NO. 47482-4-II

COURT OF APPEALS DIVISION II

OF THE STATE OF WASHINGTON

CHRISTOPHER and SUZANNE GUEST, and their marital community,
Plaintiffs/Petitioners

v.

DAVID LANGE and KAREN LANGE, individually and the marital community comprised thereof
Defendants/Respondents

PETITIONERS GUESTS' PETITION FOR REVIEW

Suzanne Guest
Christopher Guest
6833 Main Sail Lane
Gig Harbor, Washington 98335
P (253) 495-1244
F (877) 355-9586
E emeralgg@aol.com

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A. INDENTITY OF PETITIONERS

The Petitioners Guest ask this Court to review the Court of Appeals decision set forth in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its published opinion in this appeal on August 2, 2016. That opinion is in the Appendix at pages A-1 through A-13. That opinion is related to and is associated with the *Guest v. Lange* Court of Appeals unpublished Opinion No. 46802-6-II issued by Division II of the Court of Appeals on June 14, 2016. A Petition for Review of that Opinion was filed by the Talmadge/Fitzpatrick/Tribe law firm and Attorney Phillip Talmadge and Attorney Sidney Tribe with Division II of the Court of Appeals on September 29, 2016. No mandate has issued in either appeal

The Court of Appeals denied the Guests' motion for reconsideration in this Appeal in an order entered on September 2, 2016. A copy of that order is in the Appendix at page A - 14. This Petition for Review is related to and is associated with the September 29, 2016 Petition for Review of the Court of Appeals unpublished opinion in Appeal No. 46802-6-II currently before this Court.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err as a matter of law when the Court denied the Guests' request for attorneys fees, costs and expenses on appeal and below pursuant to RAP 18.1 as the prevailing parties on appeal and also with regard to the Section D language of the contract that the Langes adopted and assumed as their own in this action, appeal and litigation?

2. Whether RAP 8.1(b)(1) and (2) mandates and requires that a trial court must first accept the deposit of a party's cash supersedeas with the clerk of a superior court and file the cash bond staying and superseding a trial court's judgment and/or order affecting the possession, use and/or title to real or personal property, or to stay and supersede a money judgment or order before the deposit of a cashier's check with the clerk of a Washington State superior court successfully and automatically stays and supersedes a real and/or personal property judgment and/or order or a money judgment order against that party?

D. STATEMENT OF THE CASE

The Court of Appeals brief recitation of limited facts in this appeal are largely correct.

However, it is important that the original developer who recorded a declaration of covenants and CC&Rs in 1986 did not own and did not have any title to any of the real property or Lots, including the Guests' Lot, in the development where the Guests and the Langes own property and, further, that the developer did not own any of the development Lots, including Lot 5 that the separate "Patio or Deck Easement" document that was recorded with the County Auditor's office in 1987 was not notarized, acknowledged or sealed, the sole signature on the document was not

identifed, that a third party recorded the document not the developer, and that there is unrefutted evidence that the signature on the 1987 recorded alleged 'easement' document was "very probably" a forgery.

Although the developer did not have any standing to create or to record any covenants or CC&Rs regulating the use or the construction of any structures on the development property or to grant any deck easement to any person, entity or Lot onto or over any other Lot because the developer did not own or have any title to any of the development real property, and did not have any standing to grant any deck easement on any part of Lot 5 to any person or entity in the 1987 recorded "Patio or Deck Easement" because the developer did not own Lot 5 at any time as a matter of law, the Langes adopted and assumed the 1987 recorded "Patio or Deck Easment" Section D open-ended release, hold harmless, defense, payor and full indemnity language as their own requiring that the Langes release, defend and fully indemnify the Guests from, against and for "any and all" claims, suits, causes of action, proceedings, damages, loss, injury of any kind, type or nature, attorneys fees, costs and expenses and/or judgments of any kind arising out of and/or related to the "use" of any Lange or Lot 4 owner deck or patio on the Guests' property, or the utilization of the 1987 recorded 'easement' document.

The Section D recorded 1987 release, defense, indemnity and payor contract language that the Langes adopted and assumed as their own open-ended insurance contract and policy states in clear, plain and unambiguous words that:

> Grantee promises, covenants and agrees that the Grantor shall not be liable for any injuries incurred by the Grantee, the Grantee's guests and/or third parties arising from the utilization of said easement and further Grantee agrees to hold Grantor harmless and defend and fully indemnify Grantor against any and all claims, actions, and suits arising from the utilization of said easement and to satisfy and all judgments that may result from said claims, actions, and/or suits.

Opinion at 3, footnote 2.

The articles of incorporation for the development's community association that had limited and restrictive powers and authority under its charter prohibited the association or the developer from regulating the use or the exterior of any of the privately owned Lots, and also prohibited the association or the developer from granting any easement of any kind to any Lot owner or to any Lot onto, over, under or upon any other Lot. Under the association's charter, the Internal Revenue Code §501(c)(7) community association was governed and controlled by federal law and

was expressly prohibited from conducting or carrying on any activity at any time that was not permitted by IRC §501(c)(7). IRC §501(c)(7) and applicable §501(c)(7) rules and regulations prohibit a §501(c)(7) organization such as the development's community association from administering and/or enforcing any architectural covenants and/or architectural CC&Rs among other prohibitions, limitations and restrictions, including any purported (but null and void) grant of any deck or structural easement one Lot onto another Lot.

By 2010, the Langes wanted to tear down their then existing deck to build a new differently configured deck in Spring 2011. The Langes notified the Guests that their then existing deck was encroaching on the Guests' property, but not to worry that the Langes who had the Guests' predecessor owners' permission to have a deck on part of the Guests' property would not build their new deck on any part of the Guests' property. In 2011, the Langes asked the Guests for permission to build their new deck on part of the Guests' property in an area where it currently was. The Guests refused. The Langes built their new deck on part of the Guests' property where it had been before when the Guests were out of state with the knowledge that the Guests did not give permission.

