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Court of Appeals No. 665472

IN THE WASHINGTON COURT OF APPEALS
DIVISION I

LWIN LEISHER and SHIRLEY LEISHER,

Appellants,

v.

COMMONWEALTH LAND TITLE COMPANY
OF PUGET SOUND, LLC and
SEAWEST INVESTMENT ASSOCIATES, LLC,

Respondents.

REPLY BRIEF OF APPELLANTS

COURT OF APPEALS DIV I
STATE OF WASHINGTON
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ARGUMENT¹

A. Commonwealth Misrepresents the Nature of This Appeal and the Leishers' Burden as Appellants.

The fallacy in Commonwealth's position is evident from the very first sentence of its Response brief, wherein it states: "This is an appeal from a jury trial." (Brief of Respondent, hereafter "Resp.," at 1; repeated at p. 6). Commonwealth then urges the Court not to even *consider* the Leishers' appeal, because "Appellants have not cited one word of trial testimony or referred to a single trial exhibit..." (Resp. at 1). This argument not only misstates the procedural posture of this case; it assigns an evidentiary burden to the Leishers that they do not bear.

In fact, this is not an appeal from a jury trial.² The Leishers have not appealed any part of the jury's verdict. It was Commonwealth that filed a Notice of Appeal challenging the verdict, and that appeal has since been abandoned. The Leishers' appeal focuses solely on the trial court's decision to deny attorney's fees, a decision that was made as a matter of

¹ After the Leishers filed their original Appellants' Brief, Respondent Seawest voluntarily dismissed its cross-appeal of a portion of the trial court's summary judgment order. Additionally, Respondent Commonwealth abandoned its cross-appeal of the jury verdict. Accordingly, the only issue left for decision by this court is whether the Leishers should have been awarded their attorney's fees incurred in defending against Seawest's suit, pursuant to the doctrine of equitable indemnity.

² Commonwealth ultimately concedes this later in its brief. (Resp. at 1)(noting that "the issue of equitable indemnity was decided by the trial court on motion.")

law.³ Thus, the Leishers appeal from a bench ruling, not a jury trial.

Commonwealth repeatedly complains that the Leishers have failed to “perfect the record,” because their Brief does not cite to extensive witness testimony or exhibits from the jury trial. However, such evidence is not necessary in evaluating whether the trial judge made an erroneous application of the elements of equitable indemnity to the facts. To prevail on their theory of this case, the Leishers must simply show that, regardless of what Seawest alleged in its petition on October 9, 2008, the only reason Seawest was in a position to sue the Leishers in the first place was Commonwealth’s failure to produce the Deed in time for the October 2 closing. All of the facts necessary to make this showing have either been established as undisputed (including sworn deposition testimony that has been made a part of the record), or were subsumed within the jury’s negligence verdict against Commonwealth (findings that Commonwealth, having abandoned its appeal, can no longer challenge). Accordingly, the record is wholly adequate for this Court’s review of the trial court’s decision.

³ “[T]he trial court’s decision that the elements of equitable indemnity have been met is a legal determination subject to independent appellate review.” *Tradewell Group, Inc. v. Mavis*, 71 Wash.App. 120, 127, 857 P.2d 1053 (Wash.App. Div. 1, 1993). Where the court itself has made factual findings (as opposed to simply relying on facts found by the jury), this Court may review those findings to determine whether they support the legal decision to award or deny fees. *Id.*

B. The Leishers Are Entitled to Equitable Indemnity, Even If The Appropriate Standard is Sole Causation.

Notwithstanding Commonwealth's efforts to muddy the waters of this case, the Leishers' argument regarding causation is actually quite simple. In a nutshell, they contend—regardless of whether the proper legal standard is “proximate cause” or “sole cause” (a separate issue, discussed in Section D below)—that Seawest would never have been in a position to sue for rescission based on the lack of a Form 17, if Commonwealth had done what it was supposed to do. Thus, Commonwealth's negligence is the proximate and only reason that Seawest was able to file suit against the Leishers. The five essential building blocks of this argument are:

1. The trial court denied the Leishers' request for attorney's fees because it found there was one “other reason” (besides Commonwealth's misfeasance) why Seawest sued the Leishers; namely, the lack of a Form 17. CR 942-943. The court simply looked at Seawest's petition and assumed that, since there were two grounds listed for rescission (the lack of a Deed and the absence of a Form 17) there must necessarily be two reasons why the Leishers got sued in the first place. *Id.* The court similarly looked at the jury verdict and assumed that, since two entities were found to have been negligent (Commonwealth and Wolfstone, the firm that failed to give the Form 17 disclosure statement to

Seawest), both entities' conduct must have been catalysts for Seawest's lawsuit. But that was not necessarily true.

