

62991-3

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No. 62991-3-I

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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**GREG and LAURIE NEWHALL, Appellants,**

**v.**

**COMMONWEALTH LAND TITLE, et al, Respondents.**

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**BRIEF OF RESPONDENTS COMMONWEALTH LAND TITLE INSURANCE  
COMPANY AND TRANSNATION TITLE INSURANCE COMPANY**

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## I. INTRODUCTION

This case involves the breach of an express indemnity agreement between the Newhalls and Commonwealth Land Title Insurance Company (“Commonwealth”), and the Newhalls’ subsequent refusal to pay as agreed. The issues on appeal are simpler than the Newhalls make them out to be.

In 2004, the now-bankrupt Dale Alan Development Co., LLC. (“DALD”) owned a parcel of property in Covington, Washington. (Greg Newhall was the principal of DALD and Laurie Newhall is his wife). DALD agreed to sell the property to Sound Built Homes (“SBH”), but breached its agreement. Sound Built Homes filed a lawsuit against DALD (the “*SBH v. DALD* litigation”), and recorded a *lis pendens*. Despite the pending lawsuit, DALD sold the property to a higher bidder, Chelan Homes (“Chelan”).

To complete the sale to Chelan, DALD and the Newhalls entered into an Indemnity Agreement with Commonwealth, the title insurer. Commonwealth agreed to issue title insurance insuring against the *SBH v. DALD* litigation and *lis pendens* in exchange for DALD’s and the Newhalls’ agreement to 1) remove the cloud on title arising from the litigation and 2) indemnify Commonwealth for all damages and liability arising directly and indirectly from the litigation. The Newhalls do not dispute that they entered the Indemnity Agreement. They took a chance and gambled that SBH would lose its lawsuit.

Instead, SBH won, and obtained an order of specific performance. (In the meantime, the Newhalls had removed assets from DALD, rendering it judgment-proof and leaving SBH without an adequate damages remedy). The Court of Appeals upheld the order of specific performance, and the Supreme Court denied review.

During the litigation, Chelan sold the property to 22 individual homeowners. Transnation Title Insurance Company (“Transnation”), Commonwealth’s sister company, issued title insurance policies to the homeowners. Like the Commonwealth policies, the Transnation policies insured against the *SBH v. DALD* litigation and *lis pendens*.

The result of the *SBH v. DALD* litigation created huge potential losses for both Commonwealth and Transnation (together, the “Title Insurers”). The potential losses included the cost of moving the homeowners, lost rent, reasonable costs to secure replacement properties, and payment of attorneys’ fees for both the homeowners and the Title Insurers. Transnation was subject to claims from its insureds, the homeowners, while Commonwealth was also subject to claims from its insured, Chelan, because the homeowners had potential warranty claims against Chelan. Combined, the policy limits totalled more than \$13 million, but the Title Insurers could have been liable for far more due to bad faith claims and other claims. None of this includes the resulting bad publicity to the Title Insurers or the emotional burden on the individuals and families who would be evicted from their homes.

Facing such huge exposure, the Title Insurers worked diligently together to settle the lawsuit with SBH and prevent the homeowners from losing their homes. The Newhalls, meanwhile, continued to fail to remove the cloud on title as required by the Indemnity Agreement, and refused to engage in meaningful settlement negotiations with SBH. The underlying litigation moved forward, with the homeowners joined as defendants and the trial court judge warning that he would enforce the specific performance order.

The Title Insurers sought to enforce the Indemnity Agreement in court, intervening to assert indemnification claims against DALD and the Newhalls.

In July 2008, the parties finally reached a settlement agreement. The Title Insurers agreed to pay SBH \$5 million immediately and \$3 million if they successfully enforced the Indemnity Agreement. This was the lowest settlement price SBH had entertained since the specific performance award was upheld on appeal. Commonwealth—not Transnation—made the initial \$5 million payment.

The Title Insurers moved for summary judgment on their indemnification claims against the Newhalls, and the trial court granted it. The trial court was correct in doing so. Under Washington law, the test is quite straightforward when an indemnitee seeks reimbursement from an indemnitor after entering into a settlement agreement. The Title Insurers had to prove three elements: (1) that the Newhalls had a duty to indemnify the Title Insurers; (2) that the Title Insurers faced actual liability; and (3)

that the settlement between the Title Insurers and SBH was reasonable. Each of these elements was established as matter of law.

