

665472

665472

Court of Appeals No. 665472

IN THE WASHINGTON COURT OF APPEALS  
DIVISION I

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LWIN LEISHER and SHIRLEY LEISHER,

Appellants,

v.

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

Respondents.

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COURT OF APPEALS  
DIVISION I  
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**BRIEF OF APPELLANTS**

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## I. INTRODUCTION

This suit arises out of a failed real estate transaction in which Appellants Luin and Shirley Leisher (“the Leishers”), a retired couple in their 70’s, did everything that was asked of them. The Leishers had planned to use the money from the sale of their property in Washington to fund their retirement and their move back to their childhood home in Oklahoma. However, after following every instruction given them and granting the buyer numerous extensions of time over several years, the Leishers’ hopes for retirement were crushed by the negligence of others. It is undisputed that the Leishers were not themselves negligent in any way.

The sale of the Leishers’ property failed to close because the parties’ escrow agent, Respondent Commonwealth Land Title Company of Puget Sound, LLC (“Commonwealth”), failed to deliver the statutory warranty deed for the property to the Leishers in a timely manner. This breach of one of the fundamental duties of a closing agent and Limited Practice Officer allowed the intended buyer of the property, Respondent Seawest Investment Associates (“Seawest”), to “walk away” from the transaction, rescind the purchase agreement, and obtain a judgment against the Leishers for nearly \$1 million.

The judgment obtained by Seawest required the Leishers to return funds that had previously been disbursed to the Leishers and their agent in accordance with the terms of the parties' Real Estate Purchase and Sale Agreement ("REPSA"). Seawest was awarded the disbursement amounts over the Leishers' objection, in violation of the clear language of RCW 64.06.030, which states that if a sale of residential real property is rescinded, the buyer is entitled to the immediate return of all deposits and other consideration, "less any agreed disbursements paid to the seller, or to the seller's agent or an escrow agent for the seller's account...." (emphasis added).

After being sued by Seawest for rescission, the Leishers filed a third-party negligence action against Commonwealth. This suit alleged that Commonwealth's negligence in failing to forward the statutory warranty deed in time for closing was the proximate cause of the Leishers' damages (which included the nearly \$1 million the Leishers were ordered to pay to Seawest). On August 4, 2010, following a trial, the jury found in favor of the Leishers on all aspects of their negligence claim. Thereafter, the Leishers asked the trial court to order Commonwealth to pay their reasonable attorneys' fees expended in defending against Seawest's suit, pursuant to the well-recognized doctrine of equitable indemnity. The trial

court initially granted the Leishers' motion, believing it to be unopposed, but ultimately denied the motion on reconsideration.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in requiring the Leishers to repay to Seawest amounts that had previously been disbursed to the Leishers and their agent pursuant to the REPSA.

2. The trial court erred in denying the Leishers' motion for an award of attorney's fees and costs under the doctrine of equitable indemnity, by order entered on November 4, 2010 [CP 941-943] (as incorporated into and subsumed within the trial court's Final Judgment dated December 15, 2010 [CP 944-947]).

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Under the language of RCW 64.06.030, which expressly requires that "any agreed disbursements" made to the seller and/or third parties be deducted from any amounts ordered returned to the buyer (following rescission of a sale contract), must the following disbursements that were paid to the Leishers and third parties be excluded from any amounts returned to Seawest?

- (a) Earnest money payment made in December 2004 (\$100,000);

- (b) An “additional payment” made in January 2005 (\$650,000); and
- (c) Extension fee payments made in 2007-2008 (\$119,833.87);

(Assignment of Error 1).

2. Are the Leishers entitled to an award of attorney’s fees and costs under the equitable indemnity doctrine (also known as the “ABC Rule”), given (a) the jury’s finding that Commonwealth’s negligence was the proximate cause of Seawest’s suit to rescind the REPSA, and (b) the undisputed testimony that Seawest’s representative did not know on October 2 that a Form 17 had not been provided, or that he could refuse to close based on the lack of a Form 17? (Assignment of Error 2).

#### IV. STATEMENT OF THE CASE

##### *The Leishers seize on a golden opportunity to fund their retirement*

In the Summer of 2004, the Leishers, a retired couple in their 70’s, were approached about selling their home in Sammamish, Washington.<sup>1</sup> [CP \_\_\_\_ (MSJ Ex. 1 ¶ 2)]. By selling their home, the Leishers planned to reduce their debts, purchase a home in rural Oklahoma where they had

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<sup>1</sup> The Leishers’ Motion for Summary Judgment against Commonwealth (Trial Court Docket No. 117) and related exhibits were not originally included in the Clerk’s Papers, but a supplement to the record is being requested simultaneously herewith. The Leishers will file amended pages referencing the correct CP numbers as soon as the supplemental record is filed. For purposes of this brief, the Leishers will refer to their Motion for Summary Judgment and exhibits as “[CP \_\_\_\_ (MSJ at \_\_\_\_)].”

grown up, and have some money to fund their retirement. [CP \_\_\_\_ (MSJ Ex. 1 ¶ 1)]. In early 2004, Massoud “Matt” Aatai indicated that he was interested in purchasing the Leishers’ home. [CP \_\_\_\_ (MSJ Ex. 1 ¶ 2)]. [CP \_\_\_\_ (MSJ Ex. 1 ¶ 2)]. Aatai, the owner of Seawest and a sophisticated real estate developer, appeared to be willing to purchase the property on terms that met the Leishers needs. [CP \_\_\_\_ (MSJ Ex. 1 ¶ 2)].

