

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

NATKIN-SCOTT, a Joint Venture, consisting of  
SCOTT CO OF CALIFORNIA, a California  
Corporation, and NATKIN CONTRACTING LLC,  
a limited liability company; and BUSINESS  
SERVICES OF AMERICA II, INC., a Delaware  
corporation,

Appellants,

v.

M+W ZANDER, U.S. OPERATIONS, INC.,  
formerly known as Meissner+Wurst, U.S.  
Operations, Inc., a corporation,

Respondent.

No. 34757-1-II

UNPUBLISHED OPINION

Van Deren, A.C.J. -- Natkin-Scott, a joint venture, (N/S) and Business Services of America (BSA)<sup>1</sup> appeal the trial court's order granting summary judgment to M+W Zander, U.S. Operations, Inc. (M+W), dismissing with prejudice N/S's two claims and awarding reasonable attorney fees to M+W. N/S claims that (1) the trial court erred in concluding that N/S released M+W from any claim for breach of a settlement agreement the parties executed, (2) M+W

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<sup>1</sup> N/S assigned its rights under its subcontract with M+W to BSA, but we refer to the principal parties as N/S and M+W for clarity.

breached an implied warranty to N/S and the implied warranty was not subject to M+W's asserted defenses, (3) the trial court erred in awarding M+W attorney fees, and (4) it is entitled to recover attorney fees on appeal. We affirm the trial court's rulings, deny N/S's claim for attorney fees on appeal, and award attorney fees and costs to M+W.

## FACTS

WaferTech L.L.C. (WaferTech) built a fabrication facility and awarded the bid to construct the cleanroom to M+W. M+W awarded the subcontract for a certain portion of the construction of the cleanroom to N/S. M+W later terminated N/S's subcontract. N/S sued M+W and WaferTech, alleging "breach of contract, wrongful termination, *quantum meruit*, and a construction lien foreclosure." Clerk's Papers (CP) at 102.

As part of their settlement agreements, M+W and N/S signed a Severin Agreement for Pursuit of Claims (Agreement)<sup>2</sup> in which M+W assigned N/S "all of its pass-through rights under said N/S Subcontract to N/S for purposes of asserting its claims and causes of action against WaferTech and such third parties as it may deem advisable to be asserted by [N/S] as assignee [i]n their name." CP at 102. After much litigation, we, in an unpublished decision, held

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<sup>2</sup> The Severin doctrine generally applies to "contract claims against the federal government." *Frank Briscoe Co. Inc. v. County of Clark*, 772 F.Supp. 513, 517 n.7 (D.Nev. 1991); see *Severin v. United States*, 99 Ct. Cl. 435, 442 (1943). Under the Severin doctrine, if the prime contractor suffers actual damages, the prime contractor can collect damages on behalf of the subcontractor. *Frank Briscoe*, 772 F.Supp. at 516. A prime contractor's actual damages include (1) reimbursing the subcontractor for the subcontractor's damages or (2) liability on the part of the prime contractor for reimbursing the subcontractor for those damages in the future. *Frank Briscoe*, 772 F.Supp. at 517. The application of the Severin doctrine occurs through the use of a Severin Agreement by or between prime and subcontractors. M+W and N/S entered into a Severin Agreement to specify N/S's pass-through claims. Because the subcontractor, N/S, does not have privity to initiate suit against the owner, WaferTech, N/S's claims passed-through M+W to establish contractual privity. See *Howard Contracting, Inc. v. G.A. MacDonald Constr. Co.*, 71 Cal. App. 4th 38, 60, 83 Cal. Rptr. 590 (1998).

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that, because M+W was not a validly registered contractor on the effective date of its contract with WaferTech, N/S “cannot assert that its claims pass through an unregistered contractor.”

*Bus. Servs. of Am. II, Inc. v. WaferTech, LLC*, noted at 120 Wn. App. 1042, 2004 WL 444724, at \*6 (2004).

N/S then brought this complaint against M+W alleging breach of contract and breach of an implied warranty under the Agreement. M+W counterclaimed that N/S breached the Agreement by failing to indemnify it and sought attorney fees.

I. The Severin Agreement

On March 19, 2001, M+W and N/S entered into the Agreement to resolve their disputes arising from the construction of the WaferTech fabrication facility. In the Agreement, N/S and M+W agreed that:

1. N/S, as assignee, will pass through its claims and causes of action to WaferTech with counsel to be selected by N/S. In connection herewith, M+W specifically assigns to N/S all of its pass-through rights under said N/S Subcontract to N/S for purposes of asserting its claims and causes of action against WaferTech and such third parties as it may deem advisable to be asserted by [N/S] as assignee [i]n their name.

