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No. 657348-I

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

ALBERT L. DYKES, an individual and former General Managing Partner
of Woodinville Business Center No. 1, and MARGARET RYAN-DYKES
an individual and the marital community comprised thereof,

Appellants,

v.

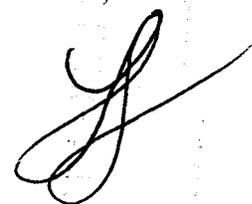
WOODINVILLE BUSINESS CENTER NO. 1,
a Washington Limited Partnership,

Respondent.

**RESPONSE BRIEF OF RESPONDENT WOODINVILLE
BUSINESS CENTER NO. 1**

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I. INTRODUCTION

This case arises out of an intentional breach of the Woodinville Business Center No. 1 Partnership Agreement (“Partnership Agreement”), an attempt by Appellant Dykes to cut one of his partners, Ned Lumpkin, out of his agreed upon partnership compensation, and the litigation resulting from these bad acts (the “underlying litigation”).

Lumpkin was and is a partner in the plaintiff, Woodinville Business Center No. 1, a Washington Partnership (“WBC” or the “Partnership”). Appellant Alhbert Dykes is the former Managing General Partner of WBC. Dykes and Lumpkin have known each other for over 30 years and were involved in several business ventures together over these years.

WBC was set up to hold, develop and manage certain commercial real property in Woodinville. By agreement of the partners, Lumpkin was to construct the buildings and Dykes was to act as the property manager. The Partnership was formed in 1980 and the property was developed in stages over the course of several years. The construction of the first two buildings was carried out pursuant to the Partnership Agreement, and went smoothly.

Dykes had a falling out with Lumpkin, around 2001. Dykes became unreasonable with Lumpkin over a separate business venture

concerning a shopping center in Edmonds. Then, when it was time to further develop the WBC property and construct buildings three and four, Dykes sought to deny Lumpkin his right to build those buildings as prescribed and required under the WBC Partnership Agreement.

The underlying litigation was brought by Ned Lumpkin and Lumpkin Inc. (“Lumpkin”), under King County Cause No. 05-2-33756-7 SEA, against WBC and Dykes for a bad faith breach of the Partnership Agreement. The Honorable William Downing found that the acts and omissions of Dykes, namely Dykes attempting to cut Lumpkin out of a portion of his return on the Partnership, were retaliatory in nature motivated by Dykes’ personal animosity toward Lumpkin and from discord arising out of the Edmonds Shopping Center dispute. Judge Downing held that Dykes breached the Partnership Agreement, not just a construction contract as Appellants refer to it, and that Dykes breached his fiduciary duties to Lumpkin. The Court of Appeals affirmed, finding substantial evidence for all of the Findings of Fact and Conclusions of Law in the underlying case .

Dykes did not retain separate counsel for the Partnership in the underlying matter despite a clear conflict of interest between Dykes and the Partnership. Dykes did not retain separate counsel for the Partnership despite the fact that he was obligated to look after and to

protect, not only the interests of the general partners, but the 45 limited partners as well.

When Lumpkin sought to execute on Dykes' personal assets, Dykes used Partnership funds to protect his own assets and supersede the judgment, in the underlying case, while on appeal. Dykes used Partnership funds to pay his own attorney fees to defend his bad acts. After final judgment was entered, in the underlying matter, the Partnership paid the judgment that had been entered against both WBC and Dykes.

With Dykes having resigned as Managing General Partner, at the request of the other partners, the Partnership now seeks reimbursement for the debt, which was properly the sole debt of Dykes all along, together with monies that Dykes spent out of the Partnership's funds to defend his wrongdoing and the cost to recoup these funds for the benefit of the innocent partners.

II. RESTATEMENT OF THE CASE

a. Clarification of Content and Status of the Record

- 1. Appellants' reference in argument to "testimony" of Dykes is improper. No actual testimony of Dykes was included in the record.**

Arguments proffering testimony of Dykes are improper as they are just that, unsupported argument of counsel, without personal

knowledge, and without support in the record. We objected below to these references and moved to strike. CP 327-328. The trial court appropriately disregarded this material. This court should also disregard any and all references in Appellants' brief as to the alleged testimony of Dykes, the intent or motivation of Dykes and all other items that are not supported by evidence in the actual record. "This being a review of summary judgment, [the appellate court is] limited to the record before the trial court – no more, no less." *Condominium Owners v. Builders*, 47 Wn. App. 767, 770, 763 P.2d 1075 (1986); RAP 9.12.

The assertion at page 25 of Appellants' opening brief that Dykes was acting "on the advice of counsel" is unsupported by the record. The additional assertions that Dykes was acting in "good faith," "believed all of his actions were justified and were objectively in the best financial interests of the Partnership" and other similar statements at pages 24, 25 and 31 of Dykes brief, at a minimum, are similarly unsupported in the record. No sworn testimony of Dykes was ever made a part of the record.

These unsupported statements in Appellants' brief mirror Dykes' defense in the underlying litigation, where Judge Downing specifically rejected Dykes testimony on this subject, finding instead that the breach of the Partnership Agreement was a retaliatory act, *not an act of good*

faith, motivated by ill will toward his partner born of discord in an unrelated business venture, not any legitimate business purpose of the Partnership and not based on the asserted good faith belief that Dykes' decisions were in the best interest of the Partnership. CP 129-131 (Findings of Fact 8-13).

2. Appellants' citation to summarized testimony of Dykes in Findings of Fact and Conclusions of Law from the underlying case are misleading in their presentation and improperly relied upon.

Appellants refer only to portions of the Findings, from the underlying matter, summarizing Dykes' testimony (CP 125-135), but fail to accept, even though they acknowledge, the status of these contentions on appeal. Judge Downing specifically rejected these contentions, finding facts to the direct contrary more credible. Appellants are bound by these Findings. They are a verity on this appeal. CP 143-157.

Dykes' brief, at page 31, acknowledges that they are bound by the Findings of Fact and Conclusions of Law from the underlying matter. Dykes explicitly acknowledges that the Court of Appeals affirmed all of the Findings and Conclusion in the underlying matter and, therefore, they are "not challenging any of those findings or conclusions here." It is, therefore, improper and misleading to reassert the summarized testimony anew as if it were a part of the undisputed factual record here.

As an example, at page 7 of Appellants' opening brief, they cite to the Clerk's Papers at 286 and 287 to reassert Dykes' factual contention, in the underlying matter, that he was in essence acting in good faith because, as he alleged, he had come to believe that Lumpkin Inc. had over-billed the Partnership for construction of the first two buildings. But, Appellants fail to also recite that the court, at Finding of Fact 10, did "not accept this factual contention." CP 287. "Rather, it finds the more credible evidence to be that Mr. Lumpkin's demands for overdue payments to him on a different partnership project (Edmonds Shopping Center) led to the discord between the two men and to this retaliatory action" by Dykes. CP 287. The same holds true for the already rejected factual assertions re-alleged at pages 24, 25, and 31 of Dykes' brief.