***The Parties Make a Deal***

In November 2004, the Leishers and Seawest executed a REPSA for the sale of the Leishers’ property. [CP 70-100]. The designated purchase price in the REPSA was \$1,750,000, with \$750,000 to be paid after the removal of a Feasibility Contingency. [CP 70, 77].

From the beginning of the negotiations, one of the terms the Leishers insisted on was that the earnest money would be disbursed to them after the Feasibility Period and become a non-refundable pre-closing payment. [CP \_\_\_\_ (MSJ Ex. 1 ¶ 3)]. This was crucial to the Leishers, because they needed to eliminate some debt and purchase a new residence in Oklahoma. [CP \_\_\_\_ (MSJ Ex. 1 ¶ 3)]. This is reflected in a letter the Leishers sent to Seawest in 2004 accompanying a revised Purchase and Sale Agreement which states: “Language has been revised and added to clarify and support the non-refundability of the first two payments...” [CP \_\_\_\_ (MSJ Ex. 1 ¶ 3 and Ex. A thereto)].

Commonwealth was designated by the parties to act as the closing agent for the sale transaction. [CP 586, 647].

***The parties authorize multiple agreed disbursements under the REPSA***

On December 13, 2004, Seawest removed the Feasibility Contingency. [CR 202]. On December 20, 2004—approximately six weeks after the REPSA was signed – the parties agreed that the \$100,000 in earnest money would be deposited by Seawest and disbursed by the parties’ escrow agent pursuant to the terms of the REPSA. [CR 202 ¶ 1]. \$20,163.20 of this money was paid directly to Jon Crittenden, the parties’ designated “mutual friend” (as authorized by Addendum B to the REPSA [CR 78 ¶ 5]), and the remaining \$79,836.80 was paid directly to the Leishers. [CR 202 ¶ 1; CR 182]. The Leishers always believed that this payment would be non-refundable, as agreed to by the parties in the revised REPSA. [CP \_\_\_ (MSJ Ex. 1 ¶ 3)].

On January 21, 2005, approximately ten weeks after the REPSA was signed, the parties agreed that Seawest would disburse \$650,000 – the “additional payment” required by the REPSA – as follows: \$594,836.80 to the Leishers and \$55,000 to Crittenden. [CP 202 ¶ 2; CR 182)].

***The Leishers grant several extensions of the closing date***

From the signing of the REPSA, the Leishers fulfilled all of their obligations, and they were prepared to close in early 2007 as required by

the REPSA. [CP \_\_\_\_ (MSJ Ex. 1 ¶ 3)]. However, in late 2006, Mr. Aatai requested an extension of the closing date. [CP \_\_\_\_ (MSJ Ex. 1 ¶ 6)]. On January 23, 2007, Mr. Aatai executed an Extension Agreement which expressly stated: “It is agreed by the parties that Seller has to date fulfilled all of the Seller’s nonmonetary obligations pursuant to the terms of the Purchase and Sale Agreement.” [CP 101; CP \_\_\_\_ (MSJ Ex. 1 ¶ 6)]. The first extension agreement extended the closing date by over a year, to February 13, 2008. [CR 101; CP \_\_\_\_ (MSJ Ex. 1 ¶ 6)].

The Leishers were again ready and able to close on February 13, 2008, the new date specified in the Extension Agreement. [CP \_\_\_\_ (MSJ Ex. 1 ¶ 7)]. However, in late 2007, Seawest requested yet another extension of the closing date. [CP \_\_\_\_ (MSJ Ex. 1 ¶ 7)]. On February 12, 2008, Seawest executed a Second Extension Agreement which postponed the closing by six months to August 31, 2008. [CP 104]. Like the first, the Second Extension Agreement contained the express representation: “It is agreed by the parties that Seller has to date fulfilled all of the Seller’s nonmonetary obligations pursuant to the terms of the Purchase and Sale Agreement.” [CP 104; CP \_\_\_\_ (MSJ Ex. 1 ¶ 7)].