*First, the Newhalls had a duty to indemnify the Title Insurers.* The Newhalls concede that they had the duty to indemnify Commonwealth, but make much of the distinction between Commonwealth and Transnation. This is essentially a distraction. The language of the Indemnity Agreement makes it clear that it applies to future title policies issued on the land, and Transnation and Commonwealth were, at the time the policies were issued, owned by the same company.

But, more importantly, whether or not Transnation had been involved in the lawsuit for indemnity the outcome would have been the same. Commonwealth was exposed to huge liability and had the obligation to facilitate a settlement with SBH. Moreover, Commonwealth, rather than Transnation, actually paid the \$5 million settlement payment that has already been made, rendering the Newhalls' objections particularly hollow. The Newhalls have no convincing legal basis for their assertion that responsibility for the settlement must be divided between Commonwealth and Transnation.

*Second, the Title Insurers faced actual liability.* As explained above, the potential losses to both Commonwealth and Transnation were astronomical. Both faced claims by their insured under the policies they had issued, as well as bad faith claims and other claims. It cannot be seriously disputed that Commonwealth was working in its own and its insured's best interest when it cooperated with Transnation to settle with SBH and

bring the matter to a resolution. Commonwealth's only other option was to allow SBH to proceed with enforcing specific performance, causing the homeowners to lose their homes and setting in motion a chain reaction of liability.

*Third, the settlement agreement was reasonable.* The Newhalls strain to create an "actual damages" standard that does not exist. The analysis that the court applied was correct. The Newhalls cannot credibly dispute that the homeowners, Chelan, and the Title Insurers all faced huge potential losses as a result of the *SBH v. DALD* litigation. After the specific performance award was upheld on appeal, SBH never entertained a settlement offer less than the final amount. Under the circumstances, the Title Insurers established as a matter of law that the settlement agreement was reasonable.

Because the Title Insurers proved these three elements as a matter of law, the court's summary judgment ruling should be upheld.

## **II. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR**

1. The Newhalls agreed that if they failed to clear the insured title of any cloud created by the *SBH v. DALD* litigation, they would reimburse Commonwealth for any payment it made to settle the litigation. The Newhalls did not clear the cloud from title and Commonwealth made a payment to SBH to settle the litigation. Where there was no genuine dispute as to any of these facts, was Commonwealth entitled to summary judgment granting it reimbursement from the Newhalls?

2. The Newhalls agreed to indemnify Commonwealth in connection with any liability, loss, or damage resulting directly or indirectly from the *SBH v. DALD* litigation. Commonwealth settled with SBH, resolving the cloud on title and the resulting claims against Commonwealth and Transnation and their respective insureds. Under Washington law, an indemnitee can obtain reimbursement from an indemnitor for payment made to settle a claim by proving three elements: (1) that the indemnitor is obligated to indemnify; (2) that the indemnitee was legally liable to pay the claim; and (3) that the amount paid was reasonable. Where Commonwealth proved these elements as a matter of law, was it proper for the trial court to grant summary judgment?

3. Did trial court abuse its discretion when it denied the Newhalls' motion for continuance, where there was no good reason for the Newhalls' delay in obtaining evidence and the evidence sought would not have raised any genuine issues of material fact?

4. Is any issue regarding the trial court's issuance of a final order after the automatic bankruptcy stay was in place moot, given that Title Insurers filed an unopposed motion for re-entry of the summary judgment order at issue in this case, and Title Insurers anticipate that the trial Court will grant the motion and re-enter the order.

### III. STATEMENT OF THE CASE

#### A. **The Newhalls Agreed to Indemnify Commonwealth to Induce It to Issue Title Insurance Insuring Against the *SBH v. DALD* Litigation.**

This case began with a parcel of property in Covington, Washington, owned by DALD. CP 585-87. Greg Newhall is the principal of DALD and Laurie Newhall is his wife. DALD agreed to sell the property to SBH, but breached the agreement and later sold the property to Chelan for a higher price. CP 585-87, 594. SBH brought a lawsuit against DALD seeking title to the property and filed a *lis pendens*. CP 594.

