No. 99154-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
(COURT OF APPEALS NO. 79657-7-I)

EVANSTON INSURANCE COMPANY, an Illinois corporation, and an Assignee of Western Refinery Services, a Washington corporation,

Petitioner,

v.

PENHALL COMPANY, a California corporation,

Respondent.

PETITION FOR REVIEW

(WHATCOM COUNTY SUPERIOR COURT JUDGE RAQUEL MONTOYA-LEWIS, PRESIDING)

Anthony R. Scisciani III, WSBA No. 32342
Audrey C. Chambers, WSBA No. 53625
Counsel for Petitioner
Evanston Insurance Company

HOLT WOODS & SCISCIANI LLP
701 Pike Street, Suite 2200
Seattle, WA 98101
(206) 262-1200

TABLE OF CONTENTS

CASES

RULES

I. IDENTITY OF PETITIONERS

Petitioner Evanston Insurance Company ("Evanston"), an assignee of Western Refinery Services, Inc. ("WRS"), asks this Court to accept review of the decision designated in § II below and attached hereto as Appendix A.

II. THE DECISION OF THE COURT OF APPEALS

Division One held that Whatcom County Superior Court Judge Raquel Montoya-Lewis erred when she granted Evanston's motion for summary judgment.

Penhall Company ("Penhall"), a specialty subcontractor that held itself out as exceptionally qualified in its field, was originally contacted by general contractor WRS in 2014 regarding the possibility of using Petromat® to waterproof a parking facility for WRS at a property owned by Morse Square. Upon visiting the parking facility, Penhall announced to WRS that Petromat® was not right for the job requested by WRS. Instead, Penhall identified and prescribed what it described as "Waterproofing Method System C" as the correct product. Penhall installed Waterproofing Method System C at Morse Square's parking facility and gave a 2-year warranty – but later conceded that it was "not the correct application."

When the parking deck leaked and Morse Square sued WRS, Penhall claimed that it had "no solutions" but nonetheless reaffirmed the

warranty extended to WRS prior to WRS's acceptance of Penhall's proposal. Despite multiple tenders of defense and requests by WRS for Penhall to assist with the defense of the Morse Square claims, Penhall repeatedly ignored WRS, leaving WRS to defend Morse Square's claims alone. WRS settled the claim with Morse Square and assigned its rights to Evanston, who initiated this action against Penhall.

On appeal, Penhall renewed its argument that it did not have a duty to defend WRS and could challenge the amount of the settlement between Morse Square and WRS as the proper measure of the damages it owes to WRS. Penhall also argued that the award of WRS's attorneys' fees, incurred defending the Morse Square claims, was improper under the equitable indemnity theory ("ABC rule"). Division One reversed the judgment and award of attorneys' fees and remanded the case for further proceedings. *Evanston Ins. Co. v. Penhall Co.*, 13 Wn. App. 2d 863, 468 P.3d 651 (2020), *reconsideration denied* (Sept. 24, 2020).[1]

III. ISSUES PRESENTED FOR REVIEW

A. Does the Court of Appeals' holding that Penhall did not have a duty to defend WRS conflict with decisions of *this Court and the Court of Appeals* recognizing the availability of implied indemnity claims based on an express warranty?

B. Does the Court of Appeals' holding that Penhall was not estopped from challenging the settlement as the proper measure

[1] Appendix B.

of damages for its breach of contract with WRS conflict with *other decisions of the Court of Appeals* holding that a party that denies a tender of defense based on a duty to defend and indemnify another party on their third party claim may not later challenge the reasonableness of the underlying settlement?

C. Does the Court of Appeals' holding that Penhall did not have a contractual or equitable duty to defend WRS conflict with express statements by this Court recognizing the availability implied indemnity claims based on express warranties and because the same is of *substantially important interest to the public*, given the use of warranties by companies to manage and allocate risk in the construction industry?

IV. STATEMENT OF THE CASE

A. Factual Allegations

Petitioner Evanston asserted claims against Respondent Penhall Company ("Penhall") for breach of contract, breach of express and implied warranty, and indemnification.[2] Evanston's claims against Penhall are the product of an assignment of rights by Evanston's insured Western Refinery Services ("WRS") following WRS's settlement of an arbitration demand by 1010 Morse Square LLC ("Morse Square").[3]

In May 2014, WRS contacted Penhall and inquired about the possible use of Petromat® to waterproof the parking facility.[4] Petromat® engineered paving fabrics are used as a moisture barrier and stress absorbing

[2] CP at 4-5.

[3] CP at 745-51.

[4] CP at 770, 777.

interlayer between flexible pavements such as asphalt overlays or a chip seal.[5] A representative of Penhall, Joe Metcalf, was given unlimited access to the parking facility and met with a WRS representative, Loren VanderYacht.[6] Metcalf informed VanderYact that Petromat® was unsuitable for the Project.[7]

Instead, Metcalf proposed "a membrane" based on his experience and expertise.[8] Petromat® and System "C" membrane ("System C") are the only two membrane products that Penhall installs.[9] The State of Washington Department of Transportation ("WSDOT") developed System C (hot applied rubberized asphalt protected with fabric) for use on highway bridges.[10] Prior to the Project, Penhall had only applied System C to bridges according to applicable WSDOT specifications.[11] Nevertheless, after visiting the site, Penhall submitted to WRS a proposal to waterproof the parking deck at Morse Square with System C.[12]

---

[5] *Petromat® Original: The Original Paving Fabric*, PROPEX, http://propexglobal.com/Petromat (last visited Oct. 25, 2020).

[6] CP at 770-71, 777, 1213.

[7] *Id.*; CP at 912.

[8] CP at 770-71.

[9] CP at 799 (Appendix E), 801, 1207.

[10] CP at 214-16, 909-11, 913-14, 1210.

[11] CP at 1209-10.

[12] CP at 794-95 (Appendix D); 912-13.

On July 15, 2014, Penhall emailed WRS and extended a 2-year warranty "for this job only," adding "[h]opefully that will help."[13] On July 21, 2014, WRS accepted Penhall's proposal and enlisted Penhall to apply System C to Morse Square's parking facility.[14] Penhall completed the installation of System C in August 2014 and was paid $53,988 by WRS for its work.[15]

Almost immediately thereafter, there were reports of water intrusion at Morse Square's parking facility. From September 2014 through February 2015, WRS and Penhall performed warranty repairs to stop the leaks at the parking facility.[16] In April 2015, Penhall admitted "that System C was not the correct application" and refused to help further, explaining that it had "no answers" and "no solutions."[17] Penhall nonetheless twice confirmed its warranty for workmanship and materials at the Project.[18]

In July 2015, Morse Square served WRS with a demand for arbitration for claims of breach of contract, breach of warranty, indemnification, and negligence pursuant to the arbitration provision in its

[13] CP at 789, 797 (Appendix C).
[14] CP at 794-95 (Appendix D).
[15] CP at 789.
[16] *Id*.
[17] CP at 775, 789, 799 (Appendix E), 801.
[18] CP at 799 (Appendix E), 801.

contract with WRS.[19] In October 2015, WRS retained MC Consultants to assess the causes for the continuing water intrusion problems at the parking facility.[20] In November 2015, there was a site inspection conducted at the parking facility.[21] Penhall did not attend the site inspection.[22] In January 2016, WRS tendered to Penhall, inviting it to help defend against Morse Square's claims, and to attend arbitration and participate in mediation.[23] Penhall did not respond.[24] Penhall never responded to WRS's follow-up tenders in February and March 2016, and did not participate in mediation.[25]