3. Absent from Appellants' Statement of the Case are the Findings of Fact and Conclusions of Law that:

1. The Agreement among the partners as to their respective rolls and compensation was clear. CP 283-284.
2. Dykes deliberately sought out a different contractor contrary to the clear and unequivocal agreement of the partners. CP 283-286.

3. Dykes deliberately withheld information from his partner Lumpkin. CP 286, 278, 288.
4. Dykes deliberately withheld information from all of his other partners, not just Lumpkin, failing to disclose that he was taking these actions outside of the Partnership Agreement. CP 286.

4. **The only testimony in the record of any fact witness with personal knowledge is the testimony of Ned Lumpkin at CP 60-64 and the exhibits attached thereto (CP 65-161), and at CP 166-167 and the exhibits attached thereto (CP 168-219).**

Lumpkin's testimony on all subjects remained undisputed at the close of briefing below. Dykes did not submit a declaration or any other form of testimony either from the proceedings in the underlying matter or that he prepared in this case.

Dykes' argument at pages 27 and 31 of their opening brief that the Partnership and the trial court relied "only" or "solely" upon the Findings of Fact and Conclusions of Law from the underlying matter ignores the undisputed factual testimony of Lumpkin and the documentary evidence that is also a part of the record here, upon which the Partnership and the trial court also relied. And, upon which this court, on review, is also entitled to rely. *Id.*, CP 352-353.

b. The Undisputed Facts Provide Substantial Evidence Supporting Judgment as a Matter of Law.

The Partnership brought this action on behalf of itself and its 45 limited partners. CP 5, 61.

Appellant, Albert L. Dykes (“Dykes”), is the former Managing General Partner of WBC. Mr. Dykes has known Mr. Lumpkin for more than 30 years. They have been involved in six different business ventures together over the years. CP 60.

The purpose of the WBC Partnership was to “invest in, finance the acquisition of, purchase, own, improve, develop, operate, manage, and maintain for any uses, and to sell or trade a warehouse/office complex . . . in Woodinville, Washington.” CP 61, 66.

By the terms of the Partnership documents, Lumpkin, a general contractor, was to construct the project and Dykes was to manage the project. Lumpkin was to receive 10% of direct construction costs as a fee and Dykes 5% of gross income management fee along with other compensation. CP 103-104, 126.

The development and construction of the first two buildings on the WBC property proceeded smoothly and according to the Partnership Agreement. CP 61.

By 2003, the Partnership was ready to commence Phases III and IV of the planned development of the Partnership property, by constructing two additional buildings on the Property. The Partnership Agreement expressly prescribed and required that Lumpkin, Inc. was to perform the construction work for the Partnership and the fee for Lumpkin Inc.'s contractor services was also expressly stated and prescribed in the agreement. CP 61.

Two years earlier, in 2001, Dykes had provoked a dispute with Lumpkin in another business venture unrelated to WBC. Dykes was withholding monies past due. This dispute related to the Edmonds Shopping Center. In the early 1980s, Lumpkin's company, Lumpkin, Inc., did construction work for this other partnership, the Edmonds Shopping Center. The Shopping Center partnership, managed by Dykes, was unwilling to pay about \$48,000 of the construction costs on the grounds that it did not have the funds available. Lumpkin agreed to accept monthly payments which were made for about two years and then discontinued. When the project was refinanced in the early 2000s, Lumpkin demanded payment with interest. That demand was rejected by Mr. Dykes, who controlled the Shopping Center partnership and its funds. Lumpkin filed suit and successfully collected the monies due. CP 61-62.

This is where Dykes fell down, allowing personal feelings to interfere with business. Dykes retaliated against Lumpkin and in the process misused his position of power and trust in the WBC Partnership in his attempt to deny Lumpkin his right to compensation from the Partnership. CP 62, 125-135. The compensation at issue was not just for construction work to be performed but also included a component of return on his initial investment in the Partnership. CP 132.

Because of his ill will toward Lumpkin, generated by Dykes own improper actions in the unrelated Edmonds Shopping Center venture, Dykes went outside of the WBC Partnership Agreement and solicited bids from other contractors and not from Lumpkin, Inc., for construction of Phases III and IV on the WBC Partnership property. Lumpkin, Inc. objected and asserted its rights under the Partnership Agreement. Dykes then entered into an elaborate ruse seeking to deny Lumpkin, Inc. the right to build the new phases. CP 62, 103-104, 125-135, 143-157.

A trial was held in the underlying matter, conducted by the Honorable William L. Downing. Judge Downing correctly found that Dykes breached the Partnership Agreement and breached his fiduciary duties to Lumpkin. Judge Downing correctly found that Dykes was motivated by "discord" in his other business relationships, unrelated to the WBC Partnership. Judge Downing correctly found that Dykes'

actions seeking to cut Lumpkin, Inc. out of the Partnership and his acts outside of the Partnership Agreement were “retaliatory” in nature, a personal vendetta. CP 62, 125-135, 143-157.

When Lumpkin, Inc. sued both Dykes and WBC, Dykes did not retain separate counsel to defend the Partnership, even though Dykes knew he had acted outside of the Partnership Agreement on a personal vendetta against Lumpkin relating to matters separate and apart from the WBC Partnership. The attorney he retained to “jointly” represent the Partnership and himself was Dykes’ personal business attorney. CP 62, 166-215.

After the trial court entered the Findings of Fact and Conclusions of Law in the underlying matter (CP 125-135), a judgment was entered against the Partnership and Dykes in the amount of \$253,327.46 (\$188,100 principal, \$60,480.59 pre-judgment interest, \$4,746.87 costs), which accrued interest at the rate of 12 percent per annum. CP 62-63, 137-139.

Dykes appealed the matter. Again, one law firm represented both Dykes and WBC. When Lumpkin sought to garnish Dykes’ personal assets to satisfy the judgment in the underlying matter, Dykes used Partnership funds to protect his personal assets. Dykes took \$300,800.00 of Partnership money and put it into a separate account and posted it in

lieu of a bond, to prevent garnishment of his personal assets. CP 63, 141, 166-215.

This Court of Appeals correctly affirmed the Trial Court's Findings of Fact and Conclusions of Law. *Lumpkin, Inc. v. Woodinville Business Ctr. No. 1*, 145 Wn. App. 1049 (2008). CP 63, 143-157. Substantial evidence supported all of the Findings of Fact and Conclusions of Law. *Id.*

Dykes applied for review by the Washington State Supreme Court. Review was denied on March 3, 2009. *Lumpkin, Inc. v. Woodinville Business Ctr. No. 1*, 165 Wn.2d 1028 (2009). CP 63.

