

FILED
COURT OF APPEALS

10 JUN -6 AM 10:22

NO. 40025-1-II

STATE OF WASHINGTON

BY _____

DEPUTY

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

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

v.

NOWICKI AND ASSOCIATES, INC. a Washington Corporation, and
NOW ENVIRONMENTAL SERVICES, d/b/a NOWICKI
ENVIRONMENTAL, a Washington Corporation,
Respondents.

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(THE HONORABLE FREDERICK FLEMING)

REPLY BRIEF OF APPELLANT
TACOMA SCHOOL DISTRICT NO. 10

K&L GATES LLP

Matthew J. Segal, WSBA # 29797
Kymberly K. Evanson, WSBA # 39973
Attorneys for Appellant
Tacoma School District No. 10

K&L GATES LLP
925 Fourth Avenue
Suite 2900
Seattle, WA 98104-1158
(206) 623-7580

pm 7-2-10

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT IN REPLY	2
A. This Appeal is Timely And Nowicki and NOW’s Motions to Dismiss Should Be Denied.....	2
B. Respondents Do Not Address Two Required Elements of RCW 39.04.240	8
1. The District was not a party to the EEI- Nowicki dispute	9
2. Respondents failed to make the required offer of settlement	11
C. Nowicki’s Interpretation of the “Public Works Contract” and “Prevailing Party” Requirements Are Unsupported By the Language and Policy of the Statute	12
1. This case does not “arise out of a public works contract”	12
2. Respondents did not “prevail” on any claims against the District	14
D. The District Cannot Be Liable For Attorneys’ Fees on Assigned Claims It Did Not Pursue	17
1. The District-EEI settlement was not an improper waiver under RCW 39.04.240.....	18
2. The District’s assignment of claims to EEI was not void as against public policy	20
E. The Motions to Dismiss Respondents’ Indemnity Claims Against the District Are Properly Before This Court	22
F. The District Is Entitled to Attorneys’ Fees	23
III. CONCLUSION.....	25

TABLE OF AUTHORITIES

	<u>Page</u>
WASHINGTON STATE CASES	
<i>Absher Construction v. Kent School Dist.</i> , 77 Wn. App. 137, 890 P.2d 1071 (1995).....	10
<i>American Safety Casualty Ins. v. The City of Olympia</i> , 162 Wn.2d 762, 174 P.3d 43 (2007).....	19
<i>American Seamount Corp. v. Science and Engineering Assoc.</i> , 61 Wn. App. 793, 812 P.2d 505 (1991).....	15, 16, 17
<i>Ball-Foster Glass v. Giovanelli</i> , 163 Wn.2d 133, 177 P.3d 692 (2008).....	13
<i>Berschauer/Phillips Constr. Co. v. Seattle School Dist. No. 1</i> , 124 Wn.2d 816, 881 P.2d 986 (1994).....	13, 20
<i>Bogle & Gates PLLC v. Holly Mountain Res.</i> , 108 Wn. App. 557, 32 P.3d 1002 (2001).....	24
<i>Bushong v. Wilsbach</i> , 151 Wn. App. 373, 213 P.3d 42 (2009).....	4
<i>Carrara, LLC v. Ron & E Enterprises</i> , 137 Wn. App. 822, 155 P.3d 161 (2007).....	4
<i>Enterprise v. Walter Construction</i> , 141 Wn. App. 761, 172 P.3d 368 (2007).....	13
<i>Estate of K.O. Jordan, et al v. Hartford Acc. and Indem. Co.</i> , 120 Wn.2d 490, 844 P.2d 403 (1993).....	16
<i>Fluor Enters. v. Walter Constr.</i> , 141 Wn. App. 761, 172 P.3d 368 (2007).....	3, 13
<i>Fox v. Sunmaster Prod.</i> , 115 Wn.2d 498, 798 P.2d 808 (1990).....	3, 6
<i>Griffin v. Thurston County Board of Health</i> , 165 Wn.2d 50, 196 P.3d 141 (2008).....	22
<i>Hertz v. Riebe</i> , 86 Wn. App. 102, 936 P.2d 24 (1997).....	11
<i>Herzog Aluminum v. Gen. Am. Window Corp.</i> , 39 Wn. App. 188, 692 P.2d 867 (1984).....	23, 24

<i>Holland v. City of Tacoma</i> , 90 Wn. App. 533, 954 P.2d 290, 292 (1998).....	23
<i>International Commercial Collectors, Inc. v. Mazel Co., et al.</i> , 48 Wn. App. 712, 740 P.2d 363 (1987).....	16
<i>Kaplan v. Northwestern Mut. Life Ins. Co.</i> , 115 Wn. App. 791, 65 P.3d 16 (2003).....	22
<i>Pepper v. King County</i> , 61 Wn. App. 339, 810 P.2d 527 (1991).....	3
<i>State Farm General Ins. Co. v. Emerson</i> , 102 Wn.2d 477, 687 P.2d 1139 (1984).....	20
<i>The Toll Bridge Auth. v. Aetna Ins. Co.</i> , 54 Wn. App. 400, 773 P.2d 906 (1989).....	13, 14
<i>Tjart v. Smith Barney, Inc.</i> , 107 Wn. App. 885, 28 P.3d 823 (2001).....	20, 21

