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COURT OF APPEALS DIV III OF THE STATE OF WASHINGTON

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BEDREDDIN IMAN and SAMEER HATEM, Appellants,

and

MUSLIM AMERICA, Appellant,

v.

TOWN OF SPRINGDALE, Respondent.

MUSLIM AMERICA'S REPLY BRIEF

JEFFRY K. FINER
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35 W. Main, Suite 300
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY ARGUMENT

I. MUSLIM AMERICA APPEALED THE FEE ORDER AND IS PERMITTED TO CHALLENGE ITS VALIDITY 8

II. THE EXISTENCE OF DEBATEABLE ISSUES ON APPEAL JUSTIFIES THE DENIAL OF APPELLATE FEES UNDER RCW 4.84.185 7

CONCLUSION

TABLE OF AUTHORITIES

Washington State Cases

Building Industry Assoc. of Washington v. McCarthy, 152 Wn. App. 702 (2009) 2

Bushong v. Wilsbach, 151 Wn. App. 373 (2009) 1

Dept. of Revenue v. Bi-Mor, ___ Wn.Ap. ___, 286 P.3d 417 (2012) 5

Highland School Dist No. 203 v. Racy, 149 Wn. App. 307 (Div. 3, 2009) 4, 5

Open Door Baptist Church v. Clark County, 140 Wn.2d 143 (2000) 6

Sumner v. First Baptist Church, 97 Wn.2d 1 (1982) 6

Rules & Statutes

RCW 4.84.185 ..... *passim*

42 U.S.C. 21C §2000cc 6

ARGUMENT

I. MUSLIM AMERICA APPEALED THE FEE ORDER AND IS PERMITTED TO CHALLENGE ITS VALIDITY

Appellee Town of Springdale argues that Muslim America's failure to appeal the order on the merits eliminates any right to challenge the order awarding fees except for "reasonableness." Resp. Br. at 7.[1] The argument derives from *Bushong v. Wilsbach*, 151 Wn. App. 373 (2009). In that case, the appellants failed to file a notice of appeal within the required time from the date the lower court entered an order awarding fees. *Bushong*, 151 Wn. App. at 375. The case does not stand for the proposition that Muslim America, in this instance, is barred from challenging the order. Muslim America did timely file its notice of appeal from the order awarding fees against it. There is no authority to support the Town's argument that Muslim America is barred from challenging the legality of that order.

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[1] Muslim America confesses error and concedes that it did not file an appeal to the November 23, 2010 Order dismissing the suit. Resp. Br. at 2. Appellant counsel is alone responsible for the error in misperceiving the record. Counsel erred in believing that a notice had been prepared and filed and did not discover otherwise during the transition of this case to the undersigned following Dawud Ahmad's unexpected death and transmission of the files. Counsel is solely responsible for the error which was inadvertent and not made for improper motive.

Muslim America does not challenge the fee for being unreasonable, rather the challenge is to the lower court's conclusion that Muslim America was responsible for litigation frivolous in its entirety. *Building Industry Association of Washington v. McCarthy*, 152 Wn. App. 702 (2009). See Assignment 3 (second half, challenging the findings of frivolousness) and 4; see Issues 3 and 4; Opening Br. at 1-2.

Assuming, without conceding, that Muslim America is confined solely to arguments challenging the lower court's legal conclusions, the fee order against Muslim America is nevertheless fatally flawed.

First, solely as a legal challenge, the Town asserts that Muslim America failed to argue "that the case was not frivolous in total", Resp. Br. at 13, and then cites "Opening Br. p.24-25".

The Town arbitrarily cuts off most of Muslim America's argument.

The argument in the Opening Brief is not confined to pages 24 and 25 (where Muslim America set forth, accurately, the law in Washington regarding fees for frivolous litigation) but in fact continues on to pages 26-27. Those arguments need not be repeated in detail here. The Town erroneously claims a default, in effect hoping this Court will ignore citation and argument directly on point, including the Town's own concession at RP 7/9/10 at 33:17-24 that the Plaintiff-Appellants'

purpose in filing their writs was "to use the structures for religious purposes." That statement puts the Town's later claim that the purpose of the suit was "for the purpose of harassment, delay, nuisance, or spite" in stark contrast to the concession made by the Town's counsel during the merits-phase.

Next, the Town argues extensively that Muslim America was an active participant during the case and cites to numerous filings made on Muslim America's behalf. None of these filings, however, involved the merits of the original suit (that is, mandamus or prohibition). The filings cited by the Town (Resp. Br. at 14-16) relate to (1) joinder, which Muslim American vigorously resisted, albeit ineffectively, (2) resistance to the motion for fees, including its filing a notice of appeal, and (3) disputes about the record itself. Resp. Br. at 15-16, 17-18.

