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STATE OF WASHINGTON
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No. 665472-1
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LWIN LEISHER and SHIRLEY LEISHER,
Appellants,

v.

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

BRIEF OF RESPONDENT COMMONWEALTH

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I. INTRODUCTION

This is an appeal from a jury trial. Yet, Appellants Leisher have not cited one word of trial testimony or referred to a single trial exhibit in their brief. This Court cannot know what testimony the parties gave at trial, or what exhibits were admitted. Although the issue of equitable indemnity was decided by the trial court on motion after trial, this Court should not even consider the Leishers' appeal because they have not met their "burden of perfecting the record so that this court has before it all of the evidence relevant to the issue." *Allemeier v. University of Washington*, 42 Wn.App. 465, 472, 712 P.2d 306, 310 (1985).

Even if the Court does reach the merits, the Leishers' appeal is utterly contrary to established law, including recent decisions of this Court. The appeal is frivolous on the merits, and the Court should affirm and award sanctions for a frivolous appeal.

II. STATEMENT OF THE CASE

This case arises from a failed real estate transaction. The transaction was scheduled to close on October 2, 2008, but the deed was not delivered to escrow on time. The purchaser Seawest signed documents and delivered a cashier's check to escrow, but escrow could not close that day with a cashier's check even if the deed had been present. CP 741. Seawest then realized that it had not been given a Real Property

Transfer Disclosure Statement, which allowed Seawest to rescind the transaction. Seawest obtained summary judgment against the Leishers for failure to deliver the Disclosure Statement, and the Leishers brought a third party claim against Commonwealth for negligence. That claim went to trial by jury, resulting in a \$1.4 million award, with Commonwealth 85% at fault and the Seller's attorney 15% at fault.

The jury answered special interrogatories from the Court. Those answers state no more than that (1) Commonwealth and Wolfstone were both negligent; (2) Commonwealth and Wolfstone were both proximate causes of the Leishers' Damages; (3) Commonwealth was 85% responsible and Wolfstone was 15% responsible and (4) the damages were \$1.4 million. CP 753-55. Since none of the parties is challenging those determinations, they are facts for purposes of this case.

The Leishers assert that the trial "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.)." Apparently, the Leishers want this Court to make some kind of factual finding, something that it does not do.

The Leishers not only ask this Court to make a factual finding, but also ask it to answer the wrong question. The question put to the jury was not whether Seawest would have attempted to rescind the transaction after

closing, but instead whether Seawest would have closed at all if the deed had been present or indeed whether Seawest tendered performance at all.

There are no more facts because the jury was not asked to make additional factual determinations. Most notably, no determination was ever made whether Seawest would have closed the transaction if the deed had been present or whether Seawest tendered performance. The Leishers could have asked the Court to put this question to the jury in a special interrogatory, but they chose not to. Now they ask this Court to make a factual finding on the basis of disputed evidence. Appellate courts do not make factual findings, particularly in jury cases.

The silence of the trial court on a material issue of fact must be interpreted as a finding against the party who bears the burden of proof on that issue. *Puget Sound Nat'l Bank v. St. Paul Fire & Marine Ins. Co.*, 32 Wash.App. 32, 645 P.2d 1122 (1982). No exception was taken to the absence of a finding in the trial court. In addition, Crane did not propose an instruction on this issue. This court will not make alternative findings of fact as a substitute for that which should have been done in the trial court.

Crane & Crane, Inc. v. C & D Elec., Inc., 37 Wn.App. 560, 570, 683 P.2d 1103, 1110 (1984). Neither the Jury nor the trial court determined that Seawest would have closed the transaction if the deed had been present or even that it tendered performance.

For that matter, the Leishers completely ignore the established fact that Seawest did not perform the agreement. The closing date was October 2, 2008. Leisher asserts that

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)J. Mr. Aatai also provided Commonwealth with a cashier's check representing the agreed-upon sales price. [CP _ (MS) at Ex. 7)]. Mr. Aatai testified that he expected to close the transaction that day. [CP _ (MS) 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].

Brief at 10. According to Leisher, the only thing that prevented the sale from closing on October 2, 2008 was the absence of the deed.

But Leisher conveniently ignores Jury Instruction No. 11, which states:

Under Washington law, if closing funds are provided by cashier's check, an escrow agent is prohibited from disbursing funds and closing the transaction until the next business day. Escrow agents must deposit cashier's checks and hold the funds overnight before funds can be released.

