

67405-6

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NO. 67405-6-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

AFR2 LLC d/b/a JARBO

Respondent;

vs.

SCHUCHART CORPORATION,
Appellant and Cross-Respondent,

vs.

DEMOLITION MAN, INC.,
Respondent and Cross-Appellant

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BRIEF OF RESPONDENT/CROSS-APPELLANT

DEMOLITION MAN, INC.

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ORIGINAL

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I. ASSIGNMENTS OF ERROR

The Trial Court erred in denying Demolition Man's request for an award of attorney fees and costs, which were warranted under the contract between the parties by operation of RCW 4.84.330.

II. ISSUE PRESENTED

Should the Trial Court have granted Demolition Man's request for an award against Schuchart for fees and costs incurred in defending the Third Party claim, when the contract between the parties contained a unilateral provision allowing Schuchart to recover such fees and costs, and RCW 4.84.330 makes such provisions reciprocal?

III. STATEMENT OF THE CASE

This case arises from damage caused to Jarbo's merchandise by a large dust plume in their storage area in the basement of 511 Boren Ave. N., in Seattle. Jarbo claimed that "demolition work" in the basement caused the dust plume that damaged their goods. Complaint, ¶ 3.4, CP 2. At the time the damage occurred, Demolition Man was on the neighboring site (referred to as the "Greenstein Building"), performing demolition work which included removing a concrete slab on the first floor. It did not perform any concrete removal in the basement. No evidence was presented at trial that Demolition Man was performing any work in the basement at the time that the dust plume was observed in Jarbo's building,

or that Demolition Man was even on the site at the time, performing any work at all. To the contrary, documents admitted at trial showed that the dust plume was accompanied by loud machine noise in the basement of the building next to Jarbo's. *CP 471-72*. This occurred at about 3:30 p.m. on February 3, 2009. *RP 271*. Demolition Man's crew had left the construction site by 2:30 p.m. that afternoon; its supervisor was gone by 3:00. *Trial Exhibits ("TEX") 30, 51; RP 210*. Demolition Man could not have been the source of the noise and dust that occurred after 3:30. However, a sandblasting subcontractor, Aqua-Brite, was on the site beginning on January 30, mobilizing equipment. *TEX 38*. On February 2 it was setting up equipment and running lines. *TEX 39*. On February 3, the date of the first dust complaint, Aqua-Brite was set up to sandblast the basement. *TEX 40*. Trial Exhibits 38-40 show Demolition Man was working outside the basement on each day. Schuchart's job logs show a complaint from Jarbo at 4:00 p.m. on February 3. *TEX 41*. Aqua-Brite was sand-blasting "off and on due to a supposed dust issue next door in the basement." *Id.* Their work immediately resulted in dust shooting out of the basement through unsealed openings, as observed by Demolition Man's crew. *RP 187*.

Upon being sued by Jarbo, and despite the information contained in its own job logs, Schuchart elected not to join the sandblaster in the

lawsuit, pointing all blame at Demolition Man in its third party complaint. *CP 25-32*. That third party complaint asserted as causes of action only a duty to defend (*Id.*, § IV), breach of duty to indemnify (*Id.*, § V), and breach of contract (*Id.*, § VI). Nowhere in the Third Party Complaint did Schuchart assert that Demolition Man was negligent.

The jury awarded Jarbo damages at trial, and Demolition Man was found to bear no fault at all. *CP 1875-76*. Following the verdict and entry of an order dismissing the Third Party claim, *CP 1927-28*, Demolition Man requested an award of attorney fees and costs incurred in its defense. *CP 1931-37*. The Trial Court denied that motion. *CP 2091-92*. That denial is the subject of Demolition Man's appeal.

Trial Exhibit 15 is the Subcontract Agreement between Schuchart and Demolition Man. In part, it required Demolition Man to defend and indemnify Schuchart for claims alleged to arise out of services performed by Demolition Man under the Agreement, but limited to the extent of Demolition Man's negligence. The Indemnification Addendum provision of the subcontract states:

Subcontractor's duty to defend, indemnify and hold Contractor harmless shall include, as to all claims, demands, losses and liability to which it applies, Contractor's personnel-related costs, **reasonable attorney's fees, court costs, and all other claim-related expenses.**

TEX 15, p. 8 [emphasis added].

