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NO. 65734-8-1

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
AT DIVISION I



ALBERT L. DYKES, an individual and former General Managing Partner
of Woodinville Business Center No. 1, and MARGARET RYAN-
DYKES, an individual and the marital community comprised thereof,

Appellants.

v.

WOODINVILLE BUSINESS CENTER NO. 1, a Washington Limited
Partnership,

Respondent.

REPLY BRIEF OF APPELLANTS

Sam B. Franklin, WSBA No. 1903
David M. Norman, WSBA No. 40564
Erin J. Varriano, WSBA No. 40572
Of Attorneys for Appellant Albert L. Dykes

LEE SMART, P.S., INC.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929
(206) 624-7990

5327524

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I. INTRODUCTION

This appeal is limited to two issues: (1) the propriety of the trial court awarding WBC, in equitable indemnity, all of the fees incurred by WBC and appellant Albert L. Dykes in defending a breach-of-contract action brought against Dykes and Respondent WBC by Ned Lumpkin and Lumpkin, Inc. in 2007; and (2) the propriety of the trial court awarding WBC the attorney fees incurred in bringing the equitable indemnity action against Dykes.

Both parties agree that the only basis for either award of attorney fees was in equity. This court must reverse both of the trial court's fee awards because the trial court did not provide a basis for either award, nor did it ever assesses the reasonableness of the fees incurred for the breach-of-contract action. A trial court is required to provide the basis for any award of attorney fees, because such an award is directly contrary to the American Rule prohibition on fee awards to prevailing parties, and also because a reviewing court cannot determine the propriety of the award, or its amount, without such a stated basis in the trial court record.

In his Opening Brief, Dykes explained how the only conceivable ground for the fee award for the breach-of-contract action was under the applicable test for an equitable indemnity action — the lone claim for which WBC was granted summary judgment below. To be entitled to an

award of fees under this theory, WBC was required to demonstrate the existence of the three elements of the “ABC Rule.” WBC did not even attempt to meet this test, nor did the trial court require WBC to do so, nor did the trial court make any conclusions about how the rule was met.

WBC tries to compensate for these facial errors by repeating the negative facts found in the underlying breach-of-contract action against Dykes in place of legal analysis, and tries to convince this court that these facts are alone sufficient to find any number of equitable bases for both fee awards. WBC, in other words, is required (as is this court) to guess as to what equitable theory the trial court must have applied.

This fails, and for the reasons specified in Dykes’ Opening Brief, and the reasons delineated below, reversal of the two attorney fee awards should be ordered by this court because the only potential grounds for either award cannot apply as a matter of law, and the trial court’s failure to provide an adequate legal basis for either award is also reversible error.

II. STATEMENT OF THE CASE

Dykes rely on the Statement of the Case set forth in his Opening Brief.

III. ARGUMENT

The trial court erred in awarding the fees and costs incurred by WBC in bringing this indemnification action because: (1) attorney fees are

not obtainable against the wrongdoer in a separate indemnity action, (2) *Tang* and *McAllister, infra*, could not apply because no breach of fiduciary duty was found against WBC in either action; and (3) the trial court failed to provide the legal or equitable basis for the fee award.

The trial court likewise erred in awarding all of the fees and costs incurred by WBC and Dykes to WBC in the breach-of-contract action brought by Lumpkin and Lumpkin, Inc. because: (1) the elements for “ABC Rule” for equitable indemnity were not shown by WBC, nor did the trial court conclude that they were; (2) WBC never showed that the fees incurred in the breach-of-contract action were reasonable; and (3) none of the other available equitable bases for the fee award now cited by WBC could have applied.

