

NO.: 37022-1-II

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

WILLIAM A. LOONEY,
Appellant

v.

PIERCE COUNTY, a political subdivision of the State of Washington;
KEN MADSEN, Pierce County Treasurer, JOHN DOES AND JANE DOE
Respondents,

v.

CLIFFORD M. BILLINGSLEA
Respondent.

OPENING BRIEF OF APPELLANT

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FILED
COURT OF APPEALS
DIVISION II
08 APR -4 PM 1:35
STATE OF WASHINGTON
BY DEBBY

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A. ASSIGNMENTS OF ERROR

1. The trial court improperly granted summary judgment dismissing the claims of plaintiff against Pierce County, Ken Madsen and Clifford Billingslea.
2. The trial court award of attorney's fees was not reasonable and an abuse of discretion.
3. The trial court erred in entering Finding 2.a. in the order granting Pierce County's motion for summary judgment.
4. The trial court erred in entering Finding 2.c. in the order granting Pierce County's motion for summary judgment.
5. The trial court erred in entering Finding 2.g. in the order granting Pierce County's motion for summary judgment.
6. The trial court erred in entering Finding 2.l. in the order granting Pierce County's motion for summary judgment.
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8. The trial court erred in entering Finding 2.n. in the order granting Pierce County's motion for summary judgment.
9. The trial court erred in entering Finding 2.o. in the order granting Pierce County's motion for summary judgment.
10. The trial court erred in entering Finding 1 in the judgment for fees and costs.
11. The trial court erred in entering Finding 2 in the judgment for fees and costs.

12. The trial court erred in entering Finding 3 in the judgment for fees and costs.
13. The trial court erred in entering Finding 4 in the judgment for fees and costs.
14. The trial court erred in entering Finding 6 in the judgment for fees and costs.
15. The trial court erred in entering Finding 7 in the judgment for fees and costs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was it improper for the trial court to conclude that the grantors of the quitclaim deed to Mr. Looney had no vested ownership interest in the subject property? (Assignment of Error 1)
2. Did the trial court improperly conclude that no clear, cogent and convincing evidence was presented by the Plaintiff to show that tender of the unpaid taxes should have been accepted by Pierce County? (Assignment of Error 1)
3. Was the trial court's award of attorney's fees under RCW 4.84.185 an abuse of discretion in a case with no finding that the cause of action as a whole was frivolous and no findings that this case was brought for spite, nuisance, or harassment? (Assignment of Error 2)
4. Was the trial court's award of attorney's fees based upon the ABC Rule reasonable when the party considered to be indemnified was aware of a potential issue with the title of property when it was purchased? (Assignment of Error 2)

STATEMENT OF FACTS

Lorraine E. Lane died on October 3, 2003, and at the time of her death she was the owner of real property situate in Pierce County, Washington, tax parcel number of 5670001110, and legally described as:

Lots 13 and 14, Block 10, McKinley Park Addition to Tacoma, Washington, as per map thereof recorded in volume 7 of plats, page 96, records of Pierce County Auditor; Situate in the city of Tacoma, county of Pierce, state of Washington. Commonly known as 3586 E Howe Street, Tacoma, Washington 98404.

Pierce County, Washington is a political subdivision of the State of Washington and on or about December 3, 2005, it scheduled a tax foreclosure sale of the above described real estate parcel. Lorraine E. Lane was listed as the owner of the property in the certificate of delinquency (CP 34-35).

This action began as a quiet title and tort action by William A. Looney against Pierce County and Ken Madsen (CP 1-4). The property in question was previously owned by Lorraine Lane, deceased (CP 48). Prior to the foreclosure sale of the property, William Looney contacted the four daughters and sole heirs of Lorraine Lane and purchased their interest in the subject property. Title was conveyed by a quit claim deed from the four daughter of Lorraine Lane to Looney (CP 48-49, 51). On December 2, 2005, Looney attempted to redeem this property by presenting a copy of the recorded quit claim deed signed by the four

daughters of Lorraine Lane, along with a cashier's check in the amount of \$4,796.33 to Pierce County (CP 48.49, 56). This redemption by Mr. Looney was rejected by Pierce County (CP 35, 48-49). Pierce County thereafter on the following Monday, December 5, 2005, sold the property at a tax foreclosure sale to Clifford Billingslea for the sum of \$85,000 (CP 35).

