

NO. 45821-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THOMAS PRICE and PATRICIA PRICE, husband and wife, individually
and their marital community composed thereof; and HYUN UM and JIN
S. UM, husband and wife, individually and their marital community
composed thereof, d/b/a P & U CAPITAL PARTNERS, LLC, a non-
existent Washington limited liability company,

Appellants,

v.

SOUNDBUILT NORTHWEST, LLC, a Washington limited liability
company,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Soundbuilt Northwest, LLC (“Soundbuilt”) continues to erroneously contend that there exists any question as to who prevailed in this action. In the prior appeal, this Court already found that Appellants were the substantially prevailing parties entitled to attorney fees on appeal. This Court “reverse[d] the trial court’s ruling in favor of [Soundbuilt], vacate[d] the subsequently entered charging order, and remand[ed] for entry of a final order of dismissal.” CP at 1031. The trial court dismissed Soundbuilt’s action in its entirety. This Court reversed the ruling on which Soundbuilt hangs its metaphorical hat – the trial court’s original judgment. There survives no decision in which Soundbuilt prevailed in this matter. This Court’s order dismissing Soundbuilt’s case was so all encompassing that it declined to reach the additional issues on appeal, including issues of scrivener’s error. CP at 1031. As such, all that remains is for the trial court to properly award Appellants their attorney fees incurred at trial and on the prior appeal and for this Court to award attorney fees on appeal.

Soundbuilt notably does not deny that the Appellants are entitled to their full attorney fees incurred during the prior appeal or that the trial court abused its discretion in determining the amount of attorney fees. Soundbuilt’s only argument is that the trial court failed to find whether either party substantially prevailed. However, that determination has already been made by this Court and even if this Court had not made that determination, there is no question that Appellants are the prevailing party.

Price and Um respectfully request that this Court vacate the trial court's order to the extent that it denied Price and Um the appellate attorney fees incurred after the bankruptcy filings and for work performed at the trial court level. Given the trial court's undisturbed and unchallenged finding that the appellate level attorney fees were "ordinary, necessary, and reasonable," Price and Um request that this Court remand and direct the trial court to enter an amended judgment in favor of Price and Um for the full amount of the prior appellate attorney fees - \$83,118.00. Additionally, Price and Um request that this Court remand and direct the trial court to enter judgment in favor of Price and Um for attorney fees incurred at the trial court level, including those fees incurred on remand. Price and Um respectfully request that this Court remand this matter before a different trial court judge.

II. FACTS

In their Answer, Appellants raised multiple affirmative defenses, as required by CR 8, but no counterclaims. 1 CP at 48 – 50. In its original findings of fact, the trial court ruled against Appellants on Appellants' affirmative defenses, including the affirmative defenses of scrivener's error and res judicata. CP at 1004 – 07. This Court reversed the trial court's ruling in favor of Soundbuilt, vacated the subsequent charging order, and remanded for entry of a final order dismissing Soundbuilt's action against Price and Um. CP at 1031. After this Court's decision, the trial court vacated its prior judgment and dismissed Soundbuilt's entire case with prejudice. CP 1107 – 08. Nothing remains of the trial court's

original decision in favor of Soundbuilt. All rulings in Soundbuilt's favor have been vacated.

As further evidence of the totality of this Court's reversal, it specifically stated that because it was reversing the trial court's ruling in favor of Soundbuilt "res judicata grounds, [it did] not reach the parties' other arguments on appeal with respect to successors in interest, scrivener's error, mutual mistake, collateral estoppel, LLC veil piercing, statutory personal liability, damages, or the charging order." CP at 1031. It defies logic to argue that Soundbuilt might be the prevailing party on the trial court's scrivener's error or mutual mistake findings when this Court acknowledged that its holding mooted the parties' arguments on these issues. More than that, the trial court's findings on these matters is no longer in effect. This Court reversed that ruling and then the trial court vacated its judgment. Nothing remains for Soundbuilt to rely on in support of its claim that Appellants obtained anything short of a complete victory.

