

67405-6

67405-6

NO. 67405-6-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 APR 19 PM 1:17

AFR2 LLC d/b/a JARBO

Respondent;

vs.

SCHUCHART CORPORATION,
Appellant and Cross-Respondent,

vs.

DEMOLITION MAN, INC.,
Respondent and Cross-Appellant

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

DEMOLITION MAN, INC.

Wood Smith Henning & Berman, LLP
Gordon G. Hauschild, WSBA #21005
520 Pike St., Ste. 1205
Seattle, WA 98101
206-204-6800
ghauschild@wshblaw.com

ORIGINAL

Table of Contents

I. DISCUSSION.....1

- a. The absence of a "prevailing party provision" in the subcontract does not render Demolition Man's attorney fee request under RCW 4.84.330 invalid1
- b. Schuchart argues from both sides of its mouth in attempting to avoid attorney fees under the Subcontract1
- c. The Subcontract does contain provisions that call for attorney fees3
- d. Case law relied upon by Schuchart is not helpful to its position4

II. CONCLUSION.....10

Table of Authorities

Statutes

RCW 2.06.040.....7
RCW 4.84.220.....3
RCW 4.84.330.....1 – 11

Cases

Almanza v. Bowen,
115 Wn.App. 16, 23-24, 230 P.3d 177 (2010).....10
Blair v. Wash. St. Univ.,
108 Wn.2d 558, 571, 740 P.2d 1379 (1987)..... 8
Borish v. Russell case,
155 Wn.App. 892, 230 P.3d 646 (2010)..... 7, 8
Calkins v. Lorain Div. of Koehring Co.,
26 Wn.App. 206, 211, 613 P.2d 1431980).....5
Developers Surety & Indemnity Co. v. Bankston,5, 6
Harmony at Madrona Park Owners Assn. v. Madison Harmony Dev. Inc.,
160 Wn.App. 728, 253 P.3d 101 (2011).....8
State Farm v. Barry, 72 Wn.App. 580, 871 P.2d 1066 (1994).....7
Tri-M Erectors, Inc., v. Drake Co.,
27 Wn.App. 529, 618 P.2d 1341 (1980).....5, 6
United Van Lines v. Hertz Penske Truck Leasing, Inc.,
710 F. Supp. 283 (1989).....4

I. DISCUSSION

a. The absence of a "prevailing party provision" in the subcontract does not render Demolition Man's attorney fee request under RCW 4.84.330 invalid.

Schuchart's primary argument against an award of fees is that there is no "prevailing party" provision anywhere in the subcontract. *Brief of Cross-Respondent*, p. 3. This argument is nonsensical, since RCW 4.84.330 expressly provides that if a contract allows only one party to recover attorney fees and costs, the prevailing party is similarly entitled, "whether he is the party specified in the contract ... or not." Ignoring this language, Schuchart asserts that since there is no "prevailing party provision" neither party is entitled to attorney fees. If there were such a provision, however, there would be no need to apply RCW 4.84.330 in the first place. Under Schuchart's application of the rule, RCW 4.84.330 could never be invoked where there was a one-sided attorney provision rather than a "prevailing party provision," and the statute would become superfluous. This Court may not construe statutes in a manner which renders them superfluous or causes absurd results, as Schuchart's interpretation does.

b. Schuchart argues from both sides of its mouth in attempting to avoid attorney fees under the Subcontract.

Schuchart argues only in this appeal that it would not be entitled to any attorney fees and costs, "even if it had been the prevailing party at trial...." *Cross-Respondent's Brief*, p. 4. This assertion is highly curious, and even hypocritical, since in its third-party claim it expressly requested an award of "attorney fees and costs as applicable by law and as may be allowed by contract." CP 25-32 (*Amended Answer, Affirmative Defenses and Third Party Complaint*, ¶ 8.3). If, as Schuchart now asserts, it would have no right to such fees and costs, then it asserted a request for relief in bad faith and without basis in fact or law. It speaks volumes that, in order to avoid attorney fees under RCW 4.84.330, Schuchart and its counsel are apparently willing to admit violating CR 11.