In March 2016, Morse Square hired FD Thomas to install Neogard® and perform the repair work to the parking facility.[26] FD Thomas performed its work in phases over two to three months to accommodate the tenants' access to parking spaces.[27] On September 1, 2016, WRS settled Morse Square's claims for $535,000.[28] The insurance policy issued by Evanston to WRS provided for the transfer of rights from the insured to Evanston to

[19] CP at 679-80; 683-701.
[20] CP at 680.
[21] *Id*.
[22] *Id*.
[23] *Id*.; 703-30.
[24] CP at 680.
[25] *Id*.
[26] CP at 762, 764-65.
[27] CP at 767-68.
[28] CP at 681; 745-51.

recover payment made on behalf of its insured WRS.[29] In August 2017, WRS assigned its rights of recovery against Penhall to Evanston.[30] Shortly thereafter, Evanston filed its action against Penhall.[31]

B. Procedural History

On August 22, 2017, Evanston filed its Amended Complaint for breach of contract, breach of indemnity, breach of express and implied warranty, and indemnification against Penhall.[32] In December 2018, both Evanston and Penhall cross-moved for summary judgment.[33] By its motion, Evanston sought from the trial court a ruling that (a) Penhall breached its contract with WRS, (b) Penhall owed indemnity to WRS for reimbursement of the underlying settlement amount and attorney's fees, (c) Penhall was estopped from challenging the reasonableness of the underlying settlement, and (d) the underlying settlement between Morse Square and WRS was reasonable.[34] The trial court granted Evanston's summary judgment motion

[29] CP at 118.
[30] CP at 806; 808-09.
[31] CP at 1-7.
[32] *Id*.
[33] CP at 663-78; 811-26.
[34] *Id*.

and subsequent fee petition[35] for Evanston's fees incurred defending WRS and those incurred in the action against Penhall.[36]

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Review is proper under RAP 13.4(b)(1) and (b)(2) because the Court of Appeals' holding that Penhall did not have a duty to defend WRS conflicts with decisions of this Court and of the Court of Appeals recognizing the availability of implied indemnity claims based on an express warranty.

Division One's holding that Penhall did not have a duty to defend WRS conflicts with decisions of this Court and the Court of Appeals, permitting review under RAP 13.4(b)(1) and (b)(2).

This Court first established the availability of implied indemnity claims in *Cent. Wash. Refrigeration, Inc. v. Barbee,* 133 Wn.2d 509, 946 P.2d 760 (1997). This Court expounded on the contours of *Barbee* in *Fortune View Condo. Ass'n v. Fortune Star Dev. Co.*, 151 Wn.2d 534, 90 P.3d 1062 (2004). "As *Barbee* explains, [w]hile indemnity sounds in contract and tort it is a separate equitable cause of action."[37] A cause of action for implied indemnity "arises when one party incurs a liability the other party should discharge by virtue of the nature of the relationship

[35] CP at 1249-58.

[36] CP at 1616-18.

[37] 151 Wn.2d 534, 539, 90 P.3d 1062, 1065 (2004) (quoting *Barbee*, 133 Wn.2d at 513) (footnote omitted).

between the two parties."[38, 39] Division One held that an implied indemnity claim can be supported by an express warranty and this Court agreed.[40] "An express warranty is an affirmation of fact which may tend to induce the buyer to purchase, or a promise by the seller upon which the buyer relies when making the purchase."[41] Contractual privity is not required for a plaintiff to benefit from express warranties in advertising.[42]

In this case, Division One noted that Evanston argued multiple grounds for relief and commented that the trial court did not articulate the grounds upon which it based its Order granting Evanston's summary

---

[38] *Id*.

[39] In her dissent in *Fortune*, 151 Wn.2d at 543-44, Justice Madsen gave a concise summary of implied contractual indemnity:

> [Implied contractual indemnity] is "based on the special nature of a contractual relationship between parties." However, not every contract or contractual relationship creates a right to implied indemnity. There must be "'unique special factors demonstrating that the parties intended that the would-be indemnitor bear the ultimate responsibility . . . or when there is a generally recognized special relationship between the parties.'" Thus, there must be a "contract between two parties that necessarily implies the right." The implication of the right to indemnity may arise from "the relationship between the parties, circumstances of the parties' conduct, and that the creation of the indemnitor/indemnitee relationship is *derivative* of the contracting parties' intended agreement."

[40] *Id*. at 539-40 (quoting *Urban Dev., Inc. v. Evergreen Bldg. Prods., L.L.C.*, 114 Wn. App. 639, 649-50, 59 P.3d 112, 118-19 (2002)).

[41] *Water & Sanitation Health, Inc. v. Chiquita Brands Int'l, Inc.*, No. C14-10 RAJ, 2014 U.S. Dist. LEXIS 70673, at *8 (W.D. Wash. May 22, 2014) (quoting *McDonald Credit Serv. v. Church,* 49 Wn.2d 400, 401, 301 P.2d 1082, 1083 (1956) (emphasis omitted)).

[42] *Id*. (quoting *Fortune View Condo. Ass'n*., 151 Wn. 2d at 539 n.3).

judgment motion.[43] So, Division One ignored the claim for implied indemnity and focused singularly on the issue of express, contractual indemnity.[44] Division One thereby failed to address Evanston's arguments regarding implied contractual indemnity based on the express two-year warranty given by Penhall. Division One expressly found that "Penhall affirmed that it warranted its work for workmanship and materials in several written communications with WRS" (which finding is sufficient to sustain Evanston's implied indemnity claim) but strangely focused on the method of delivery of the express, 2-year warranty (via e-mail, separate from the written proposal), which method of delivery has no legal significance.[45]

Under the holdings in *Barbee, Urban Dev.,* and *Fortune View Condo. Ass'n*., the existence of an express warranty (like the one given by Penhall here) provides a sufficient basis for an implied contractual indemnity claim. Here, however, Division One made no attempt to distinguish the instant case from either *Barbee*, *Urban Dev.*, or *Fortune View Condo. Ass'n*. Division One compared and distinguished the warranties in the Morse Square/WRS and Penhall/WRS contracts.[46] However, the distinction drawn by Division One is one that nonetheless

[43] *Evanston Ins. Co.*, 13 Wn. App. 2d at 869 n.1.
[44] *Id*. at 875.
[45] *Id*. at 875-76.
[46] *Id*.

affords WRS protection under *Barbee, Urban Dev.*, and *Fortune View Condo. Ass'n*., given the nature of Penhall's breach by recommending, warranting, and installing what it later admitted was the wrong product. As noted above, contractual privity was not necessary for Morse Square to be entitled to equitable indemnity from Penhall.

The Court of Appeals' opinion plainly conflicts with *Barbee*, *Urban Dev.,* and *Fortune View Condo. Ass'n*. Therefore, review is required under RAP 13.4(b)(1) and (b)(2).

B. Review is proper under RAP 13.4(b)(2) because the Court of Appeals' holding that Penhall was not estopped from challenging the settlement as the proper measure of damages for its breach of contract with WRS conflicts with other decisions of the Court of Appeals holding that a party that denies a tender of defense based on a duty to defend and indemnify another party on their third party claim may not later challenge the reasonableness of the underlying settlement.

Division One's holding that Penhall was not estopped from challenging WRS's settlement with Morse Square as the proper measure of damages for its breach of contract with WRS is in conflict with decisions of Divisions One and Three of the Court of Appeals, permitting review under RAP 13.4(b)(2).

