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STATEMENT OF THE CASE

This case originates from a 2002 public-works contract between Plaintiff below, Eastwood Enterprises, Inc. ("EEI") and a general contractor hired by the Tacoma School District (the "District"). The District needed to remove asbestos, as part of a remodeling project at Foss High School. The District hired Respondent Nowicki & Associates, Inc. ("Nowicki") as a consultant for the asbestos removal project. In 2002, Nowicki prepared bid-specifications for prospective asbestos-removal sub-contractors. CP 1-8. EEI won the bid, despite Nowicki's warning to the District, that EEI was not qualified for the job. CP 861:10 - 862:12. Nowicki also monitored EEI's performance, for compliance with federal regulations. CP 36 ¶ 25.

Respondent NOW Environmental Services, Inc. ("NOW") later purchased specified assets and liabilities from Nowicki, in 2004, and assumed the consulting contract with the District. NOW continued to monitor EEI's performance for compliance with federal regulations, for the duration of the project. CP 36 ¶ 25; CP 31-32 ¶ 2; CP 32 ¶ 4.

In 2005, EEI sued the District, claiming that Nowicki's original bid-specifications were insufficient to determine the amount of asbestos to be removed from Foss High School. EEI claimed that this resulted in

NOW ENVIRONMENTAL INC.'S RESPONSE BRIEF

cost-overruns, for which EEI was never paid. The District assigned its claims against Nowicki and NOW, as part of a settlement disposing of EEI's lawsuit against the District. CP 3. EEI then sued Nowicki and NOW (as a successor entity) in 2007. CP 31-39. Both Nowicki and NOW filed third and fourth party cross-claims against the District, respectively, based in part on breach of implied indemnity, resulting from the assignment. CP 58-63.

On **September 18, 2009**, the trial court (Hon. Frederick W. Fleming) entered a summary judgment order against EEI and the District, awarding attorney fees and costs to "Defendants" below (Nowicki and NOW), pursuant to RCW 39.04.240. The trial court also set a later date to determine "the amount of attorney fees and costs" to be awarded. CP 460.

A separate order awarding NOW attorney fees and costs in the amount of \$58,283.75, plus interest, was entered by the trial court on **October 30, 2009**. CP 771-774. The District filed a notice of appeal from both the September 18, 2009, and October 30, 2009 orders, on **November 24, 2009**. CP 775-796 (*see, esp.* CP 776).

The trial court's September 18, 2009, summary judgment order for attorney fees against the District, states that the District "had no monetary

ARGUMENT AND ANALYSIS

I. THIS APPEAL IS UNTIMELY WITH RESPECT TO THE TRIAL COURT'S SEPTEMBER 18, 2009, SUMMARY JUDGMENT ORDER AND AWARD OF ATTORNEY FEES AND COSTS AGAINST THE DISTRICT: RAP 2.4(b)

In *Bushong v. Wilsbach*, 151 Wn. App. 373, 213 P.3d 42 (2009), the Court of Appeals, Division I, specifically and unequivocally ruled that the time for filing an appeal from an order of summary judgment, which includes an award of attorney fees, begins to run from the date the summary judgment order was entered, and not from the date the *amount* of fees was determined.

In *Bushong*, the trial court entered a summary judgment order, which included an award of attorney fees, on November 29, 2007. On March 21, 2008, the trial court determined the *amount* of fees pursuant to the prior summary judgment order. The appellant in *Bushong* filed a notice of appeal from the November 29, 2007 summary judgment order, on April 18, 2008. The notice of appeal was filed within 30 days after the *amount* of fees was determined, but not within 30 days from the date the summary judgment order *awarding* fees was entered. Therefore, the appeal from the November 29, 2009 summary judgment order awarding fees was untimely, and the appeal was dismissed.

The *Bushong* court specifically held:

A timely appeal must be filed within 30 days of the trial court's decision. An appeal from an award of attorney fees is not timely when filed more than 30 days after the trial court awarded attorney fees even though the trial court has not yet set the amount of those fees.