III. ARGUMENT

A. **Appellants are the Prevailing Party because Appellants, and Appellants Alone, Obtained Judgment in their Favor.**

Soundbuilt argues that this matter should be remanded to the trial court for a determination on the prevailing party because only the trial court has discretion to award or deny attorney fees. *Respondent's Response Brief* at 2, 7. This is incorrect. The trial court lacks discretion to

deny attorney fees – the sole discretion applicable is the *amount* of attorney fees.

Although “the trial court has discretion regarding the amount of attorney fees which are reasonable, . . . where a contract provides for an award of reasonable attorney’s fees to the prevailing party, such an award must be made.” *Singleton v. Frost*, 108 Wn.2d 723, 727, 742 P.2d 1224 (1987) (emphasis added); *Hawkins v. Diel*, 166 Wn. App. 1, 10, 269 P.3d 1049 (2011) (“An award of attorney fees under RCW 4.84.330 is mandatory, with no discretion as to the amount”); *Kofmehl v. Steelman*, 80 Wn. App. 279, 286, 908 P.2d 391 (1996). “Whether a party is a ‘prevailing party’ is a mixed question of law and fact that [this court] reviews under an error of law standard.” *Wright v. Dave Johnson Ins., Inc.*, 167 Wn. App. 758, 782, 275 P.3d 339, *rev. denied*, 175 Wn.2d 1008 (2012); *Cornish College of the Arts v. 1000 Virginia Ltd. P’ship*, 158 Wn. App. 203, 231, 242 P.3d 1 (2010), *rev. denied*, 171 Wn.2d 1014 (2011); *Eagle Point Condo. Owners Ass’n v. Coy*, 102 Wn. App. 697, 706, 9 P.3d 898 (2000). The prevailing party is the party who receives an affirmative judgment in their favor. *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). Under RCW 4.84.330, the defendant generally prevails by successfully defending a contract action. *Mike’s Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 68, 975 P.2d 532 (1999).

Here, only Appellants have received an affirmative judgment in their favor. That Soundbuilt *previously* had a favorable judgment that this Court reversed is immaterial to the determination of who is the prevailing

party. Appellants successfully defended Soundbuilt's contract action. Appellants obtained the complete dismissal, with prejudice, of Soundbuilt's entire case. No judgment, ruling, finding, or order remains in effect that was favorable to Soundbuilt. As such, there is no discretion in determining whether Appellants are entitled to their attorney fees for work performed at the trial court level and on appeal.¹ There is no basis for or reason to remand this matter to the trial court for a determination of the prevailing party. Appellants alone obtained an affirmative judgment in their favor, and the REPSA, as this Court previously found, provides for an award of Appellants' attorney fees. If anything remains for the trial court to determine, it is solely the *amount* of reasonable attorney fees for Appellants at the trial court level and the appellate level if this Court is not inclined to have the commissioner's office make the determination as to the reasonableness of appellate attorney fees.

Additionally, this Court should reject Soundbuilt's arguments that there were multiple claims involved in this matter. In each of the cases Soundbuilt cites, the defendant asserted one or more counterclaims and the parties each prevailed or lost on an affirmative claim. *Hertz v. Riebe*, 86 Wn. App. 102, 104, 936 P.2d 24 (1997) (purchasers sued vendors to rescind earnest money agreement, vendors sued purchasers for unpaid rent and each party prevailed on their claims); *Marassi v. Lau*, 71 Wn. App. 912, 913 – 14, 859 P.2d 605 (1993) (Plaintiff asserted multiple contract

¹ Such fees belong and must be paid to the bankruptcy estate, not to appellants directly.

and tort claims, defendant asserted a counterclaim for property damage), *abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009).

In contrast, Appellants asserted no counterclaims in this matter. Appellants asserted affirmative defenses and fully prevailed on one of those defenses – res judicata. Neither of the cases Soundbuilt relies upon involve a situation in which the defendant asserted only affirmative defenses and obtained the complete dismissal of the plaintiff’s case based on one of the affirmative defenses.

Soundbuilt also cites no authority that Appellants are required to prevail on *every single counterclaim* they alleged before Appellants qualify as the prevailing party. Such a position is illogical for at least two reasons. First, CR 8(c) mandates the assertion of every affirmative defense available to a party. CR 8(c) (“a party shall set forth” the affirmative defenses listed in the rule). Second, it is a waste of judicial resources to require a favorable finding on multiple affirmative defenses before a defendant may be a prevailing party. As this Court correctly noted, its holding regarding the res judicata effect of Soundbuilt’s prior dismissal dealt with Soundbuilt’s claims in their entirety leaving no need to address the remaining issues before the Court. Soundbuilt’s position would require needless litigation and cost.

