IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

EASTWOOD ENTERPRISES, INC., an Oregon corporation, Respondent, v. TACOMA SCHOOL DISTRICT NO. 10, a Washington School District, Appellant, NOWICKI & ASSOCIATES, INC., a Washington corporation; NOW ENVIRONMENTAL SERVICES, INC., d/b/a NOWICKI ENVIRONMENTAL, a Washington corporation, Respondents.	No. 40025-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — This appeal concerns a trial court's order directing the Tacoma School District No. 10 (District) to pay over $235,000 in attorney fees in a lawsuit, to which it

was not a party,[1] between two private entities. Eastwood Enterprises, Inc. (EEI) sued Nowicki & Associates, Inc. (Nowicki) and its successor in interests, NOW Environmental Services, Inc. (NOW), for damages caused by alleged inadequate consulting work on the remodeling of Henry Foss High School. Although Nowicki and NOW filed third- and fourth-party[2] complaints against the District, no claims against the District were adjudicated. Despite the District not being a party to EEI's suit against Nowicki and NOW, the trial court imposed fees against the District, under RCW 39.04.240, after granting Nowicki and NOW's summary judgment motion in EEI's lawsuit. But RCW 39.04.240 does not support the trial court imposing joint and several liability for Nowicki's and NOW's attorney fees on the District, a nonparty in EEI's action. We vacate the part of the trial court's orders requiring the District to pay Nowicki's and NOW's attorney fees.[3] We also deny the District's trial and appellate attorney fee requests.

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[1] A defendant against whom a judgment is entered, under RCW 4.22.070, "must be a named defendant in the case when the court enters its final judgment." *Anderson v. City of Seattle*, 123 Wn.2d 847, 852, 873 P.2d 489 (1994). EEI did not sue the District and Nowicki did not move to have the District joined as a necessary party under CR 19. Nowicki did not file a cross claim, and thus could not join the District under CR 20. Moreover, Nowicki and NOW voluntarily dismissed their claims against the District in actions separate from the EEI and Nowicki/NOW lawsuit.

[2] Civil Rule 14 allows a defendant to bring third-party complaints. The civil rules do not provide for "fourth-party complaints" but we adopt the parties' and the trial court's nomenclature for distinguishing these actions. NOW's "fourth-party complaint" is actually a second third-party complaint.

[3] EEI did not file a notice of appeal and the trial court's order insofar as it requires EEI to pay fees and costs based on RCW 39.04.240 stands.

FACTS

In 2002, the District began a remodel of Henry Foss High School. Garco Construction, Inc., served as the general contractor and Nowicki prepared bid specifications for asbestos removal. Garco subcontracted with EEI to remove asbestos from the school. Nowicki raised concerns about EEI's asbestos removal qualifications because of problems that EEI had in previous projects. In spite of Nowicki's stated concerns, the District decided to pay Nowicki to monitor EEI's performance rather than substituting EEI's subcontract. NOW subsequently purchased Nowicki and assumed the consulting and monitoring duties. The contracts between the District and Nowicki/NOW included a "hold harmless" clause requiring Nowicki/NOW to hold the District harmless from "all suits, claims, or liabilities of any nature" except for those caused by the District's own negligence. Clerk's Papers (CP) at 232, 1655.

In May 2005, the Department of Labor & Industries cited EEI for 29 different safety violations on the Foss High School project, including multiple "serious" and "willful" violations. In response to these violations, the District required that Garco terminate EEI's subcontract.

By August 2005, EEI submitted a $998,643.34 claim to Garco, and then to the District, for "extra work" costs that it had incurred. In November 2006, after several lawsuits were filed, the District, Garco, Garco's insurance carrier, and EEI reached a settlement agreement wherein (1) the District paid EEI $165,000; (2) the District paid Garco $85,000; (3) the parties mutually released and discharged each other from any past and present claims except for a few

enumerated claims not relevant to this appeal; and (4) the District assigned to EEI some of its rights against Nowicki under the District's contract.[4]

In March 2007, EEI sued Nowicki to recover costs and expenses that the District incurred as part of the 2005-2006 litigation. EEI also asserted a breach of contract claim for Nowicki's allegedly defective asbestos removal specifications that EEI relied on when submitting its bid. EEI sought attorney fees pursuant to RCW 4.84.250-.280 and RCW 39.04.240, which allows for attorney fee awards in actions "arising out of a public works contract." RCW 39.04.240(1). EEI later amended its complaint, adding NOW as a co-defendant.