Regardless of its current position, Schuchart cannot deny that its third-party claim seeks recovery of attorney fees and costs under statute and under the contract. Schuchart should not now be heard to assert that it had no right to such relief, solely in order to deny that the contract has a unilateral provision for relief which may be applied reciprocally against Schuchart under RCW 4.84.330.

Schuchart has quoted the indemnity provisions in its *Response Brief*, at page 2. The essence of Schuchart's claim is that Demolition Man caused Jarbo's lawsuit, through actions which were undeniably connected with services performed under the Subcontract. As a result of this asser-

tion, Schuchart requested in its Third Party claim that the trial court grant Schuchart its attorney fees under statute and the contract. Only after the liability issues have all gone against Schuchart does it now claim that it never had any right to recover attorney fees or costs, and therefore neither does Demolition Man. This self-serving change of position should be disregarded.

c. The Subcontract does contain provisions that call for attorney fees.

Contrary to Schuchart's contentions, RCW 4.84.220 makes reciprocal the one-sided fee provision that are contained in the Subcontract. Schuchart twists the language of the statute in asserting that it requires that the contract at issue "specifically provides that attorneys' fees ... which are incurred to enforce the provisions of such contract ...' will be awarded to the prevailing party." *Cross-Respondent Brief*, p. 5. This misstates the statute; the contract need only provide for recovery of attorney fees/costs by "one of the parties," not by "the prevailing party."

The statute cannot logically be read to require a provision for attorney fees to "the prevailing party," for two reasons. First, if under the contract attorney fees were allowed to "the prevailing party" rather than to "one of the parties," then RCW 4.84.330 would not apply because it would not be unilateral. Second, the statute contains its own definition of "pre-

vailing party." It means "the party in whose favor final judgment is rendered." Here, that is Demolition Man, not Schuchart.

The Indemnification Addendum allows the Contractor, if it shows that a claim against it for damages to a third party arises from the Subcontractor's performance connected with the Subcontract, to receive "Contractor's personnel-related costs, reasonable attorney's fees, court costs, and all other claim-related expenses." It is difficult to comprehend how Schuchart can argue that this does not constitute a one-sided attorney fee/cost provision related to enforcing the provisions of the contract. The Indemnification Addendum is clearly a provision of the contract, and the "Contractor" is clearly entitled to attorney fees, costs and other amounts in the event that the Subcontractor's actions result in a claim. If these provisions do not fall within RCW 4.84.330, it is hard to conceive of contract language that does invoke the statute.

d. Case law relied upon by Schuchart is not helpful to its position.

i. *United Van Lines v. Hertz Penske Truck Leasing, Inc.*, 710 F. Supp. 283 (1989) is cited for the proposition that absent a contract provision allowing for recovery of attorney fees, RCW 4.84.330 does not apply. This case is not binding on this Court, being a federal district court ruling. Moreover, it is distinguishable in that the federal court noted that

Hertz Penske did not point to any provision in the truck lease agreement that called for attorney fees. In our case, Demolition Man has pointed to the contract language that provides for a unilateral recovery of fees by Schuchart which, under RCW 4.84.330, is rendered reciprocal.

ii. *Tri-M Erectors, Inc., v. Drake Co.*, 27 Wn.App. 529, 618 P.2d 1341 (1980) is cited by Schuchart for the proposition that a general contractor cannot recover its legal fees incurred in establishing his right of indemnification. *Cross-Respondent Brief*, p. 4. This case actually supports Demolition Man's position rather than Schuchart's. In *Tri-M*, the court cited with approval language from another case, *Calkins v. Lorain Div. of Koehring Co.*, 26 Wn.App. 206, 211, 613 P.2d 143 (1980), that held that "indemnity contracts should be given a reasonable construction and should not be 'so narrowly or technically interpreted as to frustrate their obvious design.'" [Citation omitted.] The court went on to note that the parties attempted to allocate risks associated with accidents that might occur in connection with the subcontract, and found the indemnity provision enforceable. 27 Wn.App. at 532-34. It further noted that the Contractor in *Tri-M* was allowed to enforce an indemnity provision because the contract required an act or omission constituting negligence on the part of the Subcontractor before the indemnity duty was triggered. Such an act or omission was found, so the indemnity provision was

enforced. Had it not been, the Contractor would have had no such right to indemnity.