Appellants respectfully request that this Court hold that the trial court erred in denying Price and Um attorney fees for work performed at the trial court level. Appellants request that this Court remand and direct

the trial court to enter judgment in favor of Price and Um for attorney fees incurred at the trial court level, including those fees incurred on remand. Price and Um respectfully request that this Court remand this matter before a different trial court judge.

B. The Trial Court Erred in Denying Appellants Appellate Attorney Fees and the Bankruptcy Court had Already Ordered the Recovery of Appellate Attorney Fees at the Time of the Trial Court's Ruling.

Soundbuilt continues to misrepresent the bankruptcy court's requirements and position on appellate attorney fees in this matter. Soundbuilt has never cited to any authority that requires an order from the Bankruptcy Court appointing counsel before attorney fees can be recovered by the bankruptcy estates. In addition, this argument ignores that the Bankruptcy Court repeatedly ordered the pursuit and collection of attorney fees – both appellate and trial court level fees – on behalf of the bankruptcy estates. As early as November 5, 2013, the Bankruptcy Court directed the bankruptcy Trustee, Eric Orse, to

collect the attorney's fee award rendered in the SoundBuilt Superior Court litigation in favor of the Debtors and take control of those funds for the benefit of the Debtors' estates. This order shall constitute a direction and authorization that any attorney's fees due either the Debtors or to Prium are to be paid to the Trustee, **including any fees incurred by any attorneys retained by the Debtors or Prium in connection with the appeal.**

CP at 1228 (emphasis added). Mr. Orse requested that the trial court

order that all reasonable attorney fees and costs incurred by Price and Um's counsel at trial and on appeal

should be paid to [him] as the Chapter 11 Trustee, regardless of whether some or all of those expenses have been paid to counsel by Price, Um, Prium, or any other parties. If any party has a claim for repayment or reimbursement of fees advanced with respect to this case, that will constitute a claim in the Bankruptcy Court for which [he] will have administrative responsibility.

CP at 1228.

Thus, by the time the trial court ruled on Appellant's attorney fee request, the Bankruptcy Court had already authorized the Trustee to recover attorney fees related to Soundbuilt's lawsuit. The authorization included "any" attorney fees incurred at both the trial court and appellate court levels, including those attorney fees incurred by attorneys that Appellants retained – this includes Mr. Mungia and the Gordon Thomas Honeywell law firm. Notably, there is no exception to the Bankruptcy Court's authorization denying recovery of attorney fees incurred after the bankruptcy filing. The only party making a distinction between pre- and post-bankruptcy fees is Soundbuilt. The Bankruptcy Court, the Trustee, and Appellants all understand that the bankruptcy estate is owed all attorney fees incurred by Appellants in this action – not just those incurred prior to the bankruptcy filings.

Because Soundbuilt continued to insist that a special order appointing appellate counsel after the bankruptcy filing was required, on February 12, 2014, the Bankruptcy Court entered an Amended Ex Parte Order Granting Trustee Authority to Employ Special Counsel Nunc Pro Tunc ("Order"). CP at 1417 – 19. The Order specifically authorized the

bankruptcy trustee to retroactively employ Appellant's appellate counsel in the prior appeal in this case under cause number 40925-9-II. CP at 1417 – 19. The Bankruptcy Court ordered that appellate counsel's "representation of the Debtors and their bankruptcy estates in the *Soundbuilt* appeal is ratified and approved *nunc pro tunc*." CP at 1417 – 19. The Bankruptcy Court further ordered that "the Pierce County Superior Court is authorized to enter an award against Soundbuilt for payment to the Trustee of [appellate counsel's] fees and costs in the *Soundbuilt* matter, whether incurred before or after the Debtor's bankruptcy petitions were filed. CP at 1417 – 19.