Schuchart never made any plausible argument that Demolition Man was negligent in any way that resulted in dust being raised in the basement next door. In fact, Schuchart's own expert, Ken Ridings, testified that the work being done by Demolition Man was not likely to have raised dust plumes such as those testified to by Jarbo witnesses. *RP 1182.-83*. Schuchart never offered any evidence disputing that Demolition Man was already gone from the site when noise and dust were being experienced in the 511 Boren basement.

Ultimately, the jury's verdict in Demolition Man's favor established that Jarbo's damages did not arise out of Demolition Man's services under the Subcontract Agreement.

Based on the Indemnification Addendum and the operation of RCW 4.84.330, Demolition Man is now entitled, after entry of the jury's verdict finding it fault-free regarding the claims of plaintiff Jarbo, to have entry of a judgment for its attorney fees, costs and expenses of suit.

IV. AUTHORITIES

RCW 4.56.110

RCW 4.84.330

RCW 19.52.020

RAP 18.1

Almanza v. Bowen, 115 Wn.App. 16, 230 P.3d 177 (2010)

Dahl-Smyth, Inc. v. City of Walla Walla, 148 Wn.2d 835, 64 P.3d 15 (2003)

Oltman v. Holland-America Line-USA, Inc., 163 Wn.2d 236, 178 P.3d 981 (2008)

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Wachovia SBA Lending v. Kraft, 165 Wn.2d 481, 200 P.3d 683 (2009)

Woo v. Fireman's Fund Ins. Co., 150 Wn.App. 158, 208 P.3d 557 (2009)

V. ARGUMENT

Schuchart elected to join only Demolition Man as a third party defendant, in response to Jarbo's claim that its damages were caused by Schuchart or its subcontractors and their demolition activities. *CP 2-3*. Thus, Schuchart had the burden to show that Jarbo's damages resulted from Demolition Man's work, in order to invoke the Indemnity Addendum of their contract. Schuchart failed to do so. Had it succeeded, Schuchart would have been entitled to its fees and costs incurred in the suit. Having failed, it is obligated by operation of statute to pay Demolition Man's fees and costs to the same extent that Schuchart could have received them.

Schuchart acknowledged in closing argument that the dust incident first occurred at "between 3:00 and 4 p.m. on the day in issue." *RP 1272*. Then it asserted that "Schuchart doesn't frivolously bring suits against contractors that weren't even working at the time of the alleged complaints. *RP 1299*. Yet, it then argued:

The [dust] complaints only occurred when Demolition Man was working. Schuchart has deduced that if any activity arose or caused the dust to travel or to be shaken into the Jarbo space, it came from the violent activity that was being conducted on the site by Demolition Man. That is the only work on the site that could have caused the vibration and could have resembled the jackhammering and could have agitated the dust in that space.

RP 1325-26. But Schuchart's arguments came without a shred of evidence that Demolition Man was on the site when dust and noise were first reported by plaintiff. The only evidence is that Demolition Man was not on the site when Jarbo first made a complaint about an active dust plume in its basement. *TEX 51.* Another subcontractor, Aqua-Brite, was there, actively setting up its equipment to sand-blast the basement. *TEX 39.*

Schuchart stopped work only of the sandblaster, not Demolition Man, due to complaints of dust. *TEX 41, RP 216.* Yet, Schuchart only sought to make Demolition Man liable for Jarbo's damages, when it came time for trial. It is no wonder that the jury rejected Schuchart's attempts to shift blame elsewhere. The only mystery is why Schuchart chose to join Demolition Man, when the evidence showed that Demolition Man could not have been responsible.

The answer to that mystery is the Indemnity Addendum to the subcontract. It provided Schuchart a financial incentive to blame Demolition Man, go to trial, and try to persuade the jury to buy its claim that Demolition Man was the at-fault party. With that strategy having

failed, it is now time to hold Schuchart to account for attorney fees and costs to the same extent that it would have been entitled to collect (and would surely have demanded) from Demolition Man in the event that the evidence had shown Demolition Man to be at fault.

a. Attorney fees and costs are warranted under the Indemnification Addendum, which is rendered reciprocal by operation of statute.