2. The trial court's decision ignored four critical undisputed facts. Specifically, (a) Seawest's representative, Matt Aatai, arrived at Commonwealth's office on October 2 fully intending to close the sale with the Leishers, CP 1276 at p. 6:14-18; (b) Mr. Aatai signed all of the closing documents Commonwealth's agent presented to him, and tendered to the agent a cashier's check for the full balance due at closing, CP 1262-1263, CP 1277 at p. 10:3-13; (c) Mr. Aatai left the closing without being told that one of the necessary closing documents was missing, CP 1277 at p. 10:14-18; and (d) most importantly, Mr. Aatai *did not know on October 2 that the Form 17 was even missing, much less that Seawest could refuse to close on that basis.* CP 216 pp. 75-76).⁴

Given this lack of knowledge, Mr. Aatai could not possibly have asserted the lack of a Form 17 to prevent the sale from closing on October 2 as scheduled.

⁴ These facts regarding Mr. Aatai's intent, actions and knowledge on October 2 were established as part of the summary judgment record and were never contested by Commonwealth (or anyone else in the case), either during the summary judgment phase or during the jury trial (when the information was repeated by Mr. Aatai). If Commonwealth believed that any part of this evidence was inaccurate, it was in a perfect position to challenge it, given that its counsel, Mr. Davis, actually represented Mr. Aatai in connection with the sale closing that day. Commonwealth has never done so.

3. There were no “other reasons” found by the jury or recited by the trial court as a basis for Seawest’s decision to file suit, much less reasons that could have prevented the sale from closing on October 2. CP 753-755, 942-943.

4. As a matter of Washington law, Seawest could not have unwound the sale transaction based on the lack of a Form 17, if the sale had closed on October 2. See RCW 64.05.030 (“If the seller fails to provide a disclosure statement as required, the buyer may rescind the transaction *at any time up until the transfer has closed.*”)(emphasis added).

5. Given the above, the lack of a Form 17, while a legitimate basis for a suit *after the fact*, could never have formed a basis for Seawest to sue the Leishers for rescission, if Commonwealth had delivered the Deed as scheduled. Put another way, if Commonwealth had brought a signed Deed to the closing, the evidence is undisputed that the sale would have closed, and the only other basis cited by the trial court for Seawest’s subsequent lawsuit –the missing Form 17 – would never have become an issue.

Thus, the Leishers contend that, given the timing of events, Commonwealth’s negligence is both the proximate and sole cause of their becoming involved in litigation with Seawest on October 9, 2008. See

Flint v. Hart, 82 Wash.App. 209, 224, 917 P.2d 590 (Wash.App. Div. 3, 1996)(“The focus is whether [the equitable indemnity plaintiff] would have been involved in litigation..., apart from [defendant’s] conduct.”) Even under the harsher “sole cause” standard urged by Commonwealth, the Leishers are entitled to equitable indemnity.

In most equitable indemnity cases, there are no special knowledge or timing issues, and it is easy for the court to determine the reason(s) why the plaintiff got sued in the underlying case. This case presents a unique factual scenario, because the second possible catalyst for the lawsuit would never have been triggered, absent the occurrence of the first. If the trial court had considered the undisputed evidence discussed above, it would have had no choice but to conclude that the Leishers are entitled to an award of attorney’s fees. The trial court’s decision should therefore be reversed and judgment rendered in favor of the Leishers.

C. Commonwealth Relies on Evidence and Argument That Was Rejected By the Jury and Was Not Relied on By the Trial Court.

Commonwealth’s Statement of the Case is intentionally misleading, as it boldly represents as fact a scenario that was considered and patently rejected by the jury. Specifically, Commonwealth avows: “The purchaser Seawest signed documents and delivered a cashier’s check to escrow, *but escrow could not close that day with a cashier’s check even*

if the deed had been present.” (Resp. at 1)(emphasis added). Commonwealth reiterates this statement later in its brief, when it argues that “[t]he sale did not close on October 2, 2008 for two reasons: first, the deed was not present; and second, Seawest delivered a cashier’s check instead of actual funds. (Resp. at 4). These are statements of wishful thinking on Commonwealth’s part, not fact.

It is undisputed that Commonwealth presented this precise argument—*i.e.*, that the sale would not have closed on October 2 *irrespective* of its negligence, because Seawest brought a cashier’s check to closing—to the jury at trial, and obtained an instruction (No. 11 of the court’s charge) that, under Washington law, such checks must be held overnight before the funds can be released. CP 741. However, the jury rejected Commonwealth’s argument, when it found Commonwealth 85% responsible for the Leishers’ damages (which were defined as the loss of the sale to Seawest).⁵ CP 753-755.

