COURT OF APPEALS, DIVISION II CASE # 55456-9

CAUSE NO: 101353-1

SUPREME COURT OF THE STATE OF WASHINGTON

CHRIS HAMILTON and JANE DOE HAMILTON, husband and wife, and HG ENTERPRISES, LLC, a Washington limited liability company,

Petitioner,

V

BEN GERVAIS,

Respondents.

RESPONSE OF GERVAIS/RESPONDENT TO PETIITON FOR REVIEW

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I. INTRODUCTION

Acceptance of review is governed by RAP 13.4(b):

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The basis for the Petition is stated as follows:

> This Court should review Division II's opinion under RAP 13.4(b)(2) and (4) because it conflicts with decisions of the Court of Appeals, ignores the plain reading of RCW 4.84.330 which does not require a litigant to be a party to a contract or lease for purposes of awarding fees if the suit was brought on that contract and because it involves an issue of substantial public interest (having clear law on the contractual award of attorneys' fees under RCW 4.84.330) that should be determined by the Supreme Court.

Petitioner does not assert the matter has constitutional implications.

With respect to RAP 13.4(b) (1) and (2), there is no published decisions of either the Supreme Court or the Court of Appeals holding that RCW 4.84.330 provides a basis for awarding fees under a contract with a fee provision where none of the litigants are either parties to or third party beneficiaries of the contract. There is no ambiguity, lack of clarity or conflict in the authority. Petitioner is, in effect, asking the Court to create a whole new, wholly unrecognized and wholly unprecedented basis for a fee award.

Petitioner asserts that RCW 4.28.330 allows an award of fees between litigants none of whom are parties to the contract with the fee provision:

> RCW 4.84.330 does not contain any requirement that the parties to the litigation be the identical parties to the contract or lease, and, in fact, it broadens otherwise agreed upon contractual language in that regard: "the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements." RCW 4.84.330 (emphasis added).

At 14.

The only function of RCW 4.84.330 is to make unilateral contracts reciprocal. As the Court in *Emerick v. Cardiac Study Ctr., Inc., P.S.,* 189 Wash. App. 711, 738, 357 P.3d 696, 710 (2015) stated succinctly, RCW 4.84.330 "provides for recovery of prevailing party attorney fees *under a contract."* Emphasis in original. RCW 4.84.330. It has no function in the absence of an alleged contractual relationship. The purpose of the language relied on by Petitioner is to make clear that a fee agreement made reciprocal authorizes an award of fees on behalf of a party to the contract even if the party to the contract is not named in the fee provision. Again, Petitioner relies on an untenable interpretation of RCW 4.84.330 in an attempt to create a whole new basis for a fee award

As the Court of Appeals concluded, it is well established non-controversial law that contracts, including fee provisions, are only enforceable by or against parties. Because none of these litigants are parties to the Lease at issue, none is entitled to enforce the fee provision.

II. APPLICABLE AUTHORITY AND DISCUSSION

Petitioner starts by mischaracterizing what was at issue before the Trial Court claiming that Respondent sued to enforce the Lease containing the fee provision. Not the case. The Lease was between 2 business entities. Neither Hamilton nor Petitioner were parties to that Lease. Respondent asserted no claim for breach of the Lease and, in fact could not have asserted such a claim as a non-party, non- third party beneficiary of the Lease.

To briefly re-visit the facts, Petitioner and Respondent were members of, and Petitioner was the managing member of HG, LLC. HG was the lessor to G & H, Inc. a company owned solely by Petitioner. The Lease contained a purchase option. The Respondent sued the Petitioner alleging that Petitioner had breached statutory duties owed in his capacity as the managing member of HG in conjunction with a sale of the property subject to the Lease. Whether the Lease was breached was an issue only to the extent that a breach would be evidence of breach of those statutory duties. No claims on the Lease were ever asserted by Respondent.

The Court of Appeals described the claims below as follows:

> On April 23, 2019, Gervais filed an amended complaint against Hamilton and HG. Relevant here, Gervais alleged that Hamilton breached certain fiduciary duties[1] by selling the South Adams property under its fair market value from HG to G&H. Gervais also alleged that Hamilton acted with

[1] Under RCW 25.15.038 the "only fiduciary duties" owed here are the duties specified expressly in that statute.

> gross negligence or engaged in willful misconduct under former RCW 25.15.155 (1994), which governs the obligations of Hamilton as the managing member of HG.

Opinion at 6. The issue here was never whether HG or G & H breached the lease. The issue was whether Hamilton in his capacity as the manager of HG breached statutory duties by essentially selling the property to himself at a discounted value.

The Court of Appeals found at 10 (cites omitted):

> Here, Gervais, Hamilton, and Heritage Bank are not parties to the lease agreement because they did not sign that document, and if they did, they did not do so in their individual capacities. Rather, the only parties identified in the lease agreement is the landlord, HG, and the tenant, G&H. Because Gervais was not a party to the lease agreement, a court could not enforce the attorney fee provision in that document against him. Similarly, because a contract does not confer benefits on nonparties, a court could not award attorney fees to Hamilton and Heritage Bank based on the lease agreement.

