to Eastwood. *Id.* On the other hand, it argues that as a result of the assignment, Nowicki and NOW have no rights to collect attorney fees against the District but only against Eastwood. *Id.*

Assignments of claims that violate public policy are void.

Berschauer/Phillips v. Seattle School Dist at 829; *Kommavongsa v. Haskell*, 149 Wn.2d 288, 299, 67 P.3d 1068 (2003). Accordingly, as much as the approved assignment of claims to Eastwood is the law of this case, there is no holding that the assignment of claims overrides the public policy asserted in the statute. The District says Nowicki, as a result of the assignment, cannot claim its right to collect fees against the District, but this is an argument saying that the assignment of claims can effectuate a waiver of Nowicki's rights in this regard without Nowicki's approval. This is not true. Waiver is a unilateral right which only Nowicki has the right to waive. *Pedrini v. Mid-City Trailer Depot*, 1 Wn. App. 56, 59, 459 P.2d 76 (1969); *Birkeland v. Corbett*, 51 Wn. 2d 554, 565, 320 P.2d 653 (1958).

In *Toste v. Durham & Bates Agencies*, 116 Wn. App. 516, 67 P.3d 506 (2003), this court held that a plaintiff seeking an opportunity for indemnification against a co-defendant in another lawsuit is barred from doing so when the claim is nothing more than a disguise to accomplish what the legislature has prohibited. In that case, the contribution plaintiff sought was barred by the Tort Reform Act implemented under RCW 4.22.040. Similarly, here the District is asking for an exception to a legislative mandate. It wants the court to permit a waiver of Nowicki's

rights against the District by allowing waiver to be included *ipso facto* within the scope of the District's assignment of claims to Eastwood. This is not the law. Accordingly, Nowicki asks the court to reject the District's argument for the reason public policy preempts any request by the District to subordinate public policy for its benefit.

In *Kommavongsa*, 149 Wn.2d 288, there is a relevant discussion on the waiver of rights. It comes up in the context of a case disallowing as a matter of public policy an assignment of malpractice claims by one's attorney to an adversary in the same litigation giving rise to the malpractice claim.

"Waiver" is discussed in relationship to a perspective advanced by Justice Brennan in his dissent to *Evans v. Jeff D.*, 475 U.S. 717, 743-66, 106 S. Ct. 1531, 89 L.Ed.2d 747 (1986). There he questioned whether or not it was appropriate for courts to routinely approve settlements favorable to an attorney's client when as a condition of the settlement, the attorney is required to waive rights to collect attorney fees from the other party. *Id.* at 299.

Justice Brennan was discussing something akin to a gun being held to the head of an attorney who otherwise refuses to sign a waiver. Here, the waiver, according to the District, can be accomplished without either Nowicki's knowledge or consent. CP 1613 pp.38-39

Ironically, even the District's Settlement Agreement reads as if anticipating the potential of the District having to pay attorney fees under RCW 39.04.240. First, it describes the assignment in language nearly as broad as the term "an action arising out of a public works contract"; It says the assigned claims are "related to Nowicki's performance on the project" (emphasis added).

Furthermore, the District's assignment of claims is not absolute since it agrees to having a continuing responsibility for paying any of Nowicki's fees still owed on work performed for the District. But most significant is the commitment required of Eastwood to hold the District harmless from any expenses that might fall upon the District as a result of the lawsuit against Nowicki. Most probable of such expenses would be having to pay Nowicki's attorney fees under RCW 39.04.240; the statute pled by the District in that action for its own benefit.

The District is misstating a fact when it disavows benefitting in any way from this litigation. App.Br.p.19. What it wants it did not receive, namely Eastwood's success so as to justify the risk taken by the District in making the assignment of claims to avoid legal expenses of a trial. Instead the District is having to bear such trial expenses anyway because Eastwood lost. Had Eastwood won, then the *Coluccio Const.* case, where attorney fees were granted for the benefit of a subcontractor not even a

party to the litigation, would have been authority for the District to be asking at this time for attorney fees they may have paid to K&L. 136 Wn. App. at 779-780.

The District cites *American Safety Casualty Ins. Co. v. Olympia*, 162 Wn.2d 762, 174 P.3d 43 (2007), for holding that fees cannot be obtained under RCW 39.04.240 against an assignor, but instead only against the assignee. However, no such holding is in that case. It is true fees were awarded against the assignee of claims, but the assignee, an insurance company, appears solvent, whereas the facts indicate the general contractor, assignor, was not. *Id.* 773 fn.4. No indication is given anywhere in the case to support an assertion that Olympia had concerns about whether it would be paid by the assignee or that the City had asked for but was turned down by the court over a request for attorney fees against the assignor.

In summary, the District, by its waiver of fees, sought an easy end to the earlier litigation by outsourcing the lawsuit to Eastwood, and in the process make Nowicki a scapegoat for its failure to properly bring the earlier lawsuit to a proper conclusion by way of a summary judgment, as did Nowicki

C. The District's responsibility to pay Nowicki's fees is not negated by the District's status as a Third Party Defendant.

The District is not satisfied with just the assertion that Eastwood, as a result of the assignment of claims, is the only party Nowicki can hold responsible to pay fees under RCW 39.04.240. It goes beyond this argument to say it owes no fees because it is not a named losing plaintiff like Eastwood but only a third party defendant on claims that have not yet been tried. App.Br.pp.21-23.

However, the question is not whether the District is a Third Party Defendant, but whether the District is without exposure to the responsibilities of RCW 39.04.240 by not being a named Plaintiff along with Eastwood? The answer to this question is no.

In *American Seamount v. Science Associates*, 61 Wn. App. 793, 812 P.2d 505 (1991). Third party defendants, as here, stood to benefit had the case been won by the plaintiff. Before the lawsuit began these defendants had the opportunity, as the District did here, to bring the lawsuit themselves against the defendants who ultimately prevailed. This is one of the reasons the court held that those third party defendants were equally responsible with the plaintiffs for the attorney fees allowed under the contracts litigated in that lawsuit. *Id.*797-800.