. . . .

6. For valuable consideration, receipt and sufficiency of which are hereby acknowledged, M+W and N/S . . . each release, exonerate, acquit, discharge and waive any right or claim each may have against the other arising out of this Project with the exception of the pursuit of these claims and causes of action against WaferTech by and through this pass-through agreement. Nothing herein contained will adversely affect the validity of the claims and causes of action of N/S to be pursued against WaferTech herein. . . .

12. This Agreement contains the entire understanding and agreement among the parties with respect to the matters referred to herein. No other representations, covenants, undertakings or other prior or contemporaneous agreements, oral or written, respecting such matters, which are not specifically incorporated shall be deemed in any way to exist or to bind any of the parties.

. . . .

15. . . . The parties further declare that they voluntarily accept the Agreement for the purposes of making a full compromise, adjustment and settlement of the claims

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released under this agreement, and each assumes any mistake of fact or law in connection with the execution hereof.

CP at 102-05. Under the Agreement M+W assigned its pass-through rights to N/S, allowing N/S to pursue M+W's claims directly against WaferTech and M+W paid \$2.4 million to N/S to settle the claims between M+W and N/S. *Bus. Servs. of Am. II, Inc.*, 2004 WL 444724, at \*2.

## II. Breach of Contract and Breach of Warranty Action

### A. Complaint

On February 28, 2005, N/S sued M+W, alleging breach of contract and breach of an implied warranty<sup>3</sup> under the Agreement. In its first claim for relief, N/S argued that M+W owed \$6.9 million for unpaid work N/S performed under the subcontract because now it could not pursue claims against WaferTech based on our holding in the prior appeal.

In its second claim for relief, N/S argued that (1) “[M+W] impliedly warranted to [N/S] that it had the right to pass-through [N/S’s] wrongful termination claim to WaferTech,” (2) “[M+W] did not disclaim any implied warranties,” and (3) N/S incurred damages because it cannot pursue the pass-through claims.

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<sup>3</sup> N/S’s breach of an implied warranty claim is based on the Restatement (Second) of Contracts § 333(1) (1981), which provides:

(1) Unless a contrary intention is manifested, one who assigns or purports to assign a right by assignment under seal or for value warrants to the assignee

(a) that he will do nothing to defeat or impair the value of the assignment and has no knowledge of any fact which would do so;

(b) that the right, as assigned, actually exists and is subject to no limitations or defenses good against the assignor other than those stated or apparent at the time of the assignment;

(c) that any writing evidencing the right which is delivered to the assignee or exhibited to him to induce him to accept the assignment is genuine and what it purports to be.

M+W denied N/S's claims and raised 17 affirmative defenses, including the defense that the Agreement bars N/S's claims. M+W also counter-claimed, alleging that (1) N/S breached its indemnity obligation and (2) it was entitled to attorney fees under the Agreement.

B. Summary Judgment Motion

M+W moved for summary judgment, arguing that N/S was trying to revive the original action on the subcontract that was dismissed with prejudice. M+W also argued that (1) under paragraph 6 of the Agreement, N/S released M+W from any claims arising out of the WaferTech project and (2) none of N/S's alleged defenses to enforcement of the Agreement is available because N/S assumed the risk of mistake, according to the Agreement's own terms. Furthermore, M+W argued that if the trial court allowed N/S to rescind the Agreement, M+W was entitled to repayment of the \$2.4 million it paid to N/S, plus interest.

M+W also argued that Washington law does not support N/S's implied warranty cause of action under the Restatement (Second) of Contracts, section 333(1) and that neither the language of the Agreement nor the circumstances surrounding its execution support such claims. N/S responded to M+W's argument on section 333(1) of the Restatement, claiming that that M+W did not expressly disclaim any implied or express warranties in the Agreement and that Washington law disfavors warranty disclaimers. N/S also argued that it necessarily did not have to rescind the \$2.4 million M+W paid, because it was asking for two alternative forms of relief: "The first is for rescission of the Agreement and the right to sue for damages under the original contract. The second remedy is to affirm the Agreement and sue for breach damages, i.e., what [N/S] would have recovered if M+W had provided a valid assignment of its rights against WaferTech." CP at 289.