In August 2008, the Leishers were once again ready and willing to close, but Seawest requested a third extension of the closing date. [CP \_\_\_\_ (MSJ Ex. 1 ¶ 7)]. On August 21, 2008, the Leishers agreed to Seawest’s request, and the parties executed a Third Extension Agreement, extending the closing to September 30, 2008. [CP 107; CP \_\_\_\_ (MSJ Ex. 1

¶ 8)]. The Third Extension Agreement contained the same terms and representations as the second. [CP 107; CP \_\_\_\_ (MSJ Ex. 1 ¶ 8)].

On September 30, 2008, the day of the scheduled closing under the Third Extension Agreement, Seawest requested yet another extension of the closing. [CP \_\_\_\_ (MSJ Ex. 1 ¶ 9)]. This time, Seawest also requested a reduction in the sales price that it had agreed to nearly four years before. [CP \_\_\_\_ (MSJ Ex. 1 ¶ 9)]. Rather than alleging a breach of contract on the part of Seawest, the Leishers reluctantly agreed to extend the closing until later that week. [CP \_\_\_\_ (MSJ Ex. 1 ¶ 9)].

At 12:03 p.m. on September 30, Seawest's lawyer Matt Davis sent an e-mail to the Leishers' attorneys on which Mr. Aatai of Seawest was copied, stating: "This will confirm that we have continued the closing date in the Leisher sale to Friday, October 3, 2008 so that we can get these issues worked out. [CP \_\_\_\_ (MSJ Ex. 1 ¶ 9)]. In response to Davis's e-mail, Weber indicated his desire to have the "closing date" be October 2, 2008, since he was going to be out of the office on the 3<sup>rd</sup>. [CP \_\_\_\_ (MSJ Ex. 1 ¶ 9 and Ex. E)].

As consideration for the repeated extensions, Seawest agreed in January 2007 to make monthly payments directly to the Leishers until the transaction closed. [CR 182 ¶ 5]. By the express terms of the extension agreements, both parties agreed that the monthly payments would be excluded from the purchase price of the property. [CR 101 ¶ 3; 104 ¶ 3; 107 ¶ 3]. This was to allow the Leishers to pay taxes and other expenses

associated with the property during the extension period. [CR 202 ¶¶ 3-4]. The extension payments Seawest made to the Leishers ultimately totaled \$119,883.87. [CR 182 ¶ 9].

***The Parties Prepare to Close***

On September 30, 2008, the parties gave the following instructions to Commonwealth: Commonwealth was to draft the Statutory Warranty Deed (the “Deed”) and deliver it in enough time to the parties so that the transaction could close on October 2. [CP 586, 591]. On October 1, 2008, Commonwealth arranged for the Leishers to execute the closing documents. [CP 112, ¶ 9]. Commonwealth’s representative scanned and sent the closing documents to a notary in Oklahoma, with instructions that the Leishers should execute them and the notary should send them via overnight mail to Commonwealth’s offices for closing on October 2. [CP \_\_\_ (MSJ at Ex. 4 p. 15:2-15)]. On October 1, 2008, the Leishers executed every document that Commonwealth provided to them. [CP 112 ¶ 9]. Those documents were returned to Commonwealth via overnight mail so that the transaction could close. [CP \_\_\_ (MSJ at Ex. 1 ¶ 10)].

Included in the documents Commonwealth sent to the Leishers was an Addendum that specified closing on October 2, 2008 at the original purchase price of \$1,750,000. [CP \_\_\_ (MSJ at Ex. 1 ¶ 10)]. Also included were executed copies of the Closing Agreement and Escrow

Instructions and the Notice Regarding Closing Services (both dated September 30, 2008). [CP \_\_\_ (MSJ at Ex. 3 pp. CPS 0134, 142)]. However, the most important document – the Statutory Warranty Deed – was not included in the packet, because Commonwealth failed to scan all of the necessary documents correctly. [CP \_\_\_ (MSJ at Ex. 1 ¶¶ 10-11; Ex. 4 p. 15:2-15)].

***Commonwealth Realizes its Error Too Late***

On the morning of October 2, 2008, Commonwealth received the documents from the Leishers, and realized for the first time that it had failed to send the Deed to the Leishers for execution. [CP \_\_\_ (MSJ at Ex. 4 p. 18:9-19; Ex. 1 ¶ 11)]. Having uncovered its mistake, Commonwealth notified the Leishers, faxed the Deed to them and requested that the Leishers return it by overnight mail for filing on October 3. [CP \_\_\_ (MSJ at Ex. 4 p. 19:2-21)].

