

Case No. 50227-5-II

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

MAUREEN HAY, et al.,
Appellants,

v.

AAA FRAMING CORPORATION, et al.,
Respondents.

BRIEF OF RESPONDENT AAA FRAMING CORPORATION

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A. INTRODUCTION

This case arises out of construction defect claims brought by plaintiff homeowners against their general contractor, Highmark Homes LLC (“Highmark”). Highmark filed third-party claims for breach of contract against several of its subcontractors, including Respondent AAA Framing Corporation (“AAA”).

AAA moved for summary judgment on the basis that there was no written contract between it and Highmark. The trial court agreed, holding that the existence of a written contract could not reasonably be inferred. The court dismissed with prejudice all claims against AAA, including claims for breach of contract; breach of warranty; breach of express, implied and/or equitable duties to defend and indemnify; failure to provide insurance; and for attorney’s fees and costs.

Appellants¹ now claim that the trial court erred when it held that a written contract could not be reasonably inferred between Highmark and

¹ The Appellants are the plaintiff homeowners. At some point, Highmark and the plaintiff homeowners entered into a settlement agreement under which Highmark assigned all claims against its subcontractors to the plaintiffs. AAA incorporates by reference herein the arguments made in its Motion to Dismiss Appellants’ Appeal, filed separately with this Court. Appellants’ lack standing to appeal the lower court’s Order dismissing AAA. Appellants had not been assigned Highmark’s claims against AAA when they opposed AAA’s Motion for Summary Judgment, when AAA was dismissed, or when Appellants appealed AAA’s dismissal. Furthermore, even if Appellants could show they were assignees of Highmark’s claims at the time of the underlying Order and this appeal, Appellants still lack standing. Highmark never filed an opposition to AAA’s Motion for Summary Judgment, moved for reconsideration of the Order, or otherwise contested the decision. Therefore, even if Highmark

AAA. However, Appellants have failed to produce the contract or provide any evidence that specific terms were agreed upon. The only “evidence” Appellants offer is the unsupported, self-serving statement by Highmark that an agreement likely exists somewhere.

Because there is no evidence that Highmark and AAA had a written contract, the trial court’s Order Granting AAA’s Motion for Summary Judgment should be affirmed.

B. STATEMENT OF ISSUES

1. Should the Court Affirm the Order Granting AAA’s Motion for Summary Judgment where there is no written contract between AAA and Highmark?
YES.
2. Should the Court’s review be limited to the issue of whether AAA and Highmark had a written contract where the Appellants failed to assign error or offer substantive argument regarding other claims?
YES.
3. If review is not limited to whether a written contract existed, should the Court dismiss any claims for breach of contract and warranties where there is no evidence of a contract or express warranties and Washington does not recognize implied warranties in non-UCC construction contracts?
YES.
4. If review is not limited to whether a written contract existed, should the Court dismiss any claims based on the duty to defend and indemnify because there is no contract containing those terms and Washington does not recognize such claims in non-UCC construction contracts?

had timely assigned its interests to Appellants, Appellants would still lack standing to appeal the Order because Highmark never contested it before the trial court.

YES.

5. If review is not limited to whether a written contract existed, should the Court dismiss any claim for failure to name Appellants as an additional insured where there is no evidence that such a duty existed?

YES.

6. If review is not limited to whether a written contract existed, should the Court dismiss the claim for attorney's fees and costs where they are not authorized by statute, contract, or recognized ground in equity.

YES.

7. Should the Court ignore unpublished decisions offered by Appellants because they have no precedential value and cannot be cited as authority?

YES.

C. STATEMENT OF THE CASE

This case arises from the construction and sale of twenty-nine single family homes located in a neighborhood called "Valley Haven" in Fife, Washington (hereinafter "Project"). Highmark and its owner (Tom Tollen) purchased the lots and acted as general contractor in their development. (CP 1645-54). As the general contractor, Highmark hired subcontractors, including AAA, to perform construction labor on the subject homes. (CP 1656-62). AAA provided framing labor on twelve of the twenty-nine homes. (CP 1801).