On September 24, 2007, Nowicki filed a third party complaint against the District alleging a right to attorney fees for defending EEI's lawsuit. Nowicki presented three theories supporting attorney fees: (1) "Implied Contract Indemnification," (2) "Express Contract Entitlement to Indemnification," and (3) "Implied Indemnification."[5] CP at 814-15. At this point, Nowicki did not allege any statutory basis for attorney fees.

On December 18, NOW filed a fourth party complaint against the District, alleging a

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[4] Section 6.11 of the settlement agreement states in full,

> 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.

CP at 239-40.

[5] The trial court subsequently granted a CR 12(b)(6) motion to dismiss Nowicki's express contractual indemnity theory for attorney fees against the District.

similar right to attorney fees for defending EEI's lawsuit. NOW also presented three theories supporting attorney fees: (1) equitable indemnity, (2) implied indemnity, and (3) a covenant of good faith and fair dealing violation. At this point, NOW did not allege any statutory basis for attorney fees.

All of the involved parties filed multiple summary judgment motions over the next 20 months. In its trial brief relating to its second summary judgment motion against EEI, Nowicki indicated for the first time its intent to seek attorney fees against the District based on RCW 39.04.240. Ultimately, Nowicki requested to amend its third party complaint to add RCW 39.04.240 as a basis for attorney fees when it also moved for summary judgment a third time in its suit against EEI. NOW's September 4, 2009 motion referenced Nowicki's fee arguments.

On September 18, the trial court granted Nowicki's third summary judgment motion in EEI's suit against Nowicki. The trial court held that (1) EEI could not be indemnified because the District had no obligation to settle EEI's claims, and (2) EEI was barred from seeking indemnification under the District-Nowicki contract's hold harmless provision because it applied only to "damages to persons and property caused by negligence and does not include recovery for economic losses." CP at 460. Accordingly, the trial court dismissed EEI's complaint, with prejudice, and ruled that under RCW 39.04.240, EEI and the District were liable for Nowicki's and NOW's attorney fees.[6] Nowicki and NOW voluntarily dismissed their third and fourth party complaints because the trial court imposed attorney fees on the District in the EEI and Nowicki/NOW lawsuit.

[6] The record is not clear if the trial court formally amended the pleadings, as Nowicki requested when it filed its third summary judgment motion, to allow for an attorney fee award under RCW 39.04.240.

On October 30, the trial court held a hearing resulting in two separate orders. First, the trial court entered an order assigning joint and several liability to EEI and the District for NOW's $58,283.75 attorney fees and costs. Second, the trial court entered an order (1) assigning joint and several liability to EEI and the District for Nowicki's $177,079.89 attorney fees and costs, (2) dismissing all remaining claims against all defendants, and (3) certifying the case for appeal.

On November 24, the District appealed the September 18 and October 30 attorney fee orders. On June 2, 2010, Nowicki filed its response brief and included a motion to dismiss the District's appeal as untimely. On appeal, we address three main issues: (1) the timeliness of the District's notice of appeal, (2) the trial court's award of attorney fees against the District, and (3) the parties' requests for attorney fees on appeal.

ANALYSIS

Timeliness of the Appeal

Nowicki and NOW challenge the timeliness of the District's appeal. Specifically, they contend that the trial court's September 18 order constituted the final judgment in this case and that the District did not appeal this order within 30 days. RAP 2.4, 5.2. Citing RAP 2.4(b), they argue that the October 30 orders addressed only the *amount* of attorney fees they were entitled to receive from EEI and the District. Accordingly, they contend that these orders can be appealed only with regard to the reasonableness of the award and that the District is prohibited from collaterally attacking the trial court's September 18 decision entitling them to attorney fees. The District asserts that the September 18 order is not a final order because, although it resolved EEI's claims against Nowicki and NOW, it did not address the third- and fourth-party complaints or comply with CR 54(b)[7] and RAP 2.2(d),[8] which require express language in a judgment or

order that it is final and appealable. We agree with the District that its appeal is timely.

