STATE OF MINNESOTA
IN COURT OF APPEALS
A13-2157

James J. Shorter, et al.,
Plaintiffs,

vs.

Equity Bank,
Respondent,

James I. Vermilya, et al.,
Appellants.

Filed June 9, 2014
Affirmed
Schellhas, Judge

Olmsted County District Court
File No. 55-CV-10-8935

Paul V. Sween, Michael D. Schatz, Adams, Rizzi & Sween, P.A., Austin, Minnesota (for respondent)

Kay Nord Hunt, Keith J. Broady, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota (for appellants)

Considered and decided by Peterson, Presiding Judge; Schellhas, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant-landowners challenge the district court's summary-judgment dismissal of their cross-claim for attorney fees against respondent-bank incurred in connection with a lawsuit brought by previous landowners against appellants and respondent. We affirm.

FACTS

This appeal arose out of a lawsuit pertaining to real property located in Olmsted County. James Shorter and Doretta Shorter previously owned the property and, in January 2007, granted respondent Equity Bank a mortgage against the property. In September 2009, after the bank foreclosed the mortgage, the district court ordered Shorters to vacate the property. The bank conveyed the property to appellants James Vermilya and Susan Vermilya.

In March 2010, Shorters sued the bank and Vermilyas, alleging, among other claims, that the bank violated Minn. Stat. § 500.245, subd. (1)(a) (2012), by failing to provide Shorters 14 days' notice before selling the property to Vermilyas.[1] Shorters sought a judicial determination that the purchase agreement and warranty deed were void. Counsel for the bank met with Vermilyas and assured them that the bank would "make this right," and, on behalf of itself *and* Vermilyas, the bank interposed an answer to Shorters' complaint, asking the district court to dismiss the complaint. Concerned that the

[1] We cite the most recent versions of the statutes in this opinion because they have not been amended in relevant part. *See Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000) (stating that, generally, "appellate courts apply the law as it exists at the time they rule on a case").

bank's counsel might not adequately represent their interests, Vermilyas hired their own attorney and cross-claimed against the bank, seeking "indemnity and/or damages," including reasonable attorney fees, if the lawsuit adversely affected Vermilyas' property rights. The district court granted summary judgment to the bank and Vermilyas and dismissed Shorters' claims with prejudice, and Shorters appealed. This court affirmed in part, reversed in part, and remanded for further proceedings on Shorters' claim under section 500.245, subdivision 1(a), because material fact questions remained concerning the bank's compliance with the statute. *Shorter v. Equity Bank*, No. A11-2056, 2012 WL 3892157, at *1 (Minn. App. Sept. 10, 2012) (*Shorter I*).

On remand, the parties reached a settlement and stipulated to dismissal of the statutory claim. The district court dismissed Shorters' claim with prejudice, noting that Vermilyas' cross-claim against the bank remained pending and was not dismissed. The bank and Vermilyas then cross-moved for summary judgment, with Vermilyas seeking approximately $65,000 in attorney fees and costs. The district court denied Vermilyas summary judgment, granted the bank summary judgment, and dismissed Vermilyas' cross-claim for attorney fees.

This appeal by Vermilyas follows.

D E C I S I O N

We review the district court's grant of summary judgment de novo, "view[ing] the evidence in the light most favorable to the party against whom summary judgment was granted to determine whether there are any genuine issues of material fact and whether the district court correctly applied the law." *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d

147, 150 (Minn. 2014). But "this court will not reverse a trial court's award or denial of attorney fees absent an abuse of discretion." *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

In dismissing Vermilyas' attorney-fee cross-claim, the district court acknowledged Vermilyas' right to indemnity on the basis of the bank's conveyance of the property to them by warranty deed but noted that Vermilyas failed to tender their defense to the bank. The court concluded that Vermilyas therefore were precluded from recovering their attorney fees from the bank. Vermilyas maintain that they tendered their defense to the bank by cross-claiming against the bank; they acted reasonably by obtaining their own attorney; and the bank's negligent-per-se violation of section 500.245, subdivision 1(a), thrust them into litigation with Shorters. Their arguments are unpersuasive.