The Partnership then paid Lumpkin, Inc. the sum total of \$309,881.37 in full satisfaction of the judgment on or about March 24, 2009. An additional amount of \$213.42 for costs that had been awarded was also paid by the Partnership to Lumpkin, Inc. This satisfied any concern that the Partnership was obligated, in the absence of a ruling such as the one sought here, to pay the judgment and it cut off the accrual of significant interest on the judgment. CP 63.

The total debt in the amount of \$310,094.79 paid to Lumpkin, Inc. by the Partnership to satisfy the underlying judgment was properly the sole debt of Albert Dykes. But for the improper acts of Mr. Dykes the debt would not have been incurred. The acts of Mr. Dykes that lead

to the underlying judgment were undertaken in secret, by Dykes alone, motivated by ill will toward his fellow partner, outside of and specifically contrary to the Partnership Agreement. CP 63, 125-135, 143-157.

Judge Downing specifically found that Albert Dykes' actions, excluding Lumpkin, Inc. from the construction of Phase III and IV, was a "retaliatory action," born of Lumpkin's request for overdue payments in an unrelated business venture. CP 63, 130.

In addition to the \$310,094.79 paid to satisfy the underlying judgment and costs awarded, Dykes also spent thousands of dollars of the Partnership's money for his own personal defense in the underlying litigation at trial and on appeal. The actual amounts that Dykes paid out of the Partnership's funds were established in the Supplemental Declaration of Ned Lumpkin, which was undisputed below. CP 166-217. Those fees and costs incurred by Dykes in the amount of \$97,531.87 need to be restored and reimbursed to the Partnership. CP 63-64, 125-135, 143-157.

The trial court in this action entered Judgment against Dykes for indemnity or reimbursement of the amount the Partnership paid on the Lumpkin Judgment, reimbursement of the \$97,531.87 that Dykes paid out of the Partnership to defend himself in the underlying action, and

awarded \$25,821.50 in attorney fees and other costs to reimburse some, but not all, of the Partnership's litigation costs in this necessary follow-on action. CP 352-353, 461-466.

III. ARGUMENT

a. Summary of Arguments

1. The Partnership is entitled to full indemnity and reimbursement for all sums paid in the underlying matter, including related attorney fees and costs. Attorney fees and costs are recoverable as damages where a recognized ground in equity exists. *City of Seattle v. McCready*, 131 Wn.2d 266, 275, 931 P.2d 156 (1997). Applicable recognized grounds in equity include: a) the inherent equitable power of the court; b) bad faith conduct by Dykes; c) breach of fiduciary duty by Dykes; d) recovery of a common fund for the Partnership and all of the partners, including the 45 limited partners; e) indemnity; and f) the Appellants' favored ABC rule.¹

The monies at issue here were expended by Dykes solely as a result of his intentional, bad faith breach of the Partnership's Agreement and breach of his fiduciary duties to his fellow partners and to the Partnership; specifically his fiduciary duties of due care, good faith and fair dealing. But for Dykes' retaliatory bad acts, motivated by ill will

¹ Other recognized grounds in equity exist that are not applicable here.

toward a fellow general partner, the Partnership would not have incurred any of these expenses. The award of damages to recover the Partnership's money used by Dykes for attorney fees and other costs incurred in the underlying action should be affirmed.

2. The Partnership is entitled to affirmation of the trial court's award of attorney fees and other costs in this matter. Attorney fees and costs are recoverable as costs of suit where a recognized ground in equity exists. *Id.* For the same reasons, and based upon the same recognized grounds in equity, namely the: a) inherent equitable powers of the court; b) bad faith conduct by Dykes; c) breach of fiduciary duty by Dykes; d) recovery of a common fund for the Partnership and all of the partners, including the 45 limited partners; e) indemnity; and f) Appellants' favored ABC rule, the Partnership's attorney fees and other costs incurred in this matter, both below and here on appeal, should be affirmed and awarded herein.

b. Standard of Review

On review of a summary judgment order the Court of Appeals "engages in the same inquiry as the trial court and only considers evidence and issues raised below." *Halbert v. Forney*, 88 Wn. App. 669, 673, 945 P.2d 1137 (1997), citing *Wash. Fed'n of State Employees v. Fin. Mgmt.*, 121 Wash.2d 152, 157, 849 P.2d 1201 (1993); RAP 9.12.

The legal right to an award of attorney fees and other costs, that is to say, the determination as to whether a basis exists under the law, is reviewed *de novo*. *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283, 289, 951 P.2d 798 (1998). Whether to award attorney fees in this case, a partnership breach of fiduciary duty case, was a matter of discretion for the trial court. *Green v. McAllister*, 103 Wn. App. 452, 468, 14 P.3d 795 (2000). The awarding of attorney fees and the amount of the award, which is not challenged here, are therefore reviewed under an abuse of discretion standard. *Id.*; *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 801, 557 P.2d 342 (1976).

At the same time, “on appeal, an order may be sustained on any basis supported by the record.” *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.3d 1036 (2006), citing *Hadley v. Cowan*, 60 Wn. App. 433, 444, 804 P.2d 1271 (1991) (citing *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989)).

c. Scope of Review.

“The appellate court may refuse to review any claim of error which was not raised in the trial court. . .” RAP 2.5. More particularly, in reviewing an order on summary judgment, theories or contentions made for the first time on appeal are beyond the proper scope of review.

Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 840 P.2d 860 (1992);
RAP 9.12.

Appellants did not argue their ABC damage theory below. Therefore, the Court of Appeals should not consider it here. *Id.*, *Sate v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991); *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408; 814 P.2d 243 (1991) (contentions not made in the trial court in summary judgment hearing may not be reviewed on appeal). Below, Dykes devoted one page of their brief to a section that mentioned the ABC rule, but did not put forward any of the arguments or legal theories made at length here for the first time on appeal. CP 221, 234-235. Below, Dykes' only argument in relation to the ABC rule was the assertion that the Partnership was required to prove that Dykes had committed an act of negligence toward the Partnership in order to prevail on summary judgment. *Id.* The Partnership's response was, therefore, limited to that issue in its Reply below. CP 330 (pointing out that Dykes had relied upon a dissenting opinion as if it were a settled majority view).

Below, Dykes did not differentiate its limited ABC argument as to any category of damages. Below, Dykes argued that its negligence/ABC rule prevented summary judgment as to the entire claim. CP 234-235. On review, Appellants did not assign error to the

portion of the summary judgment ordering Dykes to reimburse the Partnership for the amount paid on the underlying Judgment. Thus, Dykes necessarily concedes liability for the Judgment.