The unilateral attorney fee provision in the Indemnification Addendum works in favor of Schuchart, and Schuchart only according to its plain meaning, allowing it to recover all of its attorney fees, costs and other expenses of defending a claim arising out of Demolition Man's negligence. By operation of RCW 4.84.330, Demolition Man has a reciprocal right to recover to the same extent that Schuchart could have had recovery, because Schuchart failed to show that Demolition Man's negligence caused Jarbo's damages in this action. It is important to recall that Schuchart, not Jarbo, brought Demolition Man into this suit. But for the third party claim, Demolition Man would not have incurred defense fees and costs and litigation related expenses.

RCW 4.84.330 states:

In any action on a contract or lease entered into after September 21, 1977, 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, whether he 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.

* * *

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

[Emphasis added.] Demolition Man was certainly the "prevailing party" as to the cross claim asserted by Schuchart since the third party claim was rejected by the jury. Thus, the contractual provision in the Indemnity Agreement became enforceable against Schuchart, even though the contract wording did not specify that Demolition Man could recover fees, costs and disbursements.

In addition to this statute, case law supports Demolition Man's claim. "Mutuality of remedy" is described as the equitable doctrine underlying the statute, and so where a contract provides that one party [Schuchart] could recover fees if it prevailed, the other party [Demolition Man] has similar rights once it has prevailed. See, *Almanza v. Bowen*, 115 Wn.App. 16, 23-24, 230 P.3d 177 (2010). The entitlement to fees must be read into a one-sided contract provision for those fees "any time an action occurs." *Wachovia SBA Lending v. Kraft*, 165 Wn.2d 481, 489, 200 P.3d 683 (2009).

Schuchart opposed the award of fees and costs below in part on the claim that *State Farm v. Barry*, 72 Wn.App. 580, 871 P.2d 1066 (1994),

requires a specific provision permitting such fees/costs to the prevailing party. *CP 2034-35*. But as Demolition Man pointed out below (*CP 2071-82*), such a requirement would render RCW 4.84.330 superfluous since a provision protecting "the prevailing party" would already be reciprocal in its application. If the court read such a requirement into the statute, it erred in doing so.

Schuchart also opposed Demolition Man's request below on the basis of an unreported decision purported to contain a provision similar to ours. *CP 2033-34*. While such unreported decisions may be considered by the trial court, *Oltman v. Holland-America Line-USA, Inc.*, 163 Wn.2d 236, 248, 178 P.3d 981, 988-89 (2008), similar reliance on unreported decisions in the Court of Appeals is not permitted. *Dahl-Smyth, Inc. v. City of Walla Walla*, 148 Wn.2d 835, 839 (n. 4), 64 P.3d 15 (2003) (unpublished Court of Appeals opinions not precedential in the appellate courts).

b. Amount of trial fees/costs not challenged.

The legal fees and litigation costs incurred by Demolition Man were itemized in its motion, and total \$65,787.98. Of this amount, \$57,390 was not challenged by Schuchart (except to the extent that all fees/costs were contested in their opposition brief). *CP 2035-37*. Thus, if Demolition Man prevails on this appeal, it is entitled to entry of judgment

of at least that amount.

However, the parties in the Indemnity Addendum, applied their own definition to what constituted recoverable fees and costs, and included "claim-related expenses." The contract should be applied on its terms, with mutual application under RCW 4.84.330, to include all costs and fees defined by the parties to the contract.

c. Fees/costs on appeal are warranted.

In addition, Demolition Man would be entitled to recover its fees and costs incurred on appeal of this matter. The Indemnity Addendum does not restrict recovery of fees and costs to trial; therefore neither does RCW 4.84.330 apply such a restriction when the result of the trial is appealed. Further, RAP 18.1 provides for recovery of attorney fees or expenses on review, provided that the party seeking fees requests them from the Court of Appeals and devotes a section in its brief to the issue. RAP 18.1(a), (b).