OTHER AUTHORITIES

RCW 39.04.010(2).....	12
RCW 39.04.110	12
RCW 39.04.240	passim
RCW 39.80	12
RCW 39.80.30	12
RCW 4.84.250	9, 11
RCW 4.84.260	9, 11
RCW 4.84.270	9, 11
RCW 4.84.280	9
RCW 4.84.330	23

RULES

CR 54(b).....	passim
RAP 2.2(d).....	passim
RAP 2.4(b).....	8, 22
RAP 5.2(a)	8

RAP 18.9..... 24

OTHER

WA H.R. Rep. ESB 6407, March 5, 1992 10

I. INTRODUCTION

Respondents spend little time on the merits of this appeal, instead devoting the majority of their response briefing to a frivolous objection to the timeliness of the notice of appeal.¹ As fully demonstrated below, the District's appeal is timely, and the motions to dismiss the appeal should be denied. Moreover, in its opening brief, the District demonstrated why Respondents do not satisfy any of the four requirements of the fee statute on which they rely, RCW 39.04.240. Respondents do not address two of these four elements at all. Reversal is warranted on the abandoned arguments alone, although Respondents also fail to refute the District's additional grounds for reversal, including the substantial legal authority demonstrating a valid assignment of claims to EEI. Finally, Respondents do not address the District's assignment of error and supporting argument regarding the trial's court's failure to dismiss the indemnity claims against the District. As such, the trial court should be reversed, the fee awards against the District vacated, and any remaining claims against the District dismissed.

¹ The District is Tacoma School District No. 10. Respondents are Nowicki and Associates, Inc., and Now Environmental Services. All party designations in this Reply Brief are as used in the District's Opening Brief.

II. ARGUMENT IN REPLY

A. This Appeal is Timely And Nowicki and NOW's Motions to Dismiss Should Be Denied.

In moving to dismiss this appeal, both Nowicki and NOW substantially misrepresent the governing law and the record in this case.²

Respondents' motions to dismiss turn entirely on the false premise that the trial court's order of September 18, 2009, CP 457-60, was somehow a final judgment. That order, however, did not resolve all claims against all parties in the case and, therefore, was not a final order and was not subject to appeal.

In cases involving multiple parties and multiple claims, an order determining fewer than all the issues presented in a case is not a final judgment, and is subject only to discretionary review. CR 54(b); RAP 2.2(d). The only exception to this final judgment requirement is set forth in CR 54(b)³ and RAP 2.2(d).⁴ Under these rules, if a party wishes to appeal from an order determining less than all claims against all parties

² In addition to Respondents' motions in both of their briefs, NOW also filed a motion on the merits, which this Court denied.

³ CR 54(b) provides: When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties **only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment.** (emphasis added).

⁴ In any case with multiple parties or multiple claims for relief ... an appeal may be taken from a final judgment that does not dispose of all the claims or counts as to all the parties, **but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay...** (emphasis added).

(such as the September 18 order here), the trial court must certify, with mandatory written findings, that there is no just reason to delay the appeal until after trial on the remaining issues, and expressly direct entry of final judgment. CR 54(b); RAP 2.2(d); *e.g.*, *Fox v. Sunmaster Prod.*, 115 Wn.2d 498, 798 P.2d 808 (1990); *Fluor Enters. v. Walter Constr.*, 141 Wn. App. 761, 769, 172 P.3d 368 (2007); *Pepper v. King County*, 61 Wn. App. 339, 344, 810 P.2d 527 (1991).

In the absence of the required certification and findings, the order “**shall not terminate the action** as to any of the claims or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” CR 54(b) (emphasis added). Where an order does not contain a finding that there is no just reason for delay or direct entry of final judgment, the appellate court lacks jurisdiction to hear the appeal at that time. *Pepper*, 61 Wn. App. at 346. RAP 2.2(d) states in relevant part:

The time for filing notice of appeal begins to run from the entry of the required findings. In the absence of the required findings, determination and direction, a judgment that adjudicates less than all the claims or counts, or adjudicates the rights and liabilities of less than all the parties, is subject only to discretionary review until the entry of a final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties.

Accordingly, the cases on which Respondents rely relating to appeals from a fee award *after* final judgment are irrelevant. *See Bushong v. Wilsbach*, 151 Wn. App. 373, 375, 213 P.3d 42 (2009) ("Here, Vicky Bushong appealed from the trial court's judgment setting the amount of the attorney fees, not the judgments entitling Ann Wilsbach to those fees.") (emphasis added); *Carrara, LLC v. Ron & E Enterprises*, 137 Wn. App. 822, 826, 155 P.3d 161 (2007) (Appellant failed to appeal from a "final dispositive judgment.").