The trial court granted M+W's summary

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judgment motion and entered final judgment dismissing both of N/S's claims in their entirety with prejudice. The trial court ruled that the action was based on an alleged breach of the Agreement and was "not an attempt to revive or reassert any cause of action based upon the underlying subcontract agreement." CP at 430. The order also stated that:

The parties also agreed on the record at the hearing that none of the individuals representing either of the parties or their attorneys discussed or contemplated the issue of either M+W's or Natkin-Scott's contractor registration status or the effects of such registration (or lack thereof) on M+W's assignment of pass-through rights to Plaintiffs at the time the Severin Agreement was negotiated and executed. The parties bargained for the Severin Agreement and the Severin Agreement, along with the releases contained therein, are fully enforceable and have not been breached by M+W.

There are no genuine issues of material fact with respect to either of Plaintiffs' Claims for Relief or with respect to M+W's Second Counterclaim and M+W is entitled to judgment thereon as a matter of law.

CP at 430. N/S unsuccessfully sought reconsideration of the trial court's orders.

### C. Attorney Fees

M+W requested \$81,367.89 attorney fees as the prevailing party under the Agreement.

The trial court granted M+W reasonable attorney fees and costs, but our record does not contain its final ruling on its fee award.<sup>4</sup>

N/S appeals.

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<sup>4</sup> In the trial court's final judgment dismissing N/S's claims for relief and in the trial court's order granting M+W's motion for summary judgment, the court awarded M+W "its reasonable attorney fees and costs incurred, based upon the attorney fees provision of the Severin Agreement, in an amount to be determined pursuant to CR 54 and RCW 4.84.010 *et. seq.*" CP at 431. Our record contains only M+W's motion and reply relating to an award of attorney fees, N/S's opposition to an award of attorney fees, and M+W's cost bill.

## ANALYSIS

N/S argues that the trial court erred in granting summary judgment to M+W because M+W warranted that it had the right to sue WaferTech. And because M+W was not a registered contractor at the time it entered into the contract with WaferTech, it breached the Agreement and the implied warranty of an assignor under Restatement (Second) of Contracts section 333 for failing to assign enforceable rights to N/S.

### I. Standard of Review

We review de novo the trial court's ruling on a summary judgment motion. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 671, 146 P.3d 893 (2006). Our review is the same as the trial court's review under Civil Rule (CR) 56(c). *City of Spokane*, 158 Wn.2d at 671. Accordingly, the moving party is entitled to judgment as a matter of law if the pleadings, affidavits, answers to interrogatories, and depositions establish that there is no genuine issue as to any material fact. CR 56(c); *City of Spokane*, 158 Wn.2d at 671. In addition, we view "the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party." *City of Spokane*, 158 Wn.2d at 671. Generally, we also may affirm the trial court's ruling on summary judgment on any correct ground, even though that ground was not considered by the trial court, "provided that it is supported by the record and is within the pleadings and proof." *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003).

### II. Mistake<sup>5</sup>

M+W's motion for summary judgment asserted that N/S assumed the risk of a mistake of law or fact in the Agreement and, because the invalidity of M+W's contractor

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<sup>5</sup> Because we find this issue dispositive, we do not review any of N/S's other claims on appeal.

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registration status was a mistake of law, M+W did not breach the Agreement or any implied warranty. We agree.

The elements of mistake are as follows. “A mistake is a belief not in accord with the facts.” The belief must be held at the time the contract is made. The mistake must relate to a basic assumption on which both parties relied when making the contract. It must have a material effect on the agreement. Finally, a party may invoke the mistake doctrine only if the party did not bear the risk of mistake.

*Denaxas v. Sandstone Court of Bellevue*, 148 Wn.2d 654, 668, 63 P.3d 125 (2003) (quoting *Simonson v. Fendell*, 101 Wn.2d 88, 91, 675 P.2d 1218 (1984)) (citations omitted).

As the Court noted, “[t]he elements of mistake in Washington jurisprudence closely follow those in the Restatement (Second) of Contracts §§ 151-53 (1981).” *Denaxas*, 148 Wn.2d at 668 n.8. The Restatement (Second) of Contracts section 152(1) (1981) states:

Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

“Courts and commentators generally agree that the term ‘basic assumption’ means the mistake must vitally affect the basis upon which the parties contract.” *Pub. Util. Dist. No. 1 of Lewis County v. Washington Pub. Power Supply Sys.*, 104 Wn.2d 353, 362, 705 P.2d 1195 (1985) (citations omitted). And “[a] party bears the risk of a mistake when (a) the risk is allocated to him by agreement of the parties.” Restatement (Second) of Contracts § 154(a) (1981).

Here, the Agreement states:

15. . . . The parties further declare that they voluntarily accept the Agreement for the purposes of making a full compromise, adjustment and settlement of the claims released under this agreement, and *each assumes any mistake of fact or law in connection with the execution hereof.*

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CP at 105 (emphasis added).