In *U. S. Oil & Ref. v. Lee & Eastes*, 104 Wn. App. 823, 16 P.3d 1278 (2001), Division One addressed the effect of a party's denial of its obligation to defend and indemnify another party on a third party claim

on the denying party's ability to later challenge the reasonableness of a settlement agreement on the claim in the absence of any evidence suggesting unreasonableness. In that case, Lee & Eastes argued that even if a self-load agreement required coverage for U.S. Oil for a third party claim, questions of fact remained regarding the reasonableness of the underlying settlement and the relative fault of U.S. Oil, the plaintiff, and Lee & Eastes. Lee & Eastes asserted that it was not "bound by" the terms of U.S. Oil's settlement with the plaintiff, because U.S. Oil unreasonably excluded Lee & Eastes from settlement negotiations. Division One rejected these arguments, noting that Lee & Eastes declined U.S. Oil's tender of defense, and could not later insist upon reexamining the settlement in the complete absence of any evidence suggesting the settlement was unreasonable. Division One also pointed to the lack of any issue requiring a determination of relative fault and noted that relative fault is a tort law concept.[47]

In the instant case, Division One recognized Evanston's argument that Penhall's breach of contract also provided as basis for equitable indemnity under the "ABC rule" because Penhall's breach exposed WRS to liability to a third party [Morse Square].[48] The "ABC"

[47] 104 Wn. App. at 840.

[48] *Evanston Ins. Co.*, 13 Wn. App. 2d at 875.

rule is an equitable rule under which attorney fees are compensable as consequential damages in certain situations.[49] The ABC Rule has three elements which must be satisfied for it to apply: "'(1) a wrongful act or omission by A … toward B … ; (2) such act or omission exposes or involves B … in litigation with C … ; and (3) C was not connected with the initial transaction or event … , viz., the wrongful act or omission of A toward B.'"[50]

Division One found that it would be inequitable to imply a duty to defend on the part of Penhall under the ABC rule because the WRS/Morse Square contract provided for mediation and binding arbitration where the Penhall/WRS contract did not. Division One started with the general proposition that non-signatories generally will be bound to arbitrate only when ordinary principles of contract and agency dictate such a result, listing five theories for binding non-signatories to arbitration agreements.[51] Without any analysis, Division One concluded that none of the five limited exceptions were present in the instant case.

---

[49] *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 123-24, 330 P.3d 190, 193-94 (2014) (quoting *Blueberry Place v. Northward Homes,* 126 Wn. App. 352, 358, 110 P.3d 1145, 1149 (2005)).

[50] *Id*.

[51] *Evanston Ins. Co.*, 13 Wn. App. 2d at 876-77.

However, one of the five theories recognized by Division One – equitable estoppel – could have compelled Penhall's participation at the WRS/Morse arbitration.[52] It is a well-settled holding of this Court that equitable estoppel occurs if "a person wrongfully or negligently by his acts or representations causes another who has a right to rely upon such acts or representations to change his condition, to his detriment or prejudice."[53] Just this year, in *David Terry Invs., LLC-PRC v. Headwaters Dev. Grp., LLC*, 13 Wn. App. 2d 159, 463 P.3d 117 (2020), Division Three held that a non-signatory of a contract containing an arbitration clause who claims the benefits of the contract may be equitably estopped from avoiding the burden of arbitration. In so holding, Division Three reasoned that the non-signatory plaintiff

[52] The three elements of equitable estoppel are (1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) an action by another person in reasonable reliance on that act, statement or admission; and (3) an injury to the relying party that would result if the first party is allowed to contradict or repudiate the prior act, statement, or admission.

[53] *Kessinger v. Anderson*, 31 Wn.2d 157, 169, 196 P.2d 289, 296 (1948); *see Seattle-First Nat'l Bank v. Westwood Lumber*, 65 Wn. App. 811, 823-24, 829 P.2d 1152, 1158-59 (1992) ("Implicit in [the three factor test for estoppel] is that the assertion on which an estoppel is based must induce detrimental reliance by the other party."). When evaluating whether a party should be held to have abdicated a contractual right, Washington Courts have most often looked to equitable estoppel. *See, e.g., Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279, 1283 (1980). In at least one instance, however, a Washington court has applied the closely related doctrine of promissory estoppel, which requires a party to have justifiably relied on a promise. *See Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wn. App. 327, 336, 493 P.2d 782, 788 (1972).

essentially sought the benefit of the contractual promises made in the joint venture agreements while avoiding its burden (*i.e.*, an agreement to arbitrate). WRS had a right to rely upon Penhall's express, 2-year warranty in conjunction with Penhall's proposal to install System C. That reliance can be found in WRS's warranty to Morse Square of the work, which included that which was performed (and warranted) by Penhall. Under these circumstances, Penhall is estopped from denying responsibility for its work.

The Division One decision in the instant case presents a necessary opportunity for this Court to provide guidance and clarity on the application of this limited exception to the rule and to resolve any conflicts between Divisions of the Court of Appeals. Review is necessary to give meaning and clarification on the equitable estoppel exception.

C. Review is proper under RAP 13.4(b)(4) because the Court of Appeals' holding that Penhall did not have a contractual or equitable duty to defend WRS conflicts with express statements by this Court recognizing the availability implied indemnity claims based on express warranties and because the same is a substantially important interest to the public, given the use of warranties by companies to manage and allocate risk in the construction industry.

Finally, review of the Court of Appeals' holding (that Penhall did not have a contractual or equitable duty to defend WRS) is necessary

under RAP 13.4(b)(4) because it raises an issue of substantial public importance that this Court should decide, particularly in light of its significance to Washington's thriving construction industry and to the use of warranties as a tool for allocating and managing risk.

Warranties provide comfort, in the form of a legally enforceable obligation, to someone buying goods or services from the warrantor. Warranties are also intended to clarify the parties' rights and responsibilities, and often explain what should happen if something goes wrong. As Justice Madsen explained, the implication of the right to indemnity may arise from "the relationship between the parties, circumstances of the parties' conduct, and that the creation of the indemnitor/indemnitee relationship is *derivative* of the contracting parties' intended agreement."[54] Surely, a party is entitled to be protected under a warranty given by another party who prescribes, installs and warrants a product that is deemed to have failed within the warranty term.

Division One's decision in this case has created a perverse incentive for specialty subcontractors like Penhall to provide empty express warranties, ignore resultant indemnity obligations, deny tenders,

[54] *Fortune View Condo. Ass'n.*, 151 Wn.2d at 543-44 (internal citations omitted, emphasis in original).

refuse to participate in settlement discussions, abandon the indemnitee and, after the indemnitee resolves a claim with a third party (whose claims arise out of the indemnitor's failed product and/or defective work), require another round of litigation through which it challenges the underlying settlement in hopes of avoiding or diluting its indemnity and warranty obligations. This Washington cannot tolerate.

This issue is particularly important here, where Division One noted, "WRS warranted not only its own work, but also Penhall's work."[55] In its simplest terms, a warranty is a promise or representation that certain facts are true; warranties are an essential component of every construction contract because they assist parties with managing risk on their projects.

Contractors (like WRS) who hire specialty subcontractors (like Penhall) do so with the expectation that the specialty subcontractor has the necessary knowledge and experience to evaluate the work requested of them, to prescribe the right product(s) and to install the product(s) properly. The inverse is also true: if the subcontractor cannot prescribe the right product and/or cannot install it properly, it should decline to do the work. It should not make a proposal, offer a warranty, accept payment for the work

[55] *Evanston Ins. Co.*, 13 Wn. App. 2d at 876.

and then be heard to deny responsibility for what it admits was the "wrong product."