When the Langes refused to remove their new deck from the Guests' property, the Guests filed a complaint alleging various claims including that the Langes had a duty under the 1987 recorded Section D release, defense, indemnity, payor and hold harmless contract to indemnify the Guests for any and all claims, damages, loss, fees, costs and expenses arising from and/or related to the construction, use and maintance or any Lange or Lot 4 owner deck on any part of the Guests' property and/or the use or utilization of the 1987 recorded 'deck easement' document. In breach and violation of the Section D release, full Guest defense, full Guest indemnity and full Guest hold harmless and payor contract langauge that the Langes had adopted and assumed as their own, the Langes filed an unsuccessful trespass counterclaim against the Guests for accessing the Langes' new deck on part of the Guests' property, and requested a quiet title judgment against the Guests in their Counterclaim "Prayer for Relief". Although the Langes filed a trespass counterclaim against the Guests and a motion for summary judgment to dismiss all of the Guests claims, the Langes had adopted and assumed the 1987 recorded 'deck easement' Section D language as their own release, defense, indemnity, payor and hold harmless contract mandating and requiring that the Langes release the Guests from "any" Lange injury of any kind, nature or type thereby prohibiting and barring the filing or the assertion of any

Lange counterclaim against the Guests or any "quiet title" Prayer for Relief. The Guests filed a notice of lis pendens against the Langes property before the summary judgment hearings, and also file an updated and supplemental lis pendens in March 2015.

The trial court dismissed the Langes' trespass counterclaim against the Guests on summary judgment with prejudice. The trial court agreed with the Guests that the Guests had the right to access, be on, use and enjoy the Lange deck that was on a certain part of the Guests' property because the Guests' owned and had title to the underlying land and property. The Langes stipulated before trial that they would not appeal that judgment and did not do so, as they could not in any event under the Section D contract language, or under the recorded CC&Rs in any event.

The Guests' claims for trespass, breach of contract, and the Langes' breach of their duty of good faith and fair dealing went to jury trial. The Langes' asserted but null, void and non-existent 'quiet title' counterclaim did not go to jury trial. The jury did not return any quiet title verdict. On September 19, 2014, the trial court dismissed all of the Guests claims against the Langes with prejudice and granted the Langes' non-existent 'quiet title' claim on a summary basis and granted an alleged "permanent injunction" against the Guests prohibiting the Guests from

accessing and/or using any Lange deck on any part of the Guests property without any post-verdict motion practice, without permitting any argument by the Guests and without a 'quiet title' and/or injunction evidentiary hearing, and awarded the Langes statutory attorneys fees of $250.00 and miscellaneous Lange requested costs for a total monetary judgment of $565. RP (9/19/2014) at *********.

The Guests appealed, deposited $1,000.00 in cash supersedeas with the clerk of the superior court along with a Notice of Deposit of Cash Supersedeas pursuant to RAP 8.1(b)(1) and (2) to immediately and automatically stay and supersede the real and personal property and money judgments and orders against the Guests as a matter of right, including the September 19, 2014 order and judgment in the Langes' favor, which included the alleged 'quiet title' judgment and any and all adverse orders and judgments against the Guests in this real and personal property case and action. The Guests filed an Amended Notice of Stay and Deposit of Cash Supersedeas in April 2015.

The Langes were, are not and cannot be aggrieved parties in this action or on appeal under RAP 3.1 and, therefore, cannot seek or obtain any relief, remedy or recovery from the Guests under the Section D release, defense, indemnity, payor and hold harmless contract language

that the Langes adopted and assumed as their own, the null and void 1987 recorded 'deck easement' document, the CC&Rs, the community association's charter and articles of incorporation, IRC §501 (c)(7), federal, corporate or state law.

Under the Section D open-ended release, defense, indemnity, payor and hold harmless contract language that the Langes adopted and assumed for themselves binding themselves to the Guests as the Guests' full Indemnitors, defenders and payors, the Langes are required under the clear and plain words of the Section D language to release the Guests from any Lange or any other claims and/or judgments related to and/or arising out of the use of any Lange or Lange property owner, successor or assign by any person or entity and/or the utilization of the 'easement' document and satisfy (which includes dismiss) and/or pay any such judgment or money order. In addition, the Langes are also required under the Section D defense, indemnity, payor and hold harmless language to pay, reimburse and compensate the Guests for any and all Guest or other individual's ir entities' attorneys and other fees, costs and expenses incurred by, sustained, imposed upon the Guests, and/or paid by the Guests in the past, in the present and in the future in and/or related to any related and/or

associated claims, matters suits, actions, appeals, appellate proceedings, trials and/or remands.

Although the Guests prevailed in this appeal, the Guests did not have to prevail in order to receive the Guests' entitlement to the Langes' full release, including release from any Lange claim, suit and judgment, the Langes' full defense, full indemnity and full Lange payment for any and all Guest fees, costs and expense, damages, loss, injury of any kind, harm and interest theron, and any and all benefits of the Langes' full hold harmless insurance. The ordinary English dictionary meaning attributed to the words "any and all" and the words "any injury" apply to the use of those words in the Lange Section D language contract. The Langes, the trial court and the Guests all agreed that the Section D contract language was clear and that it was not ambiguous. The Langes did not assert or claim at any time that the Section D contract language was against public policy or unconscionable.

Just as the Court of Appeals found in its opinion that the definition of the word "settled" in RCW 4.28.320 in an ordinary dictionary would elucidate the meaning of that word citing to and relying on *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 12, 57 P.3d 1156 (2002)

indicating on Opinion pages 7-8 that it was not unlikely that the Court of Appeals *Guest v. Lange* Appeal No. 46802-6-II Opinion would be changed in the Washington Supreme Court and therefore not a final opinion, so here also the ordinary dictionary definition of the words "any and all" and "any injury" used in the Lange Section D language contract mean "any and all" and "any" injury encompassing any and all Guest fees, costs and expenses, any and all Guest damage, loss, injury or harm and any type of "claim" and "injury" including real property, personal property, personal injury and/or "bodily" injury but not limited to bodily injury. The words "third party" and "bodily injury" do not exist in the Section D contract language. There are no Section D time or other limits, restrictions, exclusions or parameters. The Langes did not reserve any right under the Section D contract language to sue the Guests or to file any claims against the Guests, or any right to fail or refuse to defend, release, pay, compensate, fully indemnify, hold the Guests harmless and pay and satisfy any judgment against the Guests and/or related to any use, construction or maintenance of any Lange or Lot 4 owner patio or deck on any part of the Guests' property or the use and utilization of the 1987 recorded document by any person or entity including, but not limited to, any use by the Langes, any court or any other entity or individual.