In order to complete the sale to Chelan, DALD had to convince Commonwealth to issue a title insurance policy insuring against the lawsuit and *lis pendens*. CP 6-9. To do so, DALD and the Newhalls entered a written indemnity agreement (the “Indemnity Agreement”) in which they agreed that they would 1) remove the cloud on title arising from the litigation and 2) indemnify Commonwealth for all damages and liability arising directly and indirectly from the litigation. CP 1-2; CP 6-9.

The Indemnity Agreement is written in extremely broad terms. In it, DALD and the Newhalls also agreed to remove any cloud on title resulting from the litigation. They agreed that if they did not, Commonwealth could settle the litigation and obtain reimbursement from them. Specifically, they agreed to:

promptly do all things necessary or appropriate to cause the title to the Land to be cleared of the effect of the Item [i.e., the litigation and *lis pendens*] and any other matters based

thereon or arising directly or indirectly therefrom, and of any cloud on title created by or growing out of any of the foregoing, all of which shall be done at the sole expense of the Indemnitor. If the Indemnitor shall fail to do so, then the Company may do the same, and may pay, compromise or settle the Item, or any claim or demand based thereon if the Company deems such actions necessary for the protection of any of its Insureds under any policy, or of itself, and Indemnitor shall promptly reimburse the Company for any payment, expense or expenditure made or incurred in so doing.

CP 6-7 (emphasis added).

DALD and the Newhalls further agreed to indemnify Commonwealth against claims or liabilities arising directly or indirectly from the litigation and *lis pendens*. Specifically, they agreed to:

hold harmless, protect and indemnify the Company from and against any and all liabilities, losses, damages, expenses and charges, including but not limited to attorneys' fees and expenses of litigation, which may be sustained or incurred by the Company, arising directly or indirectly out of the issuance of any future policy(ies) covering the Land, which loss may result directly or indirectly from the Item [i.e., the litigation and *lis pendens*] indemnified against, or from any claim, action, proceeding, judgment, order or process, exposing either an Insured or the Company to liability arising from or based upon or growing out of the Item, or the omission to show same in any policy of title insurance or title report.

CP 6 (emphasis added).

The Indemnity Agreement expressly applied to future title insurance policies as well as the one initially contemplated by the parties:

[T]he Company is hereby granted the right to rely upon this Agreement in issuing policies of title insurance with respect to the Land, whether or not Indemnitor is the person

ordering the same, regardless of any change in ownership, title or interest in the Land, or of any change of Indemnitors' interest therein. Said right shall extend to subsequent policies issued with respect to the Land.

CP 7 (emphasis added); CP 7 (“arising directly or indirectly out of the issuance of any future policy(ies) covering the Land”). Finally, DALD and Newhall agreed to pay for the defense of both Commonwealth and its insureds in the event of any action resulting from the *SBH v. DALD* litigation and *lis pendens*. CP 6.

With the Indemnity Agreement in place, Commonwealth issued a title policy on October 21, 2004, insuring the sale of the property to Chelan and providing affirmative coverage against loss resulting from the SBH lawsuit. CP 786-95. The coverage on the Chelan policy was originally \$2,530,000, and was later raised to \$5,830,000. CP 790, 795.

**B. Sound Built Homes Won Specific Performance in the *SBH v. DALD* Litigation.**

In the *SBH v. DALD* litigation, Judge Gonzalez of the King County Superior Court presided over a bench trial that resulted in Findings and Conclusions filed on December 19, 2005. CP 797-809. Among other things, Judge Gonzalez found:

- That DALD’s testimony was not credible (Finding 17) (CP 802);
- That DALD’s principals had taken actions to render DALD judgment-proof (Finding 36) (CP 806);
- That DALD breached the SBH purchase agreement (Conclusion 5) (CP 807);

- That DALD had acted in bad faith (Conclusions 18 & 19) (CP 808);
- That damages to SBH were “an inadequate and ineffective remedy” (Conclusions 7 & 8) (CP 807); and
- That SBH, as the prevailing party, was entitled to specific performance of the purchase agreement (Finding 38 and Conclusions 10 & 20) (CP 807, 808).

Judge Gonzalez further noted that DALD sold the property to Chelan during the litigation for \$500,000 more than it would have received from SBH, and that subsequent owners of the land would be bound by the effect of the lawsuit because of the *lis pendens* (Findings 34 & 35). CP 806.

