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No. 67405-6

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

RECEIVED
COURT OF APPEALS
DIVISION ONE
APR 16 2012

AFR2 LLC D/B/A JARBO

Respondent

v.

SCHUCHART CORPORATION

Appellant and Cross-Respondent

v.

DEMOLITION MAN, Inc.

Respondent and Cross-Appellant

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REPLY **BRIEF OF APPELLANT/CROSS-RESPONDENT,
SCHUCHART CORPORATION**

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF CASE	1
	B. Because the Subcontract Contains No Prevailing Party Fee Provision, RCW 4.84.330 Does not Apply	5
III.	ARGUMENT	3
	A. There is no prevailing party provision in the Subcontract allowing for an award to either party Under RCW 4.84.330	3
	B. Because the Subcontract Contains No. Prevailing Party fees and Provision, RCW 4.84.330 Does Not Apply.....	5
	C. Reasonableness of Demolition Man's Fee Costs and cost on Appeal	7
IV.	CONCLUSION	8

TABLE OF AUTHORITIES

CASES

Borish v. Russell, 155 Wn. App. 892, 907-908 (2010)	8
<i>Developers Surety and Indemnity Co. v. Bankston</i> , 2010 Wash. App. LEXIS 2468 (2010).....	6
<i>N. Pac. Plywood, Inc. v. Access Rd. Builders, Inc.</i> , 29 Wn. App. 228, 236, 628 P.2d 482 (1981).....	5
State Farm v. Barry, 72 Wn. App. 580, 595, 871 P.2d 1066 (1994).....	8
<i>Tri-M Erectors, Inc. v. Drake Co.</i> , 27 Wn. App. 529, 618 P.2d 1341 (1980).....	5
United Van Lines v. Hertz Penske Truck Leasing, Inc., 710 F. Supp. 283 (1989)	7

STATUTES

RCW 4.84.330	3, 5, 6, 8
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I. INTRODUCTION

The trial court denied Respondent/Cross-Appellant Demolition Man, Inc.'s ("Demolition Man" hereinafter) post-trial motion under CR 54(d) for an award of reasonable attorneys' fees and costs against Appellant/Cross-Respondent Schuchart Corporation ("Schuchart" hereinafter). Demolition Man argued at the court below that the indemnity provision in its subcontract with Schuchart supports its claim. It does not and the trial court properly denied its motion. (CP 2091-2092)

II. STATEMENT OF THE CASE

Schuchart answered the complaint of Respondent AFR2 LLC d/b/a/ Jarbo ("Jarbo" hereinafter) denying that any work on the Greenstein Building caused damage to Jarbo's clothing. (CP 4-8) Because Jarbo claimed that "demolition work" in the Greenstein Building caused the claimed damage, Schuchart brought in its demolition subcontractor, Demolition Man, as a third-party defendant seeking indemnity under the subcontract. (CP 25-32). At trial, the jury found Schuchart liable to Jarbo, and did not assign any fault for Jarbo's damages to Demolition Man. (CP1875-1876).

The indemnity provision in the subcontract is set forth below:

INDEMNIFICATION ADDENDUM

Demolition Man (hereinafter Subcontractor) **agrees to defend, indemnify, and hold Schuchart Corporation (hereinafter "Contractor") harmless from any and all claims, demands, losses, and liabilities to or by third parties arising from, resulting from or connected with** services performed or to be performed under this Subcontract by Subcontractor or Subcontractor's agents or employees to the fullest extent permitted by law and **subject to the limitations provided below.**

Subcontractor's **duty to indemnify** Contractor **shall not apply** to liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of Contractor or Contractor's agent or employees.

Subcontractor's **duty to indemnify** Contractor for liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the concurrent negligence of (a) Contractor or Contractor's agents or employees, and (b) Subcontractor or Subcontractor's agents or employees, **shall apply only** to the extent of negligence of Subcontractor or Subcontractor's agents or employees

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.

(emphasis added, CP 1943). The indemnity provision of the subcontract does not contain any provision that would support an award of reasonable attorneys' fees to either party to the subcontract should a dispute arise between the two contracting parties. It is purely, and simply, an indemnity provision running in favor of Schuchart requiring Demolition Man to defend and indemnify Schuchart against claims by third parties arising out of services performed by Demolition Man under the subcontract. (CP 1943).

III. ARGUMENT

A. There is no prevailing party provision in the subcontract allowing for an award to either party under RCW 4.84.330.

The general rule in Washington is that parties may not recover attorney fees except under a statute, contractual obligation, or some well-recognized principle of equity. *N. Pac. Plywood, Inc. v. Access Rd. Builders, Inc.*, 29 Wn. App. 228, 236, 628 P.2d 482 (1981). Demolition Man's motion for attorney's fees and costs was properly denied because there is no "prevailing party" provision anywhere in the subcontract. The subcontract Indemnity Addendum applies only to an award of fees and costs incurred by Schuchart in defending the action of a "third-party," a

non-party to the subcontract, Jarbo. By its terms, it has no application to an action between the parties to the subcontract.