A. No authority existed to support an award of fees to WBC for the indemnity action.

The Honorable Carol A. Schapira ordered that WBC was entitled to \$25,821.50 in reasonable attorney fees and \$675 in costs for bringing the indemnity action. CP 461-62, CP 465-66. WBC argued below that such fees and costs were justified under *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 557 P.2d 342 (1976) and *Green v. McAllister*, 103 Wn. App. 452, 14 P.3d 795 (2000). CP 58. In making its award, the trial court provided no explanation for the award, or legal or equitable basis upon which it was granted. *See* CP 461-62, 465-66. Further, in its Response Brief, WBC

fails to distinguish between the fees awarded for the immediate indemnification action and the fees awarded in indemnification for the breach-of-contract action; instead, WBC asserts that both awards were justified by the same equitable grounds that could have been applied by the trial court. *See* Resp. Br. at 21-42.¹

As a threshold matter, both parties acknowledge that any award of attorney fees is an exception to the established law in this state. Washington courts follow “the American Rule” in regards to the availability of attorney’s fees as costs for a prevailing party. As summarized by the State Supreme Court, “[i]n absence of a contract, statute or recognized ground of equity, a court has no power to award an attorney fee as part of the costs of litigation.” *Armstrong Const. Co. v. Thomson*, 64 Wn.2d 191, 195, 390 P.2d 976 (1964) (citation omitted).

The parties also acknowledge that the only potential basis for both fee awards was in equity. Whether an equitable theory existed for a trial court’s award of fees is reviewed de novo. *See Deep Water Brewing, LLC*

¹ WBC’s Brief was due March 17, 2011 under RAP 10.2(b). The Court moved the filing and service deadline for WBC’s Brief to March 30, 2011. However, counsel for WBC personally requested that she be given an extra day to file, despite this court’s letter ruling granting the extension and setting the new filing date — this request was granted as a courtesy. However, WBC did not file its Brief until April 4, 2011. RAP 10.2(j) states that “[t]he appellate court will ordinarily impose sanctions under rule 18.9 for failure to timely file and serve a brief.”

v. Fairway Resources, Ltd., 152 Wn. App. 229, 277, 215 P.3d 990 (2009) (citation omitted).²

1. The court may not award attorney fees against the wrongdoer in a separate indemnity action.

First, WBC ignores the black-letter rules from case law cited by Dykes that establish that **fees are not obtainable from the wrongdoer for the separate indemnity action.** See *Brock v. Tarrant*, 57 Wn. App. 562, 572, 789 P.2d 112 (1990) (citing *Brotten v. May*, 49 Wn. App. 564, 573, 744 P.2d 1085 (1987)). This was a separate indemnity action against the supposed wrongdoer brought by the innocent defendant in the original breach-of-contract action. The rule from *Brock* is thus dispositive here.

2. *Tang* and *McAllister* could not apply because Dykes did not breach a fiduciary duty to WBC.

Second, WBC's continued reliance on *Tang*, *supra*, for the award of fees in the indemnity action — now also somehow justifying the fee award for the underlying breach-of-contract action — is without merit.

As noted in Dykes' Opening Brief, *Tang* only stands for the rule that a court **may** award fees when a party directly brings — and prevails in — a breach-of-fiduciary-duty action against a party that had a fiduciary

² As a procedural matter, WBC relies on the general rule that “on appeal, an order may be sustained on any basis supported by the record.” See Resp. at 16. Implicitly, this is acknowledging the fact that the trial court provided no legal or equitable basis for either fee award. More importantly, Dykes notes that this general rule does not apply to attorney fee awards, where the trial court's basis must be articulated to be affirmed on review.

duty to the other party, and where the court finds specifically that the party's actions constituted constructive fraud. *Tang*, 87 Wn.2d at 797.³ This rule cannot apply here since summary judgment was only granted for indemnity, nor did the court conclude that there was a breach of fiduciary duty to WBC, nor did the court find "constructive fraud." WBC did not even allege that Dykes breached a fiduciary duty to it, but only that it incurred fees because of a breach to Lumpkin in the separate case. *See* CP 10, ¶¶ 25-26. Because it was not even alleged by WBC, the trial court could not have concluded that Dykes breached a fiduciary duty to WBC, and consistent with this, it did not. CP 353.