STATEMENT OF THE CASE

This action began as a quiet title and tort action by William A. Looney against Pierce County and Ken Madsen (CP1-4). William A. Looney later amended his complaint to include a cross claim defendant Clifford Billingslea who was the successful bidder at the tax foreclosure sale held by Pierce County.

On December 15, 2006 Pierce County and Ken Madsen brought a motion for summary judgment against Looney (CP 111-117). Looney had a motion for summary judgment against Pierce County and Ken Madsen. Billingslea had a motion to dismiss cross claim of Pierce County and Ken Madsen, and also a motion for judgment on the pleadings against Looney.

The only motion heard was that of Pierce County and Ken Madsen which was heard and granted by the trial court on December 19, 2006. The trial court dismissed Looney's claims pursuant to that summary judgment motion (CP 111-117). A motion for attorneys fees was filed by Billingslea against Looney on January 8, 2007 which was heard and granted on January 19, 2007. An order for

final judgment has been filed in this matter (CP 143-144).

ARGUMENT AND ANALYSIS

Standards of Review

An Appellate court will review a summary judgment de novo. *Korslund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005) (citing *Hubbard v. Spokane County*, 146 Wn.2d 699, 707-08, 50 P.3d 602 (2002)). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *CR 56(c)*. Based upon this standard, Looney is entitled to the benefit of all reasonable inferences arising from the facts in this case.

The review standard in regard to attorney's fees and costs in regard to the conclusion that this action was frivolous is for an abuse of discretion. *Bank of Am. NT & SA v. Hubert*, 153 Wn.2d 102, 123, 101 P.3d 409 (2004) (citing *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990)); *Boeing Co. v. Heidy*, 147 Wn.2d 78, 90, 51 P.3d 793 (2002) (citing *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999)). Thus, the Court will reverse the award if it is manifestly unreasonable or

based on untenable grounds. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677 at 684 (citing *Assoc. Mortgage Investors. v. G. P. Kent Construction Co., Inc.*, 15 Wn. App. 223 at 229).

The trial court's decision that the elements of equitable indemnity were met and the ABC rule applies in awarding fees and costs to Billingslea, is a legal question subject to de novo review. *Tradewell Group v. Mavis*, 71 Wn. App. 120, 126-27, 857 P.2d 1053 (1993).

A. The trial court improperly granted summary judgment dismissing the claims of plaintiff against Pierce County, Ken Madsen and Clifford Billingslea.

1. It was improper for the trial court to conclude that the grantors of the quitclaim deed to Mr. Looney had no vested ownership interest in the subject property.

In the case at hand, Lorraine Lane died October 3, 2003 and at that time she was the owner of the subject property in Pierce County, Washington (CP 48). Ms. Lane had four daughters whom according to Title 11 of the RCW's had an instantaneous vested interest in that subject property upon her death. The construction and meaning of a statute is a question of law reviewed de novo. *Wash. Pub Ports Ass'n v. State Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003).

RCW 11.04.290 states:

RCW 11.04.250 through 11.04.290 shall apply to community real property and also to separate estate; and upon the death of either husband or wife, title of all community real property shall vest immediately in the person or persons to whom the same shall go, pass, descend or be devised, as provided in RCW 11.04.015, subject to all the charges mentioned in RCW 11.04.250.