Because Dykes did not argue any distinction below, there can be no distinction raised for the first time on appeal. The trial court was not asked to differentiate liability for the underlying judgment and liability for moneys paid out of the partnership for Dykes' defense in the underlying matter. The alleged right to this distinction was not raised below. There was a single harm from which these damages directly flowed. Raising attorney fees awarded as damages as a distinct and separate issue with distinct and separate elements of liability, launched with it newly minted ABC rule for the first time on appeal, is outside of the proper scope of review on summary judgment. 120 Wn.2d 246; 62 Wn. App. 408; RAP 9.12.

Dykes further, makes no explanation to this reviewing court why he should be allowed to raise this new issue and these new contentions for the first time on appeal. Dykes further, makes no explanation to this reviewing court how he could legally be held liable to reimburse the judgment but not the fees he paid out of the Partnership's funds to defend himself, in the same underlying matter, when these are both

elements of damage in the same equitable cause of action; not a tort or contract case with a follow on request for fees.

In addition, Dykes raised two defenses below, the business judgment rule and contractual indemnity under the Partnership Agreement. CP 220, 225-229, 326-329. The trial court denied these defenses. CP 352-353. Dykes does not assign error to these decisions taken as a matter of law below. Therefore, Dykes cannot properly reassert these defenses.

Nonetheless, Dykes attempts to revive the business judgment rule at pages 23-25 of Appellants' opening brief, in a new context. If the business judgment rule was an effective defense it would have saved Dykes from liability on the underlying judgment. It did not. No error is assigned to this liability. Dykes does not explain to the reviewing court how the business judgment rule could fail as to liability on the underlying judgment but survive to save him from paying back money he paid out of the Partnership to defend his wrongdoing, in the underlying matter. The failure of the factual support for the business judgment rule, that is to say, the requirement that Dykes acted in "good faith," is discussed, *supra*. The business judgment rule is, therefore, also beyond the proper scope of review and should be disregarded.

The only remaining issue properly before this Court then is the award of attorney fees and other costs, as costs of litigation, awarded by the trial court, in an exercise of its discretion, on summary judgment below.

d. Summary Judgment Standard.

Summary Judgment was appropriate below and should be affirmed based on the following standard. Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The moving party has the burden to show that no genuine issue of material fact exists. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

This standard was met through the undisputed testimony of Ned Lumpkin (CP 60-161, 166-219) and the trial court’s adoption of the Findings of Fact and Conclusion of Law from the underlying matter (CP 125-135). Dykes’ argument below that collateral estoppel did not apply, based in part upon his further assertion of the business judgment rule and unsupported assertion of Dykes’ “good faith,” was rejected by the trial court. CP 220, 225-229, 326-329. The trial court’s adoption of the

Findings of Fact and Conclusions of Law and application of collateral estoppel are not challenged here on appeal. (Appellant's opening brief at page 31).

e. Findings of Fact and Conclusions of Law Are Not Necessary to Decisions on Summary Judgment. CR52.

Dykes complain throughout their brief that the trial court below failed to make certain findings of fact or conclusions of law. Simply put, it is neither necessary nor required. CR52(a)(5)(B). "Findings of fact and conclusions of law are not necessary . . . [for] decisions on motions under rules 12 or 56 or any other motion. . ." *Id.* Exceptions to the rule do not apply here. The Orders under consideration did not require written findings and conclusions. On summary judgment the trial court necessarily conducts the appropriate analysis and makes the appropriate determinations to come to a decision, before entering an Order. The lack of formal findings of fact and conclusions of law cannot save Dykes from the summary judgment entered in this case.

f. Equity Authorizes The Trial Court's Awards of Attorney Fees.

Appellants correctly state the applicable rule laid out by our Supreme Court, "attorney fees are not available as costs or damages

absent a contract, statute or recognized ground in equity.”² *City of Seattle*, 131 Wn.2d at 275. Put affirmatively, for purposes of this case, attorney fees are available as costs and damages where recognized grounds in equity exist. The attorney fees paid out of the Partnership’s funds by Dykes to defend the underlying matter are referred to as damages. The attorney fees expended in the instant case to achieve equity through indemnity are referred to as costs. The equitable grounds for recovery discussed here apply to both awards, as well as providing the basis for the award of Respondents’ fees on appeal.

1. The court’s inherent equitable power authorizes the award of fees and costs.

“[t]he power to award attorney fees ‘springs from our inherent equitable powers, (and) we are at liberty to set the boundaries of the exercise of that power.’” *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 799, 557

² Several Washington cases attempt to catalogue the State’s recognized equitable grounds for recovery of fees. For example, *City of Seattle*, *supra*; *PUD v. Kottsick*, 86 Wn.2d 388, 390, 545 P.2d 1 (1976); *Asarco v. Air Quality Coalition*, 92 Wn.2d 685, 601 P.2d 501 (1979); *Miotke v. Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984). Authorized equitable grounds include bad faith or wantonness, several varieties of the common fund theory, actions involving a third person in litigation; protection of constitutional principles, private attorney general actions, dissolving wrongfully issued temporary injunctions or restraining orders. *Id.* The court’s inherent equitable powers and breach of fiduciary duty have authorized fees. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 799, 557 P.2d 342 (1976), citing *Weiss v. Bruno*, 83 Wn.2d 911, 914, 523 P.2d 915, 917 (1974); *Green v. McCallister*, 103 Wn. App. 452, 468, 14 P.3d 795 (2000). Attorney fees have also been recovered as damages in malicious prosecution cases, wrongful attachment or garnishment cases and slander

P.2d 342 (1976), citing *Weiss v. Bruno*, 83 Wn.2d 911, 914, 523 P.2d 915, 917 (1974). The court has declined to exercise its inherent equitable powers to award fees where the prevailing party's cause of action was not itself an action in equity, *Dempere v. Nelson*, 76 Wn. App. 403, 886 P.2d 219 (1994). For reasons of public policy, the court was reluctant to expand the exercise of its inherent equitable powers beyond existing precedent to a tort case. This is not a tort case.

The instant cause of action is rooted in equity, *i.e.*, equitable indemnity. Indemnity is warranted due to a partner's breach of his fiduciary duties. *Tang*, a partnership breach of fiduciary duty case, provides the existing precedent, passed down by our Supreme Court, upon which to rely. The affirmation of fees based on inherent equitable powers is not an expansion of the exercise of equity, in this case.