***Seawest Arrives at Commonwealth's Office Ready to Close, But the Absence of the Deed Makes it Impossible***

During the afternoon of October 2, 2008, Seawest's representative, Mr. Aatai, went to Commonwealth's offices and executed the addendum that had been executed by the Leishers specifying a closing date of October 2. [CP \_\_\_ (MSJ at Ex. 7)]. Mr. Aatai also provided Commonwealth with a cashier's check representing the agreed-upon sales

price. [CP \_\_\_\_ (MSJ at Ex. 7)]. Mr. Aatai testified that he expected to close the transaction that day. [CP \_\_\_\_ (MSJ at Ex. 8 p. 6:14-18)]. However, as ultimately determined by the jury following trial of the Leishers' negligence claim against Commonwealth, the absence of the Deed prevented the transaction from closing on the scheduled date of October 2. [CP 774].

***Seawest Sues the Leishers to Rescind the Sale***

On October 9, 2008, Seawest filed suit against the Leishers for breach of contract and rescission of the sale, on the grounds that the Leishers had failed to timely close the transaction. [CP 2-5]. In its Complaint, Seawest cited for the first time as a basis for rescission the fact that the Leishers had failed to provide Seawest with a Form 17 seller disclosure statement. [CP 2-5]. While the law does permit Seawest to seek rescission on this basis, the uncontroverted testimony in this case reveals that Seawest's representative was not aware on October 2, when he arrived for the closing, that a Form 17 could constitute a basis for walking away from the sale. [CP \_\_\_\_ (MSJ at Ex. 8 p. 75:15-19)]. Specifically, when asked whether he was "aware, prior to closing ... what the consequences of failure to provide a Form 17 were?," Seawest's representative at the closing, Matt Aatai, answered: "I don't know if I ... was aware of that, frankly, no." [CP \_\_\_\_ (MSJ at Ex. 8 p. 75:15-19)].

***The Trial Court Enters Summary Judgment Against the Leishers***

On February 6, 2009, the trial court granted Seawest's motion for summary judgment, rescinding the RESPA and ordering the Leishers to pay Seawest \$869,883.37. [CR 173-174]. The damages amount encompassed *all* of the money that had previously been disbursed to the Leishers and their agent under the REPSA, including payments that the parties had expressly agreed were non-refundable. [CR 173-174]. The court also awarded Seawest additional amounts for attorneys' fees and costs and prejudgment interest. [CR 173-174].

***The Leishers File a Third-Party Claim Against Commonwealth***

After being sued by Seawest for rescission, the Leishers filed a third-party negligence action against Commonwealth. [CR 8-13]. This suit alleged that Commonwealth's negligence in failing to forward the statutory warranty deed in time for closing was the proximate cause of the Leishers' damages (which included the nearly \$1 million the Leishers were ordered to pay to Seawest). [CR 12-13].

***The Leishers' Claims Proceed to Trial***

In July 2010, the Leishers' third-party negligence claim against Commonwealth proceeded to trial. [CR 702]. On August 4, 2010, the jury issued its verdict, finding in favor of the Leishers and against Commonwealth on all issues. [CR 753-755]. In particular, the jury

determined that Commonwealth's negligence in failing to forward the Statutory Warranty Deed to the Leishers in time for the October 2, 2008 closing was the 85% proximate cause of the Leishers' damages, including, but not limited to, the amounts the Leishers were required to pay to Seawest. [CR 754]. The jury also found that Wolfstone, a non-party broker who assisted with the sale, was 15% negligent in failing to provide Seawest with the Form 17 disclosure statement. [CR 754]. The jury awarded the Leishers \$1,400,000.00 in damages, which encompassed all the money the Leishers were required to pay to Seawest (as a result of the summary judgment). [CP 755]. This verdict disposed of all remaining claims in the case.

***The Leishers Move for Attorney's Fees and Costs Under the Doctrine of Equitable Indemnity***

On September 22, 2010, the Leishers filed a Motion for Award of Attorney's Fees and Costs and for Entry of Judgment. [CR 758]. This motion asked the trial court to (1) reduce the jury's verdict against Commonwealth and the summary judgment for Seawest into a final judgment; and (2) order Commonwealth to reimburse the Leishers for their reasonable attorney's fees and costs incurred in defending against Seawest's suit, pursuant to Washington's "ABC Rule" of equitable indemnity. [CR 758-770]. This rule provides that a plaintiff (party "B,"

here the Leishers) may recover fees expended in defending against a prior lawsuit brought by a third party (party “C,” here Seawest), if that prior lawsuit was a natural and proximate consequence of the defendant's (party “A,” here Commonwealth) wrongful act or omission.

***The Trial Court Enters Judgment on All Claims***

On December 15, 2010, the trial court entered a final judgment that encompassed all claims in the case (*i.e.*, Seawest’s judgment against the Leishers and the Leishers’ negligence verdict against Commonwealth). [CP 944-947]. However, the trial court denied (after initially granting as unopposed) the Leishers’ motion for attorney’s fees and costs, finding that there were “other reasons [Form 17] why B [Leisher] became involved in litigation with C [Seawest].” [CP 941-943] (brackets in original text).