Our case is similar. Schuchart alleged that Demolition Man was negligent in causing Jarbo's damages, and that it was therefore liable to indemnify Schuchart, including all "personnel-related costs, reasonable attorney's fees, court costs, and all other claim-related expenses" as defined in the Subcontract. Having failed to show that Demolition Man was negligent, Schuchart cannot enforce any right to indemnity.

However, because Schuchart could have enforced a right to indemnity if it prevailed on its claim that Demolition Man was negligent, so also must Demolition Man have a right under RCW 4.84.330 to enforce a similar right now that Schuchart has failed to prove its claim. *Tri-M* actually supports Demolition Man's position more than it supports Schuchart's. The trial court erred in construing the indemnity addendum's provisions too narrowly and hyper-technically rather than applying a reasonable reading to give effect to the parties' obvious intentions.

iii. In citing *Developers Surety & Indemnity Co. v. Bankston*, Schuchart violates appellate citation rules by citing to unreported authority. While permissible in the trial court, this is not appropriate in the Court of Appeals, as discussed in *Respondent/Cross-Appellant's Brief* at p. 9. Moreover, *Bankston* contains no indication that there was any

claim under RCW 4.84.330, and merely holds that the contract relied upon by Developers Surety "provides no basis for fees on appeal." This case is not valid precedent under RCW 2.06.040, and is not helpful.

iv. Schuchart cites *State Farm v. Barry*, 72 Wn.App. 580, 871 P.2d 1066 (1994), asserting that it supports denial of fees "because [the] policy contained no provision permitting an award of attorney fees to the prevailing party." As discussed above, however, the statute cannot be read to require a provision calling for fees "to the prevailing party" as Schuchart suggests. The decision in *Barry* does not recite any fee provision, similar or dissimilar to ours, on which the attorney fee request therein was made. See, 72 Wn.App. at 595. It is not appropriate to substitute "to the prevailing party" for "to one of the parties," judicially amending the plain language of RCW 4.84.330. This Court should reject Schuchart's invitation to read such a change into the statute through the *Barry* decision.

v. Similarly, the mention of RCW 4.84.330 in the *Borish v. Russell* case, 155 Wn.App. 892, 230 P.3d 646 (2010) is inapposite. At page 907, the *Borish* court asserts that "[u]nder RCW 4.84.330, parties can enter agreements that allow the prevailing party to recover attorney fees in disputes arising from the agreement." It notes that the contract at issue there "provides for reasonable attorney fees and expenses to a prevailing

party," and thus there was no need to apply RCW 4.84.330 since there was no indication that the provision was written so as to apply only to one of the parties as specified in the statute. Thus, the mention of the statute in the *Borish* ruling was *dicta* and cannot be read to require a provision for attorney fees "to the prevailing party" rather than "to one of the parties."

vi. *Harmony at Madrona Park Owners Assn. v. Madison Harmony Dev. Inc.*, 160 Wn.App. 728, 253 P.3d 101 (2011), also fails to support Schuchart's argument. The *Harmony* court quotes provisions of the agreement at issue therein as authorizing "the prevailing party" (with quotation marks in the original) to recover its attorney fees and costs. It does not cite to RCW 4.84.330 as authority for its award of fees. See, 253 P.3d at 107, ¶ 23. Instead, it cites to *Blair v. Wash. St. Univ.*, 108 Wn.2d 558, 571, 740 P.2d 1379 (1987), a federal civil rights action (which also did not refer to RCW 4.84.330, but instead to RCW Chapter 49) for the basis of its common-law authority to award fees to a prevailing party in such actions.

These cases can only support the proposition that where there is an express contractual provision allowing fees to "the prevailing party" there is no need to resort to RCW 4.84.330 as a basis to make the award. Where there is only a provision under which one of the parties could recover fees, then RCW 4.84.330 applies the provision to both parties.