General contractors necessarily and reasonably rely upon a specialty subcontractor's experience, expertise, and judgment. This, of course, is why specialty subcontractors exist in the first instance. Here, Penhall is a self-proclaimed specialty contractor. Penhall prescribed a product – and it agreed to warrant that product before WRS agreed to retain Penhall to install that product. Penhall clearly used its specialty experience and warranty to entice WRS to hire Penhall – and Penhall should be held to its warranty and related indemnity obligations under Washington law.

In recognition of its warranty and indemnity obligations, Penhall assisted with initial attempts by WRS to address the leaks at Morse Square's parking facility. Penhall's actions thereafter – upon realization "that System C was not the correct application" – constitute breach of its warranty and indemnity obligations. Penhall's actions are also contrary to public policy encouraging parties to work cooperatively to resolve claims and avoid lawsuits. "Washington law strongly favors the public policy of settlement over litigation."[56] Penhall's conduct also

[56] *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 772, 174 P.3d 54, 59 (2007). *See also, e.g., City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (1997) ("[T]he express public policy of this state . . . strongly encourages settlement."); *Seafirst Ctr. Ltd. P'Ship v. Erickson*, 127 Wn.2d 355, 366, 898 P.2d 299 (1995) (referring to "Washington's strong public policy of encouraging

contravenes Washington's strong policy favoring arbitration.[57] According to data compiled by the Association of General Contractors on construction spending in Washington, private nonresidential construction spending totaled $6.6 billion in 2019; state and local spending totaled $12 billion.[58] As of 2017, there were 23.400 construction firms in Washington. Due to the regulations imposed because of the COVID-19 pandemic, a lower rate of productivity has led to a short-term increase in labor costs.[59] Now, more than ever, owners, general contractors and subcontractors will need to rely on warranties to provide them with a measure of comfort and certainty when bidding/budgeting projects and allocating risk.

This is an issue of substantial public importance to the construction industry because of the ubiquity and necessity of indemnity agreements and warranties. Review of Division One's decision in this case is necessary to

---

settlements"); *Haller v. Wallis*, 89 Wn.2d 539, 545, 573 P.2d 1302 (1978) ("[T]he law favors amicable settlement of disputes.").

[57] *David Terry Invs., LLC-PRC*, 13 Wn. App. 2d at 166 (citing *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 892, 16 P.3d 617 (2001); *Davidson v. Hensen*, 135 Wn.2d 112, 117-18, 954 P.2d 1327 (1998); *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995)).

[58] Ken Simonson, *The Economic Impact of Construction in the United States and Washington*, ASSOCIATED GENERAL CONTRACTORS OF AMERICA (Sept. 23, 2020), https://www.agc.org/sites/default/files/Files/Construction%20Data/WA.pdf. (last visited Oct. 25, 2020).

[59] *U.S. Construction Market: Market Snapshot Q3 - 2020 – Seattle, WA*, CUMMING CONSTRUCTION MANAGEMENT, INC., https://ccorpinsights.com/wp-content/uploads/2020/10/CCORP20Q3_MarketOverview-v1-SEA.pdf (last visited Oct. 25, 2020).

determine the scope of a party's duty to defend arising out of an implied contractual indemnity based on an express warranty (*Barbee, Urban Dev.,* and *Fortune View Condo. Ass'n*.), as well as the potential consequences of denying such a duty under the holdings in *U. S. Oil & Ref.* and *David Terry Invs., LLC-PRC*.

VI. CONCLUSION

For all these reasons, Petitioner Evanston respectfully requests the Court accept review of the Court of Appeals' decision in this case.

Submitted this 26th day of October, 2020.

HOLT WOODS & SCISCIANI LLP

/s/ Anthony R. Scisciani

Anthony R. Scisciani III, WSBA No. 32342
Audrey C. Chambers, WSBA No. 53625
Counsel for Petitioner
Evanston Insurance Company

HOLT WOODS & SCISCIANI LLP
701 Pike Street, Suite 2200
Seattle, WA 98101
(206) 262-1200

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

I am employed by the law firm of Holt Woods & Scisciani LLP.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served the document(s) to which this is attached, in the manner noted on the following person(s):

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
C/O Penhall Company Jacquelyn Beatty Karr Tuttle Campbell 701 Fifth Avenue Suite 3300 Seattle, WA 98014	**(X) Via U.S. Mail** **( ) Via Legal Messenger** **( ) Via Facsimile** **(X) Via E-Mail**

DATED this 26th day of October, 2020, at Seattle, Washington.

/s/ Jessica Heath
Jessica Heath, Legal Assistant

APPENDIX – A

FILED
7/27/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EVANSTON INSURANCE COMPANY, an Illinois corporation, subrogee and an assignee of Western Refinery Services, Inc., a Washington corporation, Respondent, v. PENHALL COMPANY, a California corporation, Appellant.	No. 79657-7-I DIVISION ONE PUBLISHED OPINION

APPELWICK, J. — Penhall appeals the trial court's grant of summary judgment finding it must indemnify Evanston, the assignee of WRS, for a settlement of a construction contract dispute between WRS and Morse. Liability for the value of the settlement was predicated on a duty of indemnity and on the failure of Penhall, as subcontractor, to accept a tender by WRS of defense of the claims made by Morse. The WRS/Morse contract contained an arbitration clause; the Penhall subcontract did not. We hold Penhall did not have a duty to defend WRS because of the arbitration provision. Absent that duty, Penhall is not estopped from challenging the settlement as the proper measure of damages for breach of its contract with WRS. Attorney fees under equitable indemnity and contractual indemnity theories are recoverable when proven as consequential damages. Attorney fees awarded as damages under the ABC rule of equitable

indemnity in the case of a third party claim are limited to the fees incurred defending that action. The award of attorney fees incurred in this action prosecuting the collection under indemnity for the earlier settlement was improper under the equitable indemnity theory. Evanston did not specify it was seeking summary judgment on Penhall's affirmative defenses, and the trial court did not rule on Penhall's affirmative defenses on summary judgment. Summary judgment was not properly granted. We reverse and remand.

FACTS

1010 Morse Square LLC knew the concrete deck of a parking facility attached to its condominium building was so badly cracked that water was leaking on vehicles on the lower level. Morse contracted with Western Refinery Services Inc. (WRS) to address leaks in its parking facility. Morse believed that paving the top deck with asphalt would solve the leaking problem. WRS advised Morse that asphalt would not solve the problem by itself because it was not totally impermeable, and so would need a waterproof membrane to go underneath it. WRS contacted Penhall, whom they know to have experience with such membranes to inquire about the possibility.

Representatives of WRS and Penhall met to examine the parking garage. WRS originally wanted Penhall to apply a product called Petromat to waterproof the top deck. During the walkthrough, Penhall's representative indicated that Petromat would not be a suitable product for the structure. He instead suggested a waterproof membrane for the job. This initial walkthrough lasted only 10-15 minutes.

Penhall thereafter submitted a written bid to WRS. The bid was entitled "MEMBRANE WATERPROOFING PROPOSAL." In it, Penhall proposed installing "Waterproofing Method System C." "System C" is a specific type of membrane for which the Washington State Department of Transportation (WSDOT) provides specifications for installation. Penhall sometimes refers to the product as "WSDOT System C" or "System C." The membrane is made by applying a layer of heated granulated rubber with an asphalt oil binder to a surface and putting a fabric layer over so the mixture bonds with the fabric.