CP 741. The sale did not close on October 2, 2008 for two reasons: first, the deed was not present; and second, Seawest delivered a cashier's check instead of actual funds. According to Jury Instruction No. 11, which is the law of the case (*Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844, 848-

49 (2005)), escrow could not have closed the transaction on October 2, 2008 even if the deed had been present.

This therefore was a case where neither party effectively tendered performance on the closing date. The outcome therefore is squarely covered by *Willener v. Sweeting*, 107 Wn.2d 388, 396, 730 P.2d 45, 50-51 (1986), in which the Supreme Court held that when neither buyer nor seller tenders performance on the closing date, the agreement terminates, and the buyer is entitled to return of his or her money. The *Willener* court held that when neither party tenders performance, no claim for breach of contract exists.

This is not some theoretical argument. The trial court granted appellant's motion to dismiss Seawest's claim for breach of contract. CP 1004-05. In their motion, Leisher did not address *Willener*, but argued that Seawest made an election of remedies to pursue rescission, which "put an end to the contract as if it never existed." CP 999 (citation omitted). Leisher is now arguing against the very argument that they won below.

All of this of course begs the question what position the parties occupied on October 3, 2008. The closing date had passed, neither side had performed, and Seawest had not given notice to rescind for failure to

provide a Disclosure Statement. Fortunately, two recent opinions of this Court provide clear and distinct answers.

First, in *Almanza v. Bowen*, 155 Wn.App. 16, 21-22, 230 P.3d 177 (2010), this Court held that RCW 64.06.040 permits the buyer to rescind the transaction for any reason at all. Then in *Renfro v. Kaur*, 156 Wash.App. 655, 663, 235 P.3d 800 (2010), this Court rejected a number of waiver arguments and held that: “If the buyer fails to timely deliver the disclosure statement, the period for the buyers right of rescission is extended.” The right to rescind continues until three days after the buyer’s receipt, or closing, whichever occurs first. RCW 64.06.040(3). Neither occurred in this case, and on October 9, Seawest had the right to declare the agreement expired under *Willener* or to rescind under RCW 64.06.040.

Leisher’s brief is based entirely on the assumption that Seawest performed on October 2, 2008. Since that did not occur as a matter of law, the failure to have the deed at closing had no effect at all. Either way, the sale would not have closed on October 2, 2008.

III. ARGUMENT

A. **The Leishers Have Failed To Perfect the Record.**

This is an appeal from a jury verdict. Although the decision on the Leishers’ motion for an award of attorney fees was made on motion, it was made after the trial. But Leisher ignores the trial altogether. No trial

testimony evidence concerning the closing is before the Court. The brief does not even contain any evidence that the sale could have closed on October 2, 2008. It contains at most deposition testimony that Seawest expected to close that day.

“It is the appellant's duty to provide an adequate record so the appellate court can review assignments of error.” *King County Dept. of Adult and Juvenile Detention v. Parmelee*, ___ Wn.App. ___, 254 P.3d 927, 939 (2011).

We begin our discussion noting that the appellant bears the burden of complying with the Rules of Appellate Procedure (“RAP”) and perfecting his record on appeal so the reviewing court has before it all the evidence relevant to deciding the issues before it. *See In re Marriage of Haugh*, 58 Wash.App. 1, 6, 790 P.2d 1266 (1990). The court may decline to reach the merits of an issue if this burden is not met. *See State v. Wheaton*, 121 Wash.2d 347, 365, 850 P.2d 507 (1993).

Rhinevault v. Rhinevault, 91 Wn.App. 688, 692, 959 P.2d 687, 689 (1998)

A party seeking review has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue. Even though the entire record is not required, “those portions of the verbatim report of proceedings necessary to present the issues raised on review” must be provided to the court.

Dash Point Village Associates v. Exxon Corp., 86 Wn.App. 596, 612, 937 P.2d 1148, 1157 (1997).

Leisher has not met this threshold burden. Nothing from the trial is before the Court, and the questions presented by the Leishers simply cannot be answered without the relevant trial exhibits and testimony.

B. Leisher's Equitable Indemnity Argument Is Frivolous.

For an appeal to be truly frivolous, its fundamental premise must be dead wrong. That is and should be a very high standard, but one that is met in this case.