1. Factual Background

Highmark selected, purchased, and supplied the lumber and materials, except nails, for the framing of the homes. (CP 1802). Highmark instructed, supervised and approved the work done by AAA.

Id. Further, Highmark secured permits for the subject homes wherein a representative of Highmark declared that in the construction of the homes, all applicable codes would be met. (CP 1794-1798).

AAA played no part in the design or engineering of the houses. (CP 1802). AAA played no part in obtaining building permits for original construction of the homes from the City of Fife. *Id.* Aside from supplying fasteners (such as nails), AAA played no part in the selection or ordering of materials that were used to build the homes. *Id.* AAA was not involved in the selection of other subcontractors – or the sequencing or inspection of work performed by any of the other subcontractors. *Id.* Highmark made it clear to AAA that it (Highmark) was the one in charge of those aspects of original construction of the homes (design, engineering, obtaining permits, selecting materials, ordering materials, selecting subcontractors, sequencing of subcontractors and inspecting subcontractors' work). *Id.*

Highmark insisted that AAA provide framing labor in strict accordance with Highmark's instructions. (CP 1802). Highmark told AAA what to do, how to do it and when to do it. *Id.* If AAA ever suggested (to Highmark) – as it did on occasion – other, alternative ways of doing things, Highmark told AAA to do things the way Highmark instructed. *Id.*

Once the construction on each house was completed, AAA would send Highmark its invoices. (CP 1802). After Highmark received the invoices, Highmark's supervisor would do an additional, final inspection. *Id.* After the final inspection, Highmark would pay AAA's invoices. *Id.* On occasion, Highmark asked AAA to construct "extras," such as an arch. *Id.* Sometimes, Highmark would not pay AAA for the extras even though they were included in the framing labor invoices. *Id.* AAA's invoices reflect an average charge to Highmark of under \$25.00 per hour.

AAA alleges that it never agreed to be responsible for making sure that the homes Highmark was building and selling complied with applicable building codes. (CP 1803). AAA never assumed responsibility for the applicable building permit requirements. *Id.* AAA also never agreed to defend, indemnify or otherwise protect Highmark from or against claims like those that the plaintiffs are making in this lawsuit. *Id.* Highmark maintains that the work done by AAA is not defective. (CP 1661).

2. There Was No Written Contract

AAA denies that there was a written contract between it and Highmark for AAA's work on homes at Valley Haven. (CP 1801). In its Third-Party Complaint, Highmark claims that there was a written contract. (CP 1660). However, Highmark has repeatedly been unable to locate and

produce the contract. (CP 1783-4; CP 1788-92). Nor can Highmark recall the date the contract was formed, including whether it was formed at the beginning of this Project or at the beginning of some other, unspecified project. (CP 1783-4; 2143). Nor has Highmark offered any factual basis for its breach of contract claims against AAA based on the alleged written agreement. (CP 1788-92).

The only written documentation related to AAA's labor on the Project was AAA's invoices to Highmark. (CP 1808-1860). The invoices do not contain any references to warranties, scope of work, performance standards, defense or indemnification, additional insurance, or attorney's fees and costs. *Id.*

3. Procedural History

Plaintiffs, owners of the subject homes, filed their Complaint in Pierce County Superior Court on May 15, 2014. (CP 1645-54). The plaintiffs alleged that after buying and moving into the Highmark homes, they discovered water penetrating exterior and interior building surfaces, which damaged (among other things) framing components of the homes. *Id.* Highmark filed a Third-Party Complaint denying plaintiffs' allegations and asserting claims against twelve of its subcontractors, including AAA. (CP 1656-62). Highmark claimed it entered into contracts with each of the subcontractors to perform labor and/or supply

materials for the construction of the Project, and the plaintiffs' claims implicated the subcontractor's work. *Id.*

Highmark alleged that that if the plaintiffs prevailed on any of their claims, then the subcontractors would be liable to Highmark for breach of contract and breach of warranty based on an alleged duty to defend and indemnify Highmark. (CP 1661).