151 Wn. App. at 375.

Moreover, "an appeal from any attorney fee decision does not bring up for review a separate judgment on the merits unless a timely notice of appeal is filed from that judgment." *Id.* at 377, *citing*, RAP 2.4(b), *Ron & Enters., Inc. v. Carrara. LLC*, 137 Wn. App. 822, 825-26, 155 P.3d 161 (2007), and 2A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE RAP 2.4, at 183 (6th ed. 2004).

In the case at bar, the trial court entered a summary judgment order, which awarded attorney fees and costs to Nowicki and NOW, against the District, on September 18, 2009. CP 459-460.¹ On October 30, 2009, the trial court entered an order determining the amount of those fees as applied to NOW. CP 771-774. The District filed a notice of

¹ See also, CP 593-595, esp. re. applicability of Sept. 18, 2009 attorney fee award to NOW.

appeal from both orders, on November 24, 2009. CP 775-796 (*see, esp.* CP 776).

Like the appellant in *Bushong*, in the case, the District argues that there was no legal basis for the trial court's award of attorney fees. However, just like in *Bushong*, the District did not appeal from the judgment establishing the attorney fee award, within 30 days of the September 18, 2009 order for attorney fees against the District. Rather, the District mistakenly appealed within 30 days from the entry of the October 30, 2009, order regarding the *amount* of fees. *See* analysis in *Bushong*, 131 Wn. App. at 377.

According to the trial court's September 18, 2009 summary judgment order on appeal in this case, it was "ORDERED ADJUDGED AND DECREED that Plaintiff's Complaint² is dismissed in its entirety [sic] with prejudice, and that Defendants [plural] are entitled to reasonable attorney fees and costs pursuant to RCW 39.04.240." The order then goes onto specify that the award of fees and costs is against the District, as well as EEI. CP 460. Therefore, the District's appeal of this award of attorney

² It must be remembered that, as an assignee of the District's alleged claims against Nowicki and NOW, the Plaintiff (EEI) stands in the shoes of the District. *Carlie v. Harbour Homes, Inc.*, 147 Wn. App. 193, 208, 194 P.3d 280 (2008) (*quoting, Puget Sound Nat'l Bank v. Dep't of Revenue*, 123 Wn.2d 284, 292, 868 P.2d 127 (1994)); *see also*, CP 874-875.

fees must fail, because the District's notice of appeal was not timely filed. CP 775-796. Furthermore, the trial court's October 30, 2009 order regarding the *amount* of fees to be awarded to NOW makes clear that: (1) the Court ordered attorney fees and costs against the District on September 18, 2009; and (2) the September 18, 2009 award of attorney fees and costs was not timely challenged. CP 772.

In the event that the District argues in reply, with regard to oral statements of the trial court on October 30, 2009, concerning the September 18, 2009 summary judgment order and fee award, it should be noted that when there is an appeal from a written judgment, an oral ruling has no binding effect unless formally incorporated into the judgment. *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998)³; *see also, DGH Enterprises v. Pacific Cities, Inc.*, 137 Wn.2d 933, 938, 977 P.2d 1231 (1999) (*verbal expressions of trial court are not binding when not incorporated into formal written findings*).⁴

II. THE REASONABLENESS AND AMOUNT OF FEES AWARDED TO NOW WAS NOT RAISED AT THE TRIAL COURT. THEREFORE, THE ISSUE IS NOT SUBJECT TO REVIEW ON APPEAL. RAP 2.5(a).

³ quoting, *State v. Mallory*, 69 Wn.2d 532, 533, 419 P.2d 324 (1966).

⁴ citing, *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997).

In *Bushong*, 151 Wn. App. at 377, the appellant untimely challenged the basis of the trial court's attorney fee award. In addition, the appellant failed to challenge the reasonableness of the fees awarded by the trial court, at the trial court level. Therefore, the Court of Appeals held "that issue is not before us." *Id.*, *see also*. RAP 2.5(a).

