

66878-1

66878-1

OCT 26 2011

No. 66878-1-I

COURT OF APPEALS
DIVISION 1
OF THE STATE OF WASHINGTON

GASTON BROTHERS EXCAVATING, INC.,

Appellants,

v.

S.D. DEACON CORPORATION OF WASHINGTON

Respondents.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 OCT 26 PM 1:22

APPELLANT'S REPLY BRIEF

Lawrence B. Linville, WSBA # 6401
Linville Law Firm, PLLC
Attorney for Appellant
800 5th Avenue, Suite 3850
Seattle, WA 98104
(206) 515-0640

TABLE OF CONTENTS

I. STANDARD OF REVIEW P. 4

II. AWARD OF FEES PER SUBCONTRACT P. 5

III. INTEREST ON ATTORNEYS' FEES P. 6

TABLE OF AUTHORITIES

STATUTES

Revised Code of Washington (RCW), 60.04.081..... 4 - 6

I. STANDARD REVIEW

Gaston agrees that the standard of review of a trial court's award of attorneys' fees is usually whether the trial court abused its discretion, which then usually necessitates an inquiry into whether the trial court's award (or non award) was based upon untenable grounds or for untenable reasons.

While the *amount* of an attorneys' fee award is reviewable under an abuse of discretion standard, a trial court's refusal to consider an award of attorneys' fees incurred before and after an artificial window period created by the trial court should be reviewed *de novo* by the appellate court. The reason is that the trial court in this matter either (1) misapplied the Court of Appeals' decision by incorrectly construing the decision, or (2) incorrectly construed or applied RCW 60.04.081 to create an interval or window period of calendar time for the consideration of an award of attorneys' fees to the prevailing party following that party's successful appeal of an initially adverse trial court decision.

II. AWARD OF FEES PER SUBCONTRACT

Deacon correctly asserts that the trial court did not resolve or attempt to resolve the contractual dispute between Gaston and Deacon, but the trial court did find that Gaston was not contractually entitled to further payment, and thus Gaston's lien was frivolous. The terms of Gaston's subcontract apply unless preempted by the fee award provided in RCW 60.04.081 because (1) this was indeed a contractual dispute, (2) Deacon opted to file a court action or proceeding, and (3) Gaston prevailed (ultimately).¹

Deacon was at liberty to draft an attorneys' fee clause providing for an award of fees to the prevailing party upon entry of judgment in favor of that prevailing party, or was at liberty to incorporate no attorneys' fee clause in its subcontract. Deacon's attorneys' fees clause clearly applies to the fees incurred by Gaston in both trial court proceedings. Nothing in RCW 60.04.081 evidences a legislative intent to preclude an award of attorneys' fees under the terms of the contract entered into between the parties. This issue rarely, if ever, comes up because rarely, if ever, does a trial court restrict its scope of award of attorneys' fees under RCW 60.04.081 to an untenably

¹ On October 13-14, 2011, the parties proceeded to binding arbitration. The arbitrator awarded Gaston its full contract balance owed in the amount of \$53,891.75.

created window period which the trial court perceives is controlled by RCW 60.04.081 or appellate decision.

III. INTEREST ON ATTORNEYS' FEES

Deacon correctly asserts that prejudgment interest is not recoverable on an award of attorneys' fees. But, that's not what happened here. The Court of Appeals Commissioner entered an order on July 20, 2009 awarding Gaston fees in the amount of \$17,336.35 and directing Deacon to pay those fees. That was a fully liquidated sum which was ordered to be paid by Deacon to Gaston. Deacon remained defiant and did not pay until February 9, 2010 after, and only after Gaston incurred additional fees to collect.

DATED this 26th day of October, 2011.

LINVILLE LAW FIRM PLLC



David E. Linville, WSBA #31017
Lawrence B. Linville, WSBA #6401
Attorneys for Appellant, Gaston Brothers
Excavating, Inc.

CERTIFICATE OF SERVICE

I, Kristin F. Kelly, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am employed by the Linville Law Firm PLLC.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served in the manner noted APPELLANT'S REPLY BRIEF on the following person:

Attorney for S.D. Deacon
J. Todd Henry
Oles Morrison Rinker & Baker LLP
701 Pike Street, Ste 1700
Seattle, WA 98101-3930

Messenger
 Facsimile: (206) 682-6234
 Mail

DATED this 26th day of October, 2011.


Kristin F. Kelly