On July 15, 2016, AAA filed a Motion for Summary Judgment to dismiss Highmark's claims against it. (CP 1754-1772). AAA argued that there was no written contract or other documentation showing that AAA had agreed to warranties, to defend or indemnify Highmark, to add Highmark as an additional insured, or that AAA would otherwise be responsible for claims by the plaintiffs against Highmark. *Id.* In addition, AAA noted that Washington law does not recognize implied warranties in construction agreements and does not recognize implied indemnity or defense in non-UCC construction contracts. *Id.*

On August 26, 2016, the Pierce County Superior Court granted AAA's Motion for Summary Judgment and dismissed all of Highmark's claims against AAA with prejudice. (CP 2358-2362). At that time, the Court also entered an Order dismissing with prejudice all of Highmark's remaining claims against three of the other third-party defendants, ABSI

Builders, Inc., Best Quality Framing #1 LLC, and S&S Home Repair Inc. (CP 2357).

4. Appeal

On September 9, 2016, the plaintiffs filed a Notice of Appeal of the lower court's Order Granting AAA's Motion for Summary Judgment as well as orders granting summary judgment to other subcontractors, including ABSI Builders, Inc., Best Quality Framing #1, LLC, and S&S Home Repair, Inc.

On October 12, 2016, the Court Commissioner converted the appeal from one as a matter of right into a notice for discretionary review. The Notice of Discretionary review was dismissed on February 7, 2017.

On February 16, 2017, Appellants filed a Motion to Enter Judgment with the Superior Court, requesting entry of judgment pursuant to a settlement agreement reached between the Appellants and Highmark Homes "in the fall of 2016." Appellants claim the settlement agreement included an assignment to Appellants of Highmark's claims against the third-party defendant subcontractors, including AAA.

On February 23, 2017, Appellants filed a new Notice of Appeal, again appealing, among other things, the Order Granting AAA's Motion for Summary Judgment and the orders granting summary judgment the other subcontractors referenced above. On March 3, 2017, the Appellants

filed an Amended Notice of Appeal, asserting that all other parties had been dismissed and/or had a judgment entered against them.

Appellants' Opening Brief was due on June 9, 2017. On June 7, 2017, Appellants filed a motion for extension. On June 9, 2017, the Court of Appeals granted an extension until July 10, 2017. Appellants missed the July 10, 2017, extended deadline, filing their Opening Brief on July 12, 2017. *See* Brief of Appellants.

D. ARGUMENT

1. Standard of Review for Summary Judgment

Summary judgment rulings are reviewed de novo. The appellate court conducts the same inquiry as the trial court. *Folsom v. Burger King*, 135 Wn.2d 658, 663 (1998) (citing *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d, 337, 341 (1994)).

A party may move for summary judgment by showing that the “nonmoving party *lacks sufficient evidence* to support its case.” *Guile v. Ballard Community Hospital*, 70 Wn. App 18, 21 (1993)(emphasis added). The moving party may support its motion for summary judgment by “merely challenging the sufficiency of the plaintiff’s evidence as to any material issue.” *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198 (1992). The nonmoving party may not rest upon mere allegations, but must instead set forth *specific facts* showing the existence of a genuine

issue for trial. CR 56(e); *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 628 (1990) (emphasis added). In the present case, the trial court properly granted AAA's summary judgment motion because Appellants failed to offer any evidence to support their claims against AAA.