**V. ARGUMENT AND AUTHORITIES**

**1. The Trial Court Erred in Requiring the Leishers to Repay Amounts Previously Disbursed Under the REPSA.**

As noted above, in awarding Seawest \$869,883.37 in damages (in addition to attorney’s fees, costs and prejudgment interest), the trial court ordered the Leishers to return to Seawest (a) the \$100,000 in earnest money that Seawest had deposited and disbursed approximately six weeks after the REPSA was signed; (b) the \$650,000 “additional payment” that Seawest had deposited and disbursed approximately ten weeks after the

REPSA was signed; and (c) the payments Seawest had made to the Leishers directly pursuant to the three extension agreements (totaling \$119,883.37). [CR 201-203 ¶¶ 1, 2, 5]. The court ordered the Leishers to repay these amounts despite the facts that (1) the disbursements had been expressly agreed to by the parties and were non-refundable under the terms of the revised REPSA, and (2) the extension payments were always understood by Seawest and the Leishers to be excluded from the purchase price and completely independent from the REPSA. [CR 101 ¶ 3; 104 ¶ 3; 107 ¶ 3; 202 ¶¶ 3-4]. This was in error.

A. The Trial Court’s Award to Seawest Contravenes the Plain Language of RCW 64.06.030.

RCW 64.06.030 provides that a buyer of residential real property may rescind the transaction under specified circumstances, and that, “upon delivery of the written rescission notice[,] the buyer shall be entitled to immediate return of all deposits and other considerations less any agreed disbursements paid to the seller, or to the seller’s agent or an escrow agent for the seller’s account ....” (emphasis added). Had the trial court applied this plain language as written, it would have been compelled to find that the monies disbursed to the Leishers and their agent must be deducted from the amounts “return[ed]” to Seawest as a result of the rescission. However, the trial court erroneously accepted Seawest’s argument that,

rather than applying a “simplistic reading” of RCW 64.06.030, it should construe the statute’s legislative history as it “*was likely meant to read.*” [CR 194] (emphasis added). In sum, Seawest convinced the trial court that applying the plain language of RCW 64.06.030 would result in the purposes of the Act never being accomplished. There is simply no case law or other authority to support Seawest’s “alternative” reading or the creation of a special exception to the statute.

B. The Disbursements of Earnest Money (\$100,000) to the Leishers and Crittenden Should Have Been Excluded From the Amounts Awarded to Seawest.

Seawest argued to the trial court that, since the earnest money payment was not given to the Leishers “unconditionally,” the disbursements of \$79,883.80 to the Leishers and \$20,000 to Jon Crittenden in December 2004 must not be “agreed disbursements” that must be excluded from repayment under RCW 64.06.030. [CR 195]. Such an argument not only ignores the clear language of RCW 64.06.030, but also mischaracterizes the parties’ understanding as expressed at the time, and the language of the promissory notes signed by the parties.

Seawest claimed in its Motion to Establish Amount Owed that “*Leisher was to repay Seawest in the event Leisher was unable to perform or the RESPA was terminated, certainly if such termination was without Seawest’s fault.*” [CR 195-196] (emphasis added). However, the

promissory notes did not and do not require Leishers to repay Seawest under the circumstances described. Rather, the notes explicitly state that:

If the Property Sale closes or if the Property Sale does not close for any reason other than our failure to close without legal excuse, then no payment shall become due on the Note, the Note shall automatically terminate, and no further action shall be required by either party to satisfy the note.

[CR 205, 206] (emphasis added). In addition, again directly contrary to Seawest's assertions, the REPSA makes it clear that:

The Earnest Money in the amount of One Hundred Thousand and no/100ths dollars (\$100,000.00) shall become nonrefundable absent seller's default and shall be released by the Escrow Agent to Seller thirty-two (32) days from the date of last execution of this Agreement.

[CR 27 ¶ 1]. The Leishers relied on this language (*i.e.*, this promise by Seawest that the payments were nonrefundable absent a default) in accepting the agreed disbursements of funds, and used the money to pay off debts, pay expenses, and make purchases. [CR ¶ 3].

Because the disbursements of the earnest money to the Leishers and Jon Crittenden in December 2004 were by the terms of the REPSA "agreed disbursements paid to the seller, or to the seller's agent or an escrow agent for the seller's account," RCW 64.06.030 dictates that they must be excluded from the amounts repaid to Seawest. The portion of the trial court's judgment ordering the Leishers to repay Seawest the \$100,000.00 earnest money should be reversed.

C. The 650,000 “Additional Payment” to the Leishers and Crittenden Should Have Been Excluded From the Amounts Awarded to Seawest.