**C. Chelan’s Resale of the Property to 22 Individual Homeowners Meant That Huge Losses Could Result from the Specific Performance Award.**

While the litigation was pending, Chelan re-sold the property to 22 individual homeowners. CP 773. Over a span of several months in 2005 and early 2006, Transnation issued title insurance policies insuring against the *SBH v. DALD* litigation and *lis pendens* to the homeowners, relying on the Indemnity Agreement. *Id.* The coverage on the individual homeowner policies totalled \$8,631,566.<sup>1</sup> *Id.* At the time,

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<sup>1</sup> At least one of the lots has since been sold to another family (the Grubbs) who used a different title insurer. CP 773. Transnation’s coverage on this lot was \$385,000. *Id.* Thus, the remaining coverage on Transnation’s current 21 homeowner policies is \$8,246,566, assuming no other lots have been sold since. *Id.*

Commonwealth and Transnation were both subsidiaries of LandAmerica Financial Group, Inc.<sup>2</sup> *Id.*

Judge Gonzalez's order meant that the homeowners had claims against their title insurer, Transnation. Within days of the award, SBH served a summons and complaint on the homeowners, seeking a declaration of conveyance of each lot. CP 811-12.<sup>3</sup> The homeowners tendered their defense to Transnation, who retained Jerry Kindinger of Ryan, Swanson & Cleveland, PLLC to represent its insureds.

Judge Gonzalez's order also meant that the homeowners had warranty claims against Chelan, Commonwealth's insured. Commonwealth tendered the defense of those claims to DALD and the Newhalls on January 6, 2006, under the terms of the Indemnity Agreement. CP 814-18. DALD and the Newhalls accepted the tender through their counsel and approved of Mr. Kindinger as the homeowners' counsel. CP 817. Based on this response, Transnation accepted the defense of litigation and informed the insureds that Mr. Kindinger would represent them. CP 819-20. DALD and the Newhalls have since paid and

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<sup>2</sup> On September 5, 2008, Transnation merged into Lawyers Title Insurance Corp. CP 772. The caption was changed to reflect this. *See, e.g.*, CP 747. Fidelity National Insurance Corp. has since purchased most of LandAmerica Financial Group, Inc.'s assets, including Commonwealth and Lawyers Title Insurance Corp.

<sup>3</sup> SBH's complaint against the homeowners was dismissed in January 2006 after DALD appealed the specific performance award, staying the litigation under CR 62. CP 946-47; 965-67. However, the homeowners were later added as defendants under CR 25(c). CP 712-16.

indemnified the Title Insurers for attorneys' fees and costs incurred by Mr. Kindinger and his firm in representing the homeowners. CP 773-74.

**D. DALD and the Newhalls Unsuccessfully Appealed the Specific Performance Order While Resisting a Realistic Settlement with SBH.**

At the outset, SBH estimated that its specific performance award was worth \$12 million, including the market value of the homes, lost rental revenue, and attorneys' fees and costs. CP 822-24. On December 20, 2006, SBH offered to settle in exchange for \$6 million from the homeowners. *Id.* But SBH withdrew the offer after the Court of Appeals affirmed the award of specific performance on April 2, 2007. CP 826-30. The parties, including the Title Insurers, participated in mediation but no agreement was reached. CP 774, 832-39. SBH continued to raise its settlement demands, warning of the possibility of bad faith claims. CP 774, 842-43.

On May 21, 2007, the Court of Appeals denied reconsideration. DALD then sought review by the Washington Supreme Court. CP 845-47.

Meanwhile, Mr. Kindinger and the Title Insurers actively requested DALD and the Newhalls to resolve the litigation in accordance with their obligations under the Indemnity Agreement. On May 3, 2007, Thomas Dreiling, counsel for DALD and Newhall, confirmed in writing to Mr. Kindinger that the Indemnity Agreement extended to all subsequent title policies issued on the Property. CP 849-50.

On May 21, 2007, the Title Insurers informed DALD and the Newhalls of their intent to propose a settlement offer to SBH. The Title Insurers pointed out that, despite DALD's and the Newhalls' obligations under the Indemnity Agreement, they had failed to remove the cloud to title on the property in the 17 months that had passed from the Indemnity Agreement or in the six weeks that had passed from the Court of Appeals' opinion. CP 852-55. The Title Insurers stated that, in light of this failure, "Transnation wishes to act affirmatively to protect its insureds." *Id.* The Title Insurers thus included a proposed settlement offer to SBH providing that Transnation would pay "one hundred cents on the dollar to settle this case," through an informal adjudication, in which SBH would be awarded its "full benefit of the bargain" under the purchase agreement. *Id.* In response, Mr. Dreiling thanked the Title Insurers for their "interest in encouraging an alternative method to bring finality to this dispute," and indicated DALD and the Newhalls' support for Transnation's offer. CP 857. The Title Insurers sent the offer to SBH, but it was rejected. CP 859-60, 775.