WBC's reliance on *McAllister*, *supra*, fails for the same reasons as its reliance on *Tang* does. *McAllister* was likewise a direct action brought by partners and their partnership against a former partner that breached his fiduciary duty to the extent that it constituted constructive fraud. 103 Wn. App. at 467-68. It was not an equitable indemnity action seeking recovery for the fees incurred in a separate and prior breach-of-fiduciary-duty

³ WBC fails to acknowledge that this holding from *Tang* has been minimized by subsequent State Supreme Court law. *See* Appellant Brief at 44-45. WBC attempts to compensate for this diminution by raising an argument not raised at all below — that somehow this is a "common fund" case. The lack of merit for this argument is addressed later in this Reply.

action.⁴ There was no finding of “constructive fraud” by this court (or the prior), and no conclusion that any breach of fiduciary duty by Dykes against WBC occurred; absent this, the trial court had no authority under *McAllister* to award the fees incurred for bringing the indemnity action.

The rules from *Tang* and *McAllister* apply only where a party has successfully brought a breach-of-fiduciary-duty action and where “constructive fraud” was specifically found. The only claim upon which WBC garnered summary judgment in its favor was for equitable indemnity, not breach of fiduciary duty. CP 449. Absent an express conclusion that Dykes breached a duty to WBC, the cases relied upon by WBC thus could not provide a basis for the award of fees for bringing the indemnity action.

More importantly, WBC’s post-facto argument that *Tang* and *McAllister* also authorized the fee award in indemnity for fees incurred in the breach-of-contract action must be rejected when WBC cites no authority establishing that the “breach of fiduciary duty” equitable basis for fee recovery can allow a recovery of fees in an indemnity action **for a**

⁴ The *McAllister* court did not even award attorney fees, but reversed the trial court only for concluding it had no authority to make such an award under the former partnership act. 103 Wn. App. at 467. Instead, the *McAllister* court took note that “[p]arties generally pay their own fees” and that the trial court only has discretion — but is not required — to award fees when a party successfully brings a breach of fiduciary claim. *Id.* at 468.

different breach found in an earlier action. That is because there is no such authority, as it would punish a party twice for the same conduct.

3. The trial court failed to provide the legal or equitable basis for the fee award

Third, the trial court must provide an adequate basis for an award of attorney's fees, which is absent here for both awards. WBC does not dispute this, but instead points out the obvious, that a trial court is not required to provide Findings of Fact and Conclusions of Law for summary judgments. *See* Resp. Br. at 21.

This argument is erroneous because that this general rule does not apply when a trial court takes the extraordinary step in awarding attorney fees.⁵ As this court expressly recognized, “[t]he trial court must provide an adequate record upon which to review a fee award.” *Estrada v. McNulty*, 98 Wn. App. 717, 723, 988 P.2d 492 (1999) (citing *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998)). In vacating the award of fees in that case, this court in *Estrada* also noted the distinction between requiring a basis for the amount of the fee and in requiring **that a trial court identify the basis for the award itself:**

⁵ It is also erroneous because the fact that formal Findings and Conclusions are not required upon summary judgment does not equate to the trial court being able to award attorney fees without any of the necessary factual and legal conclusions justifying that remedy.

Although the amount may be reasonable, it is impossible to review its reasonableness **without adequate findings concerning the basis of the fee**. Because the trial court did not provide a basis for its award of attorney fees, the fee award is vacated and that issue is remanded to the trial court for entry of findings in support of the fee award.

Estrada, 98 Wn. App. at 723-24. This basic principle cannot be questioned and has been recognized on a multitude of occasions. *See, e.g. Brand v. Dept. of Labor & Indus.*, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999) (noting that the Court has reversed attorney fee awards “when the record fails to state a basis supporting the award”); *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006) (vacating award when the “trial court made no findings about the attorney fee award” and noting that “[t]he trial court must provide sufficient findings of fact and conclusions of law to develop an adequate record for appellate review of a fee award”); *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 840-41, 786 P.2d 285 (1990) (remanding for more specific findings to show the basis for damages and method of computation made by trial court).

The above rules makes sense, in that if there needs to be adequate findings for the court to address the reasonableness of the fee award, necessarily, there must be an adequate basis identified by the trial court justifying the award in the first place. Any deviation from the American Rule must have an adequate, and identified, basis in law or equity for a

reviewing court to be able to review whether the award of fees was permissible. This is a threshold determination, and it is reviewed de novo exactly because such a determination requires a legal conclusion. In contrast, it is also exactly why the next step in the review of such award, addressing reasonableness, is reviewed for abuse of discretion, since that determination is necessarily made by assessing the given facts of the case. *See, e.g., Sanders v. State*, 169 Wn.2d 827, 866, 240 P.3d 120 (2010) (citation omitted); *Hulbert v. Clare Mumford et. al*, 159 Wn. App. 389, 407, 245 P.3d 779 (2011) (citation omitted).