In contrast, the September 18 order resolved only EEI's claims against Nowicki. CP 458-60 (dismissing EEI's indemnification claims). The order did not adjudicate Nowicki and NOW's counterclaims against EEI, CP 22-24 (implied and equitable indemnification), nor did it address Respondents' third and fourth party claims against the District. *See* CP 58-62 (NOW's claims against the District for equitable indemnification, implied indemnity and breach of the covenant of good faith); CP 810-16 (Nowicki's claims against the District for express and implied indemnity). Moreover, the September 18 order contained none of the CR 54(b) or RAP 2.2(d) findings that would have been necessary to appeal. CP 460.

Though Respondents acknowledge that additional claims against additional parties remained after the September 18 hearing and order, Respondents do not cite CR 54(b) or RAP 2.2(d) to this Court. Nowicki

Br. at 2-3, 43. Instead, Respondents go to extraordinary lengths to mislead this Court that the September 18 order was a final judgment. Respondents repeatedly assert that the September 18 order dismissed this lawsuit in its entirety and “ended the case.” *See, e.g.*, Nowicki Br. at 2, 11; NOW Br. at 6-7. The record on appeal shows that these contentions are frivolous.

At the September 18 hearing, the Court twice confirmed that no claims against the District had been resolved, and that the issue of the District’s potential liability for any attorneys’ fees would be addressed at a subsequent hearing. The transcript reflects both of these exchanges:

The Court: I’m going to grant the motion and sign the proposed order submitted by Mr. Hudson. So, I want Counsel to go through it, and I’ll sign it, including a date for a hearing regarding attorneys’ fees.

....

Mr. Storti (counsel for the District/EEI): They haven’t alleged a right to attorney’s fees. That was going to be the motion to amend that was before –

The Court: **I will hear that part on the date that everybody agrees to have the hearing.**

RP, 9/18/2009, at 49 (emphasis added).

After reviewing Nowicki’s proposed order, the District’s counsel again confirmed with the Court that no claims against the District had been adjudicated.

Mr. Storti (counsel for the District/EEI): The last paragraph says that the amount of attorneys’ fees to be placed into judgment and awarded against Eastwood and third-party defendant Tacoma School District shall be determined—I guess I just want to note that there was no motion for

summary judgment affirmatively on their third-party claims today. ... So, they may be able to get prevailing party to the extent your honor awards them against Eastwood, ... but I also represent the Tacoma School District, which faces third- and fourth-party claims for equitable indemnity against both of their clients, which that wasn't even before the Court.

The Court: **The language is not going to jeopardize ... that issue for you.**

RP, 9/18/09, at 50-51 (emphasis added).

The order entered at the conclusion of the September 18 hearing, prepared by Nowicki's counsel, contained no findings on any claims against the District. CP 457-60. Likewise, the order did not make any findings under CR 54(b) or RAP 2.2(d). CP 460.⁵ Even if the September 18 order had contained a CR 54(b) certification, which it did not, the District would still not have been required to appeal the order prior to the entry of final judgment in the case. RAP 2.2(d) provides that an appeal “**may** be taken” from certain kinds of decisions entered before the case is finally disposed. *Fox*, 115 Wn.2d at 504 (emphasis added). The rules “make it clear that a party does not automatically lose the right to appellate review of either ‘appealable orders’ or partial ‘final judgments’ by failing to file a notice of appeal within 30 days...” *Id.* at 505. Because

⁵ Nor would such findings have been justified, as the record did not “affirmatively show there is in fact some danger of hardship or injustice that will be alleviated by an immediate appeal.” *Fox*, 115 Wn.2d at 503. There is no colorable argument that Nowicki or NOW suffered any hardship by waiting an additional six weeks for entry of an appealable order.

additional claims remained in the case after the September 18 order, the District was neither required nor allowed to appeal from that order.

Not surprisingly, the issue of the District's liability under RCW 39.04.240 was subsequently addressed in briefing for and on the record at the October 30, 2009 hearing.⁶ As invited by the trial court, the District argued at that hearing that RCW 39.04.240 did not apply. RP, 10/30/09, 17-22, 32.⁷ NOW then attempted to argue that the claims against the District had been resolved at the September hearing. The trial court again rejected that premise:

Mr. Franklin (Counsel for the District): It is my understanding from a review of the record from [the September 8, 2009] hearing, in direct response to Mr. Storti's question to the Court about whether the order entered last time precluded arguments that were to be made today, you said they were not to be precluded. It was our understanding, based on that that there was no need to file a motion for reconsideration because those issues were reserved from that hearing date.

The Court: So you want the sentence, "However, plaintiff did not move for reconsideration of the Court's September 8, 2009, summary judgment order," you want me to delete that?

Mr. Franklin (Counsel for the District): Yes, Your Honor.

⁶ The following arguments were set forth in the District's briefing. *See* CP 700 (No public works contract); CP 701 (Failure to make timely offer of settlement); CP 702-03 (No prevailing party because third and fourth party claims not adjudicated); CP 704 (Incorporation of EEI briefing on unreasonableness of fees and failure to segregate); CP 691-94 (Failure to properly segregate fees).