Any other result would frustrate the purpose of RCW 4.84.330, because the indemnity provision such as the one here could only be enforced by one party (Schuchart), and not by the other (Demolition Man). This would allow Schuchart to join a subcontractor with impunity, and even frivolously, claiming that the subcontractor acted negligently in the hope of gaining a scapegoat to pay its defense costs; if it failed to prove its claim the subcontractor would have no relief and the contractor would have lost nothing in the attempt. Failing to apply RCW 4.84.330 to a written contract like ours would hand contractors like Schuchart a no-risk gamble which could only encourage dragging parties into bogus claims, forcing them to defend themselves for no reason other than the hope that a jury will pin some blame on the subcontractor and grant a windfall to the contractor.

That is exactly what happened here, as demonstrated by Schuchart's closing argument in which its counsel argued that the jury should just "assign" liability to Demolition Man, without any argument that any action or omission of Demolition Man was negligent. RP 1297-1300, 1325-26. Schuchart in fact argued to the jury that "the third party claim against Demolition Man doesn't even come into play in this case, if you find that Schuchart was not liable ... So the issue is moot, if you find no liability against Schuchart." RP 1297, lines 8-15. Schuchart suggests

that the jury should not determine Demolition Man liable, RP 1298, but then suggests that the jury "attribute 20 percent fault to the Demolition Man and 80 percent to the plaintiff...." RP 1300.

To preserve the mutuality of remedy, *Almanza v. Bowen*, 115 Wn.App. 16, 23-24, 230 P.3d 177 (2010) and *Wachovia SBA Lending v. Kraft*, 165 Wn.2d 481, 489, 200 P.3d 683 (2009), discussed in Demolition Man's initial brief at p. 9, compel this Court to apply the attorney fee provisions in the Indemnification Addendum as if written for the benefit of either party.

II. CONCLUSION

Schuchart would have this Court read RCW 4.84.330 out of existence or would have the Court judicially amend the plain language of the statute. In arguing that a "prevailing party provision" is necessary in the parties' contract, Schuchart argues that the statute is enforceable only under circumstances where it is not necessary because the contract provisions address the fees issue. This nonsensical interpretation would render the statute superfluous, and would ignore the plain meaning and intent of the statute – to make a one-sided right to recover attorney fees reciprocal.

Construing the Indemnity Addendum as proposed by Schuchart invites exactly the kind of frivolous joinder of a party that happened here,

without any proof of negligence, or worse (as happened here) with an acknowledgement that the Contractor does not believe that the Subcontractor was negligent, while nevertheless arguing that fault should be allocated to the Subcontractor just so that the Contractor can shift litigation costs to a party that bears no fault at all. In that scenario, the worst case outcome for the Contractor is that it is found liable and the Subcontractor is not, but the Subcontractor still has to pay its attorney fees and costs that it incurred only because the Contractor forced it into the litigation. This cannot be the intention of either the Indemnification Addendum or RCW 4.84.330.

The trial court erred in denying Demolition Man's request for an award of attorney fees against Schuchart. That ruling should be reversed, and since Schuchart failed to challenge the fees set out by Demolition Man, the trial court should be directed to enter judgment in Demolition Man's favor for the uncontested amount of fees and costs.

Respectfully submitted on this 19th day of April, 2012.

WOOD SMITH HENNING & BERMAN LLP



Gordon Hauschild, WSBA #21005
Attorneys for Demolition Man, Inc.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 APR 19 PM 1:17

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

Gordon G. Hauschild, WSBA #21005
Wood Smith Henning & Berman, LLP
520 Pike St., Ste. 1205
Seattle, WA 98101
206-204-6800
ghauschild@wshblaw.com
Attorneys for Respondent/Cross-Appellants
Demolition Man

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 REPLY BRIEF OF RESPONDENT/CROSS APPELLANT DEMOLITION MAN, INC. to the following:

Robert Sulkin
McNaul Ebel Nawrot & Helgren
600 University Street, Suite 2700
Seattle, WA 98101

William O'Brien
Law Office of William O'Brien
999 Third Ave, Suite 805
Seattle, WA 98104

Dated this 19th day of April, 2012, at Seattle, Washington.



Renee Faulds
rfaulds@wshblaw.com