Orders determining fewer than all the issues presented in a case are appealable only if they comply with the requirements of CR 54(b) and RAP 2.2(d). *Pepper v. King County*, 61 Wn. App. 339, 344, 810 P.2d 527 (1991). These rules require that when there is more than one claim for relief, or more than one party against whom relief is sought, the trial court must make an express determination, supported by findings, that there is no just reason to delay the appeal and that it is entering a final judgment. *Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 881,

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[7] 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.* The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties 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.

(Emphasis added.)

[8] RAP 2.2(d) provides in pertinent part,

> 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 . . . *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.* The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. 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 . . . 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.

(Emphasis added.)

567 P.2d 230 (1977); *Pepper*, 61 Wn. App. at 344-45.

Here, the trial court's September 18 order did not satisfy the requirements of CR 54(b) and was not a final appealable judgment. The September 18 order did not resolve all the pending claims in this multiple party and multiple suit action. Although the trial court dismissed EEI's complaint in its September 18 order, it did not resolve Nowicki's and NOW's third- and fourth-party complaints against the District. Accordingly, the September 18 order would be a final appealable judgment only if it complied with CR 54(b)'s requirements. But because it did not comply with CR 54(b)'s requirements and resolved the issues in only one of the three cases before the trial court, the September 18 order is not a final appealable judgment. In contrast, the October 30 order granting Nowicki attorney fees "dismiss[ed] all actions and proceedings against all Defendants, and dispos[ed] of all claims" and stated "that there is no just reason for delay of any appeal following entry of this judgment." CP at 787. Thus, the October 30 order is the final judgment of the case and the District's notice of appeal is timely.

Nowicki and NOW rely on *Bushong v. Wilsbach*, 151 Wn. App. 373, 213 P.3d 42 (2009), and *Carrara, LLC v. Ron & E Enter.*, 137 Wn. App. 822, 155 P.3d 161 (2007), which involved appeals of orders determining the amount of attorney fees and costs owed after the entry of a final judgment. Here, the trial court included the amount of Nowicki's attorney fees award with its final judgment. And the trial court entered a separate order indicating the amount of NOW's attorney fees award on the same day that it entered the Nowicki final judgment. Accordingly, *Bushong* and *Carrara* do not control.

Because the trial court did not enter its final judgment resolving all matters in the underlying cases until October 30, the District's November 24 notice of appeal was timely.

Accordingly, we deny Nowicki's motion to dismiss.[9]

Trial Court Attorney Fees Award

The District asserts several grounds for reversing the trial court's orders awarding Nowicki and NOW attorney fees. First, the District claims that RCW 39.04.240 does not apply because its contract with Nowicki was not a public works contract. Related to this claim, the District argues that Nowicki and NOW were not prevailing parties as their third- and fourth-party claims were never adjudicated and they never offered a statutorily required settlement offer. Next, the District contends that because it assigned its cause of action to EEI in a settlement agreement it had no personal stake in EEI's lawsuit and, therefore, cannot be required to pay attorney fees. Last, the District argues that even if Nowicki's and NOW's third- and fourth-party lawsuits had been litigated, they would fail as a matter of law. Related to the District's second main argument, we hold that because the District was not a party to the EEI lawsuit against Nowicki and NOW, the trial court lacked authority to impose liability on it for Nowicki's and NOW's attorney fees.

Whether a particular statutory provision authorizes attorney fees is a question of law. *Gray v. Pierce County Hous. Auth.*, 123 Wn. App. 744, 760, 97 P.3d 26 (2004); *see also N.*

[9] On December 10, 2010, citing RAP 17.4(e), Nowicki improperly filed a brief responding to the District's reply brief discussion of Nowicki's motion to dismiss. But RAP 10.4(d) and 17.4(d) govern the briefing rules for motions filed within briefs. Although these rules state that an "answer to a motion within a brief may be made within the brief of the answering party in the time allowed for filing the brief," there is no rule allowing for surrebuttal briefs. RAP 10.4(d); RAP 17.4(d).

Moreover, even if RAP 17.4(e) governed, and we interpreted the District's discussion of the motion to dismiss in its reply brief as an "answer" to which Nowicki could "reply," Nowicki's brief is untimely. Under RAP 17.4(e), any "reply to an answer must be filed and served *no later than 3 days after the answer is served on the moving party*." (Emphasis added.) Nowicki filed its brief more than five months after the District filed its reply brief.