The bid explicitly excluded some items of work, including crack sealing and surface preparation, and indicated that testing by others must occur before asphalt is paved over the membrane. The bid included several conditions, including that "[n]othing in the resulting subcontract shall require [Penhall] to indemnify any other party from any damages including any expenses, attorney's fees, etc.) to persons or property for any amount exceeding the degree [Penhall] directly caused such damages." Penhall agreed to a two year warranty for the project. The contract did not contain an arbitration provision or a provision for attorney fees.

WRS accepted Penhall's bid, and submitted its own bid to Morse. WRS's contract with Morse included three items of work: installing a waterproof membrane system, overlaying the membrane with 1 ½ inch class G asphalt, and "[a]dd $6,900 for a double cool seal coat after paving." The contract contained an arbitration provision.

WRS and Penhall began work on the parking garage. Penhall installed a waterproof membrane, and WRS installed an asphalt overlay on top. WRS

thereafter inspected the work, said it "looked good" and proceeded to pave asphalt on top of it. Nothing in the record suggests that WRS tested whether the installation was in fact waterproof. WRS and Morse also declined to install a double seal coat over the asphalt, as was originally planned, because the "system [was] working" and they "didn't need to spend the $6900 for anything additional." WRS paid Penhall $53,988 for its work.

In the fall of 2014, after the project was completed, water continued to leak into the garage. WRS and Penhall both performed repairs in an attempt to remedy the situation. In April 2015, Penhall informed WRS that it would no longer participate in repairs because it had determined that further repairs were outside its agreed scope of work. Penhall asserted that the membrane was installed correctly, but that it had "no answer" for the ongoing leaks. Penhall asserted that its position was that System C was the incorrect product to waterproof the structure. It pointed to cracks in the concrete and movement issues with the structure as the "actual issue[s]" causing the continued leaking.

Thereafter, Morse contracted with F.D. Thomas, Inc. (FDT) to fix the leaks. FDT determined that it would remove Penhall's membrane and replace it with "Auto-Gard" urethane coating. It determined that in order for the coating to adhere it would need to first fill the cracks in the concrete. FDT's initial proposal called for repair of 500 linear feet of cracks. Its final contract with Morse called for the repair of 1,500 linear feet of cracks. The final cost of this work was $443,987.

Before FDT began work on the structure, Morse commenced arbitration against WRS pursuant to the arbitration clause in their contract. WRS informed

Penhall of the proceedings, it demanded indemnification and Penhall's participation in that matter, including investigations of the parking structure. Penhall refused. WRS settled the claim with Morse for $535,000. Evanston Insurance Company paid the settlement on behalf of WRS, despite having earlier sent WRS a letter declining to indemnify it in the matter. WRS assigned any rights it had to recover from Penhall to Evanston.

Evanston commenced suit against Penhall for breach of contract, breach of warranty, and indemnification. During discovery, Penhall sought to depose Evanston. Evanston objected and later sought a protective order regarding the requested deposition. The trial court granted the motion for a protective order.

Both sides moved for summary judgment. The trial court granted Evanston's motion. Because Evanston argued multiple grounds for relief, and the trial court did not articulate upon which ground it granted Evanston's motion either in the order or at the hearing, its reasons for doing so are unclear from the record.[1] Evanston petitioned for attorney fees. Penhall objected to the award of fees in its entirety. A dispute also arose between the parties concerning the reasonableness of a portion of the fees, and Penhall sought to view the billing records associated with those hours. The trial court granted the petition for fees in the amount of $109,689 and reserved judgment on the disputed portion pending in camera

[1] The trial court did not make oral findings on summary judgment. Rather, after hearing arguments from both sides, it took the matter under advisement. The order granting summary judgment did not contain detailed findings or indicate upon which theory the trial court was granting summary judgment. At oral argument on reconsideration, the trial court declined to enter more detailed findings because it said "the basis of the Court's conclusion in granting [summary judgment] was reasonably well laid out" in the order granting summary judgment.

review of the billing records. The trial court eventually ordered an additional $68,952 in attorney fees.

Penhall appeals.

DISCUSSION

Penhall argues the trial court erred in granting Evanston's[2] motion for summary judgment and in awarding attorney fees. It also argues the trial court erred in quashing its motion to depose Evanston's counsel.

I. Summary Judgment on Liability

Evanston sought summary judgment on the issue of liability. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences must be interpreted in the light most favorable to the nonmoving party. Sabey v. Howard Johnson & Co., 101 Wn. App. 575, 582, 5 P.3d 730 (2000). We review summary judgment decisions de novo, engaging in the same inquiry as the trial court. Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993).

Evanston supported its motion with a declaration from expert Nate MacIntyre that asserted that Penhall's workmanship and materials were not adequate. Specifically, he said, "Membrane System C was not the appropriate product for the parking structure and was not properly installed." Evanston argued there had been a breach of contract and warranty.

[2]Evanston brought this suit against Penhall as an assignee of WRS. As such, Evanston steps into the shoes of WRS, the assignor. See Mut. of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn.2d 411, 424, 191 P.3d 866 (2008).

But, Penhall had pleaded affirmative defenses to Evanston's claim.[3] Evanston's motion for summary judgment did not specifically address the affirmative defenses. Given that WRS did not state with particularity that it was seeking summary judgment on the issue of affirmative defenses, Penhall cannot be said to have been given notice that summary judgment on the affirmative defenses was the relief sought. Robbins v. Mason County Title Ins., 5 Wn. App.2d 68, 84-85, 425 P.3d 885 (2018) ("Where, as here, the plaintiff does not request summary judgment on a number of affirmative defenses, CR 56(e) does not require the defendant to show an issue of fact concerning them."), affirmed, 195 Wn.2d 618, 426 P.2d 430 (2020). Penhall did not need to create a genuine issue of material fact under CR 56(e) with respect to the affirmative defenses because WRS had not moved for summary judgment on the defenses. Id. at 84. Penhall's affirmative defenses address both applicability of equitable indemnity and contractual indemnity, as well as mitigation of damages. The trial court has not ruled on the affirmative defenses.

[3] Penhall asserted five affirmative defenses in its answer to WRS's complaint: (1) WRS may have failed to mitigate its damages, such damages being specifically denied; (2) WRS's damages, such damages being specifically denied, were caused by its own design, or the design of others, and/or construction failures of other design and/or construction professionals for which Penhall had no responsibility and over whom Penhall had no control; (3) Evanston has failed to state a claim upon which relief can be granted; (4) WRS's work was performed, inspected and accepted by WRS and Morse Square Condos at the time it was completed. Having inspected and approved Penhall's work, WRS's claims are waived; and (5) Repairs, if completed as alleged, resulted in an improvement over and above the work contemplated and completed during the original construction of the project. WRS is not entitled to recover damages based on a repair scope of work that improved the quality of the structure or its component parts above which was originally contemplated and completed during original construction.

Even if we concluded the motion adequate to attack the affirmative defenses, we would conclude that summary judgment on liability was improper. Evidence in the record demonstrated questions of material fact.

In addition to its expert's declaration, Evanston also argued the contract with Penhall was to waterproof the parking deck, and since the deck continued to leak, Penhall must have breached its contract. And, it emphasized that Penhall chose System C and admitted it was the wrong product for the job.