In short, because none of the litigants here were parties to the Lease, none could enforce the Lease or sue for its breach. No liability could arise from the Lease for that reason.

However, this was not the only basis for the decision of the Court of Appeals:

> As discussed above, the parties to this contract were business entities with statutorily-created liability limitations. One of the fundamental purposes of these business entities is to insulate individuals from risking personal assets from liability for business debts and obligations. Absent a reason to disregard these business structures (and no party argues there are facts to support disregarding the corporate form), the limitation of personal liability enjoyed by both Hamilton and Gervais also functions to prevent their recovery of fees under the lease as surrogates for the business entities.

The Court is referring to RCW 25.15.126:

> [T]he debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort or otherwise, are solely the debts, obligations, and liabilities of the limited liability company; and no member or manager of a limited liability company is obligated personally for any such debt, obligation, or liability of the limited liability company solely by reason of being or acting as a member or manager respectively of the limited liability company.

Only the parties to the Lease were capable of breaching the Lease. Even if Hamilton caused HG to breach the Lease, Hamilton could not be held liable for that breach in his individual capacity as a matter of law. The contract could not be enforced against him personally.

This is equally true of Respondent. Respondent would also be immune from liability for a contractual obligation of HG. Petitioner fails to explain how RCW 4.84.330 could extend liability to persons statutorily exempt from such liability. In short, Petitioners want this Court to re-write RCW 25.15.126 as well as create a new basis for a fee award under RCW 4.84.330.

The circumstances surrounding the exercise of the option, whether or not a breach, are only relevant to the extent they show a breach of a statutory duty by Hamilton. Respondent had no recourse except for that arising from the statutory duties owed by Hamilton in his capacity as HG's manager. Given the statutory immunity, Respondent certainly had no claim under the Lease itself.

The Petitioner characterizes the issue here as follows:

> Does Washington law allow a litigant to sue to enforce a lease or contract containing an attorneys' fee provision and then avoid the consequences of that fee provision by claiming they were not a party to the very contract they sued to enforce?

At pg. 1.

Respondent did not sue to enforce the Lease. Respondent sued Hamilton on the only legal theory available where neither was a party to the Lease. So, Petitioner starts by misrepresenting what was at issue in the lawsuit.

In support, Petitioner makes 2 basic arguments. The first is sort of a plain language argument:

> RCW 4.84.330 does not contain any requirement that the parties to the litigation be the identical parties to the contract or lease, and, in fact, it broadens otherwise agreed upon contractual language in that regard: "the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements." RCW 4.84.330 (emphasis added).

At 14. Petitioner wants this to mean, it doesn't matter if none of the litigants is a party to the contract, fees can still be awarded.

RCW 4.84.330 is not a fee-shifting statute. A fee-shifting statute is designed to "punish frivolous litigation and encourage meritorious litigation." By its plain language, the purpose of RCW 4.84.330 is to make unilateral contract provisions bilateral – that's it. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wash. 2d 481, 489, 200 P.3d 683, 686–87 (2009).

The language cited by Petitioner only serves to make a fee provision reciprocal. Assume the fee provision in a contract between A and

B provides, for example, "if a dispute arises A will be entitled to recover fees." B is not named in the provision but, can recover fees because the fee provision is made reciprocal under RCW 4.84.330 and B is the prevailing party. The language does not create a basis for awarding fees against a non-party on behalf of a non-party.

There is no authority of any kind that RCW 4.84.330 is, by itself a basis for an award of fees. RCW 4.28.330 was never intended to be an independent basis for an award of fees. It only applies to contractual remedies rendering a fee provision reciprocal. While it has been extended to allow a party to recover fees where the contract is unenforceable, it still applies only to contractual rights. None of these litigants had any rights under the Lease and none could enforce the Lease.

Notwithstanding, Petitioner asserts that because the claims in the lawsuit "arose" from the Lease, RCW 4.84.330 would be applicable allowing the recovery of attorney fees. In other words, the "arose from the contract" theory represent an exception that allows an award of fees even when no enforceable contractual right is held by any litigant and, the contract is tangentially involved.

Defendants' reliance on the "arose under the contract" theory is misplaced. Initially, how does a claim arise under a contract where none of the parties to the lawsuit are parties to contract and none has any right to enforce the contract. Petitioner never really explains that link.

It is equally contrary to well-established case law holding that where the claim arises from a statute or common law, it does not arise from the contract. The only claims made by Respondent in the lawsuit involving Petitioner were based on breach of statutory duties by Hamilton.