Coast Elec. Co. v. Selig, 136 Wn. App. 636, 643, 151 P.3d 211 (2007) ("Whether a party is entitled to attorney fees is an issue of law, which is reviewed de novo. Whether the amount of fees awarded was reasonable is reviewed for an abuse of discretion.") (footnote omitted). We review questions of law, including statutory construction, de novo. *City of Pasco v. Pub. Emp't Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

RCW 39.04.240(1) provides that it applies "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*." (Emphasis added.) Therefore, the statute requires that for attorney fees to be awarded in the public works contract setting, a "public body" must be a party to the lawsuit.

Here, assuming without deciding that the action is one "arising out of a public works contract," the District was not a party in EEI's lawsuit, thus there was no "public body" party in EEI's suit against Nowicki/NOW. Nowicki and NOW filed *separate* third- and fourth-party complaints but did not join the District to EEI's original suit. And neither Nowicki nor NOW contends that the trial court resolved any of the issues in their third- and fourth-party lawsuits. In fact, Nowicki and NOW agreed to dismiss their third- and fourth-party lawsuits because the trial court had already applied RCW 39.04.240(1) in EEI's lawsuit and imposed fees and costs on the District. But the lawsuit that the trial court resolved involved only three named parties: EEI, Nowicki, and NOW. RCW 39.04.240(1) does not authorize the trial court to award any attorney fees or costs between private parties let alone impose fees and costs on a nonparty.

Nowicki cites *American Seamount Corp. v. Science & Engineering Associates, Inc.*, 61 Wn. App. 793, 812 P.2d 505, *review denied*, 117 Wn.2d 1024 (1991), for the proposition that a third-party defendant can be jointly liable with a losing plaintiff. *American Seamount* and its promoters unsuccessfully sued to enforce a pre-incorporation contract. *Am. Seamount*, 61 Wn. App. at 794-95. Science & Engineering Associates then won an attorney fees award against American Seamount and several third-party defendants. *Am. Seamount*, 61 Wn. App. at 795-96. The third-party defendants were two of the three primary shareholders in the American Seamount Corporation. *Am. Seamount*, 61 Wn. App. at 799. Division One of this court held that the third-party defendants were the real parties interested in the litigation and affirmed their obligation to pay attorney fees. *Am. Seamount*, 61 Wn. App. at 799. Division One reasoned that if American Seamount had won the case, the third-party defendants would have directly benefited and that they should also be liable if American Seamount lost. *Am. Seamount*, 61 Wn. App. at 799. Moreover, the court determined that under corporate law, the third-party defendants who had also been individual promoters of the corporation were liable for the pre-incorporation contracts and, as such, they were also individually liable for attorney fee provisions in those contracts. *Am. Seamount*, 61 Wn. App. at 799-800. But unlike the third-party defendants in *American Seamount*, the District was not a real party at interest in EEI's suit against Nowicki and NOW; accordingly, *American Seamount* does not control our decision here.

Moreover, the trial court suggested in its October 30 order that the District did not eliminate its liability by transferring its litigation rights to EEI. This is incorrect. An assignment of rights transfers the benefits and the burdens of a cause of action to the assignee and relieves the assignor of both. *Puget Sound Nat'l Bank v. Dep't of Revenue*, 123 Wn.2d 284, 290, 868 P.2d

127 (1994); *see also Int'l Commercial Collectors, Inc. v. Mazel Co.*, 48 Wn. App. 712, 718 n.5, 740 P.2d 363 (1987) ("'[A]n assignment transfers to the assignee the same right held by the assignor, with its advantages and disadvantages.'" (quoting Restatement (Second) of Contracts § 340, at 86 (1979))). In its 2005-2006 litigation settlement agreement, the District "assign[ed] 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." CP at 239-40. Accordingly, EEI was the true and only party at interest in the 2007 lawsuit filed against Nowicki and NOW. *Amende v. Town of Morton*, 40 Wn.2d 104, 106-07, 241 P.2d 445 (1952) ("'If, as between the assignor and assignee, the transfer is complete, so that the former is divested of all control and right to the cause of action, and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest.'" (quoting *Spencer v. Standard Chems. & Metals Corp.*, 237 N.Y. 479, 480, 143 N.E. 651 (1924))).