Penhall was not a waterproofing consultant for Morse or WRS and was not hired to analyze the leak problem and recommend a best option from many. Penhall chose System C only in the sense that it was the only water proofing process it installs.[4] Penhall was asked by WRS to assist with the project. WRS knew Penhall used the System C process for bridges. Penhall was willing to apply the process to the parking garage deck.

Evanston mischaracterizes Penhall's statement that System C was the wrong product. When the deck leaked after completion of the paving, Penhall made efforts to stop the leaks. It was after exhaustion of those efforts when Penhall stated in a letter that its System C was "not the correct application for the ongoing movement issues with the structure." In a later deposition, it explained the statement,

> Yeah, it was -- we felt it was the right product when we installed it; we installed it correctly. Later on it came to light that there's way

[4] WRS originally contacted Penhall to install a product called "Petromat." Penhall's representative describes that product as a "reflective crack type thing" designed for asphalt, not concrete. In later communications, Penhall affirmed that System C is the only waterproofing product it installs.

> more problems with that slab, nothing to do with us, that caused the product not to work correctly. Hence, the letter that came a year later.

The statement from Penhall was not an admission it breached the contract or the warranty. In that same communication, Penhall denied that System C failed and denied that the workmanship was inadequate. It noted contemporaneously that the structural problems with the parking garage might be the cause of the leaks, something System C could not address. Viewed in the light most favorable to the nonmoving party, this statement by Penhall does not support summary judgment on liability.

Evanston also asserted Penhall had liability under the theory of equitable indemnity. However, "a party may not recover attorney fees under the theory of equitable indemnity if, in addition to the wrongful act or omission of A, there are other reasons why B became involved in litigation with C." Tradewell Grp., Inc. v. Mavis, 71 Wn. App. 120, 128, 857 P.2d 1053 (1993).

The evidence presented did not establish that Penhall was solely responsible for the leakage, as would be required under the equitable indemnity theory. The preparation of the surface of the parking deck was the responsibility of either Morse or WRS, but not Penhall. Any preparation or repair of cracks in the concrete was the responsibility of either Morse or WRS, but not Penhall. When Morse retained a consultant and contracted to redo the work, it was necessary to do extensive work on the concrete and repair 1,500 linear feet of cracks in the structure. If this was necessary from the outset, it was work that was clearly outside the scope of Penhall's contract. And, any cracking that occurred after

Penhall completed its work that compromised the membrane could not provide a basis for liability under the warranty.

Further, the contract required that "[t]esting ([b]y others) must be performed prior to asphalt paving." WRS accepted Penhall's work upon completion. WRS did not test the surface for leaks before applying the asphalt coat on top of it as required by its contract with Penhall. And, WRS did not test the deck for leaks after paving. Morse and WRS decided not to apply the "'double seal' coat" to the asphalt. None of the evidence presented at summary judgment forecloses questions of fact about whether WRS's preparation of the surface or lack of preparation or its paving activity or its failure to apply the seal coats to the asphalt compromised the integrity of the waterproofing membrane.

Under the contract, Penhall was to apply the membrane where directed. Penhall was not responsible to independently determine where to apply the membrane or how to integrate it with the buildings attached to the parking garage. Morse or WRS was to make those determinations. It is clear the membrane did not cover the entire horizontal surface, leaving edges exposed, and areas where water could enter the cracked concrete from beyond the membrane. The evidence does not eliminate questions of fact as to whether the water was entering from outside the membrane covered area rather than through the membrane. Viewed in the light most favorable to Penhall, questions of fact exist as to breach and causation. The evidence was insufficient to support a grant summary judgment on the theory of equitable indemnity.

We vacate the grant of summary judgment on liability. We address the errors in the award of damages and attorney fees separately, since these issues will be considered again on remand.

II. Summary Judgment on Damages

The trial court determined at summary judgment that the settlement between WRS and Morse was the appropriate measure of damages between Penhall and WRS.

The damages argument at summary judgment was based on indemnity, either express or implied. The duty of indemnity was said to give rise to a duty to defend against claims by the owner, Morse. And, after failing to accept the tender of defense, Evanston argues Penhall is bound to indemnify it for the amount of its settlement with Morse Square. WRS relies on U.S. Oil & Ref. Co. v. Lee & Eastes Tank Lines, Inc., 104 Wn. App. 823, 840, 16 P.3d 1278 (2001). It claims that U.S. Oil stands for the proposition that "a party that denies it has a contractual obligation to defend and indemnify another party on their third party claim may not later challenge the reasonableness of the underlying settlement." WRS overstates U.S. Oil. The party who had a duty to indemnify and insure U.S. Oil against third party claims declined a tender of defense of a third party claim. Id. at 828. The court did not allow that party to challenge a settlement of the third party claim it refused to defend "in the complete absence of any evidence suggesting the settlement was unreasonable." Id. at 840. But, even if the trial court here had found a complete absence of any evidence suggesting the settlement was unreasonable, the facts here differ from U.S. Oil in significant ways.

Evanston relies on two theories of indemnity: express and equitable. The contract between WRS and Penhall states, "Nothing in the resulting subcontract shall require [Penhall] to indemnify any other party from any damages (including any expenses, attorney's fees, etc.) to persons or property for any amount exceeding the degree [Penhall] directly caused such damages." Though written in language of limitation, this provision is nonetheless an express agreement by Penhall to indemnify for damages it directly caused. This limitation to any indemnity under the contract includes indemnity under the warranty. However, the contract does not include an express provision requiring Penhall to defend WRS against a third party claim.

Evanston claims Penhall's breach of the contract also provides a basis for equitable indemnity under the "ABC rule,"[5] because the breach of contract by Penhall exposed WRS to liability to a third party. Though Penhall argues that the ABC rule is only applicable in tort cases, this court resolved that issue in Blueberry Place v. Northward Homes, 126 Wn. App. 352, 361-62 & n.8, 110 P.3d 1145 (2005), clearly applying the ABC rule in a contract breach context. But, even if that rule applies, it does not necessarily impose on Penhall a duty to defend WRS against any third party claim. Here, two issues make it inequitable to imply a duty to defend.

[5] The "ABC rule" embodies the theory of equitable/common law indemnity. See LK Operating, LLC v. Collection Grp., LLC, 181 Wn.2d 117, 123, 330 P.3d 190 (2014). The ABC rule requires: (1) a wrongful act or omission by A toward B, (2) that such act or omission exposes or involves B in litigation with C, and (3) that C was not connected with the wrongful act or omission of A toward B. Id.

First, Penhall's contract with WRS does not contain a warranty provision. However, Penhall affirmed that it warrantied its work for "workmanship and materials" in several written communications with WRS. The contract between WRS and Morse contained a warranty clause that provided, "Contractor warrants and guarantees all work and/or materials provided under this agreement shall be of good quality and workmanship, free from faults and defects and in conformance with this Agreement. Contractor further agrees to make good, at its own expense, any defect in materials or workmanship which may appear within one (1) year of Contractor's substantial completion hereunder." Importantly, WRS warrantied not only its own work, but also Penhall's work. Penhall did not contract with Morse and did not warranty WRS's work. The duties were not identical. Any warranty claim by Morse necessarily had to be on the broader warranty given by WRS. And, it is clear that WRS and Penhall had potentially adverse positions as to who may have caused Morse's damages.

Second, the contract between WRS and Morse provided for mediation and binding arbitration.[6] The earlier entered contract between WRS and Penhall did not contain a mediation and arbitration provision.