⁷ Respondents' claim that the District did not challenge the reasonableness of the fee award is another misstatement. Nowicki Br. at 19; NOW Br. at 9. The District expressly challenged the reasonableness and amount of Respondents' fee request in its briefing on this issue before the trial court. CP 704; CP 691-94. The District's challenge to the amount of fees is properly before this Court. As stated in the District's opening brief, the fee award was unreasonable because both Respondents failed to segregate out time spent on duplicative and unsuccessful claims. Opening Br. at 46.

Mr. Bristol (Counsel for NOW): Hold on a minute. I've got the September 18th order here. The order awards attorneys' fees and resolves all of plaintiff's claims. We weren't—we came here today to argue about A, the amount of fees, and B, whether those fees would be applicable to Tacoma School District. That sentence is simply a finding of fact that they didn't file a motion for reconsideration.

The Court: **But, they were allowed, I said they were ... allowed to make the argument. So, I'm going to strike that.**

RP, 10/30/2009, at 36 (emphasis added).

Unlike the September 18 order, the October 30 order did state that it was a final judgment and contained the required CR 54(b) certification language. CP 769.⁸ As such, under CR 54(b) and RAP 2.2(d), the October 30 order was the only final and appealable order entered in this case. The District's appeal was filed on November 24, 2009, less than 30 days after the entry of final judgment in this case. CP 775-77; RAP 5.2(a). The District's appeal is timely and the motions to dismiss should be denied.

B. Respondents Do Not Address Two Required Elements of RCW 39.04.240.

As described in detail in the District's Opening Brief, RCW 39.04.240 requires four distinct elements in order to trigger an attorneys' fee award. They are: 1) a public works contract; 2) a public entity as a party to the action; 3) a prevailing party; and 4) a timely offer of

⁸ The Court also entered a separate order on October 30, 2009 awarding fees to NOW. CP 771-74. This order, prepared by NOW, did not contain the certification language. Nonetheless, the order awarding fees to NOW is reviewable on appeal of final judgment under RAP 2.4(b).

settlement from a prevailing plaintiff to a defendant.⁹ Neither Respondent addresses elements two or four. The failure of either of these elements alone requires vacation of the fee awards against the District.

1. The District was not a party to the EEI-Nowicki dispute.

Nowicki attempts to confuse this lawsuit with an earlier, separate case between Garco, EEI and the District (“Garco litigation”).¹⁰ *See* Nowicki Br. at 5-12. But Nowicki was not a party to that earlier case, and no claims raised in the Garco litigation are currently before this Court. By frequent reference to the merits of the Garco litigation, Nowicki seeks to justify the fees award against the District in *this case*. These arguments are beside the point, because the District was not a party to *this lawsuit* between Nowicki and EEI.

EEI brought the present case against Nowicki and NOW. CP 1-8. Nowicki and NOW then later impleaded the District solely to pursue a fee claim against it. CP 58-63; 809-16. Respondents concede that they only joined the District as a third/fourth party defendant in an attempt to recover fees. Nowicki Br. at 30; *see also* CP 58-63; 809-16. Moreover, they concede that they were awarded fees under the statute even though

⁹ RCW 39.04.240 makes RCW 4.84.250-.280 applicable in actions involving public works contracts. *See* Opening Br. at 16-31.

¹⁰ *Eastwood Enterprises Inc. v. Garco Construction, et al.*, Pierce County Superior Court Case No. 05-2-14065-3 was filed by EEI on November 22, 2005 and terminated by settlement agreement on November 1, 2006. CP 3.

their claims against the District were never determined. RP, 10/30/2009, at 30-31; Nowicki Br. at 43 (third and fourth party claims were “contingent claims for attorneys fees since the trial court granted fees under RCW 39.04.240.”). As such, the District was never a “party” to the action as required by the statute. RCW 39.04.240 requires that a public body be a *party to the action* in which the fees are incurred. *See Absher Constr. v. Kent School Dist.*, 77 Wn. App. 137, 148, 890 P.2d 1071 (1995) (emphasizing that provisions apply to *an action* arising out of a public works contract).

The requirement that a public entity be a “party” to the action is tied directly to the legislative policy behind RCW 39.04.240: encouraging settlements and the pursuit of meritorious cases by public agencies. *See* WA H.R. Rep. ESB 6407, at 2, March, 1992. Where a public entity is not a party to the action, it does not control whether a case is settled or pursued on the merits. Here, for example, the District could not have settled claims between Nowicki and EEI. Nowicki ironically chastises the District for settling the earlier Garco litigation because “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.” Nowicki Br. at 23, 27, 32. The expense and uncertainty of trial are, of course, common considerations for any litigant who elects to settle. And

regardless of Nowicki's attempt to second-guess those decisions here, they do not convert the District into a "party" to the present case under RCW 39.04.240. The fee awards against the District should be reversed solely on this basis.

