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Burns Concrete, INC v. Teton County Appellant's Reply Brief Dckt. 47496

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

BURNS CONCRETE, INC. and BURNS HOLDINGS, LLC, Plaintiffs-Counter Defendants-Respondents-Cross Appellants, v. TETON COUNTY, Defendant-Counterclaimant-Appellant-Cross Respondent.	Docket No. 47496-2019 Teton County District Court Case No. CV-2013-165
CROSS-REPONDENT'S BRIEF **and** **APPELLANT'S REPLY BRIEF**	
Appeal from the District Court of the Seventh Judicial District for Teton County. The Honorable Dane Watkins, District Judge, presiding.	

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I. STATEMENT OF THE CASE

Teton County incorporates by reference the State of the Case presented in Appellant's Brief. Teton County responds to the states submitted by the Burns Companies as follows:

As a procedural matter, Teton County filed its notice of appeal of the award of attorney fees at the time of the trial court's September 9, 2019 Memorandum Decision and Order. Subsequent to the notice of appeal, the trial court issued a December 17, 2019 Memorandum Decision and Order on the Burns Companies' motion to reconsider and supplement. By this appeal, Teton County challenges the initial award and its affirmation, if any, on reconsideration.

Moreover, as a further procedural matter, Teton County appealed the trial court award of damages to the Burns Companies. The appeal is pending as Supreme Court Docket No. 47496-2019. To the extent Teton County prevails on its appeal of the monetary damages award, Teton County challenges the award of attorney fees to the Burns Companies as the prevailing party on that basis.

II. ISSUES ON APPEAL

Teton County presents no additional issues in response to the cross-appeal.

III. ATTORNEY FEES ON APPEAL

Teton County claims attorney fees on appeal pursuant to paragraph 12 (e) of the Developer's Agreement logged in the records of Teton County on September 5, 2007 as Instrument No. 191250.

IV. ARGUMENT

A. In reply, the "modified contingency fee" is unreasonable and usurious.

An engagement agreement between a lawyer and client is not a typical business arrangement. The client is often in a state of distress and the attorney is often in a superior bargaining position. The July 2018 engagement agreement between the Burns Companies and their law firm is unusual. The parties entered the agreement after trial. Kirk Burns claimed that his companies "were unable to pay Parsons Behle on a reasonably current basis for the legal fees required to prosecute this lawsuit to judgment and on the inevitable appeal that would follow, together with any post-appeal proceedings, without adversely impacting Plaintiffs' ongoing business operations." (K. Burns. Decl. of March 7, 2019.) However, the July 2018 agreement did not forgive the Burns Companies' obligation to pay past and future attorney fees at the hourly rate.

The "modified contingency fee" agreement had potential upside for the Burns Companies' attorneys at no risk to the Burns Companies. In July 2018, while the parties waited for the decision of the trial court, there were three likely outcomes: (1) the trial court would award monetary damages in excess of the requested fee amount; (2) the trial court would award monetary damages less than the requested fee amount; or (3) the trial court would not award monetary damages. For the purpose of the following illustration, let us assume that total reasonable fees were $100,000 and an amount of $25,000 was more than 120 days past due.

Now, let us look at how the "modified contingency" would impact the Burns Companies, their attorneys, and the County under each likely outcome.

(1) In the first scenario, the trial court awards monetary damages in excess of $100,000. As the prevailing party, the Burns Companies seek attorney fees of $100,000 and an additional $50,000 for past due amounts. If awarded, Teton County pays $150,000 in fees and Parsons Behle recovers $150,000.

(2) In the second scenario, the trial court awards monetary damages of less than $100,000. As the prevailing party, the Burns Companies seek attorney fees and modified contingency fees of $150,000. If awarded, Teton County pays $150,000 in fees and Parsons Behle recovers $150,000.

(3) In the third scenario, the trial court does not award monetary damages. The Burns Companies pay fees of $100,000, but not the additional $50,000. Parsons Behle recovers $100,000.

This illustration shows the purpose of the agreement was to impose an additional burden on Teton County if the Burns Companies prevailed at trial. The County has characterized the agreement as bearing a usurious rate of interest. However, the rate of 300% was never to be imposed on the Burns Companies, but was only to be imposed on the County if the Burns Companies prevailed.