On this point, WBC cites *McAllister* for the principle for whether to award fees is subject to the abuse of discretion review standard. *See* Resp. at 16. The actual rule from *McAllister* is that **after the trial court finds a breach of fiduciary duty** — in the action before it — “the court has discretion to award attorney fees.” 103 Wn. App. at 468. Appellant here is directly challenging the lack of any basis for which either fee award could have been made, and there can be no question that the determination that there is such a basis is reviewed de novo.

B. Awarding attorney fees for the breach-of-contract action without basis in law or fact, and without one identified by the trial court was error.

WBC can only speculate as to what the basis for the award of fees incurred by WBC and Dykes in the breach-of-contract action actually was,

and is now forced to discuss virtually all potential grounds in equity for the awards to compensate for the trial court's error. *See* Resp. Br. at 21-42. However, as demonstrated below, the only potentially applicable equitable theory here, equitable indemnity, was not met, and all of the other post-facto bases identified by WBC now on appeal likewise fail as a matter of law.

1. WBC did not prove the three elements of the ABC Rule, nor did the trial court find that they were met.

First, the procedural argument raised by WBC for why the court here should not consider Dykes' "newly-minted" ABC Rule argument is without merit. Specifically, WBC asserts that Dykes did not argue the ABC Rule below. *See* Resp. Br. at 17-18. This is wrong. In responding to WBC's Motion For Summary Judgment below, Dykes argued that WBC is not entitled to an award when there was no breach of fiduciary duty against WBC found in the underlying case. *See* CP 221. Dykes specifically identified the three elements of the ABC Rule on page 15 of his responsive brief, CP 234, and argued that the doctrine could not justify an award of fees in absence of a finding of a breach of fiduciary duty to WBC. *See* CP 234-35.

Even if WBC's argument had any merit, which it does not, that would not prevent this court from correcting the trial court's legal errors.

Indeed, the appellate court is obligated to correct a trial court's erroneous view of the law. *See State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). As this court noted in *Optimer Intern, Inc. v. RP Bellevue, LLC*, 151 Wn. App. 954, 214 P.954 (2009), citing the Court in *Quismundo*, “[a] trial court’s obligation to follow the law remains the same regardless of the arguments raised by the parties before it.” 151 Wn. App. at 962. WBC therefore may not rely on a makeweight procedural argument in light of the errors made by the trial court here.

Second, and more importantly, the substantive arguments raised by WBC as to why the ABC Rule was met, or more accurately, could have been met, all fail. Under a theory of equitable indemnity, the lone claim upon which WBC gained summary judgment in its favor, the party must meet three elements—otherwise known as the “ABC Rule”:

(1) a wrongful act or omission by A toward B; (2) such act or omission exposes or involves B in litigation with C; and C was not connected with the initial transaction or even, the wrongful act or omission of A toward B.

Manning v. Loidhammer, 13 Wn. App. 766, 538 P.2d 136 (1975). As Dykes noted in his Opening Brief, this exception to the American Rule is narrowly construed, and without all three elements shown, a party cannot recover fees under the theory. *See Blueberry Place Homeowners Ass’n v. Northward Homes*, 126 Wn. App. 352, 359, 110 P.3d 1145 (2005).

Therefore, for this court to affirm the trial court's award of all the fees incurred by Dykes and WBC in the breach-of-contract action, WBC must have proven all three elements of the ABC Rule below, supported by the record before the trial court, and supported by sufficient findings and conclusions by that court. *See Blueberry Place*, 126 Wn. App. at 359; *see also Estrada*, 98 Wn. App. at 723.

The first element of the ABC Rule requires that "A" be shown to have actually committed a wrong or omission towards "B." "A" in this circumstance, as WBC concedes, is Dykes. "B" is WBC, and "C" is Lumpkin and Lumpkin, Inc., the party that sued B for the wrongful acts of A. Absent a showing of a wrongdoing by A to B, there can be no recovery of fees under the ABC Rule. *See Manning*, 13 Wn. App. at 769.