The case law cited by Respondents simply does not support that conclusion. The Court of Appeals concluded:

> Here, paragraph 20 of the lease agreement, in conjunction with RCW 4.84.330 would, in other circumstances, authorize attorney fees to the prevailing parties, here Hamilton and Heritage Bank, because the claims are "on the contract" and the contract provision would be made bilateral by application of RCW 4.84.330.3 Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 489, 200 P.3d 683 (2009). But due to the fact that none of the litigants here are parties to the lease agreement, the fee provision therein simply does not apply to them even if it is made bilateral by operation of RCW 4.84.330. Mut. Sec. Fin. v. Unite, 68 Wn. App. 636, 642-43, 847 P.2d 4 (1993).

In other words, the statute only acts to make a unilateral fee provision bilateral. It has to be tied to a contract. While the case law has extended that principle to allow a recovery of fees under a contract determined to be unenforceable, it has never been applied to create a basis for an award of fess where neither party is a party to a contract. So, rather than trying to resolve an ambiguity or inconsistency in the law, Petitioners seek to create a whole new basis for liability.

The rule of law here is:

> "If a party alleges breach of a duty imposed by an external source, such as a statute or the common law, the party does not bring an action on the contract, even if the duty would not exist in the absence of a contractual

> relationship." *Boguch v. Landover Corp.,* 153 Wash.App. 595, 615, 224 P.3d 795 (2009).

Boyd v. Sunflower Properties, LLC, 197 Wash. App. 137, 150, 389 P.3d 626, 634 (2016). The significant thing is in these cases, there actually was a contract between the parties with an express fee provision in both *Boguch* and *Boyd.* In both cases, the liability on the contract did not arise because none of the duties asserted to have been breached were contractual duties even though the litigants were parties to the agreements containing fee provisions.

The Court of Appeals commented on Petitioner's same argument:

> In an apparent argument to extend the law, Hamilton argues that he can enforce the contractual fee provision as a nonparty against another nonparty because a valid contract is not necessary to invoke an attorney fee provision against certain non-parties to the contract. Hamilton relies on several inapposite cases to support this proposition.

The Court went on to state:

> It is true that parties to a purported contract cease being parties if the contract is later invalidated by the court. And in those cases the courts nevertheless allowed would-be parties to the contract to collect attorney fees under the fee provisions in the undermined contracts. But those cases are a far cry from what we have here in that neither Hamilton nor Gervais were the contracting parties, validity of the contract aside. Moreover, not only were they not the contracting parties, but the contract here has not been undermined. They are not in the same position as those would-be parties in the cases cited. Accordingly, Hamilton's reliance on those cases fails.

At 11-12.

Petitioner has consistently failed to appreciate the fundamental difference between the "arose under the contract" cases and the situation

here. If the party asserting rights under the "undermined contract" had been the prevailing party, that party would have a contractual right to fees against the other party to the undermined contract. This is where the concept of mutuality of remedy comes in. If one party is at risk for fees if it prevails in establishing a contractual liability,the other party should be entitled to fees if it prevails. RCW 4.84.330 has only been extended under these circumstances where, if there had been a contract, there would be a reciprocal right to fees.

The Court of Appeals then distinguished *Deep Water Brewing, LLC v. Fairway Resources Limited*, 152 Wn. App. 229, 215 P.3d 990 (2009) on the same basis it should be distinguished here:

> On this point, Hamilton contends that the fee provision in the right of way and easement agreement required Jack Johnson, the sole shareholder of the development company in Deep Water, to pay attorney fees despite his non-party status. Hamilton is mistaken. The facts of that case show that Johnson was a party to that agreement because he signed it both individually and in his capacity as president of the development company. Deep Water, 152 Wn. App. at 240.

At 12, FN 6. The parties asserting a right to fees were also third party beneficiaries of the agreements at issue. Id at 278. As such, they had a contractual right to enforce the agreements.

Again, it was never disputed that neither Hamilton nor Respondent not was a party to the Lease and the Trial Court specifically found that Respondent was not a third party beneficiary. CP 67-69. "The court expressly declined to conclude that Gervais was an intended third party beneficiary of the lease agreement." Opinion at 7. Again, the authority

relied on by Petitioner is distinguishable. And, again, Petitioner actually cites no authority for the proposition that RCW 4.84.330 allows an award of fees where none of the litigants is a party to the contract containing the fee provision.

The Petitioner has simply failed to provide any authoritative support actually addressing the issue here where none of the parties are litigants and none is entitled to enforce the Lease or assert claims for its breach. Moreover, even where there is a valid contract with a reciprocal fee provision, if the claims are not on the contract, well established law holds that fees are not awardable. The claims here were all statutory.

There never was a basis for any award of fees under the Lease. There was no other basis for an award of fees. There is nothing that needs clarifying. The issues do not impact the public. There is absolutely no reason for review of the Court of Appeals decision. The Petition should be denied.

The undersigned certifies that this Response contains 3006 words.

Dated this 2nd day of November, 2022

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CERTIFICATE OF SERVICE OF

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