On March 5, 2008, the Washington Supreme Court denied review of the appeal of the *SBH v. DALD* litigation, ending the appellate process. *See Sound Built Homes, Inc. v. Dale Alan Land Devel. Co.*, 163 Wn.2d 1009, 180 P.3d 784 (Mar. 5, 2008).<sup>4</sup>

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<sup>4</sup> During this period, there was related but separate litigation between DALD and another party who had made a claim to the property prior to DALD executing a purchase agreement with SBH. On May 27, 2008, arbitrator Jerry McNaul entered a final Arbitration Award interpreting the parties' settlement agreement in that case. CP 866-71.

**E. After the Unsuccessful Appeal, DALD and the Newhalls Continued to Resist Settlement.**

Following the appeal, SBH continued to indicate that it was planning to enforce the award, and moreover, that it believed the award was worth as much as \$10 million dollars. CP 873-78. SBH asked whether the Title Insurers would provide a new settlement offer, making clear that “[a]nother low-ball offer to settle is a waste of time.” *Id.*

Mr. Kindinger forwarded SBH’s letter to Mr. Dreiling, who responded that SBH’s settlement demand “remains out of line.” CP 880-88. Mr. Dreiling raised a host of dubious factual and legal assertions in his response and concluded by proposing to fight SBH on a number of procedural grounds rather than reaching any settlement agreement. *Id.*

On May 8, 2008, the Title Insurers made a written demand to DALD and the Newhalls to discharge and remove all clouds on title pursuant to the terms of the Indemnity Agreement. CP 900-01. Title Insurers indicated that “[t]ime is short” and that if DALD and the Newhalls failed to “take all necessary steps to immediately satisfy the judgment and cause all clouds on title to the properties affected to be discharged and removed,” then the Title Insurers “will take such action as we believe is necessary to protect the interests of our insureds and the [Title Insurers].” *Id.*

On May 12, DALD and the Newhalls again refused to settle with SBH, concluding that SBH was demanding an unreasonable amount. CP

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Arbitrator McNaul expressly held that DALD’s principal Derek Sinclair “made a material misrepresentation [to Mr. McNaul] during the mediation,” and ruled against DALD. *Id.*

903-05. Remarkably, Mr. Dreiling stated his clients' belief that "the extent of the actual damages to SBH is less than zero." CP 905.

Nevertheless, Mr. Dreiling encouraged the Title Insurers to continue in their efforts to settle the case with SBH, but threatened against any "overpayment" in the amount. *Id.*

On May 14, the Title Insurers informed Mr. Dreiling that they planned to offer SBH a settlement of \$3,850,000. CP 909-12. Mr. Dreiling suggested that the proposal exceeded SBH's maximum damages by \$1 million, but encouraged the Title Insurers to make the offer. CP 914-15. On May 16, the Title Insurers made the \$3,850,000 offer to SBH. CP 917-18. SBH responded that its "final" settlement demand was \$8 million, adding that if the demand was not accepted, then "Sound Built would abandon further efforts for a monetary resolution of the above matter and pursue title to all properties." CP 920. The Title Insurers forwarded this request to DALD and the Newhalls, demanding they "become proactive in settling this matter." *Id.*

On May 16, the Title Insurers retained Christopher I. Brain of Tousley Brain Stephens PLLC to represent them in the litigation. CP 777. On May 19, SBH informed Mr. Brain that the existing \$8 million demand would close at the end of the week, and that soon "the number [would] go up a couple of million. It will never go down." CP 160-61.

**F. In Summer 2008, the Homeowners Were Added to the Litigation as Defendants, the Title Insurers Intervened to Enforce the Indemnity Agreement, and Judge Gonzalez Warned He Would Enforce the Specific Performance Order.**

Shortly after the appellate process concluded, SBH moved to add the homeowners and all record interest owners as parties. CP 968-83.