Seawest’s reasoning as to why the clear language of RCW 64.06.030 should not exclude repayment of the “additional fee” disbursed to the Leishers and Jon Crittenden by agreement is the same as their argument regarding the earnest money, discussed above. Seawest argued, and the trial court apparently accepted, that the “Additional Payment” was “refundable in the event of termination absent Buyer’s default.” [CR 196]. Again, however, Seawest has mischaracterized the terms of the note, which in reality provides that it shall be payable only in the event of seller’s default, and that:

If the Property Sale closes or if the Property Sale does not close for any reason other than our failure to close without legal excuse, then no payment shall become due on the Note, the Note shall automatically terminate, and no further action shall be required by either party to satisfy the note.

[CR 205, 206] (emphasis added). The REPSA itself also describes the additional payments as nonrefundable absent buyer’s default. [CR 27 ¶ 1].

Like the other disbursements in this case, the disbursement of the \$650,000 “additional payment” to the Leishers and Jon Crittenden in January 2005 was an “agreed disbursement paid to the seller, or to the seller’s agent or an escrow agent for the seller’s account.” Accordingly,

the portion of the trial court's judgment ordering the Leishers to repay Seawest the \$650,000 additional payment should be reversed.

D. Return of the Extension Fee Payments (\$119,883.87) to Seawest is Not Authorized By RCW 64.06.030.

The extension fees paid to the Leishers by Seawest were not “deposits,” nor were they made in consideration of the \$1,750,000 purchase price. Indeed, the extension agreements expressly state that the payments made thereunder were excluded from the purchase price. [CR 101 ¶ 3; 104 ¶ 3; 107 ¶ 3]. Both parties clearly understood at the time that these payments were being made in exchange for the Leishers' willingness to extend the closing date. [CR 182 ¶ 5; CR 101 ¶ 3; 104 ¶ 3; 107 ¶ 3].

But even if this Court were to determine that the extension fees paid to the Leishers in 2007-2008 constitute a “deposit or other consideration” under the language of RCW 64.06.030, the language in that same section provides that “any agreed disbursements paid to the seller” must be excluded from the amounts that must be returned. (emphasis added). As noted above, Seawest concedes in its motion that a “simplistic reading” of RCW 64.06.030 (*i.e.*, an application of the plain language of the statute) “suggests that all consideration delivered (‘disbursed’) to the seller is not refundable to the buyer.” [CR 194] (emphasis added). Seawest then crafts an elaborate argument based on the

legislative history of the first version of the bill (which version was not adopted by the legislature) and proclaims that RCW 64.06.030 “*was likely meant to be read*” in a way that is directly contrary to the clear language of the statute. There is absolutely no case support for such an interpretation, other than the trial court’s judgment awarding previously disbursed funds to Seawest. This Court should reject the trial court’s unwitting reinterpretation of RCW 64.06.030, and find that, as an “agreed disbursement paid to the seller,” the extension fee payments made the Leishers are not subject to repayment under the statute.

2. **The Trial Court Erred in Denying the Leishers Attorney’s Fees and Costs Under the Doctrine of Equitable Indemnity.**

A. The Equitable Indemnity Doctrine

The rule of equitable indemnity, also known as the “ABC rule,” allows a plaintiff (party “B”, here the Leishers) to recover from a wrongdoer (party “A”, here, Commonwealth) the reasonable attorney’s fees and costs that plaintiff expended in defending against a prior lawsuit brought against plaintiff by a third party (party “C”, here Seawest), if that lawsuit was a natural and proximate consequence of the defendant's (party “A”’s) wrongful act or omission. *George v. Farmers Ins. Co. of Wash.*, 106 Wash.App. 430, 445, 23 P.3d 552 (Wash.App. 2001), citing *Woodley v. Benson & McLaughlin, P.S.*, 79 Wash.App. 242, 246, 901 P.2d 1070

(1995); *North Pacific Plywood, Inc. v. Access Road Builders, Inc.*, 29 Wn. App. 228, 236, 628 P.2d 482 (1981)(It is “a well-settled rule in this state that where ‘the natural and proximate consequences’ of a wrongful act by one person involve another in litigation with third persons, the wronged party may recover reasonable expenses of the litigation, including attorney's fees.”)(citations omitted).<sup>2</sup>

B. The Trial Court’s Order Denying Fees Mischaracterizes the Seawest Judgment and Ignores the Undisputed Evidence Regarding Seawest’s Knowledge on the Day of Closing.