In this case, according to the trial court's October 30, 2009 order awarding attorney fees and costs to NOW in the amount of \$58,283.75 plus interest, "Plaintiff failed to cite any specific instances of excessive fees and costs submitted by Defendant NOW Environmental, Inc." CP 772. This finding was not assigned as error in this appeal. Unchallenged findings of the trial court are verities on appeal.⁵

On October 22, 2009, NOW filed its motion and supporting declaration regarding the amount of fees to be entered against EEI and the District, pursuant to the trial court's September 18, 2009 summary judgment award of fees and costs against EEI and the District. CP 592-680. On October 28, 2009, EEI filed its response to Nowicki and NOW's motions regarding the amount of fees to be awarded. CP 681-696. The District also filed a response on October 28, 2009. CP 697-709.

⁵ Unchallenged findings of the trial court are verities on appeal. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546, 556, 132 P.3d 789 (2006).

In their responses regarding the amount of fees requested by NOW, neither EEI, nor the District challenged the reasonableness or amount of the fees requested by NOW. EEI challenged the reasonableness of the fees requested by *Nowicki*, including arguments regarding "unsuccessful motions" filed by *Nowicki*, but EEI did not challenge the reasonableness of the fees requested by NOW. CP 681-696, *see esp.* CP 691-694. The District also filed a response regarding the fee requests submitted by *Nowicki* and NOW, but the District did not challenge the amount of fees, or the reasonableness of fees with regard to either *Nowicki* or NOW. CP 697-709.

A claim of error not properly raised at the trial court is not subject to appellate review, with itemized exceptions not applicable in this case. RAP 2.5(a). Moreover, unchallenged findings of the trial court are verities on appeal. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546, 556, 132 P.3d 789 (2006). Therefore, the *amount* of fees awarded to NOW by the trial court on October 30, 2009, is deemed reasonable, and is not subject to review on appeal. The issue was not raised at the trial court.

III. ATTORNEY FEES AND COSTS SHOULD BE AWARDED TO NOW FOR DEFENDING THIS APPEAL

- A. Statutory attorney fees incurred on appeal may be awarded to a party as costs, pursuant to RAP 14.3(a).

NOW ENVIRONMENTAL INC.'S RESPONSE BRIEF

The trial court's September 18, 2009, award of attorney fees, pursuant to RCW 39.04.240, is untimely and, therefore, not subject to review. RAP 2.4(b); *Bushong*, 151 Wn. App. at 375. The trial court's September 18, 2009 award of attorney fees was based on statutory attorney fees, thus fees expended in defending this appeal can be awarded to NOW per RAP 14.3(a), in addition to costs.

B. Attorney fees and costs are appropriate pursuant to RAP 18.9.

On motion of a party, or on its own motion, the appellate court may enter an award of attorney fees and costs incurred on appeal, as the result of a frivolous appeal. An appeal is frivolous if there are no debatable issues, and the appeal has no reasonable possibility of success. *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980).

This appeal has no reasonable possibility of success, and there are no debatable issues presented by the District *with respect to NOW*, because:

(1) The District's appeal of the September 18, 2009 award of attorney fees was untimely. RAP 2.4(b); *see also, Bushong*, 151 Wn. App. at 375; and,

(2) The District never challenged the *amount* of fees awarded to NOW by the trial court's October 30, 2009 order. Therefore, the amount of fees awarded to NOW is a verity on appeal. RAP 2.5(a); *see also, Hegwine*, 132 Wn. App. at 556.

CONCLUSION

The District's appeal from the trial court's September 18, 2009 summary judgment order awarding attorney fees against the District should be dismissed as untimely. The District's appeal from the trial court's October 30, 2009 order awarding fees to NOW in the amount of \$58,283.75 should be dismissed, because the District never challenged the reasonableness, or the amount of the fees at the trial court.

Attorney fees and costs should be awarded to NOW for defending this appeal, because the trial court's attorney fee award was based on statute. Attorney fees and costs should be awarded to NOW for defending this appeal, because this appeal is frivolous, in its entirety, with respect to NOW.

RESPECTFULLY SUBMITTED this 25th day of May, 2010.



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NOW ENVIRONMENTAL INC.'S RESPONE BRIEF

CERTIFICATE OF SERVICE

Above signed attorney hereby declares subject to penalty of perjury under the laws of the State of Washington that counsel for Respondents herein, below named, were served with a copy of this Response Brief on this 25th day of May, 2010, via facsimile and regular U.S. mail and/or via courier:

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