The District let Eastwood bring its lawsuit. Had Eastwood won the District would have benefitted by virtue of avoiding trial of the first action and possibly also by collecting attorney fees under the holding in *Coluccio*

Const. at 779-780. Just as the third party defendants were held coequal to pay attorney fees in *American Seamount*, so should the District be held coequal to pay the attorney fees that have been awarded to Nowicki and NOW.

The court also might consider adding the District as either a substitute party under RAP 3.2(a) or make to make the District an additional party under CR 17(a) and 19(a).

D. The District's Appeal of Decisions of matters regarding third and fourth party claims are moot and not at this time ripe for review.

Nowicki's and NOW's arguments under their Third and Fourth Party Complaints are moot by virtue of the final decision entered by the trial court. These are only contingent claims for attorney fees since the trial court granted fees under RCW 39.04.240. Also, both involve factual disputes which have yet to be tried. Accordingly, a review of the legality of these claims at this time is not ripe for doing so. *Griffin v. Board of Health*, 165 Wn.2d.50, 63,196 P.3d.141 (2008); See also *Yuan v. Chow*, 96 Wn. App. 909, 982 P.2d. 647 (1999).

VII. ATTORNEY FEES

A. The District improperly asks for attorney fees on appeal.

As discussed in footnote 1 earlier, there is no right for the District to claim attorney fees under its hold harmless provision because it is not

applicable to cases, as here, where the losses are all economic as apposed to damages against persons or property. Furthermore, the provision itself makes no statement about attorney fees.

What surprise is the District's request for attorney fees under RCW 39.04.240. If this statute applies at all to this case, as it must for the District to make this argument, then Nowicki prevails on this appeal. Otherwise, if RCW 39.04.240 does not apply then the statute provides no basis for any party's request to be awarded attorney fees.

Finally, the District incorrectly claims a right to attorney fees under RCW 4.84.330 for reason of hoping to become a prevailing party where the losing party will have requested a right to fees which have been denied because the prevailing party proved "that no such right exists". App.Br.p.49. Instead a correct statement of the rule of "mutuality of remedy" which *Herzog Aluminum* and *Yuan* espouse (two cases cited by the District as authority) is to the effect that a prevailing party will be granted attorney fees where there is a one-way indemnification clause, as in this case, but which explicitly allows indemnification of attorney fees. Here the District's hold harmless clause makes no provision for recovery

of attorney fees.²

B. Nowicki requests attorney fees under RAP 18.1.

Nowicki, if the prevailing party, hereby requests attorney fees and costs pursuant to RAP 18.1 on three separate bases as follows:

Because Nowicki was granted attorney fees under RCW 39.04.240 at the trial level this statute again grants Nowicki attorney fees on appeal. *Absher Const.* at 149.

Nowicki is also entitled to attorney fees under RAP 18.9 as a result of the District having brought a frivolous appeal in asking the court to reconsider a final judgment, which was not timely appealed. This is a situation in full compliance with the following definition of frivolous:

There are no debatable issues on which reasonable minds can differ, when the appeal is so devoid of merit that there is no reasonable possibility of reversal, or when the appellant fails to address the basis of the lower court's decision." *In Re the Settlement/Guardianship of AGM and LLM* at 82-83.

Nowicki request attorney fees also on an equitable basis pursuant to *Central Refrigeration v. Barbee* 133 Wn.2d 509, 946 P.2d 760 (1997) and the "ABC" rule succinctly summarized in *Herzog Aluminum* 39 Wn.

² The District obtained the dismissal of Nowicki's claim for attorney fees based on the hold harmless provision and RCW 4.84.330. It argued correctly in saying Nowicki was not entitled to such fees because the hold harmless provision does not specifically mention attorney fees. CP 828 ln.3-8.

App. at 197 fn.1. The supporting undisputed facts are: (1) the District wrongly assigned claims to Eastwood in violation of §4.4.2 of its general conditions; (2) the assignment of claims caused Eastwood to sue Nowicki; and (3) Eastwood did not participate in the District's decision to assign claims but only agreed to accept the District's offer.

VIII. CONCLUSION

Nowicki's motion to dismiss must be granted. There is no court jurisdiction to review the final judgment entered on September 18, 2009 for any reason, including the basis for awarding attorney fees, since there was no timely appeal. The record also reflects no abuse of the trial court's discretion when calculating the amount of fees ordered on October 30, 2009.

Even were the merits of this appeal reviewable, dismissal would still be required. Nowicki's attorney fees are a mandatory grant under RCW 39.04.240 in an action which has, like here, arisen out of a public works contract in which a public entity, such as the District, is a party. The District's contention that by having assigned its claims against Nowicki to another entity (Eastwood) it transferred the statutory obligation to pay Nowicki's fees is prohibited.

This court held in *Toste v. Durham & Bates Agencies* that it will not permit a party to escape a legislative mandate by merely disguising a

request to the court as something other than what the legislature forbids. Nowicki has not waived its rights to collect attorney fees against the District and RCW 39.04.240 voids the District's unilateral effort to do so.

The District's argument of this no longer being an action arising out of a public works contract, but an action, due to the assignment of claims, arising out of a Settlement Agreement and the District's own Consultant Agreement signed by Nowicki, fails for reason of being inconsistent with the language of RCW 39.04.240. The same holds true for its other argument of only having liability when it is a named losing Plaintiff, rather than a Third Party Defendant (as here). Furthermore, Third Party Defendants who had the choice of being Plaintiff remain responsible to pay fees when the party they allowed to become Plaintiff loses and where they sought a benefit by the Plaintiff winning. *American Seamount v. Science Associates*.

Nowicki asks the Court to dismiss the District's appeal and to be granted attorney fees and costs as requested herein.

Respectfully submitted this 2nd day of June, 2010.

SMITH ALLING LANE, P.S.

By: 
EDWARD G. HUDSON, WSB #714
Of Attorneys for Respondent
Nowicki & Associates, Inc.