2. There is No Written Contract between Highmark and AAA

Appellants argue that there is a question of fact as to whether a written contract exists between Highmark and AAA. Yet the only evidence Appellants attempt to offer to support this claim is the declaration of Tom Tollen. Brief of Appellants, p. 27; (CP 1484-87). Yet, as Appellants' Brief plainly states, Mr. Tollen only asserts in this declaration that he remembers there being a contract between Highmark and *Best Quality Framing*, not Highmark and AAA. *Id.*

Mr. Tollen makes the bald assertion in his deposition that he thinks a contract between AAA and Highmark existed. (CP 2123). However, he admits he has never seen the contract. *Id.* He also admits he cannot locate the contract and, therefore, it never has been produced. (CP 2120-21).

Appellants argue that a jury could infer the existence (and terms) of a written contract between AAA and Highmark from Mr. Tollen's declaration. In turn, Appellants claim that AAA failed to meet its burden on summary judgment of showing that it did not enter into such a contract.

Appellants' arguments are based almost exclusively on the case of *Jacob's Meadow Owners Ass'n v. Plateau 44 II*, 139 Wn. App. 743 (2007), which they claim is "almost identical" to the present case. Brief of Appellants, p. 28. In reality, the facts in *Jacob's Meadow* are markedly different, rendering the case completely distinguishable

The *Jacob's Meadow* court held that a jury could reasonably infer the existence of a written contract between the general contractor and the subcontractor, and that the agreement contained a promise to indemnify the general contractor. However, the decision was based on the following evidence: (1) a written, unsigned contract that specifically named the general contractor and the subcontractor; (2) the unsigned contract detailed the specific work that this subcontractor was to perform; (3) the unsigned contract listed the price that this specific subcontractor was going to be paid; (4) the price in the contract was the same price the subcontractor quoted in its initial bid for the project; (5) the subcontractor admitted that it would typically want a written contract for projects like this; (6) the subcontractor admitted that it had entered into a written contract in the past with the same general contractor; and (7) the subcontractor admitted that it signed periodic lien release forms during the subject project, by which it agreed to hold the general contractor harmless

from any liens from the subcontractor's suppliers. *Jacob's Meadow*, 139 Wn. App. at 765-766.

None of the facts supporting a reasonable inference of a written contract in *Jacob's Meadow* exist in the present case. There is no written, unsigned contract that names Highmark and AAA, let alone one that specifies the work AAA was to perform or the price it charged for the work. AAA never admitted that it generally wants written contracts for these types of projects, or that it has entered into similar contracts in the past with Highmark. AAA never signed lien releases or otherwise agreed to hold Highmark harmless for any reason pertaining to the Project.

There is absolutely no evidence that a written contract existed between AAA and Highmark. The only "evidence" Appellants offer is the unsupported, self-serving claim of Highmark's owner that an agreement likely exists somewhere. In turn, there is no reasonable dispute as to whether Highmark and AAA had a written contract for the Project. They did not.

3. Whether AAA and Highmark had a Written Contract is the Only Issue Before This Court; Other Issues Should Not be Reviewed

As pertains to AAA, Appellants' Notice of Appeal states only that Appellants are appealing the Order Granting AAA's Motion for Summary Judgment ("Order"). In their Brief of Appellants, Appellants fail to make

any specific assignments of error to the Order. The only assignment that can be inferred from the briefing is whether a written contract existed between Highmark and AAA. *See* Brief of Appellants, pp. 28-29. For this reason, the only issue before this Court as pertains to AAA is whether a written contract with Highmark existed.

Appellate review is not barred “where the nature of the challenge is perfectly clear, and the challenged finding is set forth in the appellate brief[.]” *Staats v. Brown*, 139 Wn.2d 757, 784-85 (2000) (quoting *State v. Olson*, 126 Wn.2d 315, 322 (1995)). However, if the issue associated with the error is not plainly articulated in the assignment of error *and not argued in the brief*, the court will not consider that issue. *Id.* (emphasis added); *Conner v. City of Seattle*, 153 Wn. App. 673, 686, n. 37 (2009) (because an argument was not made in the briefs, the court did not consider it, pursuant to RAP 10.3 and RAP 12.1).

