

FILED

APR 26 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31445-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

KEITH MILLER,

Appellant

v.

PAUL M. WOLFF, et al.

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY
THE HONORABLE VIC L. VANDERSCHOOR

BRIEF OF APPELLANT

DAVIES PEARSON, P.C.

By: Peter T. Petrich, WSBA # 8316
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I. INTRODUCTION

Paul M. Wolff Co. (“Company”) is the former employer of Keith Miller. Mr. Miller was employed in the position of Field Sales Representative and compensated on a commission-only basis. Mr. Miller, like the Company’s other Field Sales Representatives, was paid a fifteen percent commission on all jobs meeting a thirty-five percent profit margin, upon the completion of the project and the Company’s receipt of payment. As a Field Sales Representative, Mr. Miller was assigned to an exclusive geographic region. In his region, he was responsible for obtaining contracts for jobs and managing the Company’s performance of those contracts through to completion.

On January 9, 2009, Mr. Miller voluntarily resigned his position effective immediately. The Company paid him for all commissions on projects that had been completed prior to his departure. Mr. Miller, however, demanded payment of commissions for projects that he initially worked on but did not complete. Ultimately, Mr. Miller sued the Company in an effort to obtain these commissions, claiming that he was entitled to recovery pursuant to the procuring cause doctrine.

At mandatory arbitration, Mr. Miller was awarded \$22,802.84 in damages on his procuring cause doctrine claim. Mr. Miller requested a trial de novo. At trial, he recovered \$21,628.97 in damages on his

procuring cause doctrine claim, \$1,173.87 less than he was awarded at arbitration. Nevertheless, the trial court concluded that Mr. Miller had improved his position on trial de novo. The trial court reached this conclusion by including the award of attorney fees and costs recovered by Mr. Miller pursuant to RCW 49.48.030 in its evaluation of whether he improved his position.

Because an agent should be precluded from recovering pursuant to the procuring cause doctrine when he or she voluntarily abandons a project prior to completing his or her performance, the Company respectfully requests that this Court reverse the trial court's conclusion that Mr. Miller was entitled to recovery under the procuring cause doctrine.

Additionally, because a party should not be able to improve his or her position solely through an award of attorney fees and costs on trial de novo, the Company respectfully requests that this Court reverse the trial court's award of attorney fees to Mr. Miller and remand this case for the entry of an order awarding the Company attorney fees and costs incurred since Mr. Miller requested a trial de novo.

Finally, this Court should reverse the trial court's award of attorney fees and costs to Mr. Miller pursuant to RCW 49.48.030 because

the equitable nature of the award is inconsistent with the relief provided by statute.

II. ASSIGNMENTS OF ERROR

- a. The trial court erred as a matter of law in concluding that Keith Miller was the entitled to commissions on the at-issue jobs under the procuring cause doctrine.
- b. The trial court erred as a matter of law by concluding that Keith Miller improved his position on trial de novo.
- c. The trial court erred as a matter of law by awarding Mr. Miller attorney fees pursuant to RCW 49.48.030.

III. STATEMENT OF THE ISSUES

- a. Whether the trial court erred in awarding Mr. Miller commissions pursuant to the procuring cause doctrine because Mr. Miller was not the procuring cause where he did not complete his bargained for performance, he voluntarily terminated the agency relationship, he had unclean hands, and the parties' course of performance evidenced an intention to only pay commissions to the agent completing the project.
- b. Whether the trial court erred in denying the Company's motion for attorney fees and costs because it improperly concluded that Mr. Miller improved his position on trial de novo where Mr. Miller recovered fewer damages on trial de novo yet obtained a bigger judgment solely because of an award of attorney fees and costs.
- c. Whether the trial court erred in awarding Mr. Miller attorney fees and costs pursuant to RCW 49.48.030 because the statutory relief of attorney fees and costs is not available for recovery pursuant to an equitable doctrine.

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IV. STATEMENT OF THE CASE

a. Factual History

- i. Historically, Paul M. Wolff Co. Paid its Field Sales Representatives a Commission Upon Completion of Jobs that Met a Thirty-Five Percent Gross Profit Margin Threshold.

Appellant the Company is a subcontractor that specializes in concrete finishing services. CP at 477. It employs Field Sales Representatives who are responsible for facilitating and overseeing the performance of its services on projects within their individual, exclusive geographic regions. See CP at 63-64, 477-78.

A Field Sales Representative is assigned to a prospective project after the Company receives an invitation to bid from a general contractor. CP at 78. He or she is then responsible for preparing a bid and submitting it to the Company for approval. CP at 112, 478. Once approved by the Company, the Field Sales Representative must submit the bid to the general contractor. CP at 479.