The Leishers' argument is simple. First, they say that equitable indemnity entitles a party to attorney fees incurred in defending a claim "where 'the natural and proximate consequences' of a wrongful act by one person involve another in litigation with third persons." Brief at 21 (quoting *North Pacific Plywood, Inc. v. Access Road Builders, Inc.*, 29 Wn.App. 228, 236, 628 P.2d 428 (1981).

Second, they point out that the jury found Commonwealth to be a proximate cause of their damages. Ipso facto, they argue that since Commonwealth was a proximate cause of their damages, it must have been a proximate cause of the litigation with Seawest, and they then point out that since there can be more than one proximate cause of an injury, the jury's determination that Seawest was 85% at fault satisfies all elements of equitable indemnity.

The trial court erred, say the Leishers, by confusing “proximate cause” with “sole cause.” Brief at 25-27. It is, according to the Leishers, “axiomatic” that there can be several proximate causes, and each may be liable. Brief at 26. In truth, it is the Leishers who have confused Equitable Indemnity’s “sole cause” requirement with traditional proximate cause.

It might be helpful to start by doing something that the Leishers failed to do, namely identify the actual elements of a claim for equitable indemnity.

The elements of equitable indemnity are:

- (1) a wrongful act or omission by A [Commonwealth] toward B [Leisher];
- (2) such act or omission exposes or involves B [Leisher] in litigation with C [Seawest]; and
- (3) C [Seawest] was not connected with the initial transaction or event [breach of the construction contract], viz., the wrongful act or omission of A toward B.

Blueberry Place Homeowners Ass'n v. Northward Homes, Inc., 126 Wn.App. 352, 359, 110 P.3d 1145, 1150 (2005) (some bracketed identifications changed).

Three elements are necessary to create liability: (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. The

Washington decisions discussing this rule do not clearly state that the original act or omission of A must be against B, but such is clearly implied. All of the Washington cases allowing expenses of litigation to be recovered as consequential damages involve a breach of duty by A which exposed B to litigation with C, a third person who was a stranger to the event involving A and B.

Manning v. Loidhamer 13 Wn.App. 766, 769, 538 P.2d 136, 138 - 139 (1975).

“Proximate cause” per se is not an element of the claim. The Leishers complain that the trial court required them to prove that Commonwealth was the “Sole Cause” of the litigation, but the trial court was compelled to do so by abundant Washington law.

However, we have consistently held that a party may not recover attorney fees or costs of litigation under the theory of equitable indemnity if, in addition to the wrongful act or omission of A, there are other reasons why B became involved in litigation with C.

Jain v. J.P. Morgan Securities, Inc. 142 Wn.App. 574, 587, 177 P.3d 117, 123 (2008) (emphasis added).

MacDonald-Miller Residential, Inc. (MacDonald-Miller), one of the subcontractors for a condominium*355 construction project, appeals the trial court's award of attorneys' fees and costs in favor of Northward Construction Company (Northward), the general contractor based on the theory of equitable indemnity. **Northward cannot recover attorneys' fees and costs under the theory of equitable indemnity or the “ABC rule” if, in addition to the wrongful act or omission of MacDonald-Miller, there are other reasons why Northward was sued by the homeowners.** *Tradewell Group, Inc. v. Mavis,*

71 Wash.App. 120, 857 P.2d 1053 (1993). The **defective hydronic radiant heating system installed by MacDonald-Miller was not the only reason Northward was sued by the condominium homeowners. The trial court erred in ruling as a matter of law that Northward was entitled to an award of attorneys' fees and costs for defending the homeowners' claims under an equitable indemnity theory.** We reverse and remand.

* * * *

As a matter of law, Northward was not entitled to an award of attorneys' fees based on the theory of equitable indemnity. **MacDonald-Miller's defective heating system was not the only reason the homeowners sued Northward.** We reverse the decision of the trial court to award Northward the attorneys' fees and costs it incurred in defending the homeowners' claims for the defective heating system under the theory of equitable indemnity, and remand.

Blueberry Place Homeowners Ass'n v. Northward Homes, Inc., 126 Wash.App. 352, 355, 363, 110 P.3d 1145, 1148 (2005) (emphasis added).

As these decisions both illustrate, **we have consistently held 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, there are other reasons why B became involved in litigation with C.**

Tradewell Group, Inc. v. Mavis, 71 Wn.App. 120, 128, 857 P.2d 1053, 1057 (1993) (emphasis added).