---

[6] The contract provided for mediation and arbitration as follows:

> Contracting Party and Contractor agree that all claims, collections, disputes, or other controversies arising under this Agreement or related hereto, shall be settled by and subject to binding arbitration with a single arbitrator pursuant to the Construction Industry Arbitration Rules of the American Arbitration Associations ("AAA"). Any such arbitration shall be commenced by delivery to the AAA a written demand for arbitration, and a copy of such demand shall be delivered to the other party. Contracting Party and Contractor agree that the location of any arbitration proceeding commenced with

"[A]rbitration is a matter of contract, parties cannot be compelled to arbitrate unless they agreed to do so." Weiss v. Lonnquist, 153 Wn. App. 502, 510, 224 P.3d 787 (2009). Nonsignatories to an arbitration provision will be bound to arbitrate only when ordinary principles of agency or contract law dictate such a result. Powell v. Sphere Drake Ins., 97 Wn App. 890, 895, 988 P.2d 12 (1999). We have recognized five theories that would compel such a result: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel. Id. at 895-96 (citing Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (1995)). None of those limited exceptions are present here. Penhall never agreed to resolve its disputes with WRS through arbitration, and so cannot be compelled to do so.

The Penhall contract also contained a provision that "Penhall retains all rights allowed by law. Subcontract shall not require [Penhall] to waive any legal rights." Enforcing the WRS/Morse agreement to arbitrate against Penhall, who had not agreed to it, would be forcing Penhall to surrender its constitutional right to a jury trial to resolve its contractual dispute with WRS. WASH. CONST. art. I, § 21. We will not do so.

Penhall did not have a contractual or equitable duty to defend WRS against Morse's claim. As a result, Penhall's refusal to accept tender of defense of Morse's

---

> agreement shall be at the Seattle, Washington AAA office. In any such arbitration, the prevailing party, as determined by the arbitrator, shall be entitled to its arbitration costs and reasonable attorneys' fees and other costs. Any arbitration award by the arbitrator shall be final and binding on the parties and subject to confirmation and reduction to judgment pursuant to [chapter] 7.04 [RCW] in the King County Superior Court.

claim does not estop Penhall at trial from disputing responsibility to indemnify WRS for any or all of the settlement with Morse. Evanston must prove any damages at trial.[7] The award of damages by the trial court on summary judgment is vacated.

III. Attorney Fees

The attorney fees incurred in this matter were strongly contested below both as to the legal basis and reasonableness. Whether a party in entitled to attorney fees is reviewed de novo. Baker v. Fireman's Fund Ins. Co., 5 Wn. App. 2d 604, 613, 428 P.3d 155 (2018), review denied, 192 Wn.2d 1016, 438 P.3d 111 (2019). Whether the amount is reasonable is reviewed for abuse of discretion. Id. In Washington, each side must pay their own attorney fees unless a fee award is authorized by statute, a contract, or a recognized ground in equity. In re Impoundment of Chevrolet Truck, 148 Wn.2d 145, 160, 60 P.3d 53 (2002).

In Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc., we held that

> the trial court's award of attorney fees was improper. As we have previously explained, attorney fees sought pursuant to a contractual indemnity provision are an element of damages that must be proved to the trier of fact. The goal of awarding money damages is to compensate for the losses that are actually suffered, and a party claiming damages has the burden of proving its losses. Accordingly, a party seeking the recovery of attorney fees pursuant to an indemnity provision bears the burden of presenting evidence regarding the reasonableness of the amount of fees claimed.

[7] Much of the parties' briefing focused on whether the settlement between Morse Square and WRS was reasonable or whether it was infected by bad faith. Because the settlement is not the proper measure of damages, we need not address those issues. However, we note that the trial court correctly ruled that Penhall's motion to compel Evanston's deposition was improperly brought under CR 43(f) and that it appears to be properly denied on the merits.

> Moreover, "[a]s an element of damages, the measure of recovery . . . must be determined by the trier of fact."

168 Wn. App. 86, 102, 285 P.3d 70 (2012) (citations omitted) (alterations in original) (quoting Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn. App. 743, 760, 162 P.3 1153 (2007)).

The contract between WRS and Penhall does not contain a provision authorizing attorney fees for the prevailing party. However, the indemnification language in the contract acknowledges that attorney fees may be recovered in a contract dispute to the extent directly caused by Penhall. This requires attorney fees be proved as consequential damages. Id.

A party may be entitled to attorney fees as part of an equitable indemnity claim under the ABC rule. "'When the natural and proximate consequences of a wrongful act of A involve B in litigation with others, B may as a general rule recover damages from A for reasonable expenses incurred in that litigation, including attorney's fees." Blueberry Place, 126 Wn. App. at 358 (emphasis added) (quoting Dauphin v. Smith, 42 Wn. App. 491, 494, 713 P.2d 116 (1986)). It is well established Washington law that "'a party may not recover attorney fees under the theory of equitable indemnity if, in addition to the wrongful act or omission of A, there are other reasons why B became involved in litigation with C.'" Newport, 168 Wn App at 106 (quoting Blueberry Place, 126 Wn. App. at 359). "[W]here the acts or omissions of a party to an agreement or event have exposed one to litigation by third persons—that is, to suit by persons not connected with the initial transaction or event—the allowance of attorney's fees may be a proper element of

consequential damages." Armstrong Constr. Co. v. Thomson, 64 Wn.2d 191, 195, 390 P.2d 976 (1964).

The trial court did not take evidence on the issue of consequential damages under the indemnification clause and made no finding that evidence proved those fees were incurred as consequential damages under the contract indemnification. The argument for the award of attorney fees below was based on the ABC rule under equitable indemnity. But, the scope of recoverable fees is limited to those incurred in defending the action brought by the third party. Blueberry Place, 126 Wn. App. at 358. The ABC rule does not encompass recovery of attorney fees incurred prosecuting the collection of the settlement or judgment in the third party action. However, the trial court erroneously awarded the fees both from the WRS/Morse action and those incurred in the present action. We vacate the award of attorney fees.

IV. Costs on Appeal

Both sides now request costs on appeal pursuant to RAP 14.1-14.6. Because Penhall has substantially prevailed on appeal, we award it costs for this appeal.

We reverse and remand for proceedings consistent with this opinion.

Appelwick, J.

WE CONCUR:

Brunson, J.

Chun, J.

APPENDIX – B

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

EVANSTON INSURANCE COMPANY, an Illinois corporation, subrogee and an assignee of Western Refinery Services, Inc., a Washington corporation,

Respondent,

v.

PENHALL COMPANY, a California corporation,

Appellant.

No. 79657-7-I

ORDER DENYING MOTION FOR RECONSIDERATION

The respondent, Evanston Insurance Company, filed a motion for reconsideration. The appellant, Penhall Company, has filed an answer. A majority of the panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Appelwick, J.
Judge

APPENDIX – C

Julie Snyder

From: Joe Metcalf <jmetcalf@penhall.com>
Sent: Wednesday, February 10, 2016 9:18 AM
To: Julie Snyder
Subject: FW: Petro Matt vs. Membrane

Joe Metcalf
Account Manager
Office: 206-763-9200 Ext. 2380
Mobile: 206-391-0590
Seattle

From: Joe Metcalf
Sent: Tuesday, July 15, 2014 9:44 AM
To: 'Loren VanderYacht' <Loren@WRSWeb.com>
Subject: RE: Petro Matt vs. Membrane

Good morning Loren,

I spoke with my manager and we can extend the warranty out to two years for this job only. Hopefully that will help.