Where a managing general partner misuses his position of power and trust and he intentionally breaches the Partnership Agreement, exposes the Partnership to litigation and diverts partnership funds to defend his own wrong doing, all to feed a personal vendetta that is outside of the Partnership's ordinary business, the court is right to exercise its inherent equitable powers to allocate the cost of the wrong

of title actions. *Rorvig v. Douglas*, 123 Wn.2d 854 (1994). Other grounds may also exist.

doing to the sole bad actor, Dykes, and order full indemnity.³ The award of fees as damages and costs should be affirmed.

2. Where a partner has breached his fiduciary duty equity authorizes fees and costs.

Tang, 87 Wn.2d at 800-801. “Parties generally pay their own fees. (Citation omitted). Attorney fees may, however, be authorized by a recognized ground in equity. (Citations omitted). Breach of partnership fiduciary duty is such an equitable ground.” *Green v. McCallister*, 103 Wn. App. 452, 468, 14 P.3d 795 (2000) (emphasis supplied).⁴ These partnership breach of fiduciary duty cases are squarely on point, as opposed to, for an example, automobile crash cases or construction cases relied upon by Dykes. And, even Dykes grudgingly concedes the fatal fact, *Tang* and *Green* remain good law.

A. Dykes violated his fiduciary duties to the Partnership and his fellow partners.

i. Procedural Background.

Dykes’ breach of the Partnership Agreement and Dykes’ breach of his fiduciary duty to Lumpkin was adjudicated on the merits in the underlying action. The Partnership has also been harmed by the

³ Even with these awards, the Partnership is not made completely whole as the awards did not include all of the Partnership’s attorney fees and other costs expended in this matter.

⁴ *Green* also awarded fees on appeal to be determined in the discretion of the trial court on remand of that case. 103 Wn. App. at 472.

established breaches (intentional bad acts of Dykes), in the amounts paid on the judgment, attorney fees and costs paid to defend in the underlying matter, fees and costs expended to pursue this matter and now amounts incurred on appeal.

Below, the trial court was invited to and did conclude, based on the undisputed facts in the case, including the demonstrated harm to the Partnership, that Dykes' intentional breach of the Partnership Agreement, the facts surrounding the breach and the manner in which he intentionally breached, also constituted a breach of Dykes' fiduciary duties to the Partnership and to his fellow partners, not just to Lumpkin. e.g., CP 326-327, 329-330.⁵ On review, this court has before it the undisputed facts in the record from which to conclude that Dykes breached his fiduciary duties to the Partnership and to his fellow partners as well.

Dykes complains, a little too loudly, that Judge Downing did not find a breach of fiduciary duty as to the Partnership and the other partners, in the underlying matter. There is a reason for that, and it only contributes to the factual basis that constitutes Dykes' fiduciary breach here. These matters could have been resolved in the underlying case, but for the impossible conflict of interest set up by Dykes when he retained

his personal business attorney to “jointly” defend him and the Partnership. The defense of the Partnership in the underlying matter was nominal only. CP 62-64, 166-219.

Based upon the results of the trial, the absence of a counterclaim by the Partnership against Dykes, and the strong findings and conclusions that were made in the underlying matter, one can draw the fair inference that Dykes’ attorney made no effort to protect the Partnership’s separate and distinct interests, even in the face of Dykes’ intentional bad acts. It is a fact in the record that the Partnership’s nominal defense attorney was also involved in orchestrating the breach as to Lumpkin, in the first instance. CP 62-64, 129, 131-132, 166-219 (and in particular Findings of Fact 8, 13, 15⁶). Thus, Dykes’ personal

⁵ Dykes assertion that the Partnership did not request relief on this issue and brief this issue below is mistaken.

⁶ “. . . Also acting through counsel, Mr. Dykes in early September provided Mr. Lumpkin with the current plans and specifications and with ‘an invitation to bid on the project.’” CP 129.

“Going beyond the opening clause of the preceding Finding, the Court does conclude that Mr. Dykes had additional motivations in retaining Mr. Travers. **At the time, Mr. Dykes had quite clearly already made up his mind that he did not want Mr. Lumpkin’s company to perform this work. Furthermore, since other disagreements between him and Mr. Lumpkin had already produced lawsuits, he was desirous of protecting himself legally. It is not a coincidence that Mr. Travers came to Mr. Dykes through the referral of Mr. Dykes’ attorney nor that many of Mr. Travers’ reports were made to that attorney rather than to Mr. Dykes.** Mr. Travers is an intelligent man and the Court is well satisfied that Mr. Dykes had communicated to him, however subtly or directly, his preference that MRJ would come away with this contract.” CP 131 (emphasis supplied).

counsel was just not in a position to ask Judge Downing for separate findings and conclusions to be made in favor of the Partnership and against his individual client's self-interest, in the underlying matter, and all the while Dykes paid his attorney fees with the Partnership's money. This follow-on action, free from the conflict of interest, was required.

ii. Fiduciary Duties Imposed by Statute.

Appellants concede Dykes' fiduciary duties to the Partnership and his fellow partners quoting RCW 25.05.165,⁷ in part, at pages 20 and 21 of their opening brief.⁸ As the managing general partner of WBC Dykes had a fiduciary duty and obligation to refrain from “. . . engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.” RCW 25.050.165(3). As previously established in the underlying litigation, and confirmed by the trial court below, contrary to the dictates of the partnership statute, Dykes engaged

⁷ We include the statute as appendix A for additional clarity and ease of reference. The version quoted in Appellants' brief appears to omit or misstate subsection (4) the duty of good faith and fair dealing.

⁸ Dykes' statutory duty of loyalty was not at issue below. The Partnership confirmed this in its Reply below. CP 329. Yet, Dykes continues to spend time arguing this issue. It is a red herring. Although we do not agree with the accuracy of Dykes' treatment of the issue, and Dykes does not rely on the majority view, it is not applicable to this case and, therefore, will not be dealt with in the body of our brief. It is the fiduciary duties of due care, good faith and fair dealing that are at issue here. Dykes had a heightened duty to the Partnership and to his fellow partners where he was dealing with their money and the expenditure of their money. The law imposing these applicable fiduciary duties has not changed. Dykes cites to no authority to suggest that the duties owed

in intentional misconduct and a knowing breach of the Partnership Agreement. CP 125-135.

iii. Facts of Breach.

Dykes retained architect Mark Travers to perpetuate his ruse. He was not merely negligent. He was quite calculating. See, for example, Finding quoted at footnote 6. Dykes intentionally excluded Lumpkin Inc. and his partner Ned Lumpkin from their right to perform the construction contract for the Partnership and intentionally acted outside of the Partnership Agreement to deny them their fee as prescribed and established in the Agreement. Dykes intentionally withheld information from Lumpkin and from all of the other partners about his actions. Dykes was motivated by personal animosity toward Lumpkin, and not even from any discord in this Partnership, but rather from Dykes' electing to take a losing position and wrongfully attempting to withhold monies from Lumpkin, in an unrelated matter.