10 JUN -2 PM 2:26

STATE OF WASHINGTON

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2010, I served a true and correct copy of the Brief of Respondent Nowicki & Associates, Inc. Including Motion to Dismiss for Lack of Jurisdiction to the Court of Appeals, Division II, and upon counsel of record, via the methods noted below, properly addressed as follows:

Matthew J. Segal
K&L Gates, LLP
925 Fourth Ave, #2900
Seattle, WA 98104-1158
Attorney for Defendant/Appellant
District
206-623-7580 Facsimile

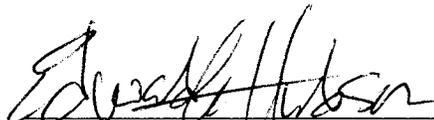
- Hand Delivered
- U.S. Mail (first-class, postage prepaid)
- Overnight Mail
- Facsimile
- Email

Justin Bristol
Law Offices of Justin Bristol
8235 So. Park Ave., PO Box 12053
Tacoma, WA 98412-0053
Attorney for Defendant/Respondent
NOW

- Hand Delivered
- U.S. Mail (first-class, postage prepaid)
- Overnight Mail
- Facsimile
- Email

Eastwood Enterprises, Inc.
c/o Misko Maynard
6545 Troon Lane
Olympia, WA 98501
Plaintiff Pro Se

- Hand Delivered
- U.S. Mail (first-class, postage prepaid)
- Overnight Mail
- Facsimile
- Email



Edward G. Hudson

APPENDIX I



07-2-06239-0 33259828 NACA 11-24-09

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Hon. Frederick W. Fleming

FILED
IN COUNTY CLERK'S OFFICE

A.M. NOV 24 2009 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

EASTWOOD ENTERPRISES, INC., an
Oregon corporation,

Plaintiff,

v.

NOWICKI & ASSOCIATES, INC., a
Washington corporation; NOW
ENVIRONMENTAL SERVICES, INC.,
d/b/a NOWICKI ENVIRONMENTAL, a
Washington corporation,

Defendants.

NOWICKI & ASSOCIATES, INC., a
Washington corporation,

Third Party Plaintiff,

v.

TACOMA SCHOOL DISTRICT NO. 10,
a Washington School District,

Third Party Defendant.

No. 07-2-06239-0

NOTICE OF APPEAL TO
DIVISION II OF THE
WASHINGTON STATE
COURT OF APPEALS

CP 775

ORIGINAL

1 Third Party Defendant, Tacoma School District No. 10 ("District") files this
 2 Notice of Appeal. Plaintiff, EASTWOOD ENTERPRISES, INC., is represented by Tyler
 3 Storti and Thomas Larkin of Stewart Sokol & Gray, LLC, located at 2300 SW First
 4 Avenue, Suite 200, Portland, Oregon 97201, and Defendant and Third Party Plaintiff,
 5 NOWICKI & ASSOCIATES, INC., is represented by Edward Greely Hudson of Smith
 6 Alling Lane, P.S., located at 1102 Broadway Plaza, #403, Tacoma, Washington 98402,
 7 and Defendant and Fourth Party Plaintiff, NOW ENVIRONMENTAL SERVICES, INC.
 8 is represented by Justin Bristol, located at 8235 South Park Avenue, P.O. Box 12053,
 9 Tacoma, WA 98412.0053.

10 The District seeks review in Division II of the Washington State Court of Appeals
 11 of the order and final judgment entered on October 30, 2009 (entitled "Order Granting
 12 Defendant Nowicki & Associates, Inc., An Award of Attorney Fees And Costs Against
 13 Plaintiff Eastwood Enterprises, Inc., And Third Party Defendant Tacoma School District
 14 No. 10"). The District further seeks review of any and all findings and rulings embodied
 15 within the final judgment, or prejudicially affecting the same, including but not
 16 necessarily limited to:

- 17 1) Order Granting Defendant Nowicki & Associates, Inc.'s Third Motion for
- 18 Summary Judgment, dated September 18, 2009;
- 19 2) Order Regarding Attorney Fees And Costs Awarded to Now
- 20 Environmental, Inc., dated October 30, 2009.

21 Copies of these Orders are attached to this Notice in Appendix A.

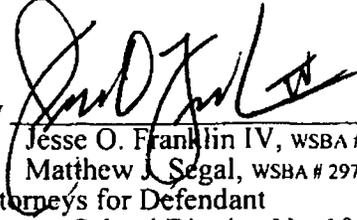
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CP 776

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DATED this 24th day of November, 2009.

K&L GATES LLP

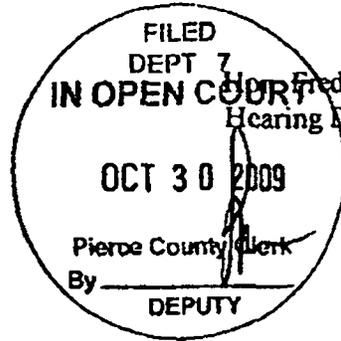
By 

Jesse O. Franklin IV, WSBA # 13755
Matthew J. Segal, WSBA # 29797
Attorneys for Defendant
Tacoma School District, No. 10

CP777

APPENDIX A

CP 779



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

EASTWOOD ENTERPRISES, INC., an
Oregon corporation,
Plaintiff,

v.

NOWICKI & ASSOCIATES, INC., a
Washington corporation; NOW
ENVIRONMENTAL SERVICES, INC.,
d/b/a NOWICKI ENVIRONMENTAL, a
Washington corporation,
Defendants.

No. 07-2-06239-0

ORDER GRANTING DEFENDANT
NOWICKI & ASSOCIATES, INC. AN
AWARD OF ATTORNEY FEES AND
COSTS AGAINST PLAINTIFF
EASTWOOD ENTERPRISES, INC. AND
THIRD PARTY DEFENDANT TACOMA
SCHOOL DISTRICT NO. 10

NOWICKI & ASSOCIATES, INC., a
Washington corporation,
Third Party Plaintiff,

v.