Under RCW 11.04.250:

When a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life of another, **his title shall vest immediately in his heirs or devisees, subject to his debts, family allowance, expenses of administration and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent:** PROVIDED, That no person shall be deemed a devisee until the will has been probated. The title and right to possession of such lands, tenements, or hereditaments so vested in such heirs or devisees, together with the rents, issues and profits thereof, shall be good and valid against all persons claiming adversely to the claims of any such heirs, or devisees, excepting only the personal representative when appointed, and persons lawfully claiming under such personal representative; and any one or more of such heirs or devisees, or their grantees, jointly or severally, may sue for and recover their respective shares or interests in any such lands, tenements, or hereditaments and the rents, issues and profits thereof, whether letters testamentary or of administration be granted or not, from any person except the personal

representative and those lawfully claiming under such personal representative. (Emphasis added)

All reasonable inferences must be made in favor of the non-moving party, Mr. Looney. Appellant is very aware of the proviso following the emphasized portion in the aforementioned statute, the language of which Pierce County and Billingslea argued to the trial court required a probate before the four daughters of Lorraine Lane had a vested interest in their mother's real property. However, that disregards that the statute clearly states that the title vested in the daughters immediately on the death of Lorraine Lane. The purpose of the second portion of RCW 11.04.250 is simply to confirm in order for the daughters of Lorraine Lane to have full entitlement to the real property they would need to probate their mother's estate. Nothing prevents them though from selling their interest in the real property they inherited by law.

“The power of an executor to manage and control the real property of the estate is not necessarily inconsistent with and does not necessarily override the power and the right of a devisee to encumber or convey his interest in the real property of the estate.” *Kerns v. Pickett*, 49 Wn.2d 770 at 773, citing *Demaris v. Barker*, 33 Wash. 200, 74 Pac. 362; *National Bank of Commerce v. Peterson*, 179 Wash. 638, 38 P. (2d) 361; and 86 A. L. R. 400. These line of

cases also make clear the right of an heir to convey his or her interest in an estate is distinct and separate from the estate.

Here, there was no probate of the estate prior to the tax foreclosure sale by Pierce County (CP 48). However, these heirs were not strangers to the property. In fact, Pierce County attempted to find at least two of the heirs to serve them regarding the foreclosure. Pierce County was made aware of these heirs by the Department of Social and Health Services (CP 96-97). The daughters of Ms. Lane were not strangers to the property.

RCW 11.02.005 (6) describes "Heirs" as those persons who are entitled under the statutes of intestate succession to the real and personal property of a decedent on the decedent's death. Devisees are defined in Black's Law Dictionary as "the person to whom lands or other real property are devised or given by will." RCW 11.04.250 clearly states "PROVIDED that no person shall be deemed a devisee until the will has been probated." This does not place an additional requirement of probate for an heir to be vested in the title to property. In fact the concept of vesting is separate and apart from being a devisee.

"Prior to the proviso, the statute says that, upon death, the title shall vest "immediately," "instantly." This is the substantive portion of the law, intended, manifestly, to change the rule announced in some of our earlier cases, such as **Balch v. Smith**, 4 Wash. 497,

30 Pac. 648. **It deals with the title - the thing that is transmissible and inheritable. It vests immediately.**”

In re Schmidt's Estate, 134 Wash. 525, 528, 236 Pac. 274 (1925) (emphasis added).

The language in *In re Schmidt's Estate* indicating that title vests immediately on death is now incorporated in RCW 11.04.250.

Mr. Looney's position is that “proof” of vesting of title can be provided through probate, however probate is not required in order to redeem property from tax foreclosure. “That is, **the probating of the will is not necessary for the passing of the title** or providing a devisee, but as proof of that kind provided for by the statute as to who shall be deemed to be the person in whom title was vested immediately upon the death of the testator.” *In re Schmidt's Estate*, at 528 (emphasis added).

2. The trial court improperly concluded that no clear, cogent and convincing evidence was presented by the plaintiff to show that tender of the unpaid taxes should have been accepted by Pierce County.

The standard of review again is de novo review. In general the “tax redemption statutes are to be liberally construed in favor of redemption.”

Kienbaum v. New Republic Company, 139 Wash. 298, 303 (1926). One of the controlling statutes regarding this matter is RCW 84.64.060 which provides

for payment by interested person before day of sale:

Any person owning a recorded interest in lands or lots upon which judgment is prayed, as provided in this chapter, may in person or by agent pay the taxes, interest and costs due thereon to the county treasurer of the county in which the same are situated, at any time before the day of the sale; and for the amount so paid he or she shall have a lien on the property liable for taxes, interest and costs for which judgment is prayed; and the person or authority who shall collect or receive the same shall give a receipt for such payment, or issue to such person a certificate showing such payment. If paying by agent, the agent shall provide notarized documentation of the agency relationship.