The next day, SBH made its “final” demand of \$8 million directly to DALD. CP 924. DALD objected to the timeframe of the demand, as well as its amount. CP 926-27. DALD stated it was “prepared to pay a commercially reasonable sum to settle this lawsuit,” which it suggested was \$1 million plus some undefined “premium.” *Id.* SBH continued to demand \$8 million. CP 929-30.

On June 6, SBH proposed an \$8 million settlement with structured payments—the Title Insurers would pay \$6 million upon execution and an additional \$2 million contingent upon the court granting a judgment to the Title Insurers on the Indemnity Agreement against DALD and Newhall for the entire \$8 million settlement amount. CP 932-34. SBH and the Title Insurers met but were unable to reach an agreement. CP 777.

In late June, the Title Insurers intervened in the lawsuit as third-party plaintiffs to assert breach of indemnity claims against DALD and the Newhalls. CP 35-44; CP 54-55; CP 56-63.

On July 1, Mr. Kindinger wrote to the Title Insurers to express the homeowners’ fears and concerns regarding SBH’s imminent efforts to transfer title, noting that, if successful, “the damages and impact upon the homeowners would be catastrophic.” CP 936-57. Mr. Kindinger added:

The homeowners with whom we have been able to speak are frightened by the prospect of the loss of their homes. The prospect of involuntary and precipitous ejection and uprooting of their families from their residences makes foreseeable potential damages and losses to these insureds well beyond losses contemplated in their title insurance policies. Several homeowners have asked (1) what the insurers intend to do to compensate them in the event of such occurrences, and (2) whether they can expect that our law firm will be able to represent them against any persons or entities necessary to obtain full compensation for these losses and, in that connection, whether those Insurance Companies will pay all legal expenses and costs incurred by this firm.

*Id.* (emphasis added).

On July 3, Judge Gonzalez granted SBH's request to add the homeowners and lenders as parties, but granted a continuance "on the order to actually transfer the real property at this time and allow the parties time to brief what they believe should happen from here." CP 198, lines 2-6. Judge Gonzalez asked the parties to set hearing dates in the near future for consideration of any remaining motions, and added that "if ultimately we get there, I will order the transfer of the property, if that is required by the law." CP 197, lines 4-8; CP 200-01.

**G. In July 2008, SBH and the Title Insurers Settled the *SBH v. DALD* Litigation, Ensuring That the Specific Performance Award Would Not Be Enforced.**

Later that day, SBH informed the Title Insurers that its settlement demand would increase to \$9.5 million upon any future order by the Court rejecting defenses raised by the homeowners or establishing liability by DALD and the Newhalls under the Indemnity Agreement. CP 204.

On July 14, SBH restated its willingness to enter into a \$6 million/\$2 million structured settlement with the Title Insurers. CP 208. The Title Insurers made a number of lower offers to SBH, all of which were immediately rejected. CP 157. SBH also resumed settlement negotiations with Mr. Kindinger, who had been authorized by the homeowners to enter into an \$8 million settlement with SBH subject to funding by Title Insurers. CP 210.

On July 18, SBH made a counter-offer to the Title Insurers, still demanding \$8 million, but altering the structured payments to \$5 million/\$3 million. CP 213. Title Insurers accepted this proposal on July 21. CP 215. On July 24, Title Insurers sent SBH a letter containing proposed deal points, including that both the \$5 million payment and the \$3 million would be contingent upon the Court's subsequent determinations. CP 217-19. Later that day, SBH strongly contested this proposal and insisted it was "non-negotiable" that the initial \$5 million not be contingent upon anything. CP 221, 223. SBH threatened that if the agreement with the Title Insurers fell through, SBH would enter into the proposed settlement with Mr. Kindinger. *Id.* That same day, SBH contacted Mr. Kindinger proposing settlement with the homeowners for \$8 million subject to funding by the Title Insurers and a reasonableness determination by the Court. CP 225.

Ultimately, the Title Insurers agreed to SBH's term that the initial \$5 million be paid upon execution and not contingent. CP 227. In the final, executed settlement agreement ("Settlement Agreement"), SBH

assigned its rights on the lawsuit and *lis pendens* to the Title Insurers in exchange for an \$8 million settlement consisting of an immediate \$5 million payment and a contingent \$3 million future payment, plus interest. CP 939-45. SBH's assignment was effective as of August 7, 2008, when Commonwealth paid \$5 million to SBH pursuant to ¶ 5.2 of the Settlement Agreement. CP 778.