TACOMA SCHOOL DISTRICT NO. 10, a
Washington School District,
Third Party Defendant.

NOW ENVIRONMENTAL SERVICES,
INC. d/b/a NOWICKI ENVIRONMENTAL,
a Washington corporation;
Fourth Party Plaintiff,

v.

TACOMA SCHOOL DISTRICT NO. 10, a
Washington school district;
Fourth Party Defendant.

CP 779

ORDER GRANTING DEFENDANT NOWICKI &
ASSOCIATES, INC. AN AWARD OF ATTORNEY FEES
AND COSTS - Page 1

Smith
Alling
Lane

A Professional Services Corporation
Attorneys at Law

1102 Broadway Plaza, #403
Tacoma, Washington 98402
Tacoma: (253) 627-1091
Seattle: (425) 251-5938
Facsimile: (253) 627-0123

1 THIS MATTER having come before the above-entitled court upon Defendant
2 Nowicki & Associates, Inc.'s motion for attorney fees and costs against Plaintiff Eastwood
3 Enterprises, Inc. and Third Party Defendant Tacoma School District No. 10 following the
4 court's granting Nowicki & Associates, Inc.'s summary judgment motion on September 18,
5 2009 dismissing entirely Plaintiff's Complaint with prejudice and for this motion Plaintiff
6 Eastwood Enterprises, Inc., being represented by Tyler Storti, Third Party Defendant Tacoma
7 School District No. 10, being represented by Tyler Storti and Jesse O. Franklin IV, Defendant
8 NOW Environmental Services, Inc., being represented by Justin Bristol, and Defendant/Third
9 Party Plaintiff Nowicki & Associates, Inc. being represented by Edward G. Hudson, and the
10 court having heard oral argument of counsel and being apprised of Nowicki & Associates,
11 Inc.'s request that judgment be entered with the provision of there being no further reason for
12 delay as to the time for appeal, and the court being fully advised in the premises, and having
13 reviewed the records on file to include the following exhibits submitted with or in response to
14 this motion:

- 15 A. Declaration of Edward G. Hudson and the following exhibits attached thereto:
16 **Exhibit A** -- Attorney fees and cost records of Smith Alling Lane, P.S.
17 **Exhibit B** -- RCW 4.84.270.
18 **Exhibit C** -- RCW 39.04.240.
19 **Exhibit D** -- Page 55 from memorandum for Nowicki's second motion for
20 summary judgment, March 23, 2009, serving notice of RCW 39.04.240.
21 **Exhibit E** -- Nowicki's supplemental response to interrogatories dated June 17,
22 2009 serving notice of RCW 39.04.240.
23 **Exhibit F** -- The District's Settlement Agreement with Eastwood.

CP780
ORDER GRANTING DEFENDANT NOWICKI &
ASSOCIATES, INC. AN AWARD OF ATTORNEY FEES
AND COSTS - Page 2

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- 1 **Exhibit G** -- Page 2 from Robert Simons Declaration of March 5, 2009.
- 2 **Exhibit H** -- District's General Conditions §4.4.2.1 and .2 (Claim 07641).
- 3 **Exhibit I** -- Pages 38-40 from Peter Wall's deposition of June 11, 2008.
- 4 **Exhibit J** -- Pages 12-13 from Ron Nowicki's Declaration of May 15, 2008.
- 5 B. Declaration of Thomas F. Gallagher dated October 21, 2009, providing his
- 6 analysis and conclusions as to the reasonableness of Defendant Nowicki & Associates, Inc.'s
- 7 request for fees and costs.
- 8 C. Nowicki & Associates, Inc.'s Reply to Eastwood's and Tacoma School District
- 9 No. 10's Separate Responses to Nowicki's Motion for Award of Attorney Fees.
- 10 D. Supplemental Declaration of Edward G. Hudson providing an update since
- 11 October 20, 2009 of attorney fees and costs incurred by Defendant Nowicki & Associates,
- 12 Inc.
- 13 E. NOW Environmental Services, Inc.'s Motion for Attorney Fees and Costs.
- 14 F. Declaration of Justin Bristol supporting an attorney fee and cost request on
- 15 behalf of NOW Environmental Services, Inc. with attached itemization of these charges.
- 16 G. Eastwood Enterprises, Inc.'s Response to Defendant Nowicki & Associates,
- 17 Inc.'s and Defendant NOW's Motions for Award of Attorney Fees.
- 18 H. Tacoma School District No. 10's Response to Defendant Nowicki &
- 19 Associates, Inc.'s and Defendant NOW's Motions for Award of Attorney Fees.
- 20 I. Declaration of Tyler J. Storti Supporting Responses by Eastwood and Tacoma
- 21 School District No. 10, with attached Verbatim Report of motion proceedings on September
- 22 18, 2009.

CP 781

1 NOW, THEREFORE, the court finds that Defendant/Third Party Plaintiff Nowicki &
2 Associates, Inc. has proven the following:

3 1. Defendant Nowicki & Associates, Inc. gave timely, proper and actual notice of
4 its request for attorney fees pursuant to RCW 39.04.240.

5 2. Defendant Nowicki & Associates, Inc. never made any offer of settlement
6 pursuant to RCW 39.04.240.

7 3. Defendant NOW Environmental Services, Inc. argued in support of Nowicki &
8 Associates, Inc.'s summary motion but did not submit a separate summary motion.

9 4. The court's summary judgment dated September 18, 2009 gives final resolve
10 of all issues that would be presented if a trial were to take place on Plaintiff's claims alleged
11 against Defendant NOW Environmental Services, Inc.

12 5. Attorney Edward G. Hudson and his law firm have billed Nowicki &
13 Associates, Inc. as of October 20, 2009 on the basis of their normal hourly rates and actual
14 costs incurred with several stated discounts reducing the total amount. After such discounts,
15 the lead attorney's total billings were \$150,034.77, intern total billings were \$12,745.94,
16 associate total billings were \$847.50, and costs charged were \$10,594.93, for a total sum of
17 \$174,223.89.