If the project is awarded to the Company by the general contractor, the Field Sales Representative is responsible for managing the Company's performance under the contract **through completion**. CP at 77, 479. Managing the Company's performance through completion of the project is considered the fifth step in the Field Sales Representative's performance

of his or her responsibilities on a given project. CP at 479, 491. The fifth step constitutes the majority of the Field Sales Representative's work and is the most valuable to the Company because it has a substantial impact on the Company's profit margin. CP at 77, 479.

The fifth step includes the following duties: coordinating with the general and other subcontractors to schedule the time for the company to perform its work; ensuring that the necessary work and equipment is on-site at the scheduled time; working with the general contractor to process and complete change orders; and ensuring that the company maintains its profit margin. CP at 77, 479. This work often does not commence for several months after the Company is awarded the project. CP at 479.

The Company has historically paid its Field Sales Representatives a fifteen percent commission on projects that meet a thirty-five percent gross profit threshold. CP at 479. Field Sales Representatives were only paid commissions after the Company completed its work and received payment. CP at 479. The parties' written contract did not address whether and to what extent post-termination commissions would be paid. CP at 478.

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ii. Keith Miller Resigned from His Position as a Field Sales Representative Prior to Completing the Fifth Step of Performance on the “At-Issue” Jobs.

Keith Miller was employed by the Company as a Field Sales Representative for multiple years until January 9, 2009. CP at 477. At all relevant times, he was paid exclusively in commissions, consistent with the Company’s compensation of other Field Sales Representatives. CP at 477.

On September 1, 2008, Mr. Miller created Final Concrete, LLC, a competitor to the Company. CP at 471:Ex. 103.

On January 9, 2009, Mr. Miller without prior notice voluntarily resigned from his position, effective immediately. CP at 471: Ex. 108, 477. Upon his resignation, the Company paid Mr. Miller all commissions for projects that had been completed. CP at 480.

On January 12, 2009, Keith Miller demanded to be paid commissions on projects that were not finished. CP at 480. Mr. Miller sought commissions on the following sixteen projects: Hamilton Middle School;¹ Mossyrock Multipurpose Room;² Wellington Hills; WinCo; Lebanon Justice; VMC; Washington State Penitentiary; New Vocational;

¹ Mr. Miller stipulated to the omission of this project from trial.

² Mr. Miller stipulated to the omission of this project from trial.

NW Detention Center; Kroc Center; Chemketa; Renton Bus; Physical Sciences; ProLogis; and Lebanon Library. CP at 481.

The Company had to assign other employees to these projects to finish the work that Mr. Miller failed to complete. See CP at 482-83. The majority of these projects took several months to complete after Mr. Miller's sudden resignation. See CP 472-473: Exs. 114, 115, 116, 117, 118, 119, 120, 121, 129, 130. Upon completion of these projects, only ten of these "at-issue" jobs met the thirty-five percent gross profit threshold. CP at 482. These projects were Wellington Hills, WinCo, Lebanon Justice, VMC, UPS, Washington State Penitentiary, New Vocational, NW Detention Center, Kroc Center, and Chemeketa. CP at 482-83.

The Company paid commissions on eight of these projects, excluding Wellington Hills and WinCo, to another Field Sales Representative, in the amount of \$25,862.87, who completed Mr. Miller's work on these projects. CP at 480-81, 483. In addition to demanding payment of the commissions already paid to the Field Sales Representative who completed his work, Mr. Miller demanded payment for commissions for the Wellington Hills and WinCo projects in the amount of \$1,173.34, for a total of \$27,036.21. CP at 484.

The Company refused to pay Mr. Miller commissions on the at-issue jobs because he had resigned, without prior notice, prior to fulfilling

his responsibilities on the projects, which include managing them through completion. CP at 77, 471; Ex. 127, 479.

b. Procedural History

- i. Keith Miller Filed a Lawsuit Against Paul M. Wolff Co. Demanding Payment of Commissions On Jobs for which He Did Not Complete Performance.

On April 16, 2009, Keith Miller filed a complaint against the Company and Curtis Beesley³ (collectively “the defendants”), who was the Company’s president at the time of and immediately following Mr. Miller’s resignation. CP at 1-11, 477. The complaint alleged that the defendants violated RCW 49.48.160, that Mr. Miller was entitled to equitable recovery under the procuring cause doctrine, and that the defendants had breached their contract with Mr. Miller. CP at 1-5. These allegations were all based upon the claim that he was entitled to payment of commissions on the unfinished projects. See *Id.* Mr. Miller claimed damages not exceeding \$50,000. CP at 6.