Here, the Leishers' damage was caused by the sale not closing. The jury found Commonwealth 85% responsible and Wolfstone 15% responsible. The Leishers spend several pages of their brief arguing that

Wolfstone did not cause the transaction to fail, which makes for fine closing argument at trial, but is irrelevant in the face of the jury's verdict.

The Leisher's argument is essentially that, since Seawest would have closed the transaction if the deed had been present, the failure to provide a disclosure statement would have had no legal effect, and that the failure to provide the disclosure statement therefore could not have been a cause of the sale not closing on October 2, 2008. Brief at 25. But under Jury Instruction 11, the sale would not have closed on October 2, 2008 even if the deed had been present, and Seawest would have retained its right to rescind under RCW 64.04.040.

Parties have attempted to use proximate cause analysis in equitable indemnity claims, but those attempts have been soundly rejected. For example, in *Tradewell Group, Inc. v. Mavis*, 71 Wn.App. 120, 125-29, 857 P.2d 1053, 1056 (1993), the trial court did exactly what the Leishers urge here:

At the conclusion of trial, the court ruled in favor of the defendants on all of Tradewell's remaining claims. Following the court's decision, Wedgwood moved for an award of costs and attorney fees against Tradewell and Mavis, contending that it was entitled to its fees under the doctrine of equitable indemnity. **The court ordered Mavis to pay \$133,301 in costs and attorney fees, finding that Mavis made "false impressions" about the status of his purchase agreement with Tradewell which was a, but not the sole, proximate cause of Tradewell's decision to sue Wedgwood.** The court's award did not include the fees

and costs Wedgwood incurred in defending against Tradewell's claims for promissory estoppel, tortious interference, and undue influence. The court's award did include, however, \$8,500 in attorney fees and \$4,000 in costs generated by Wedgwood's efforts to establish its right to equitable indemnity.

* * * *

The parties disagree as to whether this element is satisfied by a wrongful act that is only a proximate cause of the litigation, or whether it must be the sole cause or something close to it. Our research has found only 2 cases which specifically address the applicable standard of causation under equitable indemnity, *Stevens v. Security Pac. Mortg. Corp.*, 53 Wash.App. 507, 768 P.2d 1007, *review denied*, 112 Wash.2d 1023 (1989) and *Western Community Bank v. Helmer*, 48 Wash.App. 694, 740 P.2d 359 (1987).

* * * *

As these decisions both illustrate, **we have consistently held 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, there are other reasons why B became involved in litigation with C.** Applying this analysis to the undisputed facts here, the “false impression” created by Mavis that it already had a deal with Tradewell was not the only reason for Wedgwood's exposure to litigation with Tradewell. On the contrary, as with the mortgage note in Helmer and the loan purchase agreement in Stevens, Tradewell sued Wedgwood because they had each signed a lease extension agreement which Wedgwood subsequently refused to deliver. Whether this agreement was valid was a significant issue at trial and clearly a major and independent reason for Tradewell's lawsuit against Wedgwood.

* * * *

Accordingly, since, as the trial court itself recognized, Mavis's conduct was not the only reason for Wedgwood's exposure to litigation, we hold that Wedgwood was not, as a matter of law, entitled to an award of fees under the theory equitable indemnity. Thus, we reverse the trial court's award of fees to Wedgwood against Mavis in the amount of \$133,301.

Tradewell plainly rejected the “proximate cause” argument.

Since *Tradewell* was decided, “equitable indemnity has been referenced in 14 published Washington decisions: *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn.App. 229, 279-83 215 P.3d 990 (2009) (discussed); *Jain v. J.P. Morgan Securities, Inc.*, 142 Wash.App. 574, 587, 177 P.3d 117, (2008) (discussed); *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn.App. 743, 162 P.3d 1153 (2007) (discussed); *Mazon v. Krafchick*, 158 Wn.2d 440, 451, 144 P.3d 1168 (2006) (term used); *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn.App. 352, 359-60, 110 P.3d 1145 (2005) (discussed); *Fortune View Condominium Ass'n v. Fortune Star Development Co.*, 151 Wn.2d 534, 544 90 P.3d 1062 (2004) (discussed in other context in dissenting opinion); *Sound Built Homes, Inc. v. Windermere Real Estate/South, Inc.*, 118 Wn.App. 617, 632 72 P.3d 788 (2003) (mentioned); *Toste v. Durham & Bates Agencies, Inc.*, 116 Wn.App. 516, 67 P.3d 506 (2003) (discussed); *Parkridge Associates, Ltd v. Ledcor Industries, Inc.*, 113 Wn.App. 592, 603 54 P.3d 225 (2002)