The words that the Washington Supreme Court and appellate courts used in the recently amended RAP 8.1(b), (b)(1) and (b) (2) are to be given the same construction, application and analysis that the Court of Appeals used and applied in its opinion to the RCW 4.28.320 words "settled", "discontinued" and "abated".

RAP 8.1(b) states and provides that "Any party to a review proceeding has the right to stay enforcement of a money judgment or a decision affecting real, personal or intellectual property, pending review". An absolute right. RAP 8.1(b)(1) further prescribes, states and provides the process and the procedure that a party must follow to stay the enforcement of a money judgment. Pursuant to RAP 8.1(b)(1):

> "a party may stay enforcement of a money judgment by filing in the trial court a supersedeas bond ***or cash,*** or by alternative security approved by the trial court pursuant to subsection (b)(4).

Emphasis in bold and italics added.

Cash is no longer "alternative security" under RAP 8.1(b). The deposit of a cashier's check (i.e. cash) with the clerk of a superior court and the filing of a Notice of Deposit of Cash Supersedeas in the court records immediately and automatically stay the enforcement of any

money judgment as a matter of right. *Only* if another party files a RAP 8.1(e) motion in the trial court objecting to the sufficiency of the cash supersedeas within 7 days after the party making the motion is served with a copy of the Notice of deposit of the cash supersedeas which acts as a bond, is the sufficiency of the cash supersedeas deposited with the clerk of the superior court at issue.

RAP 8.1(e) further provides that "stay of enforcement of the trial court decision may be preserved only if" the party who deposited the cash that the trial court has to first determine was "inadequate" based on a properly filed RAP 8.1(e) motion if the party who deposited the cash supplements the already deposited cash within 7 days "after the entry of the order declaring the supersedeas deficient". This trial court determination, and trial court approval of any cash deposited with the clerk of the superior court will and can only be made under RAP 8.1(e) *if* another party with standing in the matter and action files a timely and proper RAP 8.1(e) Motion and under no other circumstance as a matter of law. The RAP 8.1(e) reference to a "preserved" stay explicitly and expressly elucidates that a party's deposit of cash supersedeas with the clerk of the superior court immediately and automatically stays and supersedes the enforcement of any real, personal, intellectual or money

judgment, decision or order during any review proceeding as a matter of right, subject only to RAP 8.1(e) and RAP 8.1(h), and/or a supersedeas decision appeal.

RAP 8.1(b)(2) states and provides in pertinent part, except where prohibited by statute, that "a party may obtain a stay of enforcement of a decision affecting rights to possession, ownership or use of real property, tangible personal property, or intangible personal property, by filing in the trial court a supersedeas.. cash, repeating the similar words in RAP 8.1(b)(1). The process and procedures identified and outlined in RAP 8.1(e) to raise the issue whether the cash supersedeas filed and deposited with the clerk of the superior court was sufficient and adequate apply to RAP 8.1(b)(2) just as they do to the deposit of cash supersedeas pursuant to RAP 8.1(b)(1) The burden is on an objecting party who has standing in the action and is aggrieved to challenge the sufficiency and the adequacy of the amount of the cash supersedeas deposited with at least a 7 day period wherein the immediate and the automatic stay at the instant and moment of filing "as of right" is preserved until and unless the party deposits supplemental cash in this instance *if* the trial court determines under a properly and timely filed RAP 8.1(e) motion that the original cash deposit was inadequate.

Webster's Third New International Dictionary 1794 (2002) defines the word "preservation" to mean "the act of preserving or the state of being preserved". The word "preserved" in turn is defined in pertinent part to mean "to keep safe from injury, harm, or destruction : guard or defend from evil : PROTECT, SAVE". The word "right" as used in RAP 8.1(b) is defined also in turn in pertinent part as "an absolute right not depending upon discretion or favor". WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1995 (2002).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court has recognized the importance of addressing real and personal property and of course money rights and decisions, acts or actions that would interfere with, impair and/or 'take' any real property, personal property or money from a party with the danger that once 'taken', interfered with and/or impaired that the real property, personal property and/or money may be lost in whole or in part forever, and significant and perhaps permanent loss, damage, financial and other injury and harm may be imposed upon a party.

This Court has also recognized the importance of addressing indemnification and indemnity rights as evidenced by its direct review of the *City of Tacoma v. City of Bonney Lake*, 173 Wn. 2d 584, 269 P.3d

1017 (2012) appeal. The *City of Tacoma* Opinion issued in January 2012 was issued before the Division I *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw. Inc.*, 168 Wn.App. 86, 285 P.3d 70 (2012), *review denied*, 175 Wn. 2d 1015 (2012) Court of Appeals opinion was issued in May 2012 involving a broad indemnification and indemnity agreement. In *Newport Yacht*, Division I of the Court of Appeals noted that Court of Appeals has "previously determined that the phrase "any and all claims" is to be given its ordinary meaning and includes all types of claims", citing to and relying on *MacLean Townhomes, LLC v. Am. 1st Roofing & Builders, Inc.* , 133 Wash. App. 828, 831, 138 P.3d 155 (2006), equally applicable to the use of the words "any injury" in the Section D contract language *Newport Yacht*, 168 Wash. App. at 101, 285 P.3d at 79-80.