The Appellants fail to assign error (in form or in substance) on any of the following claims: (1) breach of contract; (2) breach of warranties; (3) breach of duty to indemnify; (4) breach of duty to defend; (5) breach of duty to name Highmark as an additional insured; and (6) breach of an agreement to pay Highmark’s attorney’s fees and costs. Because the Appellants failed to assign error on these issues, and failed to adequately address them in their briefing, they should not be considered on appeal.

4. AAA Did Not Breach a Contract or Warranty

Even if the Court's review is not limited to the question of whether a written contract existed, any claims for breach of contract and/or warranties against AAA should be dismissed.

a) Breach of Contract

There can be no claim for a breach of contract unless the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Nw. Mfrs. v. Dep't of Labor*, 78 Wn. App. 707, 712 (1995). For a contract to exist, there must be a mutual intention or "meeting of the minds" on the essential terms of the agreement. *McEachren v. Sherwood & Roberts, Inc.*, 36 Wn. App. 576, 579 (1984). The burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact. *Cahn v. Foster & Marshall, Inc.*, 33 Wn. App. 838, 840 (1983).

Appellants cannot make a claim for breach of express contract because they cannot produce a written contract between AAA and Highmark.

Appellants cannot make a claim for breach of implied contract because they fail to offer any evidence to support the existence of such a contract between AAA and Highmark. For example, Appellants do not claim that an implied contract even exists. Appellants have repeatedly

maintained that the contract was written, not oral, and in the same form as other contracts it had entered into. Mr. Tollen testified that AAA had the same agreement as Best Quality and ABSI. (CP 2337-38).² Highmark's discovery responses also indicate that no oral contract with AAA existed.

INTERROGATORY NO. 2: Please identify, describe, and explain any and all agreements or arrangements, whether written or oral, you claim to have had with AAA Framing related to AAA Framing's labor on the subject homes.

ANSWER:

Highmark had a written contract with AAA Framing to install framing, including T1-11 siding, at the subject homes.

(CP 2330) (italics in original).

Although the above statements are not substantiated by any evidence, they indicate that Appellants are not claiming that an implied contract with AAA existed. Nor have Appellants presented any evidence of the terms of such a contract. In turn, any claims for breach of express or implied contract against AAA must fail.

b) Breach of Warranty

AAA did not breach an express warranty because Highmark has failed to offer any evidence that an express warranty existed. The only

² ABSI is one of the subcontractors Highmark was able to locate a written agreement for. (CP 1913-21).

documentation relating to AAA's work consists of framing labor invoices. This is not evidence sufficient to show an express warranty.

AAA did not breach an implied warranty to Highmark. In Washington, service contracts are not governed by the Uniform Commercial Code (UCC), therefore, where a construction contract contains no terms regarding warranties, an implied warranty of workmanlike performance is not implicit. *Urban Dev., Inc. v. Evergreen Bldg. Prod.'s, LLC*, 114 Wn. App. 639, 646 (2002) (court upheld the dismissal of general contractor's breach of warranty and breach of contract claims against some subcontractors that provided only services). AAA provided only services to Highmark. The only documentation relating to AAA's work consists of framing labor invoices, and there is no dispute that AAA performed framing labor. Further, there is no evidence of an agreed upon scope of work. Highmark insisted that AAA provide framing labor in strict accordance with Highmark's instructions, which AAA did. In turn, there is no evidence of an implied warranty.