18 6. The defense by Edward G. Hudson on behalf of Nowicki & Associates, Inc.
19 properly includes the work in preparing two summary motions denied by the court since each
20 addressed factual matters and legal issues to be resolved at trial.

21 7. ~~Nowicki & Associates, Inc. was excluded from final settlement negotiations in~~
22 ~~the lawsuit out of which eventually arose this proceeding.~~ As a result, the defense required
23 attention to all claims brought by the Plaintiff in this litigation as well as in the previous

CP 782
ORDER GRANTING DEFENDANT NOWICKI &
ASSOCIATES, INC. AN AWARD OF ATTORNEY FEES
AND COSTS - Page 4

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ECX 10
JFE

1 litigation. The copying of records was necessarily extensive in order to learn what the parties
2 throughout the first litigation deemed important. The court finds that the legal work necessary
3 to defend Nowicki was interrelated and could not be reasonably segregated in a manner to
4 determine what aspects of the defense were more important than others. The court finds that
5 all of the legal work done was reasonable in order to achieve the success that Nowicki did as a
6 matter of law.

7 8. Thomas F. Gallagher's analysis by declaration concludes that Smith Alling
8 Lane, P.S. billing for fees and costs as of October 20, 2009 are reasonable, necessary and not
9 duplicative, and the court hereby adopts Mr. Gallagher's findings as its own to include the
10 following specifics.

- 11 a. The complexity of the case successfully defended by Nowicki & Associates,
12 Inc. is substantial as shown by Plaintiff's First Amended Complaint's alleging
13 claims of contractual indemnity, common law/implied indemnity in fact,
14 contribution, breach of contract, and by Defendant Nowicki & Associates, Inc.
15 successful motion to add its Third Party Complaint against Tacoma School
16 District No. 10, and then having brought three summary motions (one based on
17 the Asbestos Hazardous Emergency Relief Act, another on an 858 page Claim
18 brought by Eastwood, and a third being the successful motion decided on
19 September 18, 2009), and having also defended successfully against Plaintiff's
20 summary motion regarding indemnity as to all but one issue as well as a threat
21 of CR 11 violations, arguments for dismissing summary motions under CR 56,
22 an exception claimed as reducing Plaintiff's burden of proof for reason of
23 Plaintiff being an indemnitee by way of an assignment of claims, quantum

1 meruit, the spearin doctrine, arguments against application of the economic
2 loss doctrine, breach of implied covenant of good faith and fair dealing, breach
3 of express and implied warranties, and a claim that Nowicki & Associates,
4 Inc.'s rights to attorney fees are to be denied for reason of the Tacoma School
5 District No. 10's assignment of claims to Eastwood Enterprises, Inc.
6 Defendant's counsel had to undertake trial preparation twice due to the
7 crowded court calendar and spend time before the second trial setting
8 preparing for the early stages of a trial before a judge pro tem, which had to be
9 cancelled owing to budget constraints of Pierce County.

10 b. 631.27 hours was reasonable for the work performed by Edward G. Hudson,
11 lead attorney, as of October 20, 2009, in light of the legal and factual issues
12 involved.

13 c. 202.35 hours was reasonable for the work performed by the legal interns of
14 Smith Alling Lane, P.S., as of October 20, 2009, in performing legal research
15 and preparing drafts of pleadings.

16 d. 4.70 hours was reasonable for the work performed by the associates of Smith
17 Alling Lane, P.S., as of October 20, 2009, in performing legal research and
18 preparing drafts of pleadings.

19 e. The records of Smith Alling Lane, P.S. provide appropriate documentation of
20 the hours worked, the type of work performed, and the persons performing
21 such work.

22 f. The work documented by Smith Alling Lane, P.S. is not duplicative or
23 wasteful.

CP 784

- 1 g. The rate of \$240.00 per hour was a reasonable rate for the charges of the lead
- 2 attorney's work and is comparable to charges of other lawyers who do similar
- 3 work with the same years of experience.
- 4 h. The rates of \$65.00 and \$80.00 per hour were reasonable rates for Smith Alling
- 5 Lane, P.S. to charge for work of its legal interns as billed.
- 6 i. The rates of \$175.00 and \$200.00 per hour were reasonable rates for Smith
- 7 Alling Lane, P.S. to charge for the work billed by its associates.
- 8 j. The Loadstar calculation for the lead attorney is \$240.00 times 631.27 hours
- 9 equals \$151,504.80.
- 10 k. Smith Alling Lane, P.S. discount at the time of billing for lead attorney work
- 11 of \$1,470.03 was appropriate.
- 12 l. The Loadstar calculation for the interns is \$65.00 (47.75 hrs.) and \$80.00
- 13 (154.60 hrs.) totaling 202.35 hours equals \$15,471.75.
- 14 m. Smith Alling Lane, P.S. discount at the time of billing for intern work of
- 15 \$2,725.06 was appropriate.
- 16 n. The Loadstar calculation for the associates is \$175.00 (3.70 hrs.) and \$200.00
- 17 (1.0 hr.) totaling 4.70 hours equals \$847.50.
- 18 o. The following chart summarizes the court's finding as to the reasonable
- 19 amounts for fees and costs charged by Smith Alling Lane, P.S. as of October
- 20 20, 2009:
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CP 785

Fees and Costs from 3/23/07 to 10/20/09

Atty/Cost	Rate	Hours	Fees	Discount	Total Billed
Ed Hudson	\$240.00	631.27	\$151,504.80	\$1,470.03	\$150,034.77
Intern 16	\$80.00	110.45	\$8,836.00	\$2,725.06	\$ 6,110.94
Intern 28	\$65/\$80	91.90	\$6,635.75		\$ 6,635.75
Associate 27	\$200.00	1.0	\$200.00		\$ 200.00
Associate 36	\$175.00	3.70	\$647.50		\$ 647.50
Expenses					\$ 5,480.22
Advances					\$ 5,114.71
TOTAL					\$174,223.89

9. Since the time of filing Defendant's motion for fees and costs through October 20, 2009, 11.9 hours of work has been performed by Edward G. Hudson, lead attorney for Nowicki & Associates, Inc. through 12:00 noon of October 29, 2009, and he anticipated another 1.5 hours to be spent in final preparation and oral argument before the court. The court finds these hours to be reasonable and appropriate to be valued at Mr. Hudson's usual hourly rate of \$240.00 an hour, for a total of \$2,856.00.