The Court of Appeals in *Newport Yacht* also held that in the absence of any term, provision, words or language in an indemnity or indemnification agreement that the indemnitee (here the Guests) is required to prevail before any duty and obligation to indemnify, and/or here to defend, hold harmless, release and/or pay, then in that event the indemnitee is not required to prevail as any trigger to indemnity. In fact, in reality, the indemnity payments and compensation will be greater if the indemnitee does not prevail. Also, the Court of Appeals in *Newport Yacht*

also held in May 2012 after this Court issued its *City of Tacoma* opinion in January 2012 that an indemnitee should be indemnified under an indemnity agreement and contract for its own acts and/or purported or alleged omissions under and according to the terms, words, provisions and language of the indemnity agreement citing to *Jones v Strom Const. Co.*, 84 Wash. 2d 518, 527 P.2d 1115 (1974) (likening an indemnity contract and agreement to insurance and an insurance contract and policy) *Newport Yacht*, 168 Wash. App at 100, 285 P.3d at 79.

The Court of Appeals in *Newport Yacht* did not add any words to the indemnity contract and agreement. Under Washington law, none can be added to a clear, plain and unambiguous indemnity or other contract or to an insurance policy or contract. The Courts have a duty to apply the law to the facts and to the contract as written. *Hearst Communications v. Seattle Times Co*, 154 Wn. 2d 493, 115 P.3d 262, 271 (2005) (generalized public policy concerns cannot be used to rewrite a clear and lawful contract, the courts "*will not, under the guise of public policy, rewrite a clear contract*"; strong public policy cannot be a basis to rewrite the contract, our duty is clear, "*[t]hat duty is to uphold the law and to enforce lawful agreements parties bring before us*"). The Court cannot add or delete words to the contract. *Farmers Ins. Co. of Washington v. Miller*, 87 Wn. 2d 70, 73, 549 P. 2d 9 (1976); *Agnew v. Lacey Co-Ply*, 33 Wn. App.

283, 288, 654 P. 2d 712, *review denied*, 99 Wn. 2d 1006 (1983). The Court of Appeals violated this principle when it held that the Section D contract language that the Langes adopted and assumed did not apply to this action and this appeal. The Court of Appeals thus improperly limited the scope of the Section D language to cases involving only claims by third parties, and not claims by the Langes, and restricted its application only to alleged "bodily injury" claims by adding non-existent words to the contract.

Washington State and the Washington State Courts have also recognized that indemnity and insurance contract and policies and the actions and conduct and application of those contract are a matter of significant and substantial public importance as evidenced in part by this Court's recent *Cedell v. Farmers Ins. Co.*, 176 Wash. 2d 686, 295 P.3d 239, 246 (2013) opinion affirming that a bad faith attempt by an insurer and also in this instance to avoid an insured's and/or an indemnitee's meritorious claim is "tantamount to a civil fraud".

The Division II Court of Appeals *Guest v. Lange* Appeal No. 46802-6-II unpublished Opinion and the Division II Court of Appeals *Guest v. Lange* Appeal No. 47482-4-II published Opinion are divergent in that the Court's Lis Pendens Appeal No. 47482-4-II opinion appears to

indicate that the Court's unpublished *Guest v. Lange* Appeal No. 46802-6-II opinion was likely to be changed if the Guests filed a Petition for Review in that appeal, which the Guests did on September 29, 2016.

Further, the two Division II Court of Appeals *Guest v. Lange* opinions are inconsistent with this Court's *City of Tacoma* indemnity and contract holdings and findings, and both are also inconsistent and in conflict with the Court of Appeals Division I *Newport Yacht* indemnity and indemnification opinion, findings and holdings.

In addition, the Guests also contend that the two Division II *Guest v. Lange* indemnity, indemnification and contract opinion holdings and findings and attorneys fees findings and holdings are in conflict with the Supreme Court's *City of Tacoma* opinion and its indemnity and indemnification holdings as further outlined in the Guests' September 29, 2016 Petition for Review of the unpublished opinion in Appeal No 46802-6-II. The Guests also contend that the Court of Appeals indemnity, indemnification and attorneys fees holdings, findings and decision is in conflict with this Court's *Hearst Communications* contract findings, holdings and stare decisis decisions and opinions. In addition, it is a matter of substantial public interest that the RAP 8.1(b) and (b)(1) and (b)(2) are applied correctly and appropriately. It appears that the trial

courts and also the Court of Appeals in Appeal No. 47482-4-II misapprehended the meaning, the protection and the absolute right and power that an aggrieved party has to stay a real property, personal property and money judgment and decision of a trial court.

All the above reasons and conflicts warrant this Court' review under RAP 13.4(b)(1)(2)(3) and (4). It appears that the Court of Appeals misapprehended the meaning and the application of *City of Tacoma* in this Appeal, and the distinction between the *City of Tacoma* contract terms at issue and the indemnity, release, payor, defense and hold harmless contract, terms and language at issue in this appeal. The Guests request an award of attorney fees pursuant to RAP. 18.1. RCW 4.84.330, Section D, and *Herzog Aluminum, Inc. v. General American Window*, 39 Wn. App. 188, 692 P. 2d 867 (1984) or on such other grounds as the law allows.

F. CONCLUSION

The Court should grant review as requested above.

Respectfully submitted,

Suzanne Guest

Christopher Guest

APPENDICES

1. Decision of Division II of the Court of Appeals in *Guest v. Lange*, Appeal No. 47482-4-II, dated August 2, 2016.

2. Divison II Court of Appeal Order Denying the Guests' Motion for Reconsideration, dated September 2, 2016.

Filed
Washington State
Court of Appeals
Division Two

August 2, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHRISTOPHER GUEST and SUZANNE GUEST, husband and wife. Appellants. v. DAVID LANGE and KAREN LANGE, husband and wife, and the marital community comprised thereof, Respondents, MICHAEL COE and CAROL COE, individually and as husband and wife, and the marital community thereof; and CAROL ANN WHITE and JOHN L. WHITE, individually and as husband and wife, and the marital community thereof, Third Party Defendants.	No. 47482-4-II PUBLISHED OPINION

WORSWICK, J. — This case asks us to determine whether filing a supersedeas bond prevents the cancellation of a notice of lis pendens after final judgment in the trial court. The trial court entered judgment against Christopher and Suzanne Guest in a property dispute and accepted the Guests' supersedeas bond to stay enforcement of the judgment pending appeal. The trial court then canceled a notice of lis pendens that the Guests had filed on David and Karen Lange's property. The Guests argue that the trial court lacked the authority to cancel the lis

pendens because they had filed a supersedeas bond. The Guests further argue that the trial court abused its discretion by failing to rule on certain supersedeas bond-related evidentiary issues.