There is a public policy favoring redemption. In this instance, Looney tendered the delinquent taxes of \$4,796.33 to Pierce County on December 2, 2005, three days prior to the scheduled foreclosure date (CP 48-49, 56). Mr. Looney also provided Pierce County with the recorded deed transferring the interest held by the heirs of Lorraine Lane to Looney (CP 48). Mr. Looney also called Bob Dick of the Pierce County Prosecutor's office later that day after his tender was rejected by Pierce County, who he knew to be the person who dealt with tax foreclosure issues for Pierce County, and was told again on December 2, 2005 that Pierce County was refusing his tender (CP 49). This refusal by Pierce County to accept the tender by Looney violated public policy and RCW 84.64.060.

B. The trial court award of attorney's fees was not reasonable

and an abuse of discretion.

1. Plaintiff's claims were not frivolous as they were advanced with reasonable cause and several of defendants' theories were unresolved.

As stated above, the review standard in regard to attorney's fees and costs is for an abuse of discretion. A case is not frivolous under RCW 4.84.185 just because the plaintiff loses. Even if this court were to affirm the summary judgment, the issues were obviously debatable and Looney's claim was in no way frivolous. There were minimal findings at all in regard to the award of attorney's fees.

In a leading case interpreting RCW 4.84.185, the Supreme Court noted that the legislative history "shows an intent to have the statute apply to actions which, as a whole, were spite, nuisance or harassment suits." *Biggs v. Vail*, 119 Wn.2d 129, 135, 830 P.2d 350 (1992). This suit was not for any of those purposes.

RCW 4.84.185 states:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-

claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order. The provisions of this section apply unless otherwise specifically provided by statute.

A lawsuit is frivolous under RCW 4.84.185 only when it cannot be supported by any rational argument on the law or facts. *Smith v. Okanogan County*, 100 Wn. App. 7, 24, 994 P.2d 857 (2000). The action must be viewed in its entirety and only if it is frivolous as a whole will an award of fees be appropriate. *Biggs v. Vail*, 119 Wn.2d 129, 133-37, 830 P.2d 350 (1992). A frivolous action has been defined as one that cannot be supported by any rational argument on the law or facts. *Bill of Rights Legal Found. v. The Evergreen State College*, 44 Wn. App. 690, 696-97, 723 P. 2d 483 (1986). In looking at the facts of this case, viewed as a whole, there were several issues raised in which Looney's position was supported by Washington law. Although the court rejected the argument, the Court did not characterize it as irrational or frivolous at the initial hearing on December 15, 2006.

Additionally, rejection of an argument does not make it frivolous as a matter of law. As stated above, the case must be viewed in its entirety and if it is frivolous as a whole, then fees and costs may be awarded. That is not the case here and the award of fees and costs should be reversed. There were minimal findings at all in regard to the award of attorney's fees. Since so much discretion is given to the trial court, the discretion which is exercised, must be done so on articulable grounds.

2. The ABC rule does not support an award of fees in this case.

There were absolutely no findings in support of an award of fees based on the ABC rule. The trial court's determination of the amount of an attorney fee award is reviewed for an abuse of discretion. Discretion must be exercised on articulable grounds, and awards must be based upon proper findings of fact and conclusions of law. *Mahler v. Szucs*, 135 Wn. 2d 398, 434-35, 957 P.2d 632, 966 P.2d 305 (1998). The trial court's decision that the elements of equitable indemnity are met and the ABC rule applies is a legal question subject to de novo review. *Tradewell*, 71 Wn. App. 120, 126-127, 857 P.2d 1053 (1993).