5. AAA Did Not Breach a Duty to Defend or Indemnify

Even if review is not limited to whether a written contract existed, AAA does not have a duty to defend or indemnify Highmark. There is no evidence of an agreement with those terms, and Washington does not

recognize a cause of action for implied indemnity or defense in non-UCC construction contracts.

a) Express Indemnity

Parties are free to agree to indemnity terms in construction contracts. *Urban Dev., Inc.*, 114 Wn. App. at 646. However, to enforce an indemnity clause, the agreement must be in writing. *Stocker v. Shell Oil Co.*, 105 Wn.2d 546, 549 (1986) (citing *Glass v. Stahl Specialty Co.*, 97 Wn. 2d 880 (1982)). The party enforcing the indemnity clause must prove the existence of a contract containing indemnity terms binding the other party to reimburse the enforcing party. *Jacob's Meadow Owners Ass'n*, 139 Wn. App. at 757 n. 3.

No contract containing an indemnity clause between Highmark and AAA has been produced. The only "evidence" offered on this issue is the unsupported claim in Highmark's discovery responses that "Highmark and AAA Framing entered into a contract under which AAA Framing agreed to defend and indemnify Highmark." (CP 1791). This non-specific statement does not prove there was a contract containing language that binds AAA to reimburse Highmark. To enforce an indemnification clause, the enforcing party must prove the agreement is in writing. Because Highmark cannot prove this, its claim against AAA for indemnification must be dismissed.

b) Equitable Indemnity

“A right of implied contractual indemnity arises when one party incurs liability the other party should discharge by virtue of the nature of the relationship between the parties.” *Urban Dev., Inc.*, 114 Wash. App. at 646 (citing *Central Washington Refrigeration, Inc. v. Barbee*, 133 Wn. 2d 509, 513 (1997)). Equitable indemnity is a legal question. *Blueberry Place v. Northward Homes*, 126 Wn. App. 352, 359 (2005). The elements of equitable indemnity are: (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 wrongful act or omission of A toward B. *Id.* at 359 (citing *Manning v. Loidhamer*, 13 Wn. App. 766, 769 (1975)).

Even if an enforceable indemnity clause existed, which it does not, Appellants’ equitable indemnity claim fails because the above elements are not met. Specifically, there are separate independent claims, which do not involve AAA, by the Appellant homeowners against Highmark. In the underlying case, the homeowners allege fraud against Highmark and its owner, Mr. Tollen, on the basis that they allegedly knew the subject homes were in a flood zone but proceeded to build them anyway. Additionally, other subcontractor work was implicated according to Highmark, including roofing work.

Further, Highmark admits that it selected, purchased and supplied the lumber and materials to AAA and other framing subcontractors for framing on the subject homes. It cannot be disputed that Highmark would have been sued by the Appellant homeowners regardless of any work AAA performed because other framers also performed this work at the instruction of Highmark. In turn, Highmark cannot establish that AAA's specific work caused Highmark to be sued by the plaintiff homeowners.

There are also no implicit warranties to support an implied indemnity claim. In Washington, workmanlike performance warranties are not implicit in construction contracts, and cannot support a general contractor's indemnification claim against a subcontractor in non-UCC cases. *Urban Dev., Inc.*, 114 Wn. App. at 646. Again, AAA only provided services to Highmark; therefore, their relationship is not governed by the UCC and Appellants have no implicit warranties to support an implied indemnity claim. Appellants' implied indemnity claim against AAA should be dismissed.

c) Duty to Defend

As previously discussed, there can be no claim for a breach of contract unless the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Northwest Ind. Forest Mfr.s*, 78 Wn. App. at 712. The party asserting the contract term has the

burden of proving each essential fact, including mutual intention. *Saluteen-Maschersky v. Countrywide*, 105 Wn. App. 846, 851 (2001).

Just as Appellants' claims for breach of contract as to warranties fail, so does their claim for breach of the duty to defend. Appellants have not produced evidence showing the existence of a written contract between AAA and Highmark, let alone one in which AAA agrees to defend Highmark. Nor has any evidence been produced showing mutual assent to such terms.

Furthermore, Appellants have failed to specify how AAA's work was allegedly defective, or specify the alleged causal connection between AAA's work and the alleged defects. In turn, there is no duty to defend because there is no evidence offered that liability would eventually fall on AAA.