We agree with the Guests that the trial court lacked authority to cancel the lis pendens. Therefore, we reverse the cancellation of the lis pendens and remand for additional proceedings consistent with this opinion.

FACTS

The Guests and the Langes are neighbors in a development.[1] The original developer recorded a declaration of covenants, conditions, restrictions, and reservations (CC&Rs), and a document titled "Patio or Deck Easement" (Easement), both of which documents granted easements for decks. The easement over the Guests' property covered an area of 5 feet by 21 feet for the Langes' deck.

By 2011, the Langes were concerned about the structural integrity of their deck and wanted to rebuild it. They asked the Guests for permission to rebuild the deck in its original footprint, and the Guests refused. Nevertheless, the Langes rebuilt the deck in the same footprint as the original deck.

The Guests filed a complaint alleging various claims, including trespass, and that the Langes had a duty under the CC&Rs to indemnify the Guests for all claims arising from the deck

[1] Under a separate cause number, the Guests and Langes appealed substantive issues from their property dispute. We recently affirmed. The Langes argue that the issues in this appeal are therefore moot. But because the time has not yet expired for the Guests to petition for review of that case, we hold that the issues in this appeal are not moot.

easement.[2] The Langes counterclaimed to quiet title and answered that the CC&Rs expressly granted each lot an easement to accommodate any encroachment due to, among other things, decks and patios.

Meanwhile, the Guests filed a notice of lis pendens against the Langes' property. The lis pendens provided notice to third parties that the Guests had sued the Langes to quiet title and to enforce the Langes' obligations under the CC&Rs and Easement.

The trial court dismissed several claims on summary judgment, and the case proceeded to a jury trial on the Guests' claims for trespass and breach of contract and on the Langes' claim to quiet title. The jury returned a special verdict in favor of the Langes on each claim. On September 19, 2014, the trial court dismissed all of the Guests' claims with prejudice, awarded judgment to the Langes on their claim to quiet title to the deck, and awarded the Langes attorney fees of $565. The Guests filed a Notice of Appeal on October 20.

On February 26, 2015, the Langes filed a motion to cancel the lis pendens. They argued that under RCW 4.28.320, the trial court had discretion to cancel the lis pendens because the action had been "settled, discontinued, or abated," and that all of the Guests' claims had been dismissed with prejudice. Clerk's Papers (CP) at 2. The Guests opposed this motion, arguing that the action had not been "settled, discontinued or abated" because the Guests intended to file a supersedeas bond under RAP 8.1(b) with the trial court, which bond would stay enforcement of

[2] Paragraph D of the Easement stated in relevant part that the grantor of the easement "shall not be liable for any injuries incurred by the Grantee, the Grantee's guests and/or third parties arising from the utilization of said easement and further Grantee agrees to hold Grantor harmless and defend and fully indemnify Grantor against any and all claims, actions, and suits arising from the utilization of said easement and to satisfy [any] and all judgments that may result from said claims, actions, and/or suits." *Guest v. Lange*, No. 46802-6-II, 2016 WL 3264419, at *1 (Wash. Ct. App. June 14, 2016).

the Langes' judgement. RCW 4.28.320. Indeed, on March 5, the Guests submitted cashier's checks for $4,000 as supersedeas bonds to stay two orders: the judgment and an order dismissing another party to the case below. It appears that only $1,000 of this total amount was intended to stay the Langes' judgment.

The Langes objected to the amount of the $1,000 supersedeas bond to stay their judgment. They argued that their true damages from a stay of enforcement of their judgment would be at least $215,000. In support of this amount, David Lange declared that the Langes had applied to refinance their home and had applied for a home equity loan after the final judgment in the case and that the bank refused to approve the refinancing or the loan due to the lis pendens. David Lange claimed that refinancing would save the Langes over $134,000 over the life of their loan, that some of the home equity loan would be used to pay off higher interest debt, and that they would incur about $50,000 of attorney costs and fees on appeal. Thus, the Langes argued, the supersedeas bond should be set at $215,000 to properly secure against their losses from a stay of enforcement of the judgment.

The Guests moved for leave to conduct discovery to test the accuracy of David Lange's statements in his declaration supporting the amount of damages from the supersedeas bond. The Guests also moved the trial court to strike hearsay portions of David Lange's declaration regarding statements from the bank.

On March 27, the trial court canceled the notice of lis pendens, finding that the cash supersedeas bonds on file in the amount of $4,000 were adequate to cover the Langes' damages

from the judgment being stayed in the absence of the lis pendens.[3] The trial court did not rule on the Guests' motion to conduct discovery or to strike portions of David Lange's declaration. The Guests appeal.

ANALYSIS

The Guests argue that the trial court erred by canceling the lis pendens because after they appealed, filed their supersedeas bond, and stayed enforcement of the judgment, the underlying action was not settled, discontinued, or abated as required for the cancellation of a lis pendens. We agree.

I. STANDARD OF REVIEW AND STATUTORY INTERPRETATION RULES

We review the decision to cancel a lis pendens for an abuse of discretion. *See Beers v. Ross*, 137 Wn. App. 566, 575, 154 P.3d 277 (2007). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Teter v. Deck*, 174 Wn.2d 207, 215, 274 P.3d 336 (2012). Untenable reasons include errors of law. *Cook v. Turbert Logging, Inc.*, 190 Wn. App. 448, 461, 360 P.3d 855 (2015), *review denied*, 185 Wn.2d 1014 (2016).