The rule in Washington is that absent a contract, statute or recognized ground of equity, attorneys' fees will not be awarded as part of the cost of litigation. *Pennsylvania Life Ins. Co. v. Dep't of Employment Sec.*, 97

Wn.2d 412, 413, 645 P.2d 693 (1982); *Tradewell Group, Inc.*, 71 Wn. App. at 126. One of the recognized equitable grounds under which fees may be awarded is the theory of equitable indemnity, or the 'ABC rule'. Under this theory, 'where the acts or omissions of a party to an agreement or event have exposed one to litigation by third persons - that is, to suit by third persons not connected with the initial transaction or event – the allowance of attorney's fees may be a proper element of consequential damages.' *Armstrong Const. Co. v. Thomson*, 64 Wn.2d 191, 195, 390 P.2d 976 (1964). 'When the natural and proximate consequences of a wrongful act of A involve B in litigation with others, B may as a general rule recover damages from A for reasonable expenses incurred in that litigation, including attorney's fees.' *Dauphin v. Smith*, 42 Wn. App. 491, 494, 713 P.2d 116(1986). The elements of equitable indemnity are:

- (1) a wrongful act or omission by A toward B;
- (2) such act or omission exposes or involves B in litigation with C; and
- (3) C was not connected with the initial transaction or event viz., the wrongful act or omission of A toward B. *Manning v. Loidhamer*, 13 Wn. App. 766, 769, 538 P.2d 136 (1975). All three elements must be satisfied to create liability.

Id.

The court never addressed this issue and did not make any findings in this regard. As Mr. Billingslea admitted in his declaration to the court in support of his motion for Judgment on the pleadings, he was again made aware of a potential problem with the title on the property as it showed that Looney had a recorded deed to the property and Billingslea was told by Pierce County that it was “not a problem.” Mr. Billingslea even offered to rescind the sale if Pierce County would return his money, which Pierce County refused (CP 58-59). Mr. Billingslea clearly had notice that there were concerns regarding the title of the subject property and should have known that this may subject him to litigation.

The required causal showing is greater than in an ordinary tort action. If Party A's conduct is not the only cause of Party B's involvement in the litigation, and particularly if Party B's own conduct contributed to Party B's exposure in the litigation, an award of fees under *Manning* is not proper. *Woodley v. Benson & McLaughlin*, 79 Wn. App. 242, at 248 (1995). Citing *Tradewell* 71 Wn. App. at 128-29; see also *Aldrich & Hedman, Inc. v. Blakely*, 31 Wn. App. 16, 20, 639 P.2d 235, review denied, 97 Wn.2d 1007 (1982).

Although plaintiff concedes that Billingslea was not the actual wrongdoer, he was aware going into the foreclosure sale that there were risks and made a decision to buy the property. Mr. Billingslea was also privy to information post-sale that there were potential problems with the title on the property, and asked

Pierce County to rescind the transaction.

Moreover, under *Tradewell*, even if it is possible to apportion attorneys' fees related to a particular claim, where there are additional reasons why the party seeking fees was sued, fees are not available under the theory of equitable indemnity.

CONCLUSION

Mr. Looney respectfully requests that the summary judgment order of the trial court be reversed and the court find that Mr. Looney properly complied with the aforementioned statutes in regard to curing unpaid taxes.

Mr. Looney also requests that the attorney's fees and costs in this matter be reversed based on an abuse of discretion by the trial court as there were no findings or showing that this matter was frivolous as a whole. There were also no findings or evidence presented that this action was commenced out of spite, nuisance or to harass the parties. Additionally, Mr. Looney respectfully requests that this court find that the ABC rule not only does not apply to this case, and that there were no proper findings in this regard by the trial court, and therefore is not a basis for attorney's fees and costs.

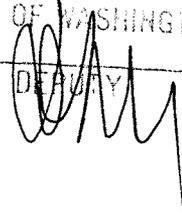
Dated this 3rd day of April, 2008.

COMFORT, DAVIES & SMITH, P.S.

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FILED
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08 APR -9 PM 1:44

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**DECLARATION OF SERVICE OF
OPENING BRIEF OF APPELLANT**

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I, Danielle S. Mallek, certify that I had delivered a copy of the
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by delivering said document by ABC-Legal Messengers, Inc. on April 4,
2008, to the aforesaid individuals on the date set out above in this certificate.

Dated this 8th day of April, 2008.


Danielle S. Mallek