WBC addresses this element in less than half a page of argument and analysis. *See Resp. Br.* at 38-39. WBC does not provide any citation to any case authority, nor does it address whatsoever the case law cited by Dykes. *Id. See Edwards v. Le Duc*, 157 Wn. App. 455, 459 n.5, 238 P.3d 1187 (2010) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.") (citation omitted). Instead, WBC states that the record shows a wrongful act against WBC. *See Resp. Br.* at 38. Again, however, neither trial court ever ruled that Dykes committed any wrong or omission against WBC, nor did any claim

brought by Lumpkin assert as such. *See* CP 17-27; CP 320 (original complaint by Lumpkin). Lumpkin, in fact, sued WBC as well as Dykes, so arguing that one co-defendant harmed the other in the underlying action would not have made any sense. Also, despite WBC's re-characterization of Dykes' conduct, breaching a fiduciary duty to a partner is not breaching a fiduciary duty to the partnership itself.

The second element of the ABC Rule requires that the party seeking indemnification for attorney fees show that the **only** reason B was exposed to litigation from C was the wrongful acts or omissions of A. *See Blueberry Place*, 126 Wn. App. at 360-62. As noted in Dykes' Opening Brief, there must be an "exceptionally close causal nexus" between the act or omission of A, and the lawsuit against B. *Woodley v. Benson & McLaughlin*, 79 Wn. App. 242, 246, 901 P.2d 1070 (1995).

For this element, WBC misstates the above test and states only that Dykes' wrongful act "exposed the Partnership to litigation with Lumpkin" so the court here can "[c]heck off that element." Resp. Br. at 40. Colloquialisms aside, WBC again provides no case authority or discussion of any authority, does not respond to any argument that Dykes posited, and spends all of half a page in discussing the element. *See Edwards*, 157 Wn. App. at 459 n. 5.

The reason WBC was sued by Lumpkin was not solely because of conduct wrongful as to WBC by Dykes. Lumpkin chose to sue WBC in the underlying breach-of-contract action, which was unnecessary. Dykes, moreover, was acting as an agent for WBC in entering the contract with MRJ, so WBC was literally an actor in the conduct that caused Lumpkin to sue it. Further, the wrongful conduct alleged by Lumpkin in the original action was the breach of contract by Dykes for reasons of personal animus, not the breach of a fiduciary duty to any party.

WBC is arguing that the wrongful conduct was the breach of fiduciary duty to WBC, which was never alleged or found by either trial court — again, WBC is attempting to re-characterize the same conduct by Dykes as two distinct breaches to justify two separate fee awards in two separate actions, which is not supported by the record or the law. WBC cites no authority for the idea that the same wrongful conduct or omission by A can be different from between the underlying action and the indemnity action, or that somehow that such a reframing of the same conduct can provide the causal nexus to the original suit to meet this element. *See also* Opening Br. at 28-34.

The third element of the ABC Rule requires the party requesting indemnification of attorney fees to show that C was not connected with the wrongful act of A — C must be a “total stranger” to the underlying act or

omission. *See Manning*, 13 Wn. App. at 769-70. WBC asserts that this element was somehow met because “Dykes acted alone” and “Lumpkin did not help Dykes breach the Partnership Agreement or breach his fiduciary duties.” With respect, this is in no way the applicable test as to this element. There is no case authority for the idea that C needs to “help” A in committing the wrongdoing to be considered **involved** in the wrongdoing, nor does WBC cite any. Lumpkin and Lumpkin, Inc., in reality, were directly involved in the negotiations for the construction contract, and were the original plaintiffs in the action against Dykes and WBC, “A” and “B”. Lumpkin was a general partner of WBC, and thus an agent of the entity that breached the agreement through Dykes. Simply put, not directly participating in the act or omission does not equate to not being involved or not being connected, which is the actual legal test.