In Minnesota, the recovery of attorney fees is governed by the American rule, which "is that attorney fees are not recoverable in litigation unless there is a specific contract permitting or a statute authorizing such recovery." *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 554 (Minn. 2008) (quotation omitted); *see Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 363 (Minn. 1998) (referring to rule as "[t]he American rule"). In this case, no contract or statute authorizes such recovery. But, as a matter of equity, a district court may award indemnity for attorney fees when "the one seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged." *United Prairie Bank–Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 56 n.2 (Minn. 2012) (quotations omitted); *see E.S.P., Inc. v. Midway Nat'l Bank of St. Paul*, 447 N.W.2d 882, 885 (Minn. 1989) ("[I]ndemnity is equitable in

nature."); *O'Connell v. Jackson*, 273 Minn. 91, 96, 140 N.W.2d 65, 69 (1966) (noting that indemnification includes attorney fees when "a party has incurred liability for damages by the tortious act or breach of duty of another and is called upon to defend an action for such damages").

Indemnity

In their cross-claim for attorney fees, Vermilyas claimed, as follows:

> In the event [Shorters] are entitled to damages against Vermilyas or equitable relief affecting Vermilyas' rights in the subject property, *such damages or equitable relief were caused by breach of warranty or other wrongful conduct of [the b]ank* and Vermilyas are entitled to *indemnity and/or damages* against [the b]ank in an undetermined sum at this time.

(Emphasis added.) Vermilyas sought "judgment against . . . [the b]ank for indemnity and/or damages for any damages that Vermilyas may suffer as a result of [Shorters'] claims" and "[f]or their costs, disbursements and *reasonable attorneys' fees* as allowed by law incurred herein." (Emphasis added.) In an indemnity action, the rule in Minnesota regarding an award of attorney fees is that,

> [i]f a party is obliged to defend against the act of another, against whom he has a remedy over, and defends solely and exclusively the act of such other party, and is compelled to defend no misfeasance of his own, he may notify such party of the pendency of the suit and may call upon him to defend it; if he fails to defend, then, if liable over, he is liable not only for the amount of damages recovered, but for all reasonable and necessary expenses incurred in such defense. Only in such case is there a right to recover such expenses.

Jack Frost, Inc. v. Engineered Bldg. Components Co., 304 N.W.2d 346, 352–53 (Minn. 1981) (quotations omitted).

Here, the bank conveyed the property to Vermilyas by warranty deed. Under Minn. Stat. § 507.07 (2012), such warranty deeds mean that the grantor covenants that it "is lawfully seized of the premises in fee simple and has good right to convey the same" and warrants "the quiet and peaceable possession thereof" and that it "will defend the title thereto against all persons who may lawfully claim the same." Although the bank denied any fault, it made a settlement payment to Shorters, and Shorters released the bank and Vermilyas from their claims. The bank therefore successfully defended Vermilyas' title to the property, and Vermilyas are not entitled to indemnity under the warranty deed. *See First Fiduciary Corp. v. Blanco*, 276 N.W.2d 30, 33 (Minn. 1979) (noting that a party is not entitled to reimbursement for attorney fees under a warranty deed "unless there has been a breach of one of the covenants in the deed"). No breach of a warranty deed occurs when the grantor of the warranty deed successfully defends the title. *Id.*; *see* 20 Am. Jur. 2d *Covenants* § 140 at 661 (2005) ("[A] successful defense of title bars the grantee from recovering attorney's fees against the grantor."); 21 C.J.S. *Covenants* § 83 at 394 (2006) ("As a general rule . . . , where a covenantee successfully defends title, he or she is not entitled to attorney's fees from the covenantor under a warranty deed.").

Moreover, "tender of the defense of th[e] action to the other party is generally a condition precedent to obtaining indemnification for attorneys fees incurred in that defense." *Hill v. Okay Constr. Co.*, 312 Minn. 324, 346, 252 N.W.2d 107, 121 (1977). Vermilyas argue that *Sorenson v. Safety Flate, Inc.*, 306 Minn. 300, 300, 235 N.W.2d 848, 849 (1975), supports the proposition that a formal tender of their defense to the bank was unnecessary because the bank did not admit its liability on Shorters' claim and offer