Regards'

PENHALL COMPANY

Joe Metcalf
Project Manager/Estimator/Sales
Division 23 / Seattle
Cell (206) 391-0590

APPENDIX – D

MEMBRANE WATERPROOFING PROPOSAL

ESTIMATOR: JOE METCALF *PHONE # (206) 763-9200* *FAX # (206) 763-9206*
11001 East Marginal Way S *Tukwila Wa* *98168*

DATE: May 22, 2014
PROJECT: Parking Structure
LOCATION: Bellingham, WA
COMPANY: WRS
ATTENTION: Loren

SCOPE OF WORK: Penhall Company will provide the following Items of work, per the item descriptions list below with Clarifications per item.

Item	Description	U O M	Qty of Units	Unit $	Total Each
PC-1	Additional mobilization / Paving Shift (est)	Ea		$ 2,800.00	$ -
PC-2	Waterproofing Method System C	SY	3300	$ 16.36	$ 53,988.00
					$ -
					$ -
Total All Work					$ 53,988.00

Clarifications:

PC-1: Price per additional paving shifts supply, heat and stage daily (quantity estimated – Actual will be billed per the quantity required by the contractor).

PC-2:
Includes installation and one mobilization. Membrane waterproofing system C is normally installed during the time period of April 1 through October 15, during dry conditions when ambient temperatures are above 50 degrees F.
Outside of this period, dry periods are often below 50. Our proposal does not allow for any costs associated with overcoming adverse weather conditions - I.e. drying, heating, enclosures, etc.
Limits of the fabric reinforcement must be clearly marked and communicated to Penhall's crew prior to each shift. Deck must be blown or vacuum swept clean (By others). Price includes one mobilization call for additional mobilizations.

EXCLUSIONS:

Layout, traffic control, surface preparation, repairing damaged waterproofing or damaged asphalt overlay, Testing (By others) must be performed prior to asphalt paving. Not responsible for required repairs after initial testing, standby/contractor delays, utilities locating, cut and cap, Washington State Sales tax or use taxes excluded. Crack sealing, access to work, permits, handling or disposal costs of any hazardous or contaminated material including lead based paint and its impacts.

General Clarifications:

- Price based on one continual mobilization until completion. Call for additional mobs.
- Contractor to provide access in and out of work area, for the duration of Penhall's Scope. .
- Penhall will not be liable for any liquidated damages assessed due to schedule or weather.
- Traffic / Pedestrian Control is to be mutually agreed prior to work commencing each shift
- Please see exclusions below.

CONDITIONS:

1. Prices quoted herein do not provide for retention. If retention is to be withheld please add 1% for each year of the project duration to each price quoted and the percentage of retention shall not exceed contractor percentage. If retention is held, it shall be due and payable within 30 days of Penhall Company's physical completion of work, as pertains to this subcontract.
2. Nothing in resulting subcontract shall require the Subcontractor to continue performance if timely payments are not made to Subcontractor for suitably performed work.
3. No provisions of resulting subcontract shall serve to void the Subcontractor's entitlement to payment for properly performed work.
4. No back charge or claim of the Contractor for services shall be valid except by an agreement in writing with the Subcontractor before the work is executed, except in the case that the Subcontractor fails to meet any requirement of the subcontract agreement.
5. Nothing in resulting subcontract shall require the Subcontractor to indemnify any other party from any damages (including any expenses, attorney's fees, etc.) to persons or property for any amount exceeding the degree Subcontractor directly caused such damages.
6. The prices quoted herein are bid as a package. Partial acceptance may be cause for price changes and no retention shall be withheld.
7. Penhall retains all rights allowed by law. Subcontract shall not require Subcontractor to waive any legal rights.
8. Termination of any agreement resulting from this proposal for convenience of the Contractor is strictly prohibited unless agreed to in writing by an authorized Penhall Company representative.
9. This proposal shall become part of any subcontract or purchase order for work contained here-in. Nothing in said agreement shall supersede clarifications and or terms contained here-in. In the event of a partial acceptance of the work proposed a revised proposal would be provided for incorporation into the agreement document.
10. Any and all work performed by Penhall Company and ordered (verbally or written) by the Contractor prior to mutually signing an agreement including initialing all changes shall be governed by this proposal.

Penhall Company is a Licensed (WA # PENHAC*101NH Oregon # 067786); Union Contractor (Laborers, Plumbers &Operating Engineers) Penhall Company is insurable with bonding capacity to meet the needs of most all contracts.

NOTES: *This proposal to be an integral part of any subcontract between the above contractor and Penhall Company.* No work shall commence before this proposal is signed and returned and/or a mutually agreed upon subcontract is issued.

Thank you for the opportunity to be of service

JOE METCALF PENHALL COMPANY	DATE	ACCEPTED	DATE 7/21/14

APPENDIX – E

ESTIMATOR: SCOTT GALLOWAY *PHONE # (206) 763-9200* *FAX # (206) 763-9206*
11001 East Marginal Way S *Tukwila Wa* *98168*

DATE: 4.29.2015
PROJECT: 200 East Maple Parking Deck Membrane
LOCATION: Bellingham, WA
ATTENTION: **Loren Vander Yacht**
Western Refinery Services - Asphalt Estimator
(Office) 360.366.3303
(Cell) 360.410.7389

Good afternoon Loren. After evaluating the issue with the parking structure and examining the documents and testing the material installed, I have determined that the System C waterproof membrane was installed correctly and that the material meets the requirements per WSDOT Specifications. We warrant our workmanship and material for this project as requested. As for the ongoing leaks, I have no answer. My professional opinion is that reflective cracking born by an unstable substrate, Migrating water through existing and "new" cracks and lack of expansion / contraction joints in the structures design, could be the actual issue. Also, the potential for some type of surface issue with the concrete and or cement mixture could also be causing an issue.

Regardless, it is Penhall Company's position that System C was not the correct application for the ongoing movement issues for this structure. At this time, Penhall Company has no solutions. The only product we install is the System C membrane. The crack sealing / leak stoppage performed to date may work. This work is beyond Penhall Company's scope however, per our conversations and in good faith, we wanted to R&D the Xypex material for other future uses. I have exhausted the budget for that effort moving forward.

Thank you for the opportunity.

Scott Galloway
Penhall Company

Penhall Company is a Licensed (Oregon # 067786 WA # PENHAC*101NH); Union Contractor (Laborers, Plumbers &_Operating Engineers) Penhall Company is insurable with bonding capacity to meet the needs of most all contracts.

SDT_PENHALL 011

HOLT WOODS & SCISCIANI LLP

October 26, 2020 - 4:03 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	79657-7
Appellate Court Case Title:	Evanston Insurance Company, Respondent v. Penhall Company, Appellant
Superior Court Case Number:	17-2-01665-5

The following documents have been uploaded:

- 796577_Petition_for_Review_20201026160017D1030836_9919.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 2020.10.26 Evanstons Petition for Review.pdf

A copy of the uploaded files will be sent to:

- achambers@hwslawgroup.com
- jbeatty@karrtuttle.com
- jheath@hwslawgroup.com
- ksagawinia@karrtuttle.com
- rradcliffe@karrtuttle.com

Comments:

Sender Name: Jessica Heath - Email: jheath@hwslawgroup.com
Filing on Behalf of: Anthony Robert SciscianiIII - Email: ascisciani@hwslawgroup.com (Alternate Email:)

Note: The Filing Id is 20201026160017D1030836