On June 29, 2009, the Company and Curtis Beesley filed their Answer and Counterclaim. CP at 14-16. They denied Mr. Miller’s claim that he was entitled to payment for commission on unfinished projects and, as a counterclaim, asserted that Mr. Miller received an overpayment of commissions. CP at 14-16.

³ Mr. Beesley is not a party to this appeal.

On August 14, 2009, Mr. Miller filed Plaintiff's Answer to Counterclaim, denying the allegation that he received an overpayment of commissions.

ii. At Mandatory Arbitration, Keith Miller Received an Award of \$22,802.84 in Damages.

On December 17, 2010, the parties engaged in mandatory arbitration. CP at 496. After hearing the parties' arguments and evidence, the arbitrator concluded that Mr. Miller was entitled to recovery under the procuring cause doctrine and awarded him \$22,802.84 in damages and statutory fees and costs. CP at 497-98. The arbitrator denied Mr. Miller's request for attorney fees and costs pursuant to RCW 49.48.030, concluding that MR. Miller's award flowed from an equitable remedy and was not for wages and salary owed. CP at 499.

iii. Keith Miller Requested a Trial De Novo and Was Awarded \$21,628.97 in Damages.

On February 18, 2011, Mr. Miller requested a trial de novo. CP at 25. The parties proceeded to a bench trial, which concluded on August 20, 2012. CP at 476. At the conclusion of trial, the trial judge awarded Mr. Miller \$21,628.97 for his procuring cause doctrine claim and denied the rest of Mr. Miller's claims and the defendants' counterclaim. CP at 476-495.

iv. The Trial Court Concluded that Mr. Miller Improved His Position on Trial De Novo, Awarded Him Attorney Fees and Costs, and Denied the Defendants' Motion for Attorney Fees and Costs.

On December 31, 2012, Mr. Miller filed a motion requesting double damages and attorney fees and costs. CP at 264 – 280. On January 8, 2013, the Company and Mr. Beesley filed a motion for attorney fees and costs, asserting that Mr. Miller failed to improve his position from the mandatory arbitration award. CP 359 at 405. The trial court denied the defendants' motion for attorney fees and costs, denied Mr. Miller's motion for double damages, and granted Mr. Miller's motion for attorney fees and costs, concluding the he had improved his position on trial de novo. CP at 491. Mr. Miller was awarded attorney fees in the amount of \$74,662.00. CP at 491-92.

V. ARGUMENT

The trial court's conclusions that Mr. Miller was entitled to recovery under the procuring cause doctrine, improved his position on trial de novo, and was entitled to an award of attorney fees and costs pursuant to RCW 49.48.030 are incorrect. While these issues are matters of first impression, the trial court erred by failing to honor the purpose for each standard. First, Mr. Miller was not entitled to relief under the procuring cause doctrine because he voluntarily terminated his agency relationship

with the Company, prior to completing his performance on the at-issue jobs. Second, Mr. Miller did not improve his position on trial de novo because he recovered fewer damages at trial de novo than at mandatory arbitration. Third, the trial court erred by awarding Mr. Miller attorney fees and costs pursuant to RCW 49.48.030 because he recovered an equitable award not wages owed by reason of employment. Accordingly, this Court should reverse the trial court.

a. *Mr. Miller was Not Entitled to Relief under the Procuring Cause Doctrine.*

The first issue presented in this appeal is whether the trial court erred as a matter of law by concluding that Mr. Miller was entitled to relief under the procuring cause doctrine. Generally, an agent's compensation is determined by the parties' contract, including whether post-termination commissions must be paid. See *Willis v. Champlain Cable Corp.*, 109 Wn.2d 747, 748 P.2d 621 (1988) (holding that "[w]e deem neither Section 454 [of the Restatement (Second) of Agency] nor the procuring cause rule applicable when, as here, a written contract provides the manner by which termination can be effected as well as how commissions will be awarded when an employee or agent is terminated").

In the absence of a contractual provision determining whether post-termination commissions are to be paid, Washington courts apply the

procuring cause doctrine. See *Syputa v. Druck*, 90 Wn. App. 638, 645-46, 954 P.2d 279 (1998) (stating that “[i]n the absence of a contractual provision specifying otherwise, the procuring cause doctrine acts as a gap-filler.”⁴). The procuring cause doctrine is an equitable remedy. *Id.* at 649.