2. Respondents failed to make the required offer of settlement.

Respondents also fail to address the requirement that a plaintiff first make an offer of settlement in order to recover under RCW 39.04.240. RCW 39.04.240 incorporates the requirements of RCW 4.84.250-.270. RCW 39.04.240(1). Under RCW 4.84.260, a plaintiff "shall be deemed the prevailing party... when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff..." RCW 4.84.260. Nowicki and NOW were plaintiffs in their claims against the District and neither made the statutorily required offer of settlement. *Hertz v. Riebe*, 86 Wn. App. 102, 107, 936 P.2d 24 (1997) (A prevailing plaintiff who fails to make a settlement offer within the statutory timeline cannot recover fees). Respondents neither contest these facts nor offer any contrary legal argument. As with the statutory "party" requirement, this ground alone is sufficient to support reversal.

C. Nowicki’s Interpretation of the “Public Works Contract” and “Prevailing Party” Requirements Are Unsupported By the Language and Policy of the Statute.

1. This case does not “arise out of a public works contract”.

The statute defines a public works contract as “a contract in writing for the execution of public work for a fixed or determinable amount duly awarded after advertisement and competitive bid, or a contract awarded under the small works roster process in RCW 39.04.155.” RCW 39.04.010(2). The District-Nowicki contract was a privately negotiated professional services agreement, awarded pursuant to RCW 39.80, which imposes its own distinct statutory requirements for contracts with professional architects and engineers. *See, e.g.*, RCW 39.80.30 (advance publication requirements for professional services agreements); CP 1694-98. Contracts awarded pursuant to RCW 39.80 are not public works contracts as defined in RCW 39.04.110. Despite this, Nowicki contends that its dispute with EEI “arises” out of a public works contract. Nowicki Br. at 35-36. In essence, Nowicki claims that the term “arising out of” in the statute extends the public’s obligation to pay attorneys’ fees to any dispute even tangentially related to public works projects. *Id.* at 36.

The cases on which Nowicki relies do not extend the reach of the statute beyond its plain language. *Berschauer/Phillips Constr. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994), does not apply RCW 39.04.240 nor interpret the statutory term “arising out of.” Rather in that case, as the trial court did here, the court found that a school district’s assignment of a breach of contract claim against a consultant was not void against public policy. *Id.* at 832-33. *Berschauer* lends no support to Nowicki’s convoluted reading of the statute and in fact supports the District’s position. Similarly, *Fluor Enterprise v. Walter Construction*, 141 Wn. App. 761, 172 P.3d 368 (2007) is inapposite to Nowicki’s claim. Like *Berschauer*, *Fluor* has nothing to do with RCW 39.04.240 and does not shed light on the statutory phrase “arising out of.” While Nowicki contends that “*Berschauer* and *Fluor* represent the kind of cases the legislature would have had in mind when adopting RCW 39.04.240,” Nowicki Br. at 35, neither case mentions the statute or awards fees.

Nowicki’s remaining case citations are equally unavailing. *Ball-Foster Glass v. Giovanelli*, 163 Wn.2d 133, 140-41, 177 P.3d 692 (2008), does not interpret RCW 39.04.240, nor does it interpret the term “arising out of” as used in Washington statutes. The case merely comments that unlike other jurisdictions, the Washington workers compensation statute does not contain “arising out of” language. *Id.* at 141. *The Toll Bridge*

Auth. v. Aetna Ins. Co., 54 Wn. App. 400, 404, 773 P.2d 906 (1989), is also distinguishable. There, an insurance policy excluded claims or accidents “arising out of the operations, maintenance or use” of a vessel. *Id.* The court unremarkably concluded that the exclusion applied to an accident that began when a car prematurely left a ferry. *Id.* The facts of the present case are not analogous to this traditional application of “arising out of”. Moreover, the present case involves a comprehensive public contracting scheme, where the Legislature has employed distinct statutory definitions. If all private agreements remotely related to a public works project arose from a “public works contract”, then the limitation of the statute to a “public works contract” would be rendered meaningless.

Nowicki asserts that “RCW 39.04.240 should equally apply to all aspects of complex public works litigation, all parties involved, and all lawsuits beget [sic] by an assignment of claims from a public entity, including a school district.” Nowicki Br. at 36. This is an argument to the Legislature to amend the statute. It does not support a fee award under the existing statute.

2. Respondents did not “prevail” on any claims against the District.

Finally, RCW 39.04.240 does not apply for the additional and independent reason that neither Respondent “prevailed” on any claims

against the District. Respondents' third and fourth party claims against the District were never adjudicated.

In an effort to obscure this fact, Nowicki spends pages of its brief belaboring irrelevant details about the separate Garco litigation. Nowicki Br. at 5-12.¹¹ The District settled the earlier Garco litigation. CP 86-89. EEI sued Nowicki in the present case, and lost. CP 1-8; CP 457-60. Respondents impleaded the District into the present case brought by EEI, but never pursued their claims against the District. CP 809-16. Nothing that happened in the Garco litigation changes the fact that Respondents never prevailed in the present case on any claims against the District.¹²

Nowicki contends that because it prevailed against EEI, it automatically prevailed on its separate third-party claims against the District. Nowicki Br. at 41-43. Nowicki relies on *Am. Seamount Corp. v. Sci. and Eng'g Assoc.*, 61 Wn. App. 793, 812 P.2d 505 (1991), for the proposition that the District as third-party defendant should be jointly liable with EEI as a losing plaintiff.