Respondent Town argues, at Resp. Br. 18, "[Muslim America] further cannot claim that it did not participate or advance *any* claim in this case." (Emphasis supplied). If by that statement the Town meant that Muslim America was involved in all claims, the argument is plainly wrong. The standard for sanctions under the statute is not "any" involvement. The standard requires a complete failure of legal and factual justification as to all claims. Muslim America does not meet this

standard: As filed by the original Plaintiffs, Muslim America has no legal liability for any claims: it was not a party. And when it reluctantly became a party, Muslim American most emphatically did not support the original claims or the merits; as shown below, its efforts were spent fighting joinder and then wrestling over the fee order. So far as the merits went, Muslim American took no position. How then can it be liable for frivolous litigation it neither started nor supported in any pleadings?

In effect, the Town concedes the facts of this argument even if it wishes to impose an inapposite result. According to the Town, Muslim America participated in "disposition" and "outcome in the disposition". Resp. Br. at 18. That statement is correct. But the Town goes further: "As a result of its participation, it may be properly charged with reasonable expenses under RCW 4.84.185." This statement is pure *ipse dixit*: counsel is unable to find any authority for the proposition that a party haled into a dispute under Rule 19 is chargeable with the improper filings of an original plaintiff. Thus, it appears that the lower court abused its discretion by imposing its fees and cost order against Muslim America. *Highland School Dist No. 203,* 149 Wn. App. 307 (Div 3, 2009) (reiterating the standard of review).

Respondent Town does not deny that, as an organization, Muslim America's pleadings in this case were geared toward staying out of the litigation. The Town, however, without notice, proof, or legal authority, asserts that Muslim America is corporately responsible for the acts of the individual petitioners. Agency theories were not pled nor presented in argument, nor were there findings to support an agency theory.

Moreover, the sanctions redressed by 4.84.185 require that the party have been acting in bad faith (for the purpose of, delay, nuisance, or spite) and that the suit be entirely frivolous, i.e., without any rational argument. *Dept. of Revenue v. Bi-Mor*, ___ Wn.Ap. ___, 286 P.3d 417, 422 (2012); but *contra Highland School Dist No. 203 v. Racy*, 149 Wn. App. 307, 312 (Div. 3, 2009) (holding that frivolous sanctions do not require findings of bad faith, delay or harassment); compare *State v. Gassman*, 175 Wn.2d 208, 209 (2012) (trial court's inherent authority to sanction and bad faith may be determined from the record without explicit findings). In this case, as demonstrated by the authorities in both Hatem and Bedreddin and Muslim America's Opening Briefs, rational

arguments do support the suit filed by the original Plaintiffs.[2] Muslim America adopts by reference the arguments put forth by the original Plaintiffs that the law does support a challenge to the Town's conduct on the basis of multiple (even if withdrawn) citations and threats to penalize the charitable activities of Muslim America and the beneficiaries of that charitable conduct. The original Plaintiffs' reliance on *Sumner v. First Baptist Church*, 97 Wn.2d 1, (1982) demonstrates a good faith reliance upon the police power of the state to curtail local government from actions that in turn impede plaintiffs' free exercise. See also, *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 164-165, 184 (2000) (declining to apply but not explicitly overruling *Sumner*). Plaintiffs' argument showing their reliance on federal law (42 U.S.C. 21C §2000cc) do as well.

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[2] Thus while this Court may rule that the substantive arguments in Muslim America's Opening Brief sections 1-3 are precluded by its failure to file a notice of appeal on the merits, on the issue of sanctions, the arguments evidence a rational non-frivolous basis on which the original Plaintiffs proceeded with their request for relief. Without re-writing those arguments here, Muslim America asks this Court to consider the legal basis set forth in the previous filings as demonstration of the litigants' good faith.

II. THE EXISTENCE OF DEBATEABLE ISSUES ON APPEAL JUSTIFIES THE DENIAL OF APPELLATE FEES UNDER RCW 4.84.185

The Town concludes by arguing for fees for this appeal, asserting that the appeal was frivolous. As basis, it cites intransigence at the lower court level and the failure by Muslim America to argue that the fees awarded below were "unreasonable" in the amount, i.e., no argument was made as "to the actual dollar amount of the award." Resp. Br. at 19.

The Town's argument fails on multiple grounds. Muslim America may well have been intransigent in its conduct below by its refusal to participate in the suit brought by the individual Plaintiffs. But it did not assert the original claims, and those claims were not sought to harass delay or oppress. It was an unwilling participant (based upon its religious objection to litigation except in self-defense) and devoted the majority of its efforts to resist inclusion in a suit it could not support. For example, CP 182-85, 186-95, 280-281, 703-09. Muslim America's arguments on appeal are properly cited, made in good faith, and advanced for the purpose of correcting an erroneous order. It seeks relief from the lower court's imposition of a burdensome penalty for the conduct of third parties, and to vindicate its rights under RCW 4.84.185 and the leading case law.

CONCLUSION

For the foregoing reasons, Muslim America respectfully prays the Court (1) reverse or vacate the Superior Court's Judgment and Order Joining Muslim America as a Necessary Party and (2) reverse or vacate the Superior Court's Judgment and Order Granting Defendant's Motion for Award of Reasonable Expenses Including Fees of Attorney Under RCW § 4.84.185.

Dated this 16th day of November, 2012.

s/ Jeffry K. Finer
On brief for Muslim America

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