“The question of whether equitable relief is appropriate is a question of law, and like all issues of law review is de novo.” *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 482, 254 P.3d 835 (2011). Moreover, because the Company is challenging the legal standard adopted by the trial court rather than its findings of fact, this is a purely legal question. See *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833-34, 161 P.3d 1016 (2007) (stating that “if ... a pure question of law is presented ... a de novo standard of review should be applied as to that question.”).

Here, the trial court erred by applying only a portion of the procuring cause standard, failing to recognize Mr. Miller’s unclean hands, and failing to honor the parties’ intent.

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⁴ While the procuring cause doctrine “acts as a gap-filler,” it is not an actual gap filler. The court in *Syputa* upheld the trial court’s decision to grant summary judgment against the plaintiff’s on his breach of contract claim and reversed on the procuring cause claim. 90 Wn. App. at 643-645. Instead, “it is essentially an equitable doctrine.” *Id.* at 649.

i. Mr. Miller was not Entitled to Relief under the Procuring Cause Doctrine Because He Failed to Complete His Performance.

Contrary to the trial court's conclusion, the procuring cause doctrine does not entitle an agent to payment of commissions simply because he or she performs "activity that sets in motion the chain of events or negotiations culminating in a sale." CP at 487 (Conclusion of Law 5). The agent must also accomplish his or her bargained-for performance, unless the agency relationship is terminated by the principal in bad faith.

Presumably, the trial court's confusion regarding this second requirement stems from the application of the doctrine in the brokerage context, where it is most often applied. See *Feeley v. Mullikin*, 44 Wn.2d 680, 686, 269 P.2d 828 (1954). In this context, the agency relationship is created for the purpose of procuring a purchaser. As this Court recognized in *Washington Professional Real Estate LLC v. Young*:

[u]nder the procuring cause of sale doctrine, when a party is employed to procure a purchaser and does procure a purchaser to whom a sale is eventually made, that party is entitled to commission regardless of who makes the sale.

163 Wn. App. 800, 809, 260 P.3d 991 (2011) (citing *Willis v. Champlain Cable Corp.*, 109 Wn.2d 747 (1988)). By procuring a purchaser, the agent both sets in motion the sale and has completed the primary purpose of the agency relationship; both prongs of the procuring cause test are met in a

single act. Examining the application of the procuring cause doctrine in the brokerage context only it is easy to overlook the requirement that, in addition to setting the sale in motion, the agent complete his or her performance.

Nevertheless, the presence of both of these requirements is still reflected in the courts' statement of the procuring cause rule in this context:

[t]he broker must set in motion the series of events culminating in the sale and, in doing so, accomplishes what he undertook under the agreement.

Washington Professional Real Estate LLC v. Young, 163 Wn. App. at 810 (citing *Roger Crane & Assocs. V. Felice*, 74 Wn. App. 769, 776, 875 P.2d 705 (1994)) (emphasis added); *Bonanza Real Estate, Inc. v. Crouch*, 10 Wn. App. 380, 385, 517 P.2d 1371 (1974). Therefore, brokers are only entitled to commission if they procure a purchaser and complete their performance, with one exception.

The sole exception to this requirement exists where the principal terminates the agency relationship in bad faith. In *Willis v. Champlain Cable Corp.*, the Washington State Supreme Court recognized that:

if a principal attempts to revoke an agency or intervenes by taking the matter into his or his own hands, such revocation or intervention, if made in bad faith, cannot defeat the right of the broker to a commission.

109 Wn.2d 747, 754, 748 P.2d 621 (1988) (emphasis added; internal quotations omitted). Therefore, brokers are only entitled to commissions under the procuring cause doctrine if they complete their performance, unless the agency relationship is terminated in bad faith.

In other contexts, such as the one at issue, the thrust of the agency relationship is often broader, requiring the agent to do more than simply procure a purchaser. For example, Mr. Miller was required to both assist the Company in obtaining contracts and manage the company's performance of those contracts through completion. CP at 77, 479.

The requirement that the agent both procures a contract and completes his or her performance is required regardless of the context. Section 445 of the Restatement (Second) of Agency⁵ provides that:

[e]xcept where there is revocation in bad faith, an agent whose compensation is conditional upon the performance by him of specified services, or his accomplishment of a specified result, is not entitled to the agreed compensation unless he renders the specified services or achieves the result.