We review questions of statutory interpretation de novo. *Flight Options, LLC v. Dep't. of Revenue*, 172 Wn.2d 487, 495, 259 P.3d 234 (2011). We endeavor to give effect to a statute's plain meaning as the expression of legislative intent. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). We derive that plain meaning from the ordinary meaning of the language at issue, the statute's context, related provisions, and the statutory

[3] The court said the "cash supersedeas bonds on file in the total amount of $4,000.00" were sufficient. CP at 223. This appears to refer to the combination of the two bonds the Guests filed: $1,000 to stay the Langes' judgment and $3,000 to stay the order dismissing another party.

scheme as a whole. *Lake*, 169 Wn.2d at 526. We may use an ordinary dictionary to discern the meaning of a nontechnical term. *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 12, 57 P.3d 1156 (2002).

II. LIS PENDENS STATUTE

A "lis pendens" is an "instrument having the effect of clouding the title to real property." RCW 4.28.328(1)(a). Either party to an action affecting title to real property, or a receiver of the real property, may file a notice of lis pendens with the county auditor. RCW 4.28.320. This filing is constructive notice to third parties that the title may be clouded. RCW 4.28.320. "In Washington, lis pendens is 'procedural only; it does not create substantive rights in the person recording the notice.'" *Beers*, 137 Wn. App. at 575 (quoting *Dunham v. Tabb*, 27 Wn. App. 862, 866, 621 P.2d 179 (1980)).

RCW 4.28.320 governs when a court may cancel a notice of lis pendens. It provides that

> the court in which the said action was commenced may, at its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled.

Thus, the statute sets forth three conditions that must be met for the court to cancel a lis pendens: (1) the action must be settled, discontinued, or abated; (2) an aggrieved person must move to cancel the lis pendens, and (3) the aggrieved person must show good cause and provide proper notice. RCW 4.28.320. If those conditions are met, the statute provides the court discretion to cancel the lis pendens.

III. ACTION WAS NOT SETTLED, DISCONTINUED, OR ABATED

Whether the filing of a supersedeas bond deprives the trial court of authority to cancel a lis pendens under RCW 4.28.320 because the action is not settled, discontinued, or abated is an

issue of first impression in Washington. We hold that under RCW 4.28.320, an action is not settled, discontinued, or abated when a supersedeas bond has been properly filed.

RCW 4.28.320 does not define the terms "settled," "discontinued," or "abated." Thus, we first turn to ordinary dictionaries to elucidate the meanings of these words. *Cooper Point Ass'n*, 148 Wn.2d at 12. *Webster's Dictionary* defines "settled" in relevant part as "unlikely to change or be changed" and "established or decided beyond dispute or doubt." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2079 (2002). It defines "discontinue" in relevant part as to "give up," to "end the operations or existence of," and "to abandon or terminate by a discontinuance or by other legal action." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 646 (2002). And it defines "abate" in relevant part as "to bring entirely down," to "put an end to," to "do away with," "to reduce or lessen in degree or intensity, and "to become defeated or become null or void (as of a writ or appeal)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2 (2002). Thus, in an ordinary dictionary, these three terms convey finality. They suggest that the action must be completely over before a lis pendens may be canceled.

Further, *Black's Law Dictionary* defines "settle" in relevant part as to "end or resolve," "to bring to a conclusion." BLACK'S LAW DICTIONARY 1581 (10th ed. 2014). It defines "discontinuance" in relevant part as the "termination of a lawsuit by the plaintiff; a voluntary dismissal or nonsuit." BLACK'S LAW DICTIONARY 563 (10th ed. 2014). And it defines "abatement" in relevant part as the "suspension or defeat of a pending action for a reason unrelated to the merits of the claim," such as where a criminal action is ended due to the death of the defendant. BLACK'S LAW DICTIONARY 3 (10th ed. 2014). The legal definitions of these terms, therefore, also convey a sense of complete finality or voluntary dismissal.

As shown by these dictionary definitions, each of the three terms in RCW 4.28.320 requires finality. They contemplate either the abandonment of a case by the parties or the complete and final resolution of the action. We now turn to considering whether the filing of a supersedeas bond prevents an action from being sufficiently final to cancel a lis pendens.

A supersedeas bond is a means of staying enforcement of a trial court judgment while on appeal. RAP 8.1. "A trial court decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule. Any party to a review proceeding has the right to stay enforcement of a money judgment, or a decision affecting real, personal or intellectual property, pending review." RAP 8.1(b). Thus, when a supersedeas bond is filed, the judgment cannot be enforced. The supersedeas bond is intended to preserve the "status quo between the parties." *Murphree v. Rawlings*, 3 Wn. App. 880, 882, 479 P.2d 139 (1970). The supersedeas bond amount should be enough to secure any money judgment plus the amount of loss which a party may be entitled to recover as a result of the inability of the party to enforce the judgment during review. RAP 8.1(c).

We hold that the Guests' supersedeas bond[4] rendered the action not "settled, discontinued, or abated." After a party timely appeals and files a supersedeas bond, the judgment is stayed and cannot be enforced until the appeal is resolved. The bond is intended to preserve the status quo—here, the status quo included the lis pendens. *Murphree*, 3 Wn. App. at

[4] We refer here to the successful filing of such a bond. We do not suggest that the mere deposit of a cashier's check would be sufficient; instead, the trial court must accept the payment and file the bond, staying the judgment.

882. Because the action was not settled, discontinued or abated, the trial court erred by cancelling the lis pendens.

The Langes argue that the trial court properly cancelled the lis pendens because the trial court's judgment settled, discontinued, or abated the Guests' action. In support of this argument, they cite cases that address the finality of a judgment for res judicata and other purposes. They also cite *State ex. rel. Gibson v. Superior Court of Pierce County*, 39 Wash. 115, 117, 80 P. 1108 (1905), which states: "[A]n appeal and supersedeas does not destroy the intrinsic effect of a judgment; . . . notwithstanding the appeal, the judgment is still the measure of such of the rights of the parties as it adjudicates; and until reversed it operates as . . . *res judicata*, as effectively as it would had no appeal been taken, and no supersedeas bond given." But the issue before us is not whether the trial court's *judgment* was final; it is whether the *action* between the parties was settled, discontinued, or abated when the Guests filed a supersedeas bond. Notwithstanding the validity and res judicata effect of the trial court's judgment pending appeal, the action was not settled, discontinued, or abated by the issuance of the judgment alone where the trial court issued a supersedeas bond.