In the order denying the Leishers’ motion for attorney’s fees and costs, the trial court initially noted that “a party may not recover attorney fees under the theory of equitable indemnity if, in addition to the wrongful act or omission of A [Commonwealth] there are other reasons [Form 17] why B [Leisher] became involved in litigation with C [Seawest].” [CR 941, citing *Blueberry Place v. Northward Homes*, 126 Wash.App. 352, 359 (2005)]. The court then cited authority holding that, “where there are additional reasons [beside party A’s conduct] why the party seeking fees was sued, ... fees are not available under the theory of equitable

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<sup>2</sup> While some older cases have held that attorney’s fees are only recoverable where the third person who instituted the action (party “C”) was not “connected with the original transaction,” see *Armstrong Constr. Co. v. Thomson*, 64 Wash.2d 191, 195, 390 P.2d 976 (1964), more recent Washington decisions have interpreted this language to mean simply that the third party must not have participated in party “A”’s wrongful act. See *Brock v. Tarrant*, 57 Wn.App. 562, 789 P.2d 112 (1990); *North Pacific Plywood*, 29 Wn. App. At 236. In the present case, it is undisputed that Seawest did not participate in Commonwealth’s negligent act of failing to forward the Deed in time for the closing.

indemnity.” [CR 941, citing *Blueberry Place*, 126 Wash.App. at 361 (other citations omitted)]. Applying these authorities, the trial court reasoned:

Seawest’s Complaint against Leisher and their successful motion for summary judgment included a claim for Leishers’ failure to provide a Form 17 to Seawest, a claim which did not implicate Commonwealth. The jury also recognized the claim related to Form 17 by their allocation of a portion of the negligence that proximately caused damages to the Leishers to the non-party that was responsible for failing to provide the Form 17 disclosure.

Based on *Blueberry* ..., as a matter of law, the Leishers are not entitled to an award of attorney fees incurred in defending Seawest’s suit....

[CR 942-943]. Thus, the trial court held that, because (a) Seawest prevailed in its suit to rescind the sale based on the absence of a Form 17; and (b) the jury found that Wolfstone was 15% negligent in failing to provide Seawest with the Form 17 before the closing, there are “other reasons” besides Commonwealth’s negligence that caused Seawest to sue the Leishers for rescission. This reasoning cannot survive scrutiny.

1. *Just because Seawest had a legal right to rescind the sale after the fact based on the missing Form 17, doesn't mean Commonwealth's negligence wasn't the proximate cause of Seawest's lawsuit.*

The trial court’s statements in its order denying the Leishers’ motion for fees and costs make clear that it considered the summary judgment in favor of Seawest on the Form 17 rescission issue to be

dispositive of the “proximate cause” analysis required for equitable indemnity. This assumption is incorrect.

The only issue before the court in deciding Seawest’s motion was whether Seawest had a legal right on October 9, a week after the scheduled closing date, to rescind the contract based on the absence of a form that Seawest’s representative did not even know was missing on October 2. [CR 14, 173]. The court was never asked to decide whether Seawest would have filed the rescission lawsuit if the sale had gone through as scheduled (*i.e.*, if Commonwealth had provided the Deed to the Leishers on time). [CR 14, 173]. Given this circumstance, the mere fact that the Court ordered the Leishers to return Seawest’s earnest money and prepayments due to a technicality that was discovered days after the closing date, has no impact on the question presented here – namely, whether Seawest would have sued the Leishers but for Commonwealth’s negligence.

2. *As a matter of law, and consistent with the jury’s findings, Seawest could not have sued the Leishers for rescission based on the absence of a Form 17, if Commonwealth had done its job properly.*

The jury determined that Commonwealth’s negligence in failing to deliver the deed to the Leishers in time for closing was a proximate and direct cause of the Leishers’ damages, including the loss of their sale to

Seawest, Seawest's subsequent lawsuit, and the Leishers' resulting obligation to reimburse Seawest \$869,883.37 in earnest money and prepayments. [CR 753-755].<sup>3</sup> Commonwealth has voluntarily dismissed its appeal of the proximate cause finding, and cannot collaterally attack that finding here. *See* Wash. R. App. P. 2.4(b) ("A timely notice of appeal of a trial court decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise appealable ... unless a timely notice of appeal has been filed to seek review of the previous decision."); *Ellis v. William Penn Life Assur. Co.*, 124 Wash.2d 1, 873 P.2d 1185 (1994)(respondent's request for reversal of an adverse ruling on a distinct cause of action from the one raised by appellant constituted a request for "affirmative relief" and could not be considered without a valid cross-appeal). The proximate cause finding must therefore be accepted as established for purposes of the Leishers' appeal.

Commonwealth will no doubt argue that the jury's finding that Wolfstone was 15% responsible for the Leishers' injuries means that Commonwealth's negligence was not the sole cause of Seawest's decision

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<sup>3</sup> This finding is supported by the testimony of Seawest's own representative that (a) he went to Commonwealth's offices on October 2 with a check, fully intending to close the sale, (b) on that day, he had no idea that the Form 17 was missing or that Seawest could refuse to close on that basis, and (c) the only reason given to him by Commonwealth for the parties' inability to close on October 2 was the absence of a signed warranty Deed; the Form 17 was never even mentioned. [CP \_\_\_\_ (MSJ at Ex. 7 and Ex. 8 p. 6:14-18)].

to file suit. However, this argument is belied by the fact that, had the sale closed on October 2 as scheduled, Seawest's right to sue for rescission based on the lack of a Form 17 would have been extinguished as a matter of law. *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."). Thus, Seawest could not have sued the Leishers for rescission based on the lack of a Form 17 if the sale had closed on October 2 as scheduled. Put another way, Wolfstone's negligence in failing to provide the Form 17 could not have formed the basis for a suit by Seawest, if Commonwealth had done its job properly. The cases cited by the trial court precluding an award of fees where there were "other reasons" why party "A" filed suit are therefore inapplicable.