(emphasis added). Comment (a) to Section 445 further clarifies that:

[i]f the principal specifies the accomplishment by the agent of a particular result as a condition precedent to payment of an agreed compensation, the agent is not entitled to such agreed compensation as such unless he accomplishes the indicated result; nor can he recover the value of his services

⁵ The authority of this section has been previously recognized by this Court in *Smick v. Pierson*, 18 Wn. App. 75, 566 P.2d 580 (1977).

in attempting to accomplish it, except as indicated hereafter in this Comment. If the result is accomplished, but not until after the termination of the agent's employment, he cannot recover the agreed compensation, unless the termination is by act of the principal in bad faith as stated in Section 454.⁶

Therefore, regardless of the context, an agent is only entitled to recovery under the procuring cause doctrine if he completes his performance or the principal terminates the relationship in bad faith.

Here, the trial court erred by granting Mr. Miller's procuring cause claim because Mr. Miller did not complete his performance on the at-issue jobs. Mr. Miller's failure to complete his performance is reflected in the trial court's findings of fact. Specifically, it held "20% of the work on the at-issue jobs occurred after Mr. Miller's resignation i.e. step 5."⁷ CP at 491. Through this finding, the trial court recognized that Mr. Miller was responsible for five steps of performance. The fifth step constituted the majority of work and was the most important to the Company because it affected its bottom line. CP at 77, 479. In contrast to a real estate broker, the thrust of the agency relationship between these parties concerned more than the procurement of a buyer.

⁶ Section 454 is addressed *infra*.

⁷ This is a finding of fact incorrectly identified as conclusion of law number fifteen. See *Casterline v. Roberts*, 168 Wn. App. 376, 382, 284 P.3d 743 (2012) (stating that "[f]indings of fact are determinations of whether evidences shows that something occurred or existed.") (internal quotations omitted). A findings of fact mislabeled as a conclusion of law should be treated as a finding of fact. *Ives v. Ramsden*, 142 Wn. App. 369, 395 n. 11, 174 P.3d 1231 (2008).

Mr. Miller undertook securing a contract and managing the company's performance of that contract. See CP at 77, 479. On the at-issue jobs, he did not complete his performance and, therefore, was not entitled to recovery pursuant to the procuring cause doctrine. "Mere commencement of a performance is not sufficient." *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. at 776.

In this manner, Mr. Miller's claim is also distinct from procuring cause cases outside of the brokerage context. For example, in *Syputa v. Druck Inc.*, Division One of the Court of Appeals found a genuine issue of material fact precluding summary judgment against Syputa on his procuring cause doctrine claim where he, working as sales representative for the purpose of obtaining a contract with Boeing, obtained a contract, was terminated, and not paid commissions on subsequent sales under that contract. 90 Wn. App. 638, 954 P.2d 279 (1998).

While the court in *Syputa* quoted only the first portion of the procuring cause standard from *Roger Crane & Assocs. V. Felice*, it recognized that "[t]he agent is responsible for acquiring a contract within the scope of its agency: Application of the procuring cause doctrine depends upon a determination of the intentions of the parties to the agency relation." 90 Wn. App. at 648-49 (quoting *Kingsley Assocs., Inc. v. Del-Met, Inc.*, 918 F.2d 1277, 1282 (6th Cir.1990)). In other words, the court

must consider the primary purpose or thrust of the parties' agency relationship.

In *Syputa*, the agency relationship was created for the purpose of obtaining a contract from Boeing, which the agent did. As the court concluded, “[f]or the purposes of summary judgment, evidence establishes [Syputa] fulfilled [his] role as a manufacturing representative by promoting the sale of the hydraulic transducers, by bringing Druck’s product to Boeing’s attention and by assisting the coordination of communications about specifications between Boeing and Druck.” *Syputa*, 90 Wn. App. 647. Syputa had obtained a requirements contract from Boeing; subsequent orders did not call for additional work from Syputa, prior to the termination of the agency relationship. See *Id.* at 641-43.

In contrast, in *Cole v. Carruthers*, the Washington State Supreme Court held that a real estate broker was not entitled to commissions for the sale of property because he voluntarily abandoned the project. 91 Wn. 500, 158 P. 75 (1916). The real estate broker, Cole, voluntarily abandoned the project during negotiations, saying that he was through and would spend no further time on it. *Id.* at 502. Under these circumstances, the Court held that Cole “had long since given up his efforts to sell the property. The commission agreement was at an end, and even if

the property was subsequently sold to his former customer, the fact did not so far revive the agreement as to make the promisor liable thereunder.” *Id.* at 503.

Here, like in *Cole* and unlike *Syputa*, Mr. Miller voluntarily abandoned the project before completing his performance. Therefore, Mr. Miller is not entitled to recovery under the procuring cause doctrine.

ii. Mr. Miller’s Failure to Complete his Performance Should not be Excused Because He Voluntarily Terminated the Agency Relationship.