¹¹ For example, whether or not EEI adequately performed under its contract, the reasons surrounding its termination, its alleged "contempt" for Nowicki, and EEI's compliance with the claim dispute procedures are all irrelevant to whether Nowicki prevailed in this case on any claims against the District.

¹² Likewise, contrary to Nowicki's claim, the outcome of the EEI-Nowicki case was equally irrelevant to the already-concluded Garco litigation. See Nowicki's Br. at 42 ("Had Eastwood won the District would have benefited by virtue of avoiding trial of the first action..."). The District had already paid EEI to settle that separate case and had thus already successfully "avoided trial."

In *American Seamount*, a corporation and its promoters (made up of individuals and other corporations) sued to enforce a pre-incorporation contract and lost. The court held that the contract's attorneys' fees provision was applicable against the individual promoters who did not voluntarily join the action as plaintiffs. *Id.* at 799. Finding that the individual promoters were the real parties in interest, the court determined that because the individual promoters owned the corporate promoter, had the corporate promoter prevailed on the contract claim, the individual promoters would have ultimately been the beneficiaries. *Id.* In that instance, the court concluded that the individuals had to accept the risks and benefits of the litigation. Likewise, the court concluded that under corporate law, individual promoters are liable on pre-incorporation contracts, such that the individuals would be held to the attorney fee provision. *Id.* at 800.

American Seamount is distinguishable on at least three grounds. First, the District was **not** a real party in interest in EEI's suit. As the District-EEI settlement agreement made clear, the District's assignment entitled EEI to retain "all recovery" from its suit against Nowicki. CP 88-89; see *Estate of K.O. Jordan, et al v. Hartford Acc. and Indem. Co.*, 120 Wn.2d 490, 495, 844 P.2d 403 (1993) (assignee's cause of action is direct, not derivative). Second, unlike the third party defendants in *American*

Seamount, the District did not stand to benefit from EEI's voluntary pursuit of the assigned claims. *See Int'l Commercial Collectors, Inc. v. Mazel Co., et al.*, 48 Wn. App. 712, 718 n.5, 740 P.2d 363 (1987) (A valid assignment transfers both the burdens and benefits of a cause of action to the assignee, and relieves the assignor of both); *Am. Seamount*, 61 Wn. App. at 800 (emphasizing that holding of case would not apply in the event the promoters were no longer in a position to benefit from a successful suit). Third, the liability of the individual promoters in *Am. Seamount* was determined by a separate motion for summary judgment against them. 61 Wn. App. at 795-96. Here, no such motion was brought, and no claims determined against the District. *Am. Seamount* does not stand for an automatic right to recovery against a third party defendant, and does not establish Respondents as prevailing parties. Thus, none of the elements of RCW 39.04.240 are satisfied, and the statute cannot serve as a ground to award fees against the District.

D. The District Cannot Be Liable For Attorneys' Fees on Assigned Claims It Did Not Pursue.

Separate and apart from its argument on the elements of RCW 39.04.240, in its opening brief, the District established that a valid assignment transfers both the benefits and burdens of the cause of action assigned, thereby preventing imposition of liability against the District

under the statute. *See* Opening Br. at 28-33. Respondents' only response is that the District's assignment of claims was an improper waiver under RCW 39.04.240 and that the assignment is void as against public policy. Neither contention withstands scrutiny.

1. The District-EEI settlement was not an improper waiver under RCW 39.04.240.

Nowicki contends that the District's assignment of claims to EEI violates the anti-waiver provision of RCW 39.04.240. It does not. Rather, this provision prevents both public entities and hopeful bidders from contracting away the statute's attorneys' fees obligation **in the terms of a public works contract.**¹³

Nowicki attempts to interchange the concepts of waiver and assignment, alleging that the District-EEI settlement agreement amounted to a "waiver of Nowicki's rights ... without Nowicki's approval." Nowicki Br. at 38 ("Waiver is a unilateral right which only Nowicki has the power to waive."). But Nowicki never held any right to attorneys' fees from the District in the first place, as it never had a "public works contract" with the District, and in fact, had contractually obligated itself to

¹³ RCW 39.04.240(2) provides "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 the submission of a dispute arising under the contract to arbitration."

pay *the District's* attorneys' fees in the event of litigation under its professional services agreement. CP 232.¹⁴

Moreover, the anti-waiver clause works to nullify a "provision of the contract" that seeks to waive the attorneys' fees obligation. RCW 39.04.240(2). There is no provision of either the District-Nowicki contract or the settlement agreement with EEI that references RCW 39.04.240, let alone intentionally waives any rights under the statute. Nowicki's argument that the District "anticipated" liability under RCW 39.04.240 is also unfounded. Nowicki Br. at 40. The indemnity clause in the District-EEI settlement agreement does not invoke the statute or suggest anything other than a standard indemnity found in a settlement agreement. CP 89. A party does not create liability for additional obligations by obtaining a broad indemnity upon settlement.