to defend against the claim. Their reliance is misplaced. Even if Vermilyas were otherwise entitled to indemnity under the warranty deed, they are not entitled to indemnity because they failed to tender their defense of Shorters' claims to the bank and declined the bank's offer to defend them. *See Sorenson*, 306 Minn. at 300, 235 N.W.2d at 849 ("Where a purchaser fails to tender defense to codefendant seller and insists on handling its own defense, thereby giving the seller no opportunity to control the litigation, purchaser is not entitled to attorneys fees and expenses either under common-law or contractual indemnity."). And their argument is contrary to *Jack Frost*, *Hill*, and *Logefeil*, which indicate that the assertion of a cross-claim did not constitute a tender of defense. *See Jack Frost*, 304 N.W.2d at 349, 353 (noting that party who filed a cross-claim for indemnity or contribution failed to tender defense of action); *Hill*, 312 Minn. at 330–31, 346, 252 N.W.2d at 113, 121 (stating that "Hills instituted this action against Okay . . . for indemnity" and "it does not appear from the record that the Hills made any tender to Okay of the defense"); *Logefeil v. Logefeil*, 367 N.W.2d 114, 116–17 & n.1 (Minn. App. 1985) (stating that record "fail[ed] to show any action approaching a request that respondent defend appellant," even though "appellant's initial contact with respondent was service of a cross-claim demanding indemnification, including attorney's fees").

Vermilyas state in their brief that "[they] concluded there was a conflict of interest with the same attorney representing both defendants." But to support their conclusory argument, they cite only Minn. R. Prof. Conduct 1.7 and no other authority. We are unpersuaded. In insurance law, "[w]hen an insurer is obligated to defend its insured *and*

contests coverage in the same suit, the insurer must pay reasonable attorneys' fees for its insured rather than conduct the defense itself." *Prahm v. Rupp Constr. Co.*, 277 N.W.2d 389, 389 (Minn. 1979) (emphasis added). But Minnesota appellate courts have never concluded that such a conflict eliminates the tender-of-the-defense requirement. Nothing in the record suggests that the bank's counsel had a conflict with Vermilyas. He assured Vermilyas that the bank would "make this right" and interposed an answer on their behalf. The bank never denied its responsibility to defend Vermilyas' title to the property.

The district court correctly concluded that Vermilyas were not entitled to recover attorney fees on their cross-claim as indemnity because the bank successfully defended the property's title and Vermilyas failed to tender the defense of Shorters' claims to the bank. In fact, Vermilyas rejected the bank's attempt to defend them against Shorters' lawsuit.

American Rule and Third-Party-Litigation Exception

Vermilyas argue that the third-party-litigation exception to the American rule entitles them to attorney fees. We disagree. "[T]he third-party litigation exception to the American rule permits a court to award attorney fees as damages if the defendant's tortious act thrusts or projects the plaintiff into litigation with a third party." *Kallok*, 573 N.W.2d at 363. The supreme court adopted that rule from the Restatement (First) of Torts § 914 (1939) in *Prior Lake State Bank v. Groth*, 259 Minn. 495, 499–500, 108 N.W.2d 619, 622 (1961), which "contains nearly identical language," *Paidar v. Hughes*, 615 N.W.2d 276, 280 n.4 (Minn. 2000), as the following language in Restatement (Second) of Torts § 914(2) (1979):

> One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.

But appellate courts are "exceedingly cautious when awarding attorney fees as damages." *Osborne v. Chapman*, 574 N.W.2d 64, 68 (Minn. 1998) (quotation omitted). To satisfy the third-party-litigation exception, the underlying tort need not be intentional. *Id. But see Cleys v. Cleys*, 363 N.W.2d 65, 72 (Minn. App. 1985) (holding that trial court did not abuse discretion by declining to order attorney fees because no evidence showed that party from whom attorney fees were sought acted "with malice or with the intent to thrust respondents into litigation"). Rather,

> The prerequisites to a defendant's liability for expenses incurred by a plaintiff in a third-party action are simply that such action shall have been conducted as a natural and proximate consequence of the defendant's tortious action and that plaintiff shall have conducted the same in good faith with reasonable ground for believing that its outcome would reimburse him for the damages occasioned thereby. The rule appears to be applied generally in all cases of this nature except where it is established that the prior litigation was either not the proximate result of the tortious conduct of another or was not undertaken in good faith.