His failure to complete his performance on the at-issue jobs was caused by his voluntary termination of the agency relationship. See CP at 471: Ex. 108, 477. Accordingly, his failure to complete his performance should not be excused, as is the case when the principal terminates the relationship in bad faith. This exception to the general rule that an agent must complete his or her performance is found in Restatement (Second) Agency Section 454, which provides that:

[a]n agent to whom the principal has made a revocable offer of compensation if he accomplishes a specified result is entitled to the promised amount if the principal, in order to avoid payment of it, revokes the offer and thereafter the result is accomplished as the result of the agent's prior efforts.

(emphasis added). Comment (b) provides further that:

[t]he typical situation for the application of the rule is that in which a broker or other intermediary has so nearly succeeded in procuring a customer or completing a transaction that the principal believes that he can perform the rest of the transaction without further assistance or expense. If, in this case, the principal terminates the agency, either to save for himself the broker's commission or to let the buyer or another agent have it, the broker is entitled to the agreed compensation.

Therefore, an agent's failure to complete his or her performance may be excused if the principal terminates the relationship in bad faith. Mr. Miller voluntarily terminated his relationship and, therefore, his failure to complete his performance should not be excused.

iii. Mr. Miller's Recovery Pursuant to the Procuring Cause Doctrine Should be Barred by His Unclean Hands.

Considering the equitable nature of the procuring cause doctrine, denying Mr. Miller's procuring cause claim is the correct outcome. As the court in *Syupta* recognized, "[a]lthough the procuring cause doctrine provides relief at law, it is essentially an equitable doctrine." 90 Wn. App. at 649. "Equity will not interfere on behalf of a party whose conduct in connection with the subject-matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him any remedy." *Portion Pack, Inc. v. Bond*, 44 Wn.2d 161, 170, 265 P.2d 1045 (1954).

It is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into the court with clean hands.

J.L. Cooper & Co. v. Anchor Securities Co., 9 Wn.2d 45, 70-71, 113 P.2d 845 (1941). Mr. Miller's recovery pursuant to the equitable, procuring cause doctrine is barred by his unclean hands. Unlike agents that Washington Courts have awarded commissions, Mr. Miller abandoned his projects prior to completion. CP at 471: Ex. 108, 477, 480-81. Not only that, but he abandoned them with no prior notice to the Company. CP at 471: Ex. 108.

This act left the Company in a position where it had to find someone else to complete Mr. Miller's work in the at-issue projects. See CP at 480-81, 483. On eight of the ten projects at issue, the Company has already paid commissions to the person who completed Mr. Miller's work. CP at 480-81, 483. In addition to leaving abruptly abandoning the Company, Mr. Miller had created Final Concrete, LLC to compete with the Company while he was still an employee of the Company. CP at 471:Ex. 103. Granting Mr. Miller commissions under these conditions is a windfall to Mr. Miller and inequitable.

Therefore, in the interests of equity, Mr. Miller should not be entitled to commissions on the at-issue jobs, which were all completed after his voluntary and sudden resignation.

iv. The Trial Court Failed to Adhere to the Parties' Intent in Awarding Mr. Miller Post-Termination Commissions on Projects He Did Not Complete.

In addition to being inequitable, the trial court reached beyond its authority in granting Mr. Miller's procuring cause claim. According to *Syputa*, the procuring cause doctrine "acts as a gap-filler" in the parties agreement. 90 Wn. App. at 646. It is not, however, an actual gap-filler as reflected in *Syputa's* affirmation of the trial court's decision to grant summary judgment on *Syputa's* contract claim. See *Id.* at 645.

A court of equity's ability to reform the parties' contract is limited. "While it is true that a court of equity does not have the power to make a new agreement between the parties or to relieve a hard or oppressive bargain, the court does have the power to reform the written instrument to conform with the intentions of the parties." *McKelvie v. Hackney*, 58 Wn.2d 23, 30, 360 P.2d 746 (1961). The parties' course of performance, an indication of their intent, limited payment of commissions to projects completed by the Field Sales Representative. CP at 478-79. The trial court erred by failing to honor the parties' intent by awarding Mr. Miller commissions on the at-issue jobs.