The trial court found that under the Agreement, both parties “bargained for the Severin Agreement, . . . along with the releases contained therein” and that when drafting the Agreement, the parties did not contemplate the issue of M+W’s contractor registration, or lack thereof. CP at 430. M+W and N/S were mistaken about M+W’s contractor registration status, which was a defense Wafer Tech raised to M+W’s claims and against N/S’s pass-through claims in the first appeal. *Bus. Servs. of Am. II, Inc.*, 2004 WL 444724, at \*5.

Paragraph 15 of the Agreement expressly allocates the risk of such a mistake to each party, without recourse against the other. Because the parties expressly assumed the consequences of this mistake, no cause of action can be sustained against M+W due to its mistaken belief that it was a legally registered contractor in the State of Washington when it contracted with WaferTech. Thus, N/S cannot now claim breach of the Agreement based on both parties’ mistaken belief that M+W had a right to sue WaferTech directly.<sup>6</sup> The trial court did not err in granting M+W’s motion for summary judgment.

### III. Attorney Fees At Trial

N/S next argues that we should reverse the trial court’s award of attorney fees to M+W because the trial court did not rule on the amount and because the trial court’s summary judgment determination was in error. M+W argues it is entitled to attorney fees and costs as the prevailing party under the Agreement.

The prevailing party is entitled to recover reasonable attorney fees and costs if the

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<sup>6</sup> This also holds true for any future claims based on any mistake of law. Because both N/S and M+W bore the risk of mistake, neither can raise it in an effort to rescind the Agreement.

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contract contains an attorney fee provision. RCW 4.84.330.<sup>7</sup> This statute is mandatory and does not allow for an exercise of discretion in awarding the attorney fees. *Singleton v. Frost*, 108 Wn.2d 723, 729, 742 P.2d 1224 (1987). But, the trial court retains its discretion in awarding a reasonable amount of attorney fees. *Singleton*, 108 Wn.2d at 730.

We review the reasonableness of a trial court's award of attorney fees for an abuse of discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). "Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought." *Mahler*, 135 Wn.2d at 434. The trial court must exercise its discretion in an articulate manner and make an adequate record, including findings of fact and conclusions of law, on which we can review the attorney fees award. *Mahler*, 135 Wn.2d at 435. In the absence of an adequate record, we will remand the attorney fees award to the trial court to develop such a record. *Mahler*, 135 Wn.2d at 435.

Here, the Agreement states:

9. In any proceeding to enforce this Agreement, the prevailing party, in addition to any other remedy, shall be entitled to reasonable litigation costs, including attorneys' fees incurred in the enforcement of this Agreement.

CP at 104. And the trial court awarded M+W reasonable attorney fees and costs based on the Severin Agreement. N/S does not argue that the prevailing party under the Agreement should not receive attorney fees or that the fees awarded were unreasonable but, rather that, since the trial court's summary judgment determination was erroneous, M+W should not have been awarded

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<sup>7</sup> RCW 4.84.330 provides in relevant part:

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.

fees.

M+W, as the prevailing party, was entitled to an award of attorney fees and costs under the Agreement and RCW 4.84.330. N/S argues that we cannot affirm the trial court's award because it did not enter an order defining the amount of attorney fees it awarded and, as we have noted, our record does not contain such an order. But N/S does not challenge the trial court's attorney fees award as unreasonable. Therefore, we need not review the reasonableness of the trial court's award. Because the trial court did not err in granting summary judgment in favor of M+W, making it the prevailing party, we affirm the trial court's award of attorney fees to M+W without review of its actual award.

#### IV. Attorney Fees and Costs on Appeal

Both N/S and M+W request attorney fees on appeal if we rule in their favor. As M+W is the prevailing party on appeal under the Agreement, we grant it reasonable attorney fees and costs in an amount to be determined according to Rules of Appellate Procedure (RAP) 14<sup>8</sup> and 18.1.<sup>9</sup>

We affirm the trial court's summary judgment ruling, and affirm the trial court's award of attorney fees and costs to M+W. We also award attorney fees and costs to M+W on appeal in an amount to be determined by a Commissioner of this court upon compliance with RAP 18.1 and deny attorney fees and costs to N/S.

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<sup>8</sup> RAP 14.2 provides in relevant part: "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review."

<sup>9</sup> RAP 18.1(a) provides:

Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeal or the Supreme Court, the party must request the fees or expense as provided in the rule, unless a statute specifies that the request is to be directed to the trial court.

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A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Van Deren, A.C.J.

We concur:

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Armstrong, J.

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Penoyar, J.