10. The Loadstar calculation for the additional hours worked by Edward Hudson total \$2,856.00. The court finds this amount to be reasonable and appropriate to add to the sum of \$174,223.89 as summarized in the chart above, thereby granting Nowicki & Associates, Inc. \$177,079.89 as reasonable reimbursement for attorney fees and costs incurred in this litigation.

11. The harm to Defendant Nowicki & Associates, Inc. is indivisible between Plaintiff and Third Party Defendant.

CP 786

ORDER GRANTING DEFENDANT NOWICKI & ASSOCIATES, INC. AN AWARD OF ATTORNEY FEES AND COSTS - Page 8

**Smith
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Lane**

*A Professional Services Corporation
Attorneys at Law*

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1 **BASED UPON THE ABOVE FINDINGS:**

2 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Defendant Nowicki
3 & Associates, Inc. is the prevailing party and therefore entitled to attorney fees and costs
4 made mandatory under RCW 39.04.240. It is Further

5 **ORDERED, ADJUDGED AND DECREED** that the assignment of claims by Tacoma
6 School District No. 10 to Plaintiff Eastwood Enterprises, Inc. does not eliminate, reduce, or
7 waive Defendant Nowicki & Associates, Inc.'s right to judgment for attorney fees against
8 Third Party Defendant Tacoma School District No. 10 pursuant to RCW 39.04.240. It is
9 Further

10 **ORDERED, ADJUDGED AND DECREED** that Nowicki & Associates, Inc. is hereby
11 awarded judgment against Plaintiff Eastwood Enterprises, Inc. and Third Party Defendant
12 Tacoma School District No. 10, jointly and severally, for legal fees totaling \$166,484.96 and
13 costs totaling \$10,594.93, for a total judgment of fees and costs of \$177,079.89. It is Further

14 **ORDERED, ADJUDGED AND DECREED** that this is a final judgment dismissing all
15 actions and proceedings against all Defendants, and disposing of all claims, and that there is
16 no just reason for delay of any appeal following entry of this judgment.

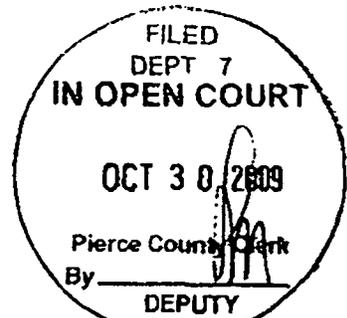
17 **DONE IN OPEN COURT** this 30th day of Oct., 2009.

[Handwritten Signature]
JUDGE/COMMISSIONER

18 Presented by:

19 SMITH ALLING LANE, P.S.

20 By: *[Handwritten Signature]*
21 EDWARD G. HUDSON, WSBA #00714
22 Of Attorneys for Defendant
23 Nowicki & Associates, Inc.



ORDER GRANTING DEFENDANT NOWICKI &
ASSOCIATES, INC. AN AWARD OF ATTORNEY FEES
AND COSTS - Page 9

Smith Alling Lane
A Professional Services Corporation
Attorneys at Law

1102 Broadway Plaza, #403
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CP 787

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Objections to Form and Content:
Approved as to form; Notice
of presentation waived:

STEWART SOKOL & GRAY, LLC

By *TL* WSBA #40341
THOMAS LARKIN, WSBA #24515
Attorneys for Eastwood Enterprises, Inc./
Tacoma School District No. 10

Approved as to form; Notice of
Presentation waived:

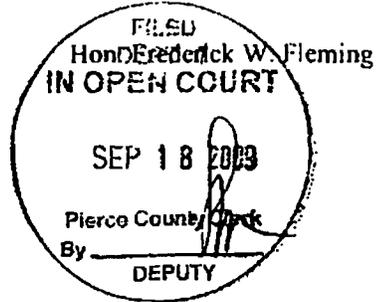
JB
JUSTIN BRISTOL, WSBA #29820
Attorney for Defendant NOW
Environmental Services, Inc.

OBJECTIONS TO FORM AND CONTENT:
Approved as to form; Notice
of presentation waived:

K&L GATES, LLP

By *JOF*
JESSE O. FRANKLIN IV, WSB #13755
Attorney for Tacoma School District 10

CP 788



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

EASTWOOD ENTERPRISES, INC., an
Oregon corporation,

Plaintiff,

v.

NOWICKI & ASSOCIATES, INC., a
Washington corporation; NOW
ENVIRONMENTAL SERVICES, INC.,
d/b/a NOWICKI ENVIRONMENTAL, a
Washington corporation,

Defendants.

NOWICKI & ASSOCIATES, INC., a
Washington corporation,

Third Party Plaintiff,

v.

TACOMA SCHOOL DISTRICT NO. 10, a
Washington School District,

Third Party Defendant.