In conclusion, the trial court erred by awarding Mr. Miller commissions on the at-issue jobs by applying an incomplete standard, failing to recognize Mr. Miller's unclean hands, and reforming the parties' contractual relationship in a manner that was inconsistent with their intent. Accordingly, the trial court's award of commissions to Mr. Miller should be reversed.

b. *Mr. Miller Failed to Improve His Position on Trial De Novo.*

The second issue on appeal is whether the trial court erred in denying the Company's motion for attorney fees and costs pursuant to MAR 7.3 and RCW 7.06.060. Attorney fees and costs may be awarded when authorized by statute, agreement of the parties, or recognized ground in equity. *Niccum v. Enquist*, 175 Wn.2d 441, 446, 286 P.3d 966 (2012). Whether a statute or court rule authorizes an award of attorney fees and costs is a question of law subject to de novo review. *Id.*

Mr. Miller requested and failed to improve his position on trial de novo and, therefore, the Company was entitled to an award of attorney fees and costs pursuant to MAR 7.3 and RCW 7.06.060. MAR 7.3 provides in relevant part that:

[t]he court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo.

RCW 7.06.060(1) is identical in all material respects pertaining to this appeal.⁸ Both rules mandate an award of attorney fees if the party requesting trial de novo does not improve his or her position. *Wilkerson v. United Inv., Inc.*, 62 Wn. App. 712, 716, 815 P.2d 293 (1991).

Here, Mr. Miller received a damage award in the amount of \$22,802.84 from the arbitrator and only \$21,628.97 upon trial de novo. CP at 476, 497-98. Mr. Miller did not improve his position. Nevertheless, the trial court mistakenly concluded that Mr. Miller improved his position by considering attorney fees and costs recovered by Mr. Miller. CP at 493. Consideration of attorney fees and costs is contrary to the purposes of MAR 7.3 and RCW 7.06.060.

They are designed to encourage settlement and discourage meritless appeals. *Niccum*, 175 Wn.2d at 451; *Wilkerson*, 62 Wn. App. at 716. This is consistent with the overarching purpose for arbitration: to reduce court congestion. *Westmark Properties, Inc. v. McGuire*, 53 Wn.App. 400, 766 P.2d 1146 (1989) (stating that “[t]he very purpose of arbitration is to avoid the courts. It is designed to settle controversies not to serve as a prelude to litigation.”). MAR 7.3 and RCW 7.06.060 force

⁸ RCW 7.06.060(1) states that “[t]he superior court shall assess costs and reasonable attorneys’ fees against a party who appeals the award and fails to improve his or her position on the trial de novo. The court may assess costs and reasonable attorneys’ fees against a party who voluntarily withdraws a request for a trial de novo if the withdrawal is not requested in conjunction with the acceptance of an offer of compromise.”

litigants to seriously consider the necessity of requesting a trial de novo by increasing their risk; they force litigants to weigh their chances of success on appeal against the risk of paying their opponent's fees and costs, if they do not improve their position on trial de novo.

To determine whether a party has improved its position on trial de novo, most courts in Washington have adopted the "compare the comparables" test. See *Tran v. Yu*, 118 Wn. App. 607, 613, 75 P.3d 970 (Div. I, 2003); *Wilkerson v. United Inv., Inc.*, 62 Wn. App. at 815 (Div. III). And, while the Washington State Supreme Court has not adopted the rule, it has sanctioned the approach. See *Niccum*, 175 Wn.2d at 448 (stating that the it has not adopted the compare the comparables doctrine); See Also *Haley v. Highland*, 142 Wn.2d 135, 154, 12 P.3d 119 (stating that "[w]e generally agree with the Court of Appeals' view that only the comparables are to be compared...."). Under this test, "compensatory damages should be compared to compensatory damages, not to compensatory damages plus costs." *Niccum*, 175 Wn.2d at 448-49.

In *Wilkerson v. United Investment, Inc.*, the court found that the party requesting trial de novo did not improve his position from an arbitration award against him of \$20,965.12, comprised of \$10,965.12 in damages and \$10,000.00 in attorney fees and costs, to a jury verdict against him in the amount of \$16,000 in damages. 62 Wn. App. at 815.

The court reasoned that it would be inequitable to compare an award of damages, attorney fees, and costs to an award of damages. *Id.* at 717. There, as in the instant case, the party obtained a better outcome solely because of an award of attorney fees and costs.

While the court in *Wilkerson* excluded consideration of attorney fees and costs from its compare the comparables analysis because they were not requested at arbitration, excluding an award of attorney fees and costs is required to fulfill the purpose of MAR 7.3 and RCW 7.06.060. As Justice Talmadge explained in his concurring opinion in *Haley v. Highland*:

the court deciding if a party improved its position in comparison to the arbitration result for purposes of MAR 7.3 should compare the award of damages, *exclusive* of costs and attorney fees. Failing this, any party appealing the arbitrator's award and recovering the identical award of compensatory damages would *always* improve its position because it would recover additional interest and more attorney fees would be incurred. This would be inconsistent with the purpose of MAR 7.3 which is to *discourage* appeals from arbitrator decisions.