**H. The Trial Court Granted Summary Judgment to the Title Insurers on Their Indemnification Claim and Denied the Newhalls' Motion for a 56(f) Continuance.**

As noted above, the Title Insurers served a third-party complaint for indemnification on DALD and the Newhalls on July 3, 2008. The Newhalls filed an affidavit of prejudice against Judge Gonzalez and the matter was re-assigned to Judge McDermott on July 29. CP 1038-39; 1041.

On September 23, the Court substituted the Title Insurers for SBH as plaintiffs. CP 64-66. SBH retained "a limited status as plaintiff to this action with the sole ability to move this Court, if SBH chooses, for a determination of the reasonableness of the settlement agreement between SBH and Commonwealth." CP 65.

On September 26 the Title Insurers responded to interrogatories and produced documents in response to discovery requests from the Newhalls. CP 356-76. In their responses, the Title Insurers identified all potential witnesses with knowledge, including Larry Leggett and Chris Brain. CP 363-64. In addition, the Title Insurers made supplemental document production available for Newhall and DALD's review

beginning on October 6. CP 1043, 1048. The Title Insurers never requested or noted a deposition, or even inquired into the availability of witnesses for deposition. CP 1044.

On October 17—more than three months after filing their third-party complaint, and nearly a month after responding to the Newhalls’ discovery requests—the Title Insurers moved for summary judgment on their indemnity claims. CP 130-154. (SBH concurrently filed its own motion for summary judgment seeking a determination that the Settlement Agreement was reasonable. CP 79-99.) The Newhalls sought a continuance pursuant to CR 56(f), served a second set of discovery requests, and requested to depose Larry Leggett on November 11, just a few days before the hearing date. CP 319-32; 1044, 1050–60. The Court denied the continuance. CP 475-76.

The summary judgment hearing took place on November 14, 2008. RP 1. On November 18, 2008, the Court issued a letter ruling granting both the Title Insurers’ and SBH’s motions, and directing the parties to prepare proposed orders. CP 725-26. The Title Insurers notified the Newhalls that they would present their proposed order for entry on December 9, 2008. CP 727-28. On that day, the Newhalls notified the Court that they had filed for bankruptcy protection and that further proceedings were barred by bankruptcy’s automatic stay. CP 744-46. The Court’s order granting the Title Insurers’ summary judgment motion was entered on January 14, 2009. CP 747-52.

As the Court is aware, the automatic bankruptcy stay has been lifted because the Newhalls' bankruptcy terminated. *See* December 22, 2010 Letter from the Court Administrator/Clerk of the Court of Appeals (notifying the parties that the bankruptcy stay had been lifted).

#### IV. ARGUMENT

##### A. **The Trial Court Applied the Correct Analysis When It Granted Summary Judgment.**

The trial court properly granted summary judgment to the Title Insurers. It is well-settled that an indemnitee may obtain reimbursement from an indemnitor after settling with a claimant, even if no prior notice of the settlement was provided to the indemnitor. *See Nelson v. Sponberg*, 51 Wn.2d 371, 376-77, 318 P.2d 951 (1957). To determine whether an indemnitee who has settled a claim is entitled to indemnification, the court applies the three-element test laid out in *Cheney v. City of Mountlake Terrace*, 20 Wn. App. 854, 583 P.2d 1242 (1978). The trial court properly applied that analysis.

To prevail, the indemnitee must prove three elements: (1) “that the indemnitor is obligated to indemnify”; (2) “that the indemnitee was legally liable to pay the claim”; and (3) “that the amount paid was reasonable.” *Cheney*, 20 Wn. App. at 863. *See also United Boatbuilders, Inc. v. Tempo Products Co.*, 1 Wn. App. 177, 179-80, 459 P.2d 958 (1969) (stating same three elements in the context of equitable, rather than contractual, indemnification); *see also* 41 Am. Jur. 2 *Indemnity* § 27 (2008) (stating identical elements); *King County v. Puget Sound Power & Light Co.*, 70

Wn. App. 58, 60-61, 852 P.2d 313 (1993) (noting element of “reasonableness”). Here, all three elements were established as a matter of law and the trial court was correct to grant the Title Insurers’ motion for summary judgment.