Additionally, case law could not be clearer that there cannot be a direct wrongdoing by A against C, but only A against B, and where C had nothing to do with the wrongdoing at all. *See Haner v. Quincy Farm Chem., Inc.*, 97 Wn.2d 753, 758, 649 P.2d 828 (1982). WBC’s indemnification case was based on the theory that Dykes harmed WBC by having it fund his defense in the breach-of-contract action against Lumpkin and Lumpkin, Inc., while its previous cause of action was

premised on harm by Dykes and WBC against Lumpkin and Lumpkin, Inc. WBC cannot have it both ways.

2. WBC never showed that the fees incurred in the breach-of-contract action were reasonable.

An auxiliary requirement under the ABC Rule is that the party seeking indemnification of its attorney fees must demonstrate that the fees were incurred reasonably. According to this court,

To demonstrate proximate cause under the ABC rule, **the expense of the prior litigation must have been reasonably incurred[.]**

George v. Farmers Ins. Co. of Wash., 106 Wn. App. 430, 445, 23 P.3d 552 (2001) (emphasis added; citation omitted).

WBC did not meet this burden. WBC submitted the attorney invoices with the Supplemental Declaration of Ned Lumpkin in Support of Plaintiff's Motion for Summary Judgment. *See* CP 168-217. However, in none of its substantive briefing did WBC ever attempt to show or argue that those fees were reasonably incurred. Even outside the context of the ABC Rule, it is black letter law that a party must demonstrate that its requested fees are reasonable. *See Faraj v. Chulisie*, 125 Wn. App. 536, 549, 105 P.3d 36 (2005) (citations omitted). Separate from the lack of legal or equitable basis for the fees, the trial court here awarded the fees incurred in the breach-of-contract action without ever making a

determination as to the reasonableness of those fees. This was manifest error, mandating reversal. *See Brand*, 139 Wn.2d at 665.

3. None of the other available equitable bases for the fee award now cited by WBC could have applied.

As a threshold matter, this is an indemnification action, where any attorney fee award is considered a measure of **damages**, and not costs. *See, e.g., City of Seattle v. McCready*, 131 Wn.2d 266, 274-75, 931 P.3d 156 (2006); *Manning*, 13 Wn. App. at 769. Related to this, WBC is now relying on equitable grounds that it did not argue below, and that award fees only **as costs** in equity. This is significant because the equitable grounds now asserted by WBC as potential sources of the awards legally cannot be the basis of the award for the fees incurred in the breach-of-contract action under an indemnification theory. Besides this fundamental point, WBC's untimely arguments in support of these alternate equitable theories fail.

First, WBC argues that the "bad faith" equitable ground could have provided a basis for the trial court's awards. *See Resp. Br.* at 31. This is a frivolous argument, and for a multitude of reasons. This court in *Dempere v. Nelson* specifically rejected — not just "questioned" — the idea that a party could glean fees under the "bad faith" equitable principle for the same conduct that gave rise to the original cause of action. *Dempere*, 76

Wn. App. 403, 408-10, 886 P.2d 219 (1994), *overruled on other grounds* by *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (2006). This is exactly what WBC is doing here, in direct conflict with this court's holding. Attorney fees under this exception can only be awarded in three narrow circumstances: pre-litigation misconduct, procedural bad faith, or substantive bad faith. *See Rogerson v. Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 926-29, 982 P.2d 131 (1999).

Here, the trial court in the breach-of-contract action did not find any bad faith by Dykes in the litigation, nor did the trial court in the indemnity action find any bad faith, nor did WBC even allege such bad faith. Further, the State Supreme Court specifically ruled that the bad faith equitable ground awards fees as costs, and not damages, as in indemnification actions. *See McCready*, 131 Wn.2d at 274-75 (citations omitted). Therefore, there was no factual or legal basis upon which the trial court could have awarded any fees as damages for either action.

In attempting to avoid *Dempere's* dispositive rule, WBC blames this court for not reviewing another one of its earlier cases, *Victoria Tower P'ship v. Lorig*, 40 Wn. App. 785, 700 P.2d 768 (1985), when it decided *Dempere*. *See Resp. Br.* at 32. This argument fails. *Lorig* was not a case in which the party sought equitable indemnity as here, but, like the case it cited, *Tang*, was a direct action alleging a breach of fiduciary duty. Had

Lumpkin brought a claim of breach of fiduciary duty in the first action — which he did not — and had the court concluded that fees were warranted due to the breach to Lumpkin — which it did not — *Lorig*, as well as *Tang*, might have been relevant.