Dykes did not save the Partnership any money, as Appellants contend. After change orders and cost overruns his substitute contractor charged the Partnership \$318,000 *more* than the Lumpkin estimate. CP 290. In addition to this cost over-run by the "low-bidder," Dykes' intentional breach of the Partnership Agreement exposed the Partnership

when handling other peoples' money have been relaxed by our courts in

to litigation and the obligation to pay twice for the contractor's fee, as well as the waste of Partnership resources (for example, Travers' fees, and consulting attorney's fees) through the entire process, even before the underlying litigation began.

Substantial evidence exists in the record from which to conclude that Dykes breached his fiduciary duty of due care to the Partnership and to his fellow partners. Substantial evidence exists to support the conclusion that Dykes' actions and omissions, when taken as a whole, were "grossly negligent." Substantial evidence exists to support the conclusion that Dykes' actions and omissions were "reckless," and that he acted with reckless disregard of the adverse financial impact to the Partnership and to his fellow partners, in pursuit of his personal vendetta. Substantial evidence exists to support the conclusion that Dykes' actions and omissions, which caused serious financial harm to the Partnership, constituted "intentional misconduct." RCW 25.05.165(3). And, Dykes indirectly concedes the breach of his fiduciary duty as he is not contesting his obligation to pay the underlying Judgment.

iv. Additional Statutory Duties and Breach.

Dykes was further obligated to discharge his duties in good faith and with fair dealing:

any way.

(4) A partner *shall* discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

RCW 25.05.165 (emphasis supplied). The same undisputed facts that establish the breach of the duty of care establish the breach of Dykes' additional statutory obligation of good faith and fair dealing to the Partnership and to the other partners. RCW 25.05.165(4). Use of Partnership funds for personal purposes falls below the standard of good faith and fair dealing towards the Partnership and Dykes' fellow partners; misusing his position to pursue a personal vendetta while using his fellow partners' money falls even lower. It follows that the Partnership is entitled to full indemnity from Dykes. All of the damages incurred as a result of Dykes' bad acts, including attorney fees and other costs, are properly the sole debt of Dykes and not the other partners.

v. ***Tang and Green authorize the award of fees.***

Dykes' attempts to recast *Tang* as a common fund case (which is okay because common fund applies here as discussed *infra*) does nothing to disturb the facts of the *Tang* case and the Supreme Court's holding that attorney fees are an authorized ground in equity based upon a partners' breach of fiduciary duty. 87 Wn.2d at 799-801. In *Tang*, the court did not find that Tang had misused or taken any partnership

money, only co-mingled it and failed to perform a separate accounting, yet fees were still awarded because a breach of Tang's fiduciary duties had, in fact, occurred. In this case, a far more egregious and demonstrable monetary harm to the Partnership, and the other partners, flowed directly from Dykes' breach of his fiduciary duties. Thus, fees are not only authorized but justly awarded.

Dykes does not even attempt an escape from the application of *Green, supra*. There is none. In *Green*, the court found that the partners in question had breached their fiduciary duties and specifically confirmed that equity authorized the payment of attorney fees in a partnership breach of fiduciary duty case. 103 Wn. App. at 468. The Judgment should be affirmed.

3. Bad faith authorizes the equitable award of attorney fees and costs.

"A court may grant attorney fees to the prevailing party if the losing party's conduct constitutes bad faith or wantonness." *PUD v. Kottsick*, 86 Wn.2d 388, 390, 545 P.2d 1 (1976). "[B]ad faith or misconduct of a party" is an explicitly recognized ground in equity authorizing attorney fees as costs or damages. 131 Wn.2d 266, 274-275 (1997). This ground was questioned in *Dempere v. Nelson, supra*, where the court declined to expand the award of equitable fees to a tort case.

But, Dempere did not cite to or consider *Victoria Tower Partnership v. Lorig*, 40 Wn. App. 785, 789, 700 P.2d 768 (1985). In *Lorig*, the court explicitly recognized bad faith conduct by partners in a partnership, our case here, as a ground for recovery of fees. “Attorney fees can be awarded under the equitable exception if the losing party’s conduct constitutes bad faith.” *Id.* Appellants’ also concede this ground in their opening brief at page 16, and in cases cited elsewhere throughout their brief.

Here the undisputed facts in the record support a finding of bad faith on the part of Dykes. Dykes intentionally breached the Partnership Agreement. He intentionally withheld information about his actions from his fellow partners. The only convincing reason the trial court found in the underlying case for Dykes’ actions was his desire to retaliate against a fellow partner for pressing his right to past due payments in a separate business venture. Dykes failed to protect the Partnership from harm flowing directly from misuse of his position as managing general partner to pursue a personal vendetta. Dykes failed to retain separate counsel for the Partnership in the underlying matter so that he could continue to pursue his personal vendetta against Lumpkin, with Partnership funds. Dykes used Partnership funds to protect his personal

assets. The record before this court provides substantial evidence to support a finding of Dykes' bad faith. The Judgment should be affirmed.

4. The common fund theory authorizes the award of attorney fees and costs.

Miotke v. Spokane, 101 Wn.2d 307, 678 P.2d 803 (1984), *Brougham v. Swarva*, 34 Wn. App. 68, 661 P.2d 138 (1983), commenting on *Tang, supra*; *City of Seattle v. McCready*, 131 Wn.2d 266, 274-275; *PUD v. Kottsick*, 86 Wn.2d 388, 390, 545 P.2d 1 (1976), and cases cited therein, among other Washington cases, all authorize the common fund as a recognized ground in equity upon which an award of attorney fees and other costs may be based. Dykes also concede this ground in their opening brief at page 16, and in cases cited elsewhere throughout their brief. Dykes only attempt to deal with this obvious ground for the award is the wholly unsupported and passing statement that “. . . this matter is not a ‘common fund’ case . . .” (Appellants’ opening brief at page 45). The facts prove otherwise.

The common fund theory allows recovery of attorney fees where the litigation “benefits others as well as the litigant and also to protect, preserve, or create a common fund.” *Brougham*, 34 Wn. App. at 73. *Brougham* also comments that *Tang, supra*, appeared to award fees at least in part “from the prevailing party’s having preserved partnership

assets, that is to say an identifiable fund.” *Id.* Here the Partnership is seeking to protect, preserve and create a common fund. The Partnership is seeking to recoup monies paid out from the actual party at fault, to retrieve Partnership assets paid out on account of the bad acts of Dykes in the underlying litigation, and to protect Partnership assets from further exhaustion from the cost of recovery of funds, all for the common benefit of the Partnership as an entity, but also for the benefit of the partners, including the 45 limited partners that had nothing whatsoever to do with Dykes’ bad acts. The award of fees and costs should be affirmed.