Soundbuilt does not dispute that the Bankruptcy Court had authority to enter this order, nor that the order is binding on the superior court. Rather, Soundbuilt now claims that Appellant's prevailing party status or the reasonableness of Appellant's attorney fees was somehow affected by the Bankruptcy Court did not enter this order earlier. *Respondent's Response Brief* at 2. This is incorrect. Whether Appellants are the prevailing party has no relationship to the entry of this order. Additionally, the reasonableness of Appellants' attorney fees does not rely on the entry of this order. Even if it did, the Bankruptcy's order is retroactively effective. The Bankruptcy Court has approved and ratified the appellate work performed by Mr. Mungia and Gordon Thomas Honeywell. It is an unchallenged finding on appeal that Appellants' "attorney's [sic] fees incurred at the appellate court level were ordinary, necessary, and reasonable." CP at 1384. As such, there is no basis for

reducing Appellant's appellate attorney fees incurred during the prior appeal. The trial court erred.

Given the trial court's undisturbed and unchallenged finding that the appellate level attorney fees were "ordinary, necessary, and reasonable," Price and Um request that this Court remand and direct the trial court to enter judgment in favor of Price and Um for the full amount of appellate attorney fees – \$83,118.00.

C. The trial court abused its discretion in limiting the award of attorney fees to only those fees incurred on appeal before the bankruptcy filings.

Soundbuilt does not deny that the trial court abused its discretion in its determination of Appellant's reasonable attorney fees during the prior appeal. The trial court specifically found that the attorney fees incurred at the appellate court level were ordinary, necessary, and reasonable. CP at 1384. The trial court misapplied the law in determining that it had no authority to award appellate attorney fees incurred after the bankruptcy filings. The Bankruptcy Court had issued several orders directing the Trustee to pursue recovery of appellate and trial court attorney fees for the benefit of the bankruptcy estates. In addition, the Bankruptcy Court has since entered an Order ratifying and approving prior appellate counsel's representation of Price and Um on appeal and directing the trial court to enter an award of appellate attorney fees.

To the extent that the trial court's determination on this matter was discretionary, the trial court abused that discretion.

D. Price and Um are entitled to attorney fees on appeal.

If this Court finds that Price and Um are the prevailing party, Price and Um request an award of attorney fees on appeal. Pursuant to RAP 18.1(b), the REPSA, and this Court's prior decision, Price and Um are entitled to prevailing party attorney fees and costs incurred in this appeal. Such fees belong to the bankruptcy estates.

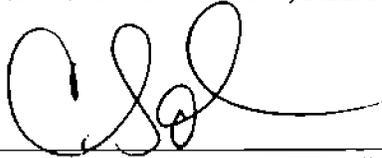
IV. CONCLUSION

Soundbuilt does not dispute that the trial court erred or abused its discretion in reducing Appellant's prior attorney fees on appeal. Soundbuilt also does not dispute that the Bankruptcy Court's Order conclusively and finally demonstrates that Appellants' bankruptcy estates are entitled to the full amount of their attorney fees, regardless of when Appellants' bankruptcy began. Price and Um respectfully request that this Court vacate the trial court's order to the extent that it denied Price and Um the appellate attorney fees incurred after the bankruptcy filings and for work performed at the trial court level. Given the trial court's undisturbed and unchallenged finding that the appellate level attorney fees were "ordinary, necessary, and reasonable," Price and Um request that this Court remand and direct the trial court to enter judgment in favor of Price and Um for the full amount of appellate attorney fees - \$83,118.00. Additionally, Price and Um request that this Court remand and direct the trial court to enter judgment in favor of Price and Um for attorney fees incurred at the trial court level, including those fees incurred on remand. Price and Um are indisputably the prevailing party in this matter, having

obtained a complete dismissal of Soundbuilt's claims with prejudice. Price and Um respectfully request that this Court remand this matter before a different trial court judge.

RESPECTFULLY SUBMITTED this 21st day of July, 2014.

EISENHOWER CARLSON, PLLC

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2014, I caused all parties hereto to be served with the foregoing *Appellant's Reply Brief* and this *Certificate of Service* by directing delivery as follows:

By U.S. first-class mail, postage prepaid, and by e-mail, on July 21, 2014, to Attorney for Respondent:

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I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of July, 2014, at Tacoma, Washington.


Cindy Rochelle

EISENHOWER & CARLSON

July 21, 2014 - 2:31 PM

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