No. 07-2-06239-0

ORDER GRANTING DEFENDANT
NOWICKI & ASSOCIATES, INC.'S THIRD
MOTION FOR SUMMARY JUDGMENT

THIS MATTER having come on for hearing before the above-entitled court on
September 11, 2009, with Plaintiff, Eastwood Enterprises, Inc., and Third Party Defendant,

ORDER GRANTING DEFENDANT NOWICKI &
ASSOCIATES, INC.'S THIRD MOTION FOR SUMMARY
JUDGMENT Page 1

ORIGINAL

*Smith
Alling
Lane*

A Professional Service Corporation
Attorneys at Law

1102 Broadway Plaza, #403
Tacoma, Washington 98402
Tacoma: (253) 627-1091
Seattle: (425) 251-5938
Facsimile: (253) 627-0123

CP 789

1 Tacoma School District #10, appearing by and through their attorney, Thomas Larkin.
 2 Defendant, NOW Environmental Services, Inc., appearing by and through its attorney, Justin
 3 Bristol, and Defendant/Third Party Plaintiff, Nowicki & Associates, Inc., appearing by and
 4 through its attorney, Edward G. Hudson, the court having heard oral argument of counsel, and
 5 being apprised of the attorney fee provision in RCW 39.04.240, and being fully advised in the
 6 premises, and having reviewed the records and pleadings on file, including the following
 7 additional exhibits submitted specifically for this motion:

- 8 1. Misko Maynard's Deposition of July 21, 2009;
- 9 2. Paul Reeves' Deposition of July 21, 2009, a continuation of his deposition
 10 taken May 28, 2008;
- 11 3. Nowicki & Associate, Inc.'s Third Motion for Summary Judgment;
- 12 4. Nowicki & Associate, Inc.'s Memorandum in Support of Third Motion for
 13 Summary Judgment;
- 14 5. Plaintiff's Eastwood's Response to Nowicki's Third Motion for Summary
 15 Judgment with supporting documents; and
- 16 6. Nowicki's Reply to Plaintiff's Response to Third Motion for Summary
 17 Judgment with supporting documents, i.e. copies of several exhibits previously filed with the
 18 court.

19 NOW, THEREFORE, the court finds that Defendant, Nowicki & Associates, Inc., has
 20 proven the following:

- 21 1. Eastwood is barred from claiming a right to indemnification as an assignee of
 22 claims from the District's "Hold Harmless" clause contained in all of the contracts it entered
 23 into with Nowicki & Associates, Inc. or NOW Environmental Services, Inc. for the reason

ORDER GRANTING DEFENDANT NOWICKI &
 ASSOCIATES, INC.'S THIRD MOTION FOR SUMMARY
 JUDGMENT - Page 2

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 Attorneys at Law

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 Tacoma, Washington 98402
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CP 790

1 that it is limited to negligent claims causing damage to persons or property and does not
2 include a right for Eastwood, Plaintiff and assignee herein, to be indemnified for economic
3 losses.

4 2. Tacoma School District No. 10 ("District") had no monetary obligation in the
5 lawsuit initiated by Eastwood Enterprises, Inc. ("Eastwood") under Pierce County Superior
6 Court Cause No. 05-2-14065-3 to make a payment to Garco Construction ("Garco") as the
7 result of a claim submitted by Eastwood, nor to pay Eastwood directly for the following
8 reasons:

9 (a) Eastwood understood the scope of work required by the District's hazardous
10 waste specifications but excluded out of its bid and it's Subcontract with Garco.
11 the removal of all asbestos, such as overspray, for which no estimates were
12 provided by the District.

13 (b) Eastwood, after being terminated by the District, submitted a claim for extra
14 work that did not comply procedurally with claim dispute process stated in the
15 General Conditions, and therefore the right to submit a claim was waived.

16 **BASED UPON THE ABOVE FINDINGS:**

17 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Plaintiff has
18 failed to prove that the monies it seeks by way of indemnification were originally paid
19 because of a legal obligation on the part of Tacoma School District No. 10 to do so.

20 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the "Hold
21 Harmless" clause on which Plaintiff relies to assert rights of indemnification does not permit
22 recovery by right of indemnification in this case because the language limits recovery to
23

CP 791

1 damages to persons and property caused by negligence and does not include recovery for
2 economic losses.

3 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Plaintiff's
4 Complaint is dismissed in its entirety with prejudice, and that Defendants are entitled to
5 reasonable attorney fees and costs pursuant to RCW 39.04.240.

6 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the amount of
7 attorney fees and costs to be placed into judgment against Plaintiff, Eastwood Enterprises,
8 Inc., and Third Party Defendant, Tacoma School District No. 10, shall be determined by the
9 court at a hearing to be held on October 2, 2009.

10 **DONE IN OPEN COURT** this 18 day of September, 2009.

[Signature]
JUDGE/COMMISSIONER

12 Presented by:
SMITH ALLING LANE, P.S.

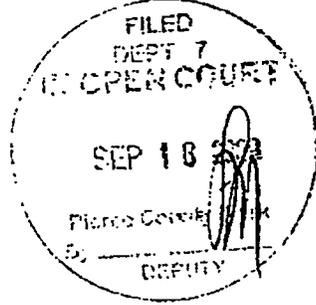
13 By *[Signature]*
14 EDWARD G. HUDSON, WSBA #00714
15 Of Attorneys for Defendant
Nowicki & Associates, Inc.

[Signature]
Judge

16 Approved as to form; Notice
17 of presentation waived:

18 STEWART SOKOL & GRAY, LLC

19 By *[Signature]* WSBA #40341
20 THOMAS LARKIN, WSBA #24515
Attorneys for Eastwood Enterprises, Inc. and
Tacoma School District No. 10



21 ~~McFERRAN BURNS & STOVALL~~

22 By *[Signature]*
23 JUSTIN BRISTOL, WSBA #29820
Attorneys for NOW Environmental Services, Inc.

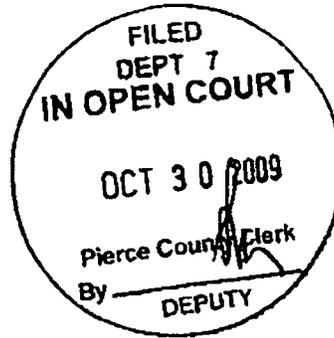
ORDER GRANTING DEFENDANT NOWICKI &
ASSOCIATES, INC.'S THIRD MOTION FOR SUMMARY
JUDGMENT - Page 4

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CP 792



IN THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

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EASTWOOD ENTERPRISES, INC., an Oregon corporation

Plaintiffs

vs.