5. Where the central cause of action is indemnity, Appellants’ tortured version of the ABC rule does not apply. No additional ground in equity need be added to a cause of action already sounding in equity for a court to make a party whole.

Indemnity “is a distinct and separate equitable cause of action. (*Central Washington Refrigeration v. Barbee*, 133 Wn.2d 509, 513, 946 P.2d 760 (1997)) ‘Indemnity requires full reimbursement and transfers liability from the one who has been compelled to pay damages to another who should bear the entire loss.’” (Emphasis supplied).

Sabey v. Howard Johnson & Co., 101 Wn. App. 575, 588, 5 P.3d 730 (2000). “Implied indemnity is an equitable action based on a party paying more than its fair share ...” *Toste v. Durham & Bates Agencies, Inc.*, 116 Wn. App. 516, 521, 67 P.3d 506 (2003).

“We established the availability of implied indemnity claims in *Central Washington Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 946 P.2d 760 (1997). As Barbee explains, “[w]hile indemnity sounds in contract and tort it is a separate equitable cause of action.” 133 Wn.2d at 513 (footnote omitted). 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 between the two parties.” *Id.* (Emphasis supplied).

Fortune View Condominium Assoc. v. Fortune Star Dev. Co., et al., 151 Wn.2d 534, 539, 90 P.3d 1062 (2004).

The undisputed facts here demonstrate that in equity the Partnership should be fully reimbursed and Dykes should bear the entire loss. Because of his personal ill will toward Lumpkin, Dykes disregarded the Partnership’s obligation to retain Lumpkin, Inc. as contractor. Dykes went outside of the Partnership agreement and attempted to quietly cut Lumpkin out of his agreed upon compensation. When Lumpkin got wind of Dykes’ double dealing he asserted his rights under the Partnership Agreement.

Dykes then set up an elaborate ruse, all at Partnership expense, to make it appear he was setting up a “fair and impartial” contractor bidding process among Lumpkin, Inc. and other contractors. Dykes, at partnership expense, retained architect Mark Travers to act as the “fair and impartial” person to select a contractor. Dykes, however, held

private meetings with Travers for the purpose of assuring that Lumpkin, Inc. would “not get the bid.” Dykes had Travers meet with his personal attorney. The court in the underlying matter specifically found that from the outset of this process “Dykes had quite clearly already made up his mind that he did not want Mr. Lumpkin’s company to perform this work.” CP 131. All the while Dykes was aware that in the ordinary course of the Partnership’s business Lumpkin, Inc. was the agreed upon contractor. CP 60-64, 103-104, 125-135.

In addition, Dykes intentionally failed to provide Lumpkin or Lumpkin, Inc. with necessary design information, which he supplied to the other contractor(s) in order to assure that Lumpkin, Inc. would not get the bid. Meanwhile, Dykes’ status reports to the other partners are completely silent as to his *ultra vires* acts. *Id.*

When the work was awarded to another contractor, Lumpkin and Lumpkin, Inc. sued the Partnership and Dykes. They claimed breach of contract against the Partnership and both breach of contract and breach of fiduciary duty against Dykes. Despite the obvious conflict of interest created by Lumpkin’s claims between the two defendants, Dykes hired only one lawyer, his long-time personal business lawyer, to “jointly” defend both defendants. None of Dykes’ personal funds were used to

pay the fees and costs to defend the underlying lawsuit. Dykes used Partnership funds. CP 166-219.

The Partnership has been damaged by the willful, retaliatory and intentional bad acts of Dykes. The underlying judgment (which Dykes does not dispute here on appeal), and the related expenses including attorney fees and costs incurred in the underlying matter, are properly the sole debt of Dykes and not the Partnership. Dykes acted outside of the scope of his authority. He had no authority to commit willful bad acts against his fellow partners. Dykes' abuse of his position as managing general partner caused the accrual of these costs and expenses. Thus, equity transfers full liability for the judgment and related expenses to Dykes alone. *Central Washington Refrigeration, supra; Sabey, supra.*

“[W]hen the natural and proximate consequences of a wrongful act by defendant involve plaintiff in litigation with others, there may, as a general rule, be a recovery of damages for the reasonable expenses incurred in the litigation, including compensation for attorney fees.” *Wells v. Aetna*, 60 Wn.2d 880, 882, 376 P.2d 644 (1962) (no ABC rule analysis required beyond this straightforward equitable principle). Fees were awarded because the “fees were a loss occasioned by the action of the wrongdoer.” *Id.* at 883. Here, the award of attorney fees and costs

incurred in the underlying matter should also be affirmed. The fees are a loss occasioned by Dykes, the wrongdoer.

6. Even under Appellants' newly asserted ABC theory, attorney fees and costs are authorized.

Appellants' ABC argument is outside the permissible scope of review as outlined above. To the extent the Court considers this new contention raised for the first time on appeal, the Partnership comes within the rule. The ABC rule discussed at length in Appellants' brief provides that, attorney fees may be awarded as damages when there is "(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." *Haner v. Quincy Farm Chemicals, Inc.*, 29 Wn. App. 93, 627 P.2d 571 (1981).

A. Wrongful Act by A, Dykes, Toward B, Partnership.

The undisputed facts in the record demonstrate Dykes' wrongful act toward the Partnership. Without restating all of the salient points here again, in summary, Dykes (A) misused his position as managing general partner and misused Partnership funds to carry out a personal vendetta against one of his fellow partners. He intentionally breached the Partnership Agreement, to spite his fellow partner, which then cost

the Partnership hundreds of thousands of dollars, among other items. A wrongful act by Dykes (A) toward the Partnership (B) is well supported in the record. The first prong of the test is met.

i. The Business Judgment Rule Provides No Shield

As outlined in section III. c. above, the business judgment rule is outside of the proper scope of review here. To the extent that the court considers this issue, Dykes arguments fail. Dykes contends that the business judgment rule should shield him from a finding of wrong doing. But, the business judgment rule does not and cannot shield intentional wrong doing. The rule only applies “if there is a reasonable basis to indicate that the transaction was made in good faith,” among other criteria. *McCormick v. Dunn and Black, P.S.*, 140 Wn. App. 873, 887, 167 P.3d 610 (2007); *Interlake Porsche + Audi Inc. v. Bucholz*, 45 Wn. App. 502, 509, 728 P.2d 597 (1986). CP 228.