Because the District cannot have liability in a suit where it was not a party and had no real interest, we vacate the trial court's attorney fee award orders insofar as they apply to the District.

Alternative Grounds for Trial Attorney Fees and Costs

The District asks us to also reverse the trial court's denial of its motion to dismiss and summary judgment motions related to Nowicki's and NOW's third- and fourth-party complaints. As an initial matter, the District did not challenge the trial court's denial of these motions in its notice of appeal. We "review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts

review." RAP 2.4(b). Here, the District's arguments concerning the trial court's denial of its summary judgment motion on the third- and fourth-party complaints are not properly before us because they have no bearing on the properly appealed error relating to the attorney fees awarded in the EEI versus Nowicki/NOW lawsuit.

Moreover, the trial court's October 30 order "dismiss[ed] *all* actions and proceedings against *all* Defendants, and dispos[ed] of *all claims*." CP at 787 (emphasis added). This order applied to EEI's case against Nowicki and NOW, Nowicki's third-party complaint against the District, and NOW's fourth-party complaint against the District. The third- and fourth-party complaint lawsuits were dismissed and there is no remedy that we can provide to the District for the earlier denial of its summary judgment motions.

Attorney Fee Requests on Appeal

Nowicki and NOW each request attorney fees and costs on appeal. Nowicki and NOW did not prevail in this appeal and we deny their requests.

The District requests both trial court and appellate attorney fees and costs, including an explicit request for fees associated with Nowicki's appellate motion to dismiss. The District asserts three contract and statutory grounds for its fees and costs. Reasonable attorney fees are recoverable on appeal if allowed by statute, rule, or contract, and the request is made pursuant to appellate rules governing attorney fees and expenses. RAP 18.1(a); *Pierce County v. State*, 159 Wn.2d 16, 50, 148 P.3d 1002 (2006). We hold that the District waived its right to trial court attorney fees by failing to request them at trial and reject the District's asserted grounds for appellate attorney fees.

First, we address the District's request for trial court attorney fees. As the District was

not a party to EEI's lawsuit against Nowicki and NOW, we interpret the District's request as one for attorney fees in defending against Nowicki's and NOW's third- and fourth-party complaints. Our review of the entire record reveals that the District never requested attorney fees at trial in any of its briefs or motions when trying to get the third- and fourth-party complaints dismissed. Claims for attorney fees, other than costs and disbursements, must be made by a motion filed within 10 days of the entry of a judgment unless the substantive law in the cause of action included a damages element proved at trial. CR 54(d)(2). There is nothing in the record before us that suggests the District complied with CR 54(d)(2) after the trial court dismissed the third- and fourth-party complaints in the October 30 order. Accordingly, the District has waived any right to trial court attorney fees by failing to request them at trial.

Next, we turn to the District's three contract and statutory grounds for appellate attorney fees. The District argues that the hold harmless provision of its contract with Nowicki and NOW entitles it to attorney fees and costs because Nowicki and NOW agreed to hold "the District harmless from **all** suits, claims, or liabilities of any nature." Br. of Appellant at 48 (alteration in original). But the hold harmless provision of the contract serves to limit the District's liability and does not create a right to attorney fees for the District from Nowicki and NOW. Therefore, the contract cannot serve as grounds for appellate attorney fees.

The District's arguments concerning RCW 4.84.330 fail for similar reasons. "In any action *on a contract or lease* . . . where such contract or lease specifically provides that attorney's fees and costs, *which are incurred to enforce the provisions of such contract or lease*, shall be awarded to one of the parties, the prevailing party . . . shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements." RCW 4.84.330 (emphasis added). EEI's

lawsuit did not concern the enforcement of any provisions of the District and Nowicki/NOW's contract and the third- and fourth-party complaints against the District were voluntarily dismissed. Thus, RCW 4.84.330 does not apply and cannot support an attorney fees award.

Finally, in accord with our decision that the District is not liable for attorney fees to Nowicki and NOW, the District cannot claim attorney fees under RCW 39.04.240. As a nonparty to EEI's lawsuit, the District can neither be liable for nor assert a right to attorney fees under RCW 39.04.240 in EEI's lawsuit.

We vacate the trial court's order's insofar as they impose joint and several liability for Nowicki's and NOW's attorney fees on the District and we deny the District's request for trial and appellate attorney fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

PENOYAR, C.J.