C. The Trial Court's Decision to Deny Fees Confuses "Proximate Cause" With "Sole Cause."

Even assuming for the sake of argument that Wolfstone's 15% negligence in failing to provide a Form 17 could have been a cause of the sale not closing on October 2, 2008 – and it could not, given Mr. Aatai's undisputed testimony regarding his knowledge on that date – such possibility in no way precludes the Court from finding that Commonwealth's negligence proximately caused Seawest to file suit against the Leishers.

It is well established that “proximate cause” refers to a cause which “in a direct sequence,” produces the injury complained of and without which such injury would not have happened. *Strong v. Terrell*, 147 Wash.App. 376, 388, 195 P.3d 977 (Wash.App. Div. 2, 2008, review denied). However, the trial court’s order denying fees seems to equate “proximate cause” with *sole* causation, assuming that just because a party’s actions were a proximate cause of an injury, no other party’s negligence could have contributed to that injury. Such logic is clearly erroneous. It is axiomatic that

There may be more than one proximate cause of an injury.... And the concurrent negligence of a third party does not break the chain of causation between original negligence and the injury.... If the defendant's original negligence continues and contributes to the injury, the intervening negligence of another is an additional cause. It is not a superseding cause and does not relieve the defendant of liability.

*Travis v. Bohannon*, 128 Wash.App. 231, 242 115 P.3d 342 (Wash.App. Div. 3, 2005)(citing *State v. Jacobsen*, 74 Wash.2d 36, 37, 442 P.2d 629 (1968); *Doyle v. Nor-West Pac. Co.*, 23 Wash.App. 1, 6, 594 P.2d 938 (1979. Accord *Brashear v. Puget Sound Power & Light Co.*, 100 Wash.2d 204, 207, 667 P.2d 78 (1983).

Consistent with the above, even if Seawest ultimately recited Wolfstone’s 15% concurrent negligence as a justification for its lawsuit, Commonwealth’s own (85%) negligence remains a “natural and proximate

consequence of' Seawest's suit for purposes of the ABC rule. *George*, 106 Wash.App. at 445; *Woodley*, 79 Wash.App. at 246.

**D. The Fees and Costs Requested by the Leishers Are Reasonable.**

As evidenced by the Affidavit of Logan E. Johnson, which was submitted to the trial court with the Leishers' motion for fees, the Leishers expended \$263,921.17 in attorney's fees and \$47,385.40 in court costs in defending against Seawest's lawsuit, up through and including this Court's final summary judgment Order on December 4, 2009. [CR 758 at Ex. B, CR 778-780]. These fees and costs are reasonable and necessary, and the attorney's fees are of the type and amount customarily charged by attorneys with similar levels of experience in the Seattle, Washington area. [CR 758 at Ex. B, CR 778-780].

**VI. CONCLUSION**

For all of the above reasons, Appellants Luin and Shirley Leisher respectfully request that this Court (a) modify the trial court's judgment as it pertains to Seawest, to omit the obligation to repay the "agreed disbursements" identified above; and (b) order 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 16<sup>th</sup> day of June, 2011.

Respectfully submitted,

SCHIFFER ODOM HICKS & JOHNSON

By:

  
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Leisher*

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5 IN THE WASHINGTON COURT OF APPEALS  
6 DIVISION I  
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9 LUIN LEISHER and SHIRLEY LEISHER,

10 Appellants,

11 v.

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

15 Respondents.

16 I, Julie Fitzgerald, hereby declare that I am an employee of the law firm of Schiffer  
17 Odom Hicks & Johnson PLLC, Attorneys for Appellants in the above-captioned cause, I am  
18 over the age of 18, am competent to be a witness and I am not a party to the action and that on

19 6. 16. 11, I had served via U.S. Mail:

20  
21 1) Brief of Appellants; and

22 this 2) Declaration of Service to:  
23  
24  
25

1 Christopher R. Osborn  
Nicole Guerrero Diven  
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9 14450 N.E. 29th Place, Suite 200  
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11 I hereby declare under penalty of perjury under the Laws of the State of Washington  
12 that the foregoing is true and correct.

13  
14 DATED at Houston this 16<sup>th</sup> day of June, 2011.

15  
16 **SCHIFFER ODOM HICKS & JOHNSON**

17  
18 By: JRF  
19 Julie Fitzgerald, Legal Assistant

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