

No. WD 60242

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

PC CONTRACTORS, INC.,
Appellant/Cross-Respondent,

v.

J.E. DUNN CONSTRUCTION COMPANY and
STARLIGHT THEATRE,
Respondents/Cross-Appellants.

Appeal From the Circuit Court of Jackson County,
State of Missouri

Division 13

The Honorable Jay A. Daugherty, Circuit Judge

**REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT
J.E. DUNN CONSTRUCTION COMPANY**

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REPLY

I. THE TRIAL COURT ERRED IN NOT AWARDING JE DUNN THE FULL AMOUNT OF ATTORNEY'S FEES AND EXPENSES IT REQUESTED BECAUSE THE INDEMNIFICATION PROVISION CLEARLY AND UNAMBIGUOUSLY PROVIDES FOR THE RECOVERY OF ATTORNEY'S FEES AND EXPENSES DUNN INCURRED IN THAT DUNN INCURRED ATTORNEY'S FEES AND EXPENSES IN PURSUING INDEMNIFICATION FROM PC CONTRACTORS AS WELL AS IN DEFENDING PLAINTIFFS' CLAIMS FOR DAMAGES.

As PC Contractors points out in response to Dunn's argument for allowing the full amount of attorney's fees and expenses it incurred in defending Plaintiffs' claims and in pursuing indemnification, attorney's fees may be recovered when provided pursuant to contract. The indemnification provision agreed upon by Dunn and PC Contractors provides indemnification "from and against any claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work under this Subcontract." (L.F., Vol. V, p.612). PC Contractors improperly states that the subcontract "limited indemnification to expenses of defending claims 'attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property.'" (Reply Brief of Appellant/Respondent PC Contractors, Inc., p.15). Reference to the indemnification provision clearly indicates that the language cited by PC Contractors was stricken from the subcontract. (See L.F., Vol. V, p. 612). Therefore, to the extent PC Contractors' argument relies upon the stricken language, it is misplaced.

RJF Int'l Corp., v. B.F. Goodrich Co., 880 S.W.2d 388 (Mo. App. E.D. 1994), provides for indemnification of attorney's fees and expenses incurred pursuing indemnity. PC Contractors attempts to distinguish *RJF Int'l* by arguing that the indemnification provision in that case provided for recovery of expenses incurred by the indemnitee in defending claims **and** for attorney's fees resulting from a breach of the agreement itself. The indemnification provision in *RJF Int'l*, required indemnification "from and against any and all claims, liabilities, damages, losses, costs and expenses, including without limitation, reasonable counsel fees and disbursements resulting from...any breach or default in the performance or observance" of the indemnitee's obligations under the contract between the indemnitor and indemnitee. *Id.* at 371-72. Although the court in *RJF Int'l* did not cite the entire indemnification provision, its holding indicates that the contract provided indemnification for "attorney's fees and costs incurred while defending against plaintiff's case in the trial court."

Dunn is unable to see how the indemnification provisions are distinguishable in the context of providing for attorney's fees and expenses incurred in defending claims as opposed to pursuing indemnification. Further, if the provisions are distinguishable, the indemnification provision at issue in this case is broader than the provision in *RJF Int'l*, because it provides for recovery of expenses that arise out of or result from the performance of PC Contractors' work. Such broad language includes indemnification for damages Dunn suffered as a result of PC Contractors' breach of the subcontract as well as for defending claims;

the same types of indemnification the court in *RJF Int'l* held were included in a similar and arguably narrower provision.

Plaintiffs' claims and Dunn's corresponding need to pursue indemnification from PC Contractors clearly arose out of and resulted from PC Contractors' admitted negligence. The indemnification provision Dunn and PC agreed upon does not expressly preclude recovery for attorney's fees and expenses Dunn incurred as the result of PC Contractors' failure to indemnify Dunn as required under the contract. Further, there is no language in the provision that limits PC Contractors' indemnity obligation solely to attorney's fees and expenses Dunn incurred in defending Plaintiffs' claims. Therefore, under the broadly worded indemnification provision, Dunn is entitled to indemnification from PC Contractors for the entire amount of attorney's fees and expenses Dunn incurred in defending against plaintiffs' claims and in pursuing indemnification.

II. THE TRIAL COURT ERRED IN NOT AWARDING DUNN PRE-JUDGMENT INTEREST BECAUSE, UNDER § 408.020, R.S.MO., DUNN IS ENTITLED TO THE INTEREST ACCRUED FROM APRIL 23, 1998 IN THAT DUNN NOTIFIED PC CONTRACTORS OF THE PENDING LAWSUIT AND DEMANDED INDEMNIFICATION FROM PC CONTRACTORS ON THAT DATE.

Dunn made demand upon PC Contractors for indemnification on April 23, 1998. At that time, neither Starlight nor Dunn had settled with plaintiffs. Therefore, Dunn and PC Contractors could not have definitively ascertained the amount for which PC Contractors was obligated to indemnify Dunn and the amount necessarily remained unliquidated. However, that amount was readily ascertainable

on April 23rd because PC Contractors was given the right to defend Dunn and indemnify Dunn as required under the subcontract and, therefore, PC Contractors could have controlled the litigation from that point forward.

III. THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST DUNN ON STARLIGHT'S CLAIM FOR INDEMNIFICATION BECAUSE STARLIGHT IS NOT ENTITLED TO INDEMNIFICATION FOR STARLIGHT'S DEFENSE OF PLAINTIFFS DIRECT CLAIMS OF NEGLIGENCE AGAINST STARLIGHT IN THAT THE INDEMNIFICATION PROVISION DOES NOT CLEARLY AND UNAMBIGUOUSLY PROVIDE FOR INDEMNIFICATION FOR STARLIGHT'S OWN NEGLIGENCE.

This point is provisional, in that it will only be pursued if the Court of Appeals reverses Dunn's judgment against PC Contractors. The trial court's ruling inextricably joins Starlight and Dunn, in the sense that if Dunn is not entitled to indemnification from PC Contractors, then Starlight is not entitled to indemnification from Dunn. Therefore, only if this Court reverses the trial court's judgment in favor of Dunn on its indemnification claim against PC Contractors, does Dunn request this Court reverse the trial court's granting of summary judgment in favor of Starlight on its indemnification claim against Dunn.

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CERTIFICATE OF COMPLIANCE AND SERVICE

COMES NOW, the undersigned attorney for Respondent/Cross-Appellant J.E. Dunn Construction Company, on this 12th day of February, 2002 and hereby certifies pursuant to Rule 84.06(c) the following:

1. This brief includes the information required by Rule 55.03.
2. This brief complies with the limitations contained in Rule 84.06(b).
3. This brief contains 903 words and 93 lines according to statistics compiled by the Microsoft Word program.
4. Pursuant to Rule 84.06(g), a Microsoft Word file containing this Brief is being submitted on a floppy disk, which has been scanned for viruses and is virus-free.
5. Two (2) copies of this brief have been hand-delivered to each of the following:

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