Finally, Nowicki suggests that the assignment constitutes a waiver by implying that EEI cannot pay the judgment against it. In attempting to distinguish *Am. Safety Cas. Ins. v. The City of Olympia*, 162 Wn.2d 762, 174 P.3d 43 (2007), Nowicki comments that that case did not raise "concerns about whether [the assignor] would be paid by the assignee."

¹⁴ The hold harmless provision in the District-Nowicki contract indemnifies the District from the costs of "**all suits, claims, or liabilities of any nature**, including costs and expenses for or on account of the injuries or damages sustained by any person or property resulting in whole or in part from negligent activities or omissions of the Consultant/ Contractor, its agents, or employees pursuant to this Agreement." CP 232 (emphasis added).

Nowicki Br. at 43. There is nothing in the record to indicate that EEI cannot or will not pay the judgment against it. Moreover, EEI's ability to pay a judgment after the fact does not convert the valid assignment of the District's cause of action into an improper waiver of RCW 39.04.240. As such, any argument that EEI cannot pay the judgment against it is irrelevant to the District's obligation to do so.

2. The District's assignment of claims to EEI was not void as against public policy.

Contracts are assignable unless such assignment is expressly prohibited by statute, contract, or is in contravention of public policy. *Berschauer*, 124 Wn.2d at 830 (emphasis added). Though Nowicki concedes the trial court's approval of the District's assignment of claims, Nowicki Br. at 38, Nowicki nonetheless urges this Court to find that the assignment violated public policy. Beyond vague references to the **waiver** argument discussed above, however, Nowicki fails to identify any specific public policy allegedly violated by the District's **assignment**. "In general, a contract which is not prohibited by statute, condemned by judicial decision, or contrary to the public morals contravenes no principle of public policy." *State Farm General Ins. Co. v. Emerson*, 102 Wn.2d 477, 481, 687 P.2d 1139 (1984). Moreover, "Washington courts have been hesitant to invoke public policy to avoid express contract terms absent

legislative action.” *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 901, 28 P.3d 823 (2001) (citations omitted).

Nowicki proffers that the alleged exclusion of its employee, Mr. Simons, from a mediation session held in the Garco litigation violated the District’s general conditions, and consequently invalidated the assignment. *Id.* The general conditions explain the District’s pre-litigation mediation requirements, which pertain to a claim between the contractor and the District (owner). The conditions provide that “**to the extent there are other parties in interest** such as architects, engineers, or consultants ... their representatives or others **deemed necessary by the owners, with full authority to settle the claim**, shall attend the mediation.” CP 1401 (emphasis added). As Nowicki concedes, Mr. Simons attended the mediation at the invitation of the District. Nowicki Br. at 9. The general conditions did not mandate Nowicki’s attendance. Nowicki was not “a party in interest” to the mediation and Mr. Simons did not have authority to settle anything, as Nowicki was not a party to the Garco litigation. As such, even if the general conditions were relevant to the assignment claim (which they were not), the District did not violate them.

The trial court properly refused to find that the assignment was void as against public policy. RP, October 30, 2009, at 28-29; CP 1971.

The assignment was valid, and the statute's waiver clause does not support a fee award against the District.

E. The Motions to Dismiss Respondents' Indemnity Claims Against the District Are Properly Before This Court.

While failing to respond to the District's substantive arguments on the indemnity claims, Nowicki instead urges this Court not to review them at all.¹⁵ Both grants and denials of summary judgment are reviewable on appeal, so long as the motion was not denied pretrial because material facts remained for consideration at trial. *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn. App. 791, 800, 65 P.3d 16 (2003). The District is entitled to review of all prior orders "prejudicially affecting the decision" identified in the notice of appeal. RAP 2.4(b). The order denying the District's motion for summary judgment, CP 1971, falls within this rule, and may be reviewed as part of this Court's review of the judgment entered on October 30, 2009.

As to the merits, NOW does not address the indemnity claims in its response brief, and Nowicki's treatment is limited to a footnote

¹⁵ Nowicki cites two cases in the sole paragraph addressing this issue, but doesn't explain why either applies. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration on appeal. *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn. App. 791, 801 n.5, 65 P.3d 16 (2003) (citation omitted). Nonetheless, of the two cited cases, only *Griffin v. Thurston County Board of Health*, 165 Wn.2d 50, 63, 196 P.3d 141 (2008) makes limited reference to ripeness as the Court's justification for failing to reach an alternative argument advanced by the parties. But the *Griffin* opinion does not indicate whether the alternative argument was considered below. Here, by contrast, the trial court ruled twice on motions concerning the indemnity claims. CP 65, 1971.