NOWICKI & ASSOCIATES, INC., a Washington Corporation; NOW ENVIRONMENTAL SERVICES, INC., a Washington Corporation

Defendants

NOWICKI & ASSOCIATES, INC., a Washington Corporation

Third Party Plaintiff

vs.

TACOMA SCHOOL DISTRICT No. 10, a Washington School District

Third Party Defendant

NOW ENVIRONMENTAL SERVICES, INC., a Washington Corporation

Fourth Party Plaintiff

vs.

TACOMA SCHOOL DISTRICT No. 10, a Washington School District

Fourth Party Defendant

No. 07-2-06239-0

ORDER RE. ATTORNEY FEES AND COSTS AWARDED TO NOW ENVIRONMENTAL INC.

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The Court ordered an award of attorney fees and costs to Defendants in this action, pursuant to the Court's Order Granting Defendant Nowicki & Associates, Inc.'s Third Motion for Summary Judgment, filed in this action on September 18, 2009. *SJ Order at 4.* The said Summary Judgment order disposes of Plaintiff's complaint in its entirety. *Id.*

Both Defendants in this action, Nowicki & Associates, Inc. and NOW Environmental, Inc., thereafter moved for an award of attorney fees pursuant to declarations from the respective Defendants regarding attorney fees and costs incurred in this action, which is the matter currently before the Court. Plaintiff filed a response to both Defendants' motions, arguing that attorney fees and costs should not be awarded, and (alternatively) that fees requested by Defendants are excessive. ~~However, Plaintiff did not move for reconsideration of the Court's September 18, 2009, Summary Judgment Order.~~ Therefore, the award of attorney fees and costs stated in the said Order remains in effect, as Plaintiff failed to timely challenge the language of the Order.

JFK
[Handwritten signature]
[Handwritten initials]

Plaintiff failed to cite any specific instances of excessive fees and costs submitted by Defendant NOW Environmental Inc. Upon review of the following documents, the Court finds that the fees and costs submitted by Defendant NOW Environmental Inc. are reasonable:

1. Defendant NOW Environmental, Inc.'s Motion for Attorney Fees and Costs Against Tacoma School District No. 10 and Plaintiff Eastwood Enterprises Inc., Pursuant to RCW 39.04.240 and the Court's Summary Judgment Order dated September

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18, 2009;

2. Declaration of Counsel for NOW Environmental Inc. Re. Attorney Fees and Costs;

3. Response to Motion for Attorney Fees and Costs filed by Plaintiff Eastwood Enterprises, Inc.;

4. Response to Motion for Attorney Fees and Costs filed by Tacoma School District No. 10;

5. Declaration of Tyler J. Storti in Support of Responses to Motion for Attorney Fees and Costs filed by Plaintiff Eastwood Enterprises, Inc. and Tacoma School District No. 10;

6. Supplemental Declaration of Tyler J. Storti in Support of Responses to Motion for Attorney Fees and Costs filed by Plaintiff Eastwood Enterprises, Inc. and Tacoma School District No. 10;

7. Reply to Eastwood Enterprises Inc. and Tacoma School District No. 10's Separate Responses, filed by Defendant Nowicki & Associates Inc.; and

8. Oral arguments of counsel for Plaintiff, Tacoma School District No. 10, and Defendants.

Therefore, it is hereby:

ORDERED, ADJUDGED, AND DECREED:

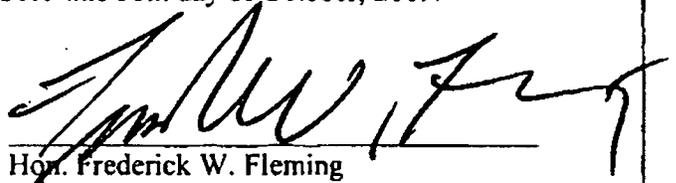
Defendant NOW Environmental Inc. is awarded reasonable attorney fees and costs against Plaintiff Eastwood Enterprises, Inc. and Fourth Party Defendant

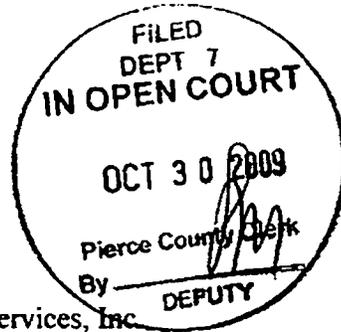
CP 795

1 Tacoma School District No. 10, jointly and severally, in the amount of Fifty Eight
2 Thousand Two Hundred Eighty Three Dollars and Seventy Five Cents (\$58,283.75).

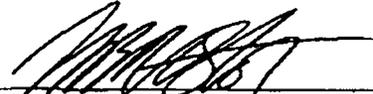
3 After thirty (30) days from the date of this Order, any unsatisfied portion
4 of this Order for attorney fees and costs shall bear interest at the statutory rate of twelve
5 percent (12%) per annum.
6

7 DONE IN OPEN COURT this 30th day of October, 2009.

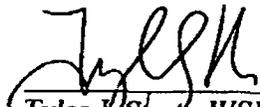
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10 Hon. Frederick W. Fleming

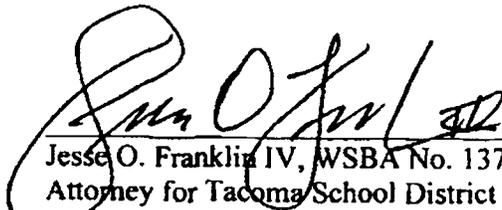


11 Presented by:

12
13 
14 Justin D. Bristol, WSBA No. 29820
15 Attorney for Defendant NOW Environmental Services, Inc.
16

17 *OBJECTED TO FURTHER AND* **CONTEXT:**
18 Approved as to form:

19 
20 Tyler J. Stott, WSBA No. 40341
21 Attorney for Plaintiff and Tacoma School District No. 10

22 
23 Jesse O. Franklin IV, WSBA No. 13755
24 Attorney for Tacoma School District No. 10

25 
26 For Name