(discussed); *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn.App. 192, 198, 49 P.3d 912 (2002) (discussed); *U.S. Oil & Refining Co. v. Lee & Eastes Tank Lines, Inc.*, 104 Wn.App. 823, 16 P.3d 1278 (2001) (term used); *Flint v. Hart*, 82 Wn.App. 209, 224, 917 P.2d 590 (1996) (discussed); *Lyzanchuk v. Yakima Ranches Owners Ass'n, Phase II, Inc.*, 73 Wn.App. 1, 10-11 866 P.2d 695 (1994) (discussed).

Out of these 14 opinions, only two even contain the term “proximate cause” (*Blueberry Place*, at 360, citing *Tradewell* and *Flint*, 82 Wn.App. at 214-219, in the context of the business judgment rule. Even if one were to widen the search to all cases containing the term “equitable indemnity” and any derivative of “proximat,” one would find only five cases. For the Court’s convenience, they are summarized here.

The case law regarding attorney fees recoverable as damages is significantly less well-developed. In the majority of cases which have discussed attorney fee damage recoveries, such recoveries have been based on principles of equitable indemnity:

[W]hen the natural and proximate consequences of a wrongful act by defendant involve plaintiff in litigation with others, there may, as a general rule, be a recovery of damages for the reasonable expenses incurred in the litigation, including compensation for attorney's fees.

Wells v. Aetna Ins. Co., 60 Wash.2d 880, 882, 376 P.2d 644 (1962); *Manning v. Loidhamer*, 13 Wash.App. 766, 769–74, 538 P.2d 136 (1975). See also *Tri-M Erectors, Inc. v. Donald M. Drake Co.*, 27 Wash.App. 529, 531, 618 P.2d

1341 (1980) (noting that attorney fees incurred in defending suit against third party were recoverable pursuant to contractual indemnity provision as damages, the measure of which was determined by the jury). Pursuant to this rule, such attorney fees are considered to be damages rather than costs.

Attorney fees recoverable pursuant to a contractual indemnity provision are an element of damages, rather than costs of suit. As with attorney fees recoverable pursuant to the equitable indemnity doctrine, the attorney fee recovery provided for in the indemnification provision at issue herein references attorney fees incurred as a result of actions by S.C. Visions that caused SSB to become involved in litigation with the developer. Accordingly, such fees represent damages flowing from the breaching party's (S.C. Visions) actions rather than costs incurred by SSB as a result of maintaining its subsequent action against S.C. Visions.

As an element of damages, the measure of the recovery of attorney fees pursuant to the indemnification provision must be determined by the trier of fact. When trial is to a jury, therefore, the measure of such damages is a jury question.

Jacob's Meadow, 139 Wash.App. at 759-760.

Based on the declarations presented in support of the summary judgment motions, the court found that Krafchick was not grossly negligent and did not engage in intentional misconduct. But the court stated that it “finds Mazon free of fault and entitled to recover costs and expenses lost as a proximate result of defendant's negligence. The Court finds *446 that defendant's negligent conduct proximately caused plaintiff's loss of ‘costs advanced’ and other out of pocket expenses.” CP at 580. The court reasoned, because no evidence was presented to support a finding of plaintiff's negligence (comparative fault), Mazon was entitled to recover his lost costs and expenses advanced. The court awarded Mazon \$465 in costs and the insurance deductible

of \$2,500 he had paid out of pocket to defend Layouni's professional negligence claim. CP at 580.^{FN3} Both parties appealed.

* * * *

If Mazon's claim for indemnity is analyzed as a claim for contribution, he is still not entitled to relief from Krafchick. In the absence of contractual indemnity, a party's right to contribution, also referred to as equitable indemnity, is governed by chapter 4.22 RCW. "Contribution" is "[a] tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault." Black's Law Dictionary 353 (8th ed.2004). The contribution statute provides that the right of contribution is limited to parties who have been held jointly and severally liable for the plaintiff's injury. RCW 4.22.070.

Mazon, 158 Wn.2d at 445-46.