If the jury had concluded that the property sale would not have gone forward on October 2 *in any event* (because Seawest brought a cashier’s check to closing), then, as a matter of law, it could not have

⁵ Among other evidence, the Leishers presented the testimony of Ken Bloch, a real estate attorney with 45 years of experience, that he routinely closed real estate transactions on the same day even where the buyer paid by cashier’s check. RP 7/28/10 at pp. 85:16-86:23. The jury was within its rights to credit this evidence over Commonwealth’s on this point.

found causation sufficient to support an 85% negligence verdict against Commonwealth. *See* CR 742 (Court’s Instruction No. 12)(defining proximate cause). The Court’s Instruction No. 13 made clear that, if the jury determined that the Leishers’ financial loss “could not have been avoided [*i.e.*, if the sale would have fallen through on October 2 anyway] “regardless of [Commonwealth’s] negligence, then [such] negligence is not the proximate cause of the financial loss.” CR 743. The jury found that Commonwealth’s negligence caused 85% of the Leishers’ loss. Commonwealth’s argument regarding a cashier’s check therefore conflicts with the jury’s subsumed finding on causation.⁶

Having abandoned its appeal of the underlying judgment, Commonwealth cannot collaterally attack the jury verdict here. *Bjurstrom v. Campbell*, 27 Wn.App. 449, 451, 618 P.2d 533 (1980)(“The exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment....”); see generally *Stevens v. City of Centralia*, 86 Wn.App. 145, 155, 936 P.2d 1141 (1997)(a party “waives any argument” rejected in a ruling by failing to appeal it.) Commonwealth’s argument regarding the

⁶ *See generally* 4 WASH. PRACT. CR 49 (explaining that if the court, in submitting issues to the jury, “omits any issue of fact raised by the pleadings or by the evidence ... without [a] demand [for submission], the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment....”) Accord *City of Houma, La. v. Municipal and Indus. Pipe Service, Inc.*, 884 F.2d 886, 890 n. 5 (5th Cir. 1989, reh’g denied)(noting that a finding of causation is subsumed within the decider’s ultimate finding of negligence liability).

cashier's check and reliance on Jury Instruction No. 11 as if it were a jury finding that the sale would not have gone forward (when in fact the jury found just the opposite) is therefore improper.

Moreover, the trial court did not cite Seawest's presentment of a cashier's check at closing as an "other reason" (for Seawest's suit) that precluded application of the doctrine of equitable indemnity. CP 942-943 (citing only Commonwealth's negligence and Wolfstone's failure to provide Seawest with a Form 17 disclosure statement). Commonwealth's discussion of the cashier's check issue, both here and (even more extensively) in its Motion on the Merits, is therefore also a red herring.

D. There is Nothing "Equitable" About the Causation Standard Applied By the Trial Court.

The early cases establishing the modern doctrine of equitable indemnity spoke only in terms of proximate cause; "sole cause" was not part of the analysis. See, e.g., *Armstrong Constr. Co. v. Thomson*, 64 Wash.2d 191, 195, 390 P.2d 976 (1964) ("Where the natural and proximate consequence of the acts or omissions of a party to an agreement have exposed one to litigation with a third person, equity may allow attorney fees as an element of consequential damages."); *Wells v. Aetna Ins. Co.*, 60 Wash.2d 880, 376 P.2d 644 (1962); *Manning v. Loidhamer*, 13 Wash.App. 766, 538 P.2d 136, review denied, 86 Wash.2d 1001 (1975).

In 1993, this Court decided *Tradewell*, 71 Wash.App. at 120. There, the parties disagreed as to whether the second element of an equitable indemnity claim (*i.e.*, the requirement that party A's wrongful act or omission must expose or involve B in litigation with C) could be satisfied by "a wrongful act that is only a proximate cause of the litigation, or whether it must be the sole cause or something close to it." *Id.* (emphasis added).

In deciding this issue, the Court observed that, at the time, there were "only 2 cases which specifically address[ed] the applicable standard of causation under equitable indemnity...." *Id.* In each of those cases, the Court had denied an award of fees after finding that, in addition to the defendant's wrongful conduct, the plaintiff had itself committed a breach of contract that precipitated the filing of the underlying lawsuit. *Id.* at 128, citing *Stevens v. Security Pac. Mortg. Corp.*, 53 Wash.App. 507, 768 P.2d 1007, review denied, 112 Wash.2d 1023 (1989), and *Western Community Bank v. Helmer*, 48 Wash.App. 694, 740 P.2d 359 (1987). Accordingly, this Court in *Tradewell* concluded: "the critical inquiry under the causation element of equitable indemnity is whether, apart from A's actions, B's own conduct caused it to be 'exposed' or 'involved' in litigation with C." *Tradewell*, 71 Wash.App. at 129 (emphasis added).