Indeed, the weight of authority from other jurisdictions suggests that an appeal preserves the lis pendens. At common law, a notice of lis pendens carried through an appeal. *See Bollong v. Corman*, 125 Wash. 441, 444-45, 217 P. 27 (1923); *Morton v. LeBlank*, 125 Wash. 191, 194-95, 215 P. 528 (1923). And in the vast majority of states with comparable lis pendens statutes, a lis pendens endures through an appeal.[5] However, we have previously held that the mere filing

[5] *See* D.C. CODE § 42-1207(d)(1) (2010); HAW. REV. STAT. § 501-151 (2012); VA. CODE ANN. § 8.01-269 (West 2014); *Ashworth v. Hankins*, 408 S.W.2d 871, 873 (Ark. 1966); *Top Rail Ranch*

of a notice of appeal does not prevent the cancellation of a lis pendens. *See Beers*, 137 Wn. App. at 575. In *Beers*, we held that the trial court did not abuse its discretion in canceling the lis pendens after a notice of appeal "because the Beerses did not request a stay." 137 Wn. App. at 575. But *Beers* does not analyze the language of RCW 4.28.320, and its holding appears contrary to the statute's plain language. It appears to us that a notice of appeal, by transporting a case from a trial court to a court of appeals, renders the action in that case not "settled,

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Estates, LLC v. Walker, 327 P.3d 321, 334-35 (Colo. App. 2014); *Vonmitschke-Collande v. Kramer*, 841 So. 2d 481, 482 (Fla. Dist. Ct. App. 2002); *Vance v. Lomas Mortgage USA, Inc.*, 426 S.E.2d 873, 875 (Ga. 1993); *McClung v. Hohl*, 61 P. 507, 508 (Kan. Ct. App. 1900); *Weston Builders & Developers, Inc. v. McBerry, LLC*, 891 A.2d 430, 439-41 (Md. Ct. Spec. App. 2006); *Oldewurtel v. Redding*, 421 N.W.2d 722, 728 (Minn. 1988); *Slattery v. P.L. Renoudet Lumber Co.*, 82 So. 332, 333 (Miss. 1919); *State ex rel. Lemley v. Reno*, 436 S.W.3d 232, 235 (Mo. Ct. App. 2013); *Kelliher v. Soundy*, 852 N.W.2d 718, 726 (Neb. 2014) (suggesting that before the Nebraska legislature removed the phrase "settled, discontinued, or abated," a trial court never had authority to cancel a lis pendens until the time to appeal had expired, and noting that the "right to appeal usually extends the time for which property is subject to the lis pendens doctrine"); *Salas v. Bolagh*, 747 P.2d 259, 261 (N.M. Ct. App. 1987); *Lazoff v. Goodman*, 138 N.Y.S.2d 684, 685 (N.Y. App. Div. 1955); *It's Prime Only, Inc. v. Durden*, 152 N.C.App. 477, at *7 (N.C. Ct. App. 2002); *Hart v. Pharaoh*, 1961 OK 45, 359 P.2d 1074, 1079 (Okla. 1961); *Berg v. Wilson*, 353 S.W.3d 166, 180 (Tex. App. 2011); *Hidden Meadows Dev. Co. v. Mills*, 590 P.2d 1244, 1248 (Utah 1979); *Zweber v. Melar Ltd., Inc.*, 2004 WI App 185, ¶ 10, 276 Wis. 2d 156, 687 N.W.2d 818; *but see* CAL. CIV. PROC. CODE § 405.32 (West 1992) (requiring cancellation of lis pendens notice if the filer failed to prove his claim at trial); DEL. CODE ANN. tit. 25, § 1608 (West 1999) (granting discretion to cancel lis pendens if the filer is not likely to prevail); MICH. COMP. LAWS § 600.2731 (1970) (permitting courts to cancel lis pendens in certain circumstances during litigation); *Sloane v. Davis*, 433 So. 2d 374, 375 (La. Ct. App. 1983) (quoting LA. CODE CIV. PROC. ANN. art. 3753 (1960)) (holding that appeal did not prevent cancellation of lis pendens under statute reading in part that lis pendens shall be canceled "[w]hen judgment is rendered in the action or proceeding against the party who filed the notice of the pendency thereof . . . ."); *Inv'rs Title Ins. Co. v. Herzig*, 2010 ND 169, ¶ 33, 788 N.W.2d 312, 324 (quoting N.D. CENT. CODE § 28-05-08 (2001)) (holding that statute permitting cancellation of lis pendens "at any time" allowed cancellation during pendency of appeal); *Carolina Park Associates, LLC v. Marino*, 732 S.E.2d 876, 880 (S.C. 2012) (holding that appellants failed to state a claim regarding real property, therefore the lis pendens was improperly granted and could be canceled notwithstanding appeal).

discontinued, or abated." RCW 4.28.320. *Beers*, therefore, appears to conflate the two concepts of when a *judgment* is final and when an *action* is final.

Nevertheless, even following *Beers*, we find its facts easily distinguished. In *Beers*, the appellant took no action apart from appealing. 137 Wn. App. at 575. But here, the Guests did all they could to preserve the lis pendens. They filed a notice of appeal, filed a supersedeas bond, and stayed enforcement of the judgment. Even if a notice of appeal alone does not prevent the canceling of a lis pendens, we hold that the filing of a supersedeas bond does.[6]

The Langes also characterize their judgment as "self-executing" and argue that a supersedeas bond has no effect on a self-executing judgment. Br. of Resp't at 24. On that basis, they argue that *Beers* cannot be distinguished. We disagree, because the question of whether a judgment is self-executing does not bear on the finality of the underlying action. It is the action, not the judgment, which must be "settled, discontinued, or abated" for the trial court to have the authority to cancel a notice of lis pendens. RCW 4.28.320.