142 Wn.2d at 159. In rejecting an argument that the total judgment should be considered, including costs and sanctions, the court in *Tran v. Yu* also recognized that excluding consideration of attorney fees and costs is consistent with the purpose of MAR 7.3. 118 Wn. App. at 612. It reasoned that:

[a] trial is almost always more expensive than arbitration. If Tran's position was accepted, a party would invariably improve its position because additional costs, attorney fees and interest would be incurred.

Id. As these authorities recognize, concluding that a party improved his or her position solely because of an award of attorney fees and costs is inconsistent with the purpose for MAR 7.3 and RCW 7.06.060. Because Mr. Miller's award of damages upon trial de novo is less than he was awarded by the arbitrator, he did not improve his position.

Accordingly, the Company was entitled to recover reasonable attorney fees and costs incurred since Mr. Miller requested a trial de novo.⁹ The Company respectfully requests that this case be remanded for the entry of an order awarding it reasonable attorney fees incurred since February 14, 2011. See CP at 25.

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⁹ Mr. Miller's failure to improve his position draws two statutes regarding attorney fees and costs into conflict, RCW 7.06.060 and RCW 49.48.030. RCW 49.48.030 is the statute under which the trial court awarded attorney fees to Mr. Miller. CP at 452. Both RCW 49.48.030 and RCW 7.06.060 provide for a mandatory award of attorney fees and costs, but conflict regarding which parties is entitled to the award. The language of Chapter 7.06 RCW indicates that it is intended to apply to all actions, and at least one court has previously recognized that it controls over an alternative statute regarding an award of attorney fees and costs. *In re Brown*. 159 Wn. App. 931, 247, P.3d 466 (2011) (holding that RCW 7.06.060 controlled over RCW 26.09.140). And, as further discussed *infra*, Mr. Miller was not entitled to an award of attorney fees pursuant to RCW 49.48.030.

c. *The Trial Court erred in granting Mr. Miller attorney fees and costs pursuant to RCW 49.48.030.*

The trial court erred in granting Mr. Miller attorney fees and costs pursuant to RCW 49.48.030 because he recovered in equity not by reason of employment. A court's authority to award attorney fees and costs is restricted to instances when such an award is authorized by statute, contract, or a recognized ground in equity. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).

RCW 49.48.030(1) provides for payment of attorney fees and costs "[i]n any action in which any person is successful in recovering judgment for wages or salary owed to him." There is no definition of "wages" in Chapter 49.48 RCW. Instead, courts have relied upon the definition found at RCW 49.46.010(7), which defines "wages" as "compensation due to an employee by reason of employment." *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 34, 111 P.3d 1192 (2005).

In this case, the trial court's conclusion that Mr. Miller recovered wages, a legal remedy provided by statute, is inconsistent with the equitable nature of the procuring cause doctrine. He recovered in equity and not by reason of employment. Therefore, the trial court erred in awarding Mr. Miller attorney fees and costs pursuant to RCW 49.48.030.

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VI. ATTORNEY FEES AND COSTS ON APPEAL

On appeal, a court may award the prevailing party its reasonable attorney fees and costs when authorized by statute, contract, or a recognized ground in equity. *Dayton*, 124 Wn.2d at 280; RAP 18.1. Here, the Company is entitled to attorney fees and costs on appeal based upon Mr. Miller's failure to improve his position upon trial de novo pursuant to MAR 7.3 and RCW 7.06.060(1).

VII. CONCLUSION

As addressed above, the trial court erred in awarding Mr. Miller commissions pursuant to the procuring cause doctrine, denying the Company's motion for attorney fees and costs under MAR 7.3 and RCW 7.06.060, and awarding him attorney fees and costs pursuant to RCW 49.48.030.

First, Mr. Miller was not entitled to recovery under the procuring cause doctrine because he terminated the agency relationship before he completed his performance. Second, Mr. Miller failed to improve his position on trial de novo because he received fewer damages at trial than at arbitration. An award of attorney fees and costs should be excluded from consideration under the compare the comparables test.

Third, Mr. Miller was not entitled to an award of attorney fees and costs pursuant to RCW 49.48.030 because he recovered in equity not by

reason of employment. Accordingly, the Company respectfully requests that this Court reverse the trial court on these issues.

RESPECTFULLY SUBMITTED this 25th day of April, 2013.

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