Groth, 259 Minn. at 500, 108 N.W.2d at 622–23.

After remand by this court because of the existence of factual issues about whether the bank failed to comply with Minn. Stat. § 500.245, *Shorter I*, 2012 WL 3892157, at *1, the district court dismissed Shorters' statutory claim based on the parties' settlement, release, and stipulation. Nevertheless, Vermilyas then moved the court for summary judgment, arguing that the bank thrust them into litigation with Shorters by violating

section 500.245, subdivision 1(a), thereby entitling them to recover their attorney fees from the bank. Vermilyas also advance that argument on appeal, claiming that the bank violated section 500.245, subdivision 1(a), and that its violation was negligence per se. *See Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W.2d 693, 706 (Minn. 2012) (stating that "negligence per se is a form of ordinary negligence that results from violation of a statute" in which "a statutory duty of care is substituted for the ordinary prudent person standard such that a violation of a statute is conclusive evidence of duty and breach" (quotations omitted)), *cert. denied*, 133 S. Ct. 1249 (2013).

But the bank persuasively argues that Vermilyas' third-party-litigation-exception argument fails because Shorters sued Vermilyas for conversion of personal property. "In cases where a party seeking indemnity has been required to defend claims arising out of another's wrongful conduct *and also to defend accusations which encompass his separate wrongful acts*, the court may properly disallow attorney's fees in indemnity action." *Sorenson*, 306 Minn. at 306, 235 N.W.2d at 852 (emphasis added) (quotation omitted). Conversion of personal property is a wrongful act separate from violating section 500.245, subdivision 1(a)'s notice requirement. *Compare Christensen v. Milbank Ins. Co.*, 658 N.W.2d 580, 585 (Minn. 2003) ("[W]e have defined conversion as an act of willful interference with the personal property of another, done, without lawful justification, by which any person entitled thereto is deprived of use and possession." (quotation omitted)), *with* Minn. Stat. § 500.245, subd. 1(a) ("The seller must provide written notice to the immediately preceding former owner that the agricultural land or farm homestead will be offered for sale at least 14 days before the agricultural land or

farm homestead is offered for sale."). Moreover, under *Blanco*, the bank's successful defense against Shorters' claim under section 500.245, subdivision 1(a), precludes Vermilyas from predicating their third-party-litigation-exception argument on the bank allegedly violating section 500.245, subdivision 1(a). Under *Blanco*, a party cannot recover attorney fees under the third-party-litigation exception based on a claim of wrongful conduct against which the party from whom attorney fees are sought successfully defended. 276 N.W.2d at 34.

Vermilyas argue that *Kendall v. Lowther*, 356 N.W.2d 181 (Iowa 1984), shows that the district court erred by rejecting their third-party-litigation-exception argument. Their reliance on *Kendall* is misplaced. In *Kendall*, the trial court awarded the attorney fees "based on the theory that Lowthers had failed to warrant and defend the premises against the Kendalls' claim." 356 N.W.2d at 190. Here, the bank successfully defended the premises against Shorters' claims. Moreover, foreign caselaw is not precedential in Minnesota.

Here, in the settlement and release, Vermilyas, "for themselves, their heirs, administrators, representatives, successors and assigns, and anyone who has or who obtains legal rights or claims for [them], [there]by release[d] and discharge[d the bank] . . . from any and all claims of any kind or character which [Vermilyas] ha[d] or [could] have against [the bank]." And the bank did "not admit any liability to [Shorters] but . . . expressly den[ied] any liability, from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of any violations alleged by [Shorters] in this suit." Shorters authorized and

agreed to instruct their attorney "to enter into a Stipulation of Dismissal with Prejudice relating to all claims asserted by [Shorters] against [the bank and Vermilyas]." "Settlement of claims is encouraged as a matter of public policy." *Voicestream Minneapolis, Inc. v. RPC Props., Inc.*, 743 N.W.2d 267, 271 (Minn. 2008). We conclude that the settlement, release, and dismissal resulted from the bank's successful defense against Shorters' claims. The settlement eliminated Vermilyas' risk of losing the property to Shorters.

We conclude that the district court correctly dismissed Vermilyas' cross-claim on summary judgment.

Affirmed.