Second, WBC also raises for the first time the notion that the award of attorney fees incurred in the breach-of-contract action was justified under the “common fund” theory. *See* Resp. Br. at 33. This doctrine allows a court to award fees out of a common fund to a litigant who has maintained a successful suit for the preservation, protection, or increase in a common fund for the benefit of the litigant and others. *See, e.g., Mahler*, 135 Wn.2d at 426-27; *Lyzanchuk v. Yakima Ranches Owners Ass’n*, 73 Wn. App. 1, 8, 866 P.2d 695 (1994). Attorney fees under the common-fund theory cannot be awarded, however, if the common fund was only protected for the benefit of the litigant. *See Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 545, 585 P.2d 71 (1978). Indeed, the scope of this exception has been held as only applicable to a narrow range of scenarios. *See City of Sequim v. Malkasian*, 157 Wn.2d 251, 271-72, 138 P.3d 943 (2006) (citations omitted).

Further, under the common fund exception, the obligation to pay attorney fees is on the party that benefitted — **not on the losing defendant**. *See Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App.

502, 520-21, 728 P.2d 597 (1986). As noted by the State Supreme Court, “[the common-fund theory] is different than most other theories authorizing the granting of attorney fees for here the award of fees is borne by the **prevailing party**, not the losing party.” *Bowles v. Wash. Dept. of Retirement Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993) (emphasis in original; citations omitted). Also, and relevant here, where the fees are awarded from the common fund, normally the parties that benefitted **are not entitled to be indemnified by the defendant for the award of fees**. See *Interlake*, 45 Wn. App. at 523.

WBC’s interpretation of how the common-fund exception to the American Rule is applied is mistaken. The common-fund theory could not have applied in the breach-of-contract action for because WBC did not benefit from having a judgment entered against it; Lumpkin and Lumpkin, Inc. brought the action to benefit Lumpkin’s pecuniary interests, not WBC’s. Further, the common-fund theory could not apply to the indemnification action because equitable indemnity is the only potential ground for the reimbursement for the fees incurred in the breach-of-contract action. The common-fund theory, instead, is for circumstances in which a party seeks an award of fees from the common fund in a case brought by that party, and where the result benefitted the common fund.

This action, in contrast, has the “common fund” seeking fees directly from Dykes, the losing party at trial, under an indemnification theory. As noted above, the common-fund theory applies when the prevailing party is seeking fees **from the common fund** that benefitted from the litigation, not the defendant in an indemnification case. *See, e.g., Lyzanchuk*, 73 Wn. App. at 8; *Interlake*, 45 Wn. App. at 520. Here, the common fund is literally the only prevailing party below. Additionally, WBC offered absolutely no evidence demonstrating that the other partners involved with WBC benefitted from the outcome of Lumpkin’s suit. *See Rustlewood Ass’n v. Mason County*, 96 Wn. App. 788, 802, 981 P.2d 7 (1999) (rejecting common-fund theory when party “presented no evidence on summary judgment” that other common fund participants benefitted from the outcome of the litigation). Simply showing that WBC was reimbursed does not equate to a showing that any of the members of the common fund — assuming even that WBC qualifies — “benefitted.”

Further, WBC does not cite any case law where fees were awarded under the common-fund theory in an indemnity action against the wrongdoer. Case law instead shows definitively that the ABC Rule is the applicable test when the wrongdoer is ordered to indemnify the “common fund” for the money the common fund paid to the prevailing party. *See Lyzanchuk*, 73 Wn. App. at 9-10 (rejecting indemnification when the

would-be beneficiary of the indemnification, the common fund, could not meet the ABC Rule when it actively participated in the contract that was the basis of the finding of wrongdoing); *see also Interlake*, 45 Wn. App. at 523 (rejecting request for indemnification by common fund from wrongdoer because ABC Rule only allows wronged party to recover its own fees in indemnity).