Applying those principles to the case before it, this Court denied fees to the plaintiff in *Tradewell*, after finding that all of the parties in the underlying case had “withheld significant information from the other” and otherwise engaged in a “pattern of obfuscation.” *Id.* at 128. The rule was thus solidified in Washington state that recovery under a theory of equitable indemnity is precluded where the plaintiff’s own misconduct constitutes an “other reason” why the underlying lawsuit was filed. *Id.*

This Court has continued to apply the “other reason” rule as originally intended, precluding a recovery of fees only where the plaintiff was also at fault. See, e.g., *Jain v. J.P. Morgan Securities, Inc.*, 142 Wash.App. 574, 177 P.3d 117, 124 (Wash.App. Div. 1, 2008, review denied)(“We hold that the Jains' own conduct caused them to be involved in the litigation and, therefore, under the ABC rule they may not recover fees or litigation costs.”), cert. denied, 129 S.Ct. 1584, 173 L.Ed.2d 676, 77 USLW 3412, (2009); *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wash.App. 352, 362, 110 P.3d 1145, 1151 (Wash.App. Div. 1, 2005)(fees denied where plaintiff’s own conduct provided a “major and independent reason” for the underlying litigation).

In the present case, Commonwealth argues, and the trial court apparently held, that the law requires a denial of fees any time there are “other reasons” why the underlying lawsuit was filed, even if the plaintiff

did nothing wrong. (Resp. at pp. 10-20)(arguing for a blind application of the “sole cause” standard to equitable indemnity claims, regardless of the circumstances); CP 942-943 (holding that, because Seawest obtained rescission on both grounds and the jury found Wolfstone 15% negligent in failing to provide Form 17, Commonwealth’s negligence was not the sole cause of Seawest’s suit). Such an approach severely distorts the principle articulated by this Court in *Tradewell*, and produces an absurd and unjust result.

It makes sense that the doctrine of equitable indemnity would not apply where, in addition to the tortfeasor’s negligence, the party seeking fees was itself negligent in contributing to its own loss. However, where, as here, the party seeking attorney’s fees played no part in causing the loss that sparked the underlying lawsuit, it is incongruous to deny fees simply because the jury apportioned fault to more than one tortfeasor. To bar a plaintiff’s recovery of fees just because two people harmed him instead of one, simply punishes the innocent victim of wrongdoing even further. Such an unfair, in“equitable” result surely is not contemplated by the cases establishing the doctrine and the “other reason” rule.⁷

⁷ Requiring an equitable indemnity plaintiff to bear the cost of attorney’s fees incurred in defending against litigation generated by defendants’ negligence results in the plaintiff not being made fully whole, even if he obtains a tort judgment against defendants for the amount of the underlying loss. On the other hand, a rule of joint and several liability or comparative responsibility for attorney’s fees properly places the burden of payment on

Consistent with the above, the Leishers submit that the trial court committed clear error (1) when it applied a “sole cause” standard rather than “proximate cause,” and/or (2) when it interpreted the “other reasons” language in *Tradewell* and its progeny to preclude an award of fees. The Leishers are entitled to recover from Commonwealth, under a theory of equitable indemnity, their reasonable attorney’s fees incurred in defending against Seawest’s suit.

CONCLUSION

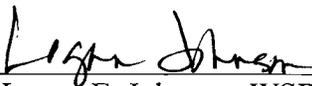
For all of the above reasons, Appellants Luin and Shirley Leisher respectfully request that this Court (a) reverse the trial court’s final judgment only insofar as denies the Leishers’ request for attorney’s fees; and (b) render judgment that the Leishers shall recover from Commonwealth attorney’s fees in the amount of \$263,921.17 and costs in the amount of \$47,385.40, pursuant to the rule of equitable indemnity.

DATED this 21st day of September, 2011.

Respectfully submitted,

SCHIFFER ODOM HICKS & JOHNSON

By:



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the defendants whose actions cast the plaintiff into litigation. Moreover, such a system would be easy to implement, since the factfinder already decides comparative fault as part of its verdict.

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CERTIFICATE OF SERVICE

I, Logan Johnson, state: On this day I caused to be delivered by U.S. Mail Reply Brief of Appellants for delivery on September 21st, 2011 to the Court of Appeals Division I and to

Matthew F. Davis
Demco Law Firm, PS
5224 Wilson Avenue South, Suite 200
Seattle, WA 98118

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 21st day of September, 2011 at Houston, Texas.

Logan Johnson
Logan Johnson *by permission JCR*