Our holding advances the policy concerns of the lis pendens statute. The purpose of lis pendens is to put potential purchasers on notice of ongoing litigation so that they are aware that

[6] The Langes argue that under *Cashmere State Bank v. Richardson*, 105 Wash. 105, 109, 177 P. 727 (1919), a trial court may cancel a lis pendens even if the appellant has superseded the judgment. In 1919, our Supreme Court held that a trial court did not err by canceling a lis pendens after dismissing an action on its merits because the "appellant was amply protected by its superseding the judgment." *Cashmere*, 105 Wash. at 109. *Cashmere* is a case about allegedly fraudulent mortgages and deeds, and the court's discussion focused on whether the plaintiff had failed to prove fraud. 105 Wash. at 106-09. The case does not discuss the issue before us: whether a supersedeas bond deprived the trial court of the authority to cancel a lis pendens. It does not discuss the requirements of RCW 4.28.320, although the statute's predecessor had been in effect since 1893. *See* REM. REV. STAT. § 243 (1893). In short, the single sentence in *Cashmere* that the Langes cite does not defeat the statutory language at issue in this appeal.

title may be clouded. RCW 4.28.320. When a party appeals a judgment in a real property case, litigation concerning the property is ongoing. Title to the property at issue may be clouded pending the outcome of the appeal. For a notice of lis pendens to protect the public as intended, it should remain in effect until the litigation is ended. And property owners are amply protected by the trial court setting a supersedeas bond in the proper amount, which should be sufficient to compensate them for any damages they would incur during appeal with the notice of lis pendens in place.

Thus, we hold that the trial court erred by cancelling the lis pendens because the Guests' appeal and supersedeas bond meant the action was not settled, discontinued, or abated. RCW 4.28.320. Because the trial court lacked the legal authority to cancel the lis pendens, it abused its discretion in doing so.[7] *Cook*, 190 Wn. App. at 461. We reverse the cancellation and remand for proceedings consistent with this opinion.[8] On remand, the trial court should ensure that the amount of any supersedeas bond is sufficient to compensate the Langes for any damages they incur due to the appeal and lis pendens.

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[7] Because we hold that the trial court lacked the authority to cancel the lis pendens, we do not consider whether the trial court abused its discretion in canceling the lis pendens for other reasons.

[8] The Guests also argue that the trial court abused its discretion by failing to rule on their motions to conduct discovery related to the supersedeas bond amount and to strike portions of a declaration. It appears to us that the trial court did not rule on these motions because it cancelled the lis pendens. Because the trial court made no ruling for us to correct, and in light of our holding that the trial court lacked the authority to cancel the lis pendens, we do not reach this claim of error.

ATTORNEY FEES

The Guests request attorney fees pursuant to RAP 18.1 and under Section D of the Easement. The Guests argue that Section D, which indemnifies the Guests in the event of a lawsuit arising from the use of the deck, permits them to collect attorney fees from the Langes. We review indemnity agreements under the fundamental rules of contract construction, giving effect to the parties' intent as expressed through the plain language. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005); *Knipschield v. C-J Recreation, Inc.*, 74 Wn. App. 212, 215, 872 P.2d 1102 (1994).

Section D is not a basis for attorney fees in this action. Instead, its plain language reveals that it is an indemnity provision intended to protect the Guests from liability for injuries sustained on the easement portion of the Langes' deck. Its plain language applies to injuries arising from the "utilization of said easement." Suppl. CP at 461. *See City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 594, 269 P.3d 1017 (2012) (rejecting a similar argument). Therefore, we deny the Guests' request for attorney fees.

Worswick, J.

We concur:

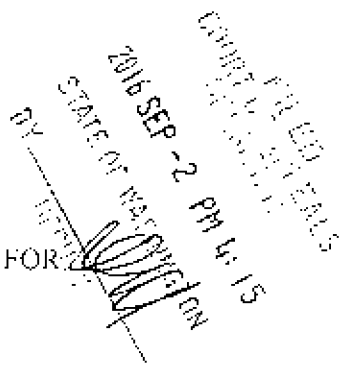
Bjorgen, C.J.

Lee, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHRISTOPHER and SUZANNE GUEST,	
Appellants,	No. 47482-4-II
v.	ORDER DENYING MOTION FOR RECONSIDERATION
DAVID and KAREN LANGE,	
Respondents.	



APPELLANTS move for reconsideration of the Court's **August 2, 2016** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: JJ. Bjorgen, Worswick, Lee

DATED this 2nd day of September 2016.

FOR THE COURT:

Bjorgen, C.J.
CHIEF JUDGE

Patrick McKenna
GILLASPY & RHODE, PLLC
821 Kirkland Ave Ste 200
Kirkland, WA 98033-6311
pmckenna@gillaspyrhode.com

Betsy A. Gillaspy
Gillaspy & Rhode, PLLC
821 Kirkland Ave Ste 200
Kirkland, WA 98033-6311
bgillaspy@gillaspyrhode.com

Suzanne Guest
6833 Main Sail Ln
Gig Harbor, WA 98335
emma1g@aol.com

Christopher Guest
6833 Main Sail Lane
Gig Harbor, WA 98335

Timothy Joseph Farley
Farley & Dimmock LLC
2012 34th St
Everett, WA 98201-5014
tjfarley@farleydimmock.com

Irene Margret Hecht
Keller Rohrback LLP
1201 3rd Ave Ste 3200
Seattle, WA 98101-3052
ihecht@kellerrohrback.com

CERTIFICATE OF MAILING

I, the undersigned, certify under penalty of perjury under the laws of the State of Washington that on this day I caused to be delivered the foregoing PETITIONERS GUESTS' PETITION FOR REVIEW and APPENDIX to the following parties:

VIA EMAIL
Court of Appeals
State of Washington
Division II

VIA EMAIL:

All attorneys of record for the Langes and the Trust parties.

DATED this 3rd day of October, 2016 at Gig Harbor, Washington.

Suzanne Guest