The Appellants argue that Dykes believed he was acting “in the best financial interests of the Partnership,” yet this naked assertion is wholly unsupported by any evidence. And, this very issue was Dyke’s defense in the underlying matter. It was rejected by Judge Downing, who found that Dykes was *not* motivated by good faith or legitimately interested in trying to save the Partnership any money. CP 130. “Rather

[the Court] finds the more credible evidence to be that Mr. Lumpkin's demands for overdue payments to him on a different partnership project (Edmonds Shopping Center) led to the discord between the two men and to this *retaliatory action*." *Id.* (Emphasis added).

None of the cases cited by the defense support the business judgment rule shielding a managing general partner who misuses his position to intentionally breach the Partnership Agreement, in retaliation against another partner, to satisfy a personal vendetta. The business judgment rule does not save Dykes from a determination that he was wrong and that he wronged the Partnership and his 45 limited partners, on his way to, colloquially speaking, try to teach Ned Lumpkin a lesson.

B. Wrongful act of A, Dykes, exposes B, Partnership, to litigation with third party, C, Lumpkin.

Dykes' wrongful act exposed the Partnership to litigation with Lumpkin. Check off that element. Lumpkin, C in Appellants' view, sued the Partnership solely because Dykes, the managing general partner of the Partnership, breached the Partnership Agreement. No other reason for the lawsuit exists. No facts in the record even hint otherwise. A closer "causal nexus" (which Appellants' lobby for in their brief at pages 28 and 29) between Dykes' wrongful act and the exposure of the Partnership to the lawsuit could not be found. But for Dykes' bad faith

breach of the Partnership Agreement, no lawsuit against the Partnership would have been filed. The second prong of the test is met.

C. Lumpkin, C, was not connected with the wrongful act by Dykes, A, toward Partnership, B.

Lumpkin, or C, was not involved with the initial transaction or event, which means the “wrongful act or omission of A toward B.” *Brock v. Tarrant*, 57 Wn. App. 562, 570, 789 P.2d 112 (1990). Dykes acted alone. Taking up Appellants’ challenge, Respondent can indeed say “straight-faced” that Lumpkin did not help Dykes breach the Partnership Agreement or breach his fiduciary duties. To claim otherwise is absurd. Lumpkin was at the receiving end of Dykes’ wrongdoing as was the Partnership. Lumpkin was “not connected with” the wrongful act by Dykes toward the Partnership, which means in this analysis, Lumpkin did not do the bad act. *Flint v. Hart*, 82 Wn. App. 209, 224, 917 P.2d 590 (1996).

To meet the third element, “[t]he focus is whether [the Partnership] would have been involved in litigation with [Lumpkin] apart from [Dykes’] conduct.” *Id.* Here, but for the intentional breach of the Partnership Agreement by Dykes the Partnership would not have been sued. The third prong of the test is met.

Arguing that Lumpkin could have elected not to sue the Partnership does not defeat liability. *Brotten v. May*, 49 Wn. App. 564, 572-573, 744 P.2d 1085 (1987). In *Brotten*, the court held that just because one real estate broker, in the “C” position like Lumpkin here, could have refrained from suing his client does not defeat liability where that real estate broker had nothing to do with the second real estate brokers’ bad acts toward their mutual client. Fees were awarded. *Id.* at 573.

Here, Lumpkin did nothing wrong. Dykes’ wrongful acts “were wholly independent.” *Id.* Lumpkin did not breach the contract with himself. The ABC rule is met. The award of fees and costs should be affirmed.

g. The Partnership is Entitled to its Attorney Fees and Other Costs on Appeal.

As the prevailing party, the partnership is entitled to its attorney fees and other costs on appeal. The underlying basis for the award of appellate fees and costs are grounded in equity and outlined and supported above in the sections of this brief concerning fees and other costs as damages and costs of litigation awarded. In addition, *Green v. McAllister*, 103 Wn. App. at 472, explicitly authorizes fees on appeal to the prevailing party in a partnership breach of fiduciary duty case. The

grounds for the award of appellate fees are also referenced in the briefing below, at Clerk's Papers 58. The Court should not allow Dykes to further exhaust the Partnership's resources, his fellow partner's money, in the effort to recover what Dykes should have paid in the first instance. RAP 14.2, RAP 18.1.

IV. CONCLUSION

Appellants limit their assignments of error on appeal to the legal basis for the awards of attorney fees and costs; first, the award of attorney fees and costs as damages in the underlying matter (the amount was not disputed below and is undisputed here, and; second, the award of attorney fees made necessary to obtain reimbursement of the Partnerships' funds in the instant case. The amount was disputed below, but is not challenged on appeal.

Appellants concede, however grudgingly, the several applicable grounds in equity for the awards, but attempt unsuccessfully to argue a failure of proof on the facts. The undisputed record contains substantial evidence of Dykes intentional, bad faith breach of the Partnership Agreement and failure of his fiduciary duties of care, good faith and fair dealing.

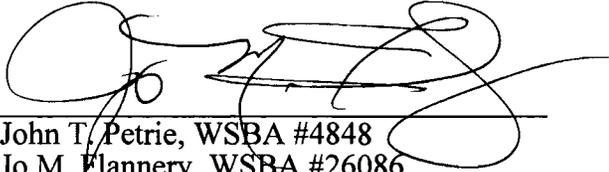
The Partnership was drawn into litigation with Lumpkin due solely to Dykes' intentional breach of the Partnership Agreement. But

for Dykes' bad acts, the Partnership would never have incurred the fees and costs at issue here. Where Dykes misused his position as managing general partner, the damages flowing from his abuse of power are appropriately Dykes' sole debt.

The Partnership is entitled to protect, preserve and recover the common funds of the many partners in WBC. The awards were authorized by settled case law, much of which Appellants acknowledge in their opening brief. Multiple grounds for the awards are supported by the undisputed facts in the record. The Judgment should be affirmed and fees awarded to Respondent as the prevailing party herein.

Respectfully submitted this 4th day of April, 2011.

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By 

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APPENDIX A

RCW 25.05.165
General standards of partner's conduct.

(1) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (2) and (3) of this section.

(2) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(a) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

(b) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

(c) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

(3) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(4) A partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(5) A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.

(6) A partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law.

(7) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

[1998 c 103 § 404.]

DECLARATION OF SERVICE

I declare that on the 4th day of April, 2011, I caused to be filed with the Court, via ABC Legal Messengers, Inc., the original of the following documents:

RESPONSE BRIEF OF RESPONDENT
WOODINVILLE BUSINESS CENTER NO. 1

and served copies of the above-named documents upon the following addresses via Messenger:

Attorney Appellants

Sam B. Franklin
Lee Smart, P.S.
701 Pike Street, Suite 1800
Seattle, WA 98101



Robert Walker

Dated: April 4, 2011

Place: Seattle, WA