Finally, WBC's arguments regarding how the ABC Rule does not need to be met in an indemnity action because it is a "separate action" are wrong. *See* Resp. Br. at 34-35. WBC seems to be confused as to whether the ABC Rule is the cause of action itself, or only the standard a party must meet to be entitled to relief in an equitable indemnity action. On this point, the ABC Rule was developed as an analytical engine for how a party would recover fee in a situation as that described in *Wells v. Aetna Ins. Co.*, 60 Wn.2d 880, 882, 376 P.2d 644 (1962), a case that predates the development of what became identified as the "ABC Rule" in *Armstrong*, *supra*; over the course of the last near-50 years, this test has become the standard by which all parties must meet in seeking equitable indemnity — exactly the claim the trial court granted in favor of WBC.

C. There is no applicable authority allowing an award of fees and costs to WBC fees on appeal.

WBC also prematurely argues that it is entitled to attorney fees and costs on appeal. *See* Resp. Br. at 42. With no citation to authority or

argument in support of its assertion, WBC states only that the “underlying basis” for such an award is grounded in equity. *See id.* Further, WBC cites *McAllister, supra*, which, according to WBC, “explicitly authorizes fees on appeal to prevailing party in a partnership breach of fiduciary duty case.” *Id.*

WBC’s arguments are erroneous. First, WBC is apparently confused as to whether it needs to be the “prevailing party” at the trial level or **on appeal** to be entitled to its fees and costs on appeal. *See* Resp. Br. at 42. WBC must prevail on appeal, regardless of the trial court outcome, in order to be entitled to fees and costs on appeal. *See Hwang v. McMahonill*, 103 Wn. App. 945, 954, 15 P.3d 172 (2000).

Second, RAP 18.1 allows for an award of fees only when authorized by law. *See Pruitt v. Douglas County*, 116 Wn. App. 547, 560, 66 P.3d 1111 (2003). Even assuming that WBC prevails on appeal here, mere citation to RAP 18.1, without providing actual argument and the underlying grounds for fees, is not sufficient and a request for fees and costs on appeal will be denied in such circumstances. *See Pruitt*, 116 Wn. App. at 560. WBC only cites generally how “equitable grounds” exist to award fees and refers to unspecified sections of its brief in support. WBC’s broad-stroke request cannot provide a basis for an award of fees and costs on appeal. *See Bay v. Jensen*, 147 Wn. App. 641, 661, 196 P.3d

753 (2008) (“bald request” for fees insufficient, as “[t]he rule requires argument and citation to authority to advise us of the appropriate grounds for an award of attorney fees and costs”).⁶

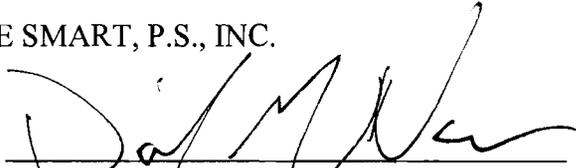
Third, WBCs reliance on *McAllister* is again erroneous for the simple reason that this case is not a breach of fiduciary duty case, nor did the court conclude that any breach of fiduciary duty by Dykes occurred. This is an equitable indemnity action where no breach was found whatsoever, let alone as to WBC.

CONCLUSION

For the reasons set forth herein, and in the Opening Brief of Appellants, Dykes requests that this court reverse the two attorney fee awards that are the subject of this appeal.

Respectfully submitted this 4 day of May, 2011.

LEE SMART, P.S., INC.

By: 

Sam B. Franklin, WSBA No. 1903

David M. Norman, WSBA No. 40564

Erin J. Varriano, WSBA No. 40572

Attorneys for Appellants Albert L. Dykes
and Margaret Ryan-Dykes

⁶ As only one example, WBC argues, for the first time, that “bad faith” was a potential basis for both fee awards. *See* Resp. Br. at 31-33. Besides the fact that there was no showing at all of bad faith by Dykes in the indemnity action itself, as discussed below, there can be certainly no argument that Dykes exhibited bad faith on appeal.

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on May 4, 2011, I caused service of the foregoing on each and every attorney of record herein:

VIA LEGAL MESSENGER

Mr. John Petrie
Ms. Jo M. Flannery
Ryan Swanson & Cleveland, PLLC
1201 Third Ave, Ste 3400
Seattle, WA 98101-3034

DATED this 4th day of May, 2011, at Seattle, Washington.



Vonnice Fredlund, Legal Assistant