6. AAA Did Not Breach a Duty to Name Highmark as an Additional Insured

Even if review is not limited to whether or not a written contract existed, AAA did not breach a duty to name Highmark as an additional insured because there is no evidence that such a duty existed.

As discussed above, there can be no claim for a breach of contract unless the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Northwest Ind. Forest Mfr.s,*

78 Wn. App. at 712. The party asserting the contract term has the burden of proving each essential fact, including mutual intention. *Saluteen-Maschersky*, 105 Wn. App. at 851.

Just as Appellants' claims for breach of contract as to warranties fail, so does their claim that AAA breached a duty to name Highmark as an additional insured. Without any supporting evidence of a contract that included an obligation to add Highmark to its insurance, AAA cannot be found to have breached that duty. Appellants certainly cannot prove the existence of a mutual intention between AAA and Highmark if they cannot even produce the written contract itself. This claim must be dismissed.

7. AAA Did Not Have to Pay Highmark's Attorney's Fees and Costs

Even if this Court's review is not limited solely to the question of whether a written contract existed, AAA did not breach a duty to pay Highmark's attorney's fees and costs because there is no evidence that a written contract exists with those terms.

In addition, a party is not entitled to recover attorney fees as an expense of litigation under the theory of equitable indemnity unless the defendant's wrongful act or omission is the sole reason the party became involved in litigation with a third party. *Blueberry Place*, 126 Wn. App. at

359-360. If there are additional reasons why the party was sued, attorney fees are not available, even if it is possible to apportion attorney fees among the various claims. *Id.* at 361.

AAA's alleged wrongful action was not the sole reason Highmark became involved in litigation with the Appellant homeowners. Highmark was sued by the Appellants for multiple reasons, including for the alleged wrongful action of several other subcontractors. Appellants also alleged that Highmark and Mr. Tollen committed fraud. In turn, attorney fees cannot be recovered from AAA based on a theory of equitable indemnity.

Furthermore, common law does not provide for the recovery of attorney's fees in these circumstances. Courts do not have the power to award attorney's fees and costs in cases not authorized by statute, contract or recognized ground of equity. *Bongirno v. Moss*, 93 Wn. App. 654, 658, 969 P.2d 1118 (1999), overruled on other grounds by *Malted Mousse, Inc. v. Steinmetz*, 150 Wn. 2d 5128, 531 (2003).

The attorney's fees sought by the Appellants are not authorized by statute, contract, or recognized ground in equity. In turn, any claim for attorney's fees and costs against AAA should be dismissed.

8. Unpublished Decisions Referenced in Appellants' Briefing Should be Ignored

Appellants rely on multiple unreported cases to support their

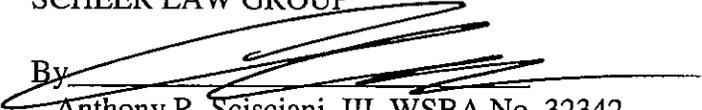
claims. See Initial Brief of Appellants, pp. 14, 19, 25. Unpublished opinions have no precedential value and cannot be cited as authority under RAP 10.4(h). *In re Marriage of Schweitzer*, 132 Wn.2d 318, 328 (1997) (citing *State v. Sigman*, 118 Wn.2d 442, 444 n.1 (1992)); and see *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 548-49 (2000), *rev den'd*, 143 Wn.2d 1024 (2001) (Division I imposed \$500 in sanctions against counsel who cited and discussed at length an unpublished opinion of that court). This Court should ignore any unreported cases offered by Appellants.

E. CONCLUSION

The Appellants fail to offer any evidence that a written contract exists between Highmark and AAA and fail to offer any evidence to support claims for breach of contract, warranty or indemnity. AAA respectfully requests that this Court affirm the trial court's Order Granting AAA's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 2nd day of October, 2017.

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