The Newhalls strain to create what they call an “actual damages” standard for the indemnification of a settlement, but that standard does not exist in the case law. To construct their proposed standard, the Newhalls rely solely on *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 912 P.2d 472 (1996). Significantly, *Moen* did not purport to alter the existing standard for indemnification—in fact, it cites to the same three-element standard in *United Boatbuilders* that was later applied in *Cheney. Moen*, 128 Wn.2d at 764. Any seeming discrepancy between *Moen* and earlier cases like *Cheney* is easily explained by reference to the facts.

In *Moen*, a general contractor and a subcontractor had an indemnification agreement providing that the subcontractor would indemnify the general contractor in connection with services performed by the subcontractor. *Moen*, 128 Wn.2d at 748-49. However, the agreement expressly limited the subcontractor’s duty to indemnify to damages or liability arising out of the subcontractor’s own negligence, and, where the general contractor was also negligent, in proportion to the subcontractors’ own negligence. *Id.* An employee of the subcontractor was injured in a fall and sued the general contractor, which settled with the employee for \$680,000. *Id.* at 749-50. The general contractor then sought

indemnification from the subcontractor based on the express indemnification agreement.

On appeal, the court remanded the case for a determination of whether negligence of the general contractor and subcontractor contributed to the employee's injuries, and, if so, in what proportion. *Id.* at 764. Such a determination was necessary in *Moen* because the subcontractor's contractual duty to indemnify the general contractor only extended to damages or liability arising from the subcontractor's own proportional negligence.<sup>5</sup> Here, in contrast, the Newhalls' contractual duty to indemnify Commonwealth is much broader; it is not dependent on the Newhalls' negligence and it does not require a division of liability between the Newhalls and Commonwealth (or any other party). Commonwealth is therefore entitled to indemnification as long as it also established the second and third elements, actual liability and reasonableness of the settlement, which it did as a matter of law.

**B. The Newhalls Are Unquestionably Liable to Commonwealth for the Full \$8 Million Settlement.**

Here, all three elements—1) “that the indemnitor is obligated to indemnify”; (2) “that the indemnitee was legally liable to pay the claim”; and (3) “that the amount paid was reasonable”—were established as a matter of law. *Cheney*, 20 Wn. App. at 863.

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<sup>5</sup> *Moen* also involved the application of RCW 4.24.115, which addresses indemnification agreements in construction projects and has no bearing here. *Id.*

1. The Newhalls Are Obligated to Indemnify Commonwealth

The Newhalls' duty to indemnify Commonwealth is essentially undisputed. That obligation arises from the express Indemnity Agreement. DALD and the Newhalls do not dispute that they signed and executed the Indemnity Agreement. Their sole challenge in this regard is the claim that their duty to indemnify extends only to Commonwealth, not to Transnation. Appellants' Brief, at pg. 28. Thus, the Newhalls essentially concede the first element stated in *Cheney* as it pertains to Commonwealth.

The language of the Indemnity Agreement was quite broad, and Commonwealth's settlement clearly falls within its scope. DALD and the Newhalls agreed to remove any cloud on title resulting from the litigation. They agreed that if they did not, Commonwealth could settle the litigation and obtain reimbursement from them. CP 6-7. DALD and the Newhalls breached this promise. They failed to prevail at or settle the *SBH v. DALD* litigation, and Judge Gonzalez awarded specific performance. CP 806-08.

DALD and the Newhalls further agreed to indemnify Commonwealth against claims or liabilities arising directly or indirectly from the litigation and *lis pendens*. Specifically, they agreed to:

hold harmless, protect and indemnify the Company from and against any and all liabilities, losses, damages, expenses and charges, including but not limited to attorneys' fees and expenses of litigation, which may be sustained or incurred by the Company, arising directly or indirectly out of the issuance of any future policy(ies) covering the Land, which loss may result directly or indirectly from the Item [i.e., the litigation and *lis pendens*]

indemnified against, or from any claim, action, proceeding, judgment, order or process, exposing either an Insured or the Company to liability arising from or based upon or growing out of the Item, or the omission to show same in any policy of title insurance or title report.

CP 6 (emphasis added). Commonwealth's settlement is clearly within the scope of the Newhalls' obligations under the Indemnity Agreement.

The Indemnity Agreement expressly and unambiguously applies to future title insurance policies as well