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 Wash.2d 412, 413, 645 P.2d 693 (1982); *Tradewell Group, Inc.*, 71 Wash.App. at 126, 857 P.2d 1053. 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 Wash.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 Wash.App. 491, 494, 713 P.2d 116(1986).

The elements of equitable indemnity are:

(1) a wrongful act or omission by A [MacDonald-Miller] toward B [Northward];

(2) such act or omission exposes or involves B [Northward] in litigation with C [the homeowner plaintiffs]; and

(3) C was not connected with the initial transaction or event [breach of the construction contract], viz., the wrongful act or omission of A toward B.

Manning v. Loidhamer, 13 Wash.App. 766, 769, 538 P.2d 136 (1975). All three elements must be satisfied to create liability. *Id.* 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 Wash.App. at 126-27, 857 P.2d 1053.

Blueberry Place, 126 Wash.App. at 358-59 (2005)

MIMI argues that even if Durham & Bates's claims survive the MIMI/Toste settlement, summary judgment was nonetheless inappropriate because there were genuine issues of material fact. It specifies issues of fact as to (1) whether its placement of the F/V Ponderosa insurance coverage constituted an unfair act or practice in violation of the CPA that proximately caused Durham & Bates's damages; and (2) whether its actions were the sole cause of litigation between Durham & Bates, as an equitable indemnity claim requires. But because of our above holding that the MIMI/Toste settlement extinguished Durham & Bates's CPA and equitable indemnity claims, we do not address this issue.

Toste, 116 Wash.App. at 525.

Attorney fees may be awarded if authorized by contract, statute or recognized ground in equity. *Lyzanchuk v. Yakima Ranches Owners Ass'n, Phase II, Inc.*, 73 Wash.App. 1, 7, 866 P.2d 695 (1994). An equitable ground exists “when the natural and proximate consequences of a wrongful act by defendant involve plaintiff in litigation with others....” *Armstrong Constr. Co. v. Thomson*, 64 Wash.2d 191, 196, 390 P.2d 976 (1964) (quoting *Wells v. Aetna Ins. Co.*, 60 Wash.2d 880, 882, 376 P.2d 644 (1962)); *Brock v. Tarrant*, 57 Wash.App. 562, 570, 789 P.2d 112, *review denied*, 115 Wash.2d 1016, 802 P.2d 126 (1990).

Here, the wrongful act of Hart & Winfree involved Mr. Flint in litigation with the Meyers. The factors creating liability are: (1) a wrongful act or omission by Hart & Winfree toward Mr. Flint; (2) the act or omission exposes or involves Mr. Flint in litigation with the Meyers; and (3) the Meyers were not connected with the initial transaction or event, namely, the wrongful act or omission of Hart & Winfree toward Mr. Flint. *Manning v. Loidhamer*, 13 Wash.App. 766, 769, 538 P.2d 136, *review denied*, 86 Wash.2d 1001 (1975). Mr. Flint became involved in the litigation only because he did not have a secured interest in the goodwill and could not take back the funeral home. Had he been able to take the business back, he would have done so. At the least, he would have been a fully secured creditor in the bankruptcy. The fact that there may have been other reasons for the Meyers' bankruptcy, or that the Meyers prolonged the litigation, is not the relevant inquiry. The focus is whether Mr. Flint would have been involved in litigation with the Meyers, apart from Hart & Winfree's conduct. *Tradewell Group, Inc. v. Mavis*, 71 Wash.App. 120, 128, 857 P.2d 1053 (1993) (party may not recover attorney fees under the theory of equitable indemnity if, in addition to the wrongful act or omission, there are other reasons why he or she became involved in litigation with another). The answer to that question is no. If he prevails on remand, Mr. Flint would be entitled to an award of attorney fees.

Flint, 82 Wash.App. at 224.

Washington law could not be more clear that equitable indemnity is not available unless the defendant was the sole cause of the litigation with a third party. To prevail on a claim for equitable indemnity, the elements of that claim must be met, and proximate cause is not one of them. The Leishers' complete disregard for the law has forced Commonwealth to devote a great deal of time, effort and expense to responding to this appeal. Pursuant to RAP 18.9, Commonwealth requests that the Court award it attorney fees as sanctions under RAP 18.9(a).

IV. CONCLUSION

This Court should affirm the denial of fees under the equitable indemnity doctrine and award Commonwealth its attorney fees pursuant to RAP 18.9

DATED this 19th day of August, 2011.

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