In the event that this Court agrees that Demolition Man is entitled to fees/costs incurred on appeal, Demolition Man will file its affidavit of fees and expenses as required by RAP 18.1(d).

d. Applicable interest rate is 12%.

Schuchart argued in the trial court that RCW 4.56.110 would apply

a 5.25% interest rate because this judgment is "founded on the tortious conduct of individuals or other entities." *CP 2036*. Presuming that it would make the same argument here, it would be incorrect because this judgment would not be founded on Demolition Man's tortious conduct, even though the lawsuit originated in tort. Schuchart sued Demolition Man based on the Subcontract Agreement, for contractual defense and indemnity, not for tortious conduct. Schuchart was only entitled to indemnity if Demolition Man was found to have caused Jarbo's damages, but this does not mean that attorney fees awardable to Demolition Man are "founded on the tortious conduct" of Demolition Man. Instead, the right to attorney fees is based on the same contractual provisions relied upon by Schuchart in making its Third-Party Claim, and the reciprocal effect of those provisions pursuant to RCW 4.84.330. Thus, the statutory rate of 12% would apply.

Woo v. Fireman's Fund Ins. Co., 150 Wn.App. 158, 208 P.3d 557 (2009), held that it is the nature of the **judgment** which determines the applicable interest rate, not the nature of the **claim**. *Id.*, at 167. It went on to hold that Woo's claim against Fireman's Fund, although arising out of the contractual relationship between the parties, sounded in tort because of claims of bad faith. *Id.*, at 169-172. Here, the parties' contractual relationship was the basis of Schuchart's third-party claim. There was no

extra-contractual tort claim between the parties. The tort nature of the claim by Jarbo against Schuchart does not change the contractual nature of the Schuchart third-party claim against Demolition Man.

Thus, because the indemnity provisions of the Subcontract Agreement provide for the fees at issue here, and they are silent as to the interest rate applicable to attorney fees and costs, RCW 4.56.110(4) applies, and sets the interest rate at the maximum rate permitted under RCW 19.52.020, which is 12%.

VI. CONCLUSION

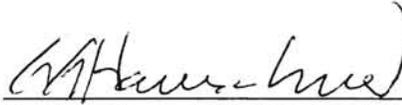
Based on the facts of this case and the application of statute, the jury verdict entitles Demolition Man to an award of its attorney fees, costs and litigation related expenses, to the same extent that Schuchart would have been entitled to those amounts had it proven that its liability was predicated on Demolition Man's negligence. Since Schuchart failed to prove any negligence or liability on the part of Demolition Man, it was not entitled to any defense or indemnity, and it became liable to Demolition Man for defense costs incurred as a result of Schuchart's claims against Demolition Man.

The Court should reverse the Trial Court's denial of Demolition Man's motion for fees and costs, and remand for entry of a judgment in Demolition Man's favor, against Schuchart, for its defense and litigation

related costs and fees, including those incurred on appeal, with interest at 12% until paid in full.

Respectfully submitted on this 26th day of March, 2012.

WOOD SMITH HENNING & BERMAN LLP

A handwritten signature in cursive script, appearing to read "Gordon Hauschild", is written above a horizontal line.

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Attorneys for Demolition Man, Inc.

NO. 67405-6-I

WASHINGTON STATE COURT OF APPEALS
DIVISION I

AFR2 LLC d/b/a JARBO,
Plaintiff Below and Respondent,

v.

SCHUCHART CORPORATION,
Defendant Below, Third-Party Plaintiff, Appellant and
Cross-Respondent,

v.

DEMOLITION MAN, INC.,
Third-Party Defendant Below and Cross-Appellant.

**CERTIFICATE OF SERVICE OF
BRIEF OF RESPONDENT/CROSS APPELLANT
DEMOLITION MAN, INC.**

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CERTIFICATE OF SERVICE

The undersigned declares under penalty or perjury under the laws of the State of Washington, that on the below date, I mailed a true and accurate copy of BRIEF OF RESPONDENT/CROSS APPELLANT DEMOLITION MAN, INC., with revised margins, to the following:

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Dated this 27th day of March, 2012, at Seattle, Washington.



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