Stated another way, the Indemnity Addendum would not allow Schuchart to recover its reasonable attorney's fees and costs in prosecuting its claim for indemnity against Demolition Man, even if it had been the prevailing party at trial on the indemnity claim against Demolition Man. A general contractor cannot recover its legal fees incurred in establishing his right of indemnification. *Tri-M Erectors, Inc. v. Drake Co.*, 27 Wn. App. 529, 618 P.2d 1341 (1980). "The general and virtually unanimous rule appears to limit the allowance of such fees to the defense of the claim indemnified against [the Jarbo claim] and not to extend such allowance for services rendered in establishing the right to indemnification. *Id.* citing 41 *Am Jur. 2d Indemnity* s 36 (Supp. 1974).

Likewise, Schuchart and Demolition Man cannot recover their attorney's fees and costs for Schuchart prosecuting the third-party claim, or Demolition Man defending the third-party claim. In effect, there is no provision for awarding fees and costs to one of the parties as a "prevailing party." RCW 4.84.330 simply does not apply.

Division One has already considered this issue: In *Developers Surety and Indemnity Co. v. Bankston*, 2010 Wash. App. LEXIS 2468 (2010), the Court denied the developer's request for attorney's fees based on an attorney's fee provision in the indemnification agreement. The indemnification agreement was similar to the one in this case, and provided that the principals will indemnify the surety for all demands including attorneys' fees to which the surety shall become liable. The developers requested attorney's fees on appeal under this indemnification clause and Division One stated that the indemnification clause provided no basis for an award of fees on appeal because the reference is not to fees for the prevailing party. Id.

B. Because the Subcontract Contains No Prevailing Party Fee Provision, RCW 4.84.330 Does Not Apply.

Demolition Man's interpretation of RCW 4.84.330 is legally incorrect and contrary to case law. The plain words in the statute, RCW 4.84.330, require a provision in the contract that "specifically provides that attorneys' fees ... which are incurred to enforce the provisions of such contract..." will be awarded to the prevailing party. The duty to defend and to indemnify in the subcontract between Schuchart and Demolition Man applies only to the defense of claims by a non-party to

the subcontract against Schuchart, not to fees incurred by Schuchart and/or Demolition Man in defense of claims of one party to the contract against another party to the contract.

Demolition Man points to no prevailing party provision in the contract because it does not exist. Case law interpreting the statute requires a prevailing party attorney's fee clause before the statute is triggered. In *United Van Lines v. Hertz Penske Truck Leasing, Inc.*, 710 F. Supp. 283 (1989), the U.S. District Court addressed the same issue and summarily dismissed the request. Penske claimed attorney's fees under RCW 4.84.330. The district court denied fees to Penske stating, "Penske has not pointed to a specific term of the contract that provides for attorney's fees to the prevailing party." See also *State Farm v. Barry*, 72 Wn. App. 580, 595, 871 P.2d 1066 (1994) (upholding decision that RCW 4.84.330 does not allow request for fee award because policy contained no provision permitting an award of attorney fees to the prevailing party). In contrast, see *Borish v. Russell*, 155 Wn. App. 892, 907-908 (2010) (contract allowed for reasonable attorney fees to prevailing party on suits concerning the agreement, thus fees were awarded.). Further, in *Madison Harmony Development, Inc.*, 160 Wn.

App. 728, Wash. App. LEXIS 445 (2011), Division One granted attorney's fees to the prevailing party because Paragraph 7.4 of the agreement authorized the "prevailing party" to seek its "actual attorneys' fees and all costs of . . . litigation". *Id.* at 739. The parties in *Harmony* had a virtually identical¹ Indemnification Addendum as the indemnification addendum to the subcontract between Schuchart and Demolition Man, but the Court allowed attorney's fees and costs only because there was a separate prevailing party provision in the contract. There is no prevailing party provision in the Schuchart/Demolition Man subcontract.

C. Reasonableness of Demolition Man's Fees and Costs and Costs on Appeal.

No additional argument is required on these topics: No fees can be awarded Demolition Man at the Trial or on appeal.

¹ In *Harmony*, the indemnification addendum to the parties contract stated, "Subcontractor's duty to defend, indemnify and hold Contractor and Owner harmless shall include, as to all claims, demands, losses and liability to which it applies, Contractor's and/or Owner's personnel-related costs, consultant fees, reasonable attorneys' fees, court costs and all other claim-related expenses". *Harmony*, 160 Wn. App. at 739.

IV. CONCLUSION

Schuchart respectfully requests that the trial court's order denying Demolition Man's motion for attorneys' fees and costs be affirmed.

DATED this 16~~2~~ day of April, 2012.

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CERTIFICATE OF SERVICE

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TO: Clerk of the Court

And TO: All Parties and Counsel of Record.

The undersigned declares as follows:

I am over the age of 18, not a party to this action, and competent to be a witness herein.

On the 16th day of April, 2012, I caused to be filed a true and correct copy of Reply Brief of Appellant/Cross-Respondent Schuchart Corporation to AFR2 LLC d/b/a/ Jarbo and a copy of Brief of Appellant/Cross-Respondent, Schuchart Corporation, and delivered copies of said briefs to the following counsel of record as indicated:

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