A rate of 300% on a past due legal fee is unreasonable – whether payable by a client or an opposing party and whether characterized as interest, late fees, or a "modified contingency fee". As discussed in the County's opening brief, attorneys have historically been conscientious

of champerty and usery in their fee agreements. Ethical rules have relaxed somewhat in recent years to allow certain forms of contingency fee agreements and rates of interest. None of those approved forms of fees is at issue here. As recognized by one court, a "license to practice [law] is not a license to mulct the unfortunate, but to assist in righting their wrongs, so far as humanly possible." *Recht v. State Bar of Cal.*, 23 P.2d 273, 274 (Cal. 1933). Attorney-client agreements are not typical business arrangements, and this Court should not recognize exorbitant past due rates as reasonable.

B. The trial court did not award the "modified contingency fee" in the way the Burns Companies suggested.

The Burns Companies' articulation of their fee claim and the trial court's interpretation of the claim are not the same. The trial court's memorandum decision shows that it perceived the issue as one of discretion, articulated the applicable legal standard, and acted within its discretion. *See Kenworth Sales Co. v. Skinner Trucking, Inc.,* 165 Idaho 938, 943, 454 P.3d 580, 585 (2019). However, it appears the trial court construed the "modified contingency fee" differently than the Burns Companies advocated.

The trial court's understanding is shown in its initial decision on attorney fees. There, the trial court stated: "Plaintiffs would not incur any liability on the 120-day past due fees if it did not prevail and recover fees against Teton County." (Mem. Dec. of Sept. 9, 2019 at p. 20.) The trial court appears to have read the "modified contingency fee" as forgiving the Burns

Companies of these past due amounts.[1] Therefore, the trial court disregarded the initial fee in its calculation of the fee award. Instead, the trial court appears to have awarded the double amount of those fees – the enhanced "modified contingency" amount.

This apparent interpretation is problematic for both parties. If the trial court had understood the allocation of risk differently (i.e., that the Burns Companies would still be responsible for the base hourly rate), then it may have ruled that the fee agreement was unreasonable. If, as proposed by the Burns Companies, the contract called for three times the base hourly rate, then the trail court may have otherwise calculated the award.

C. The trial court properly denied the Burns Companies' request for additional "contingency" fees.

By their supplemental request for fees, the Burns Companies attempted to continue to collect 300% on fees that fell past due after the judgment and initial attorney fee claim. However, as conceded by the Burns Companies, an award of attorney fees "bears the judgment rate of interest from its effective date." (Resp. Brief at 24, *citing Camp v. Jiminez*, 107 Idaho 878, 886, 693 P.2d 1080, 1089 (Ct. App. 1984); *Roesch v. Kelmann*, 155 Idaho 175, 179, 307 P.3d 192, 196 (2013).) The trial court issued its judgment on February 28, 2019 and its initial attorney fee award on September 9, 2019. From that date forward, interest (even if masked as a "modified

[1] By contrast, in its statement of facts, the trial court recognized that "Plaintiffs would continue to pay attorney fees on an hourly basis but agreed to pay 300% of any fees more than 120 days past due, contingent upon recovery of damages from Teton County." (Mem. Dec. of Sept. 9, 2019 at 3.)

contingency fee") is governed by Idaho Code § 28-22-104. The trial court correctly denied the supplemental request for enhanced amounts on past due fees.

V. CONCLUSION

Based on the foregoing, Teton County requests that this Court deny the Burns Companies' claimed attorney fees as unreasonable. In the alternative, Teton County requests that this Court deny the "modified contingency fee" award on unpaid amounts. In addition, Teton County requests that the Court deny the relief sought by the Burns Companies by refusing remand and by refusing to award additional fees.

Respectfully submitted on April 20, 2020.

OFFICE OF THE TETON COUNTY
PROSECUTING ATTORNEY

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CERTIFICATE OF SERVICE

The undersigned certifies that date set forth below, a true and correct copy of the foregoing was caused to be filed electronically with automated service to:

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Dated: April 20, 2020.

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