attempting to incorporate trial court briefs by reference. Nowicki Br. at 29, n.1. Trial court briefs cannot, however, be incorporated into appellate briefs by reference. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290, 292 (1998). Accordingly, both Respondents' substantive arguments concerning the indemnity claims have been abandoned. *Id.* Moreover, as fully set forth in the District's opening brief, Nowicki and NOW's third and fourth party indemnity claims fail as a matter of law. *See* Opening Br. 37-46. The trial court erred in ruling that the hold harmless provision did not apply to economic losses. The claims also fail because the court cannot imply an indemnification right that runs contrary to the express obligation in a contract. The trial court's denial of the District's motions to dismiss and for summary judgment should be reversed and the indemnity claims dismissed, thereby resolving this case in its entirety.¹⁶

F. The District Is Entitled to Attorneys' Fees.

In the event of reversal, the District is entitled to its attorneys' fees. Nowicki contends that the *Herzog* rule cited in the District's opening brief does not apply. But, under RCW 4.84.330 and *Herzog*, fees are available to a defendant who successfully defends against a contract claim where a plaintiff alleges a right to fees, even where the defendant proves that no

¹⁶ At the October 30 hearing, Nowicki and NOW indicated their intent to voluntarily dismiss the third and fourth party claims. RP, October 30, 2009, at 30-31. To the extent those claims have not been resolved, the District asks this Court to order their dismissal as a matter of law by reversing the denial of summary judgment below.

such right exists. *Herzog Aluminum v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 197, 692 P.2d 867 (1984). Here, Respondents alleged the District's liability for attorneys' fees based on numerous grounds allegedly based on the District-Nowicki contract, and were ultimately awarded attorneys' fees under RCW 39.04.240. If the District prevails in this appeal, it is entitled to both trial and appellate fees for successfully defending against Respondents' claims.

Likewise, as courts have held under other statutes in a similar context, the District is entitled to its fees under RCW 39.04.240 for successfully proving that no right to recovery exists under that statute. *Cf. Bogle & Gates PLLC v. Holly Mountain Res.*, 108 Wn. App. 557, 563, 32 P.3d 1002 (2001) (party subject to a claim under bilateral contract fee statute may recover fees in prevailing on its defense of the fee claim). Moreover, the District is entitled to attorneys' fees on the basis of its contract with Nowicki, which holds the District harmless from **all** suits, claims, or liabilities of any nature. CP 232. Finally, the District reserves the right to bring a motion pursuant to RAP 18.9 for attorneys' fees incurred in responding to Respondents' frivolous motions to dismiss.¹⁷

¹⁷ RAP 18.9 states that a motion is the proper mechanism by which to request fees on these grounds. To the extent that RAP 18.1 requires a request in this brief, the District makes that request here.

Respondents are not entitled to attorneys' fees on the basis of RAP 18.9 or any equitable ground.¹⁸ The District has presented numerous grounds for reversal of the trial court's ruling. The District's appeal is meritorious, and certainly not frivolous.

III. CONCLUSION

The trial court erred in awarding attorney's fees against the District. There is no legal basis to summarily award attorney's fees under RCW 39.04.240 against a non-party public entity based on a private dispute over a private contract. Respondents offer no grounds to affirm the fee awards. Respondents' motions to dismiss this appeal are also without merit and should be denied. The District respectfully requests that this Court reverse the trial court, and dismiss all claims against the District.

DATED this 2nd day of July 2010.

K&L GATES LLP

By 

Matthew J. Segal, WSBA # 29797

Kymerly K. Evanson, WSBA # 39973

Attorneys for Appellant

Tacoma School District No. 10

¹⁸ Nowicki misunderstands the "ABC" rule as stated in *Herzog*. Attorneys' fees may be awarded on equitable grounds if there is: (1) a wrongful act or omission by A towards B; (2) such act or omission exposes or involves B in litigation with C; and (3) C was not connected with the original wrongful act or omission of A towards B. 39 Wn. App. at 191 n.1. As detailed above, the District's assignment of claims was lawful, and not "wrongful." Likewise, Nowicki cannot show that EEI was not "connected" with the assignment of claims from the District, as EEI participated in and accepted the assignment.

Justin Bristol
Law Offices of Justin Bristol
8235 South Park Avenue
P.O. Box 12053
Tacoma WA 98412.0053
Phone: (253) 961-5837
jdbristol@piercecoun tylaw.com

Eastwood Enterprises, Inc.
6545 Troon Lane
Olympia WA 98501

Attorney for NOW
Environmental Services, Inc.

Mr. Edward Hudson
Smith Alling Lane PS
1102 Broadway
Suite 403
Tacoma WA 98402-3526
Phone: (253) 627-1091
edhudson@smithallinglane.com

Attorney for NOWICKI and
Associates, Inc.

I declare under penalty of perjury that the foregoing is
true and correct:

EXECUTED this 2nd day of July, 2010 at Seattle, WA.


Dawn M. Taylor

K:\2061902\00021\20913_MJS\20913P23N2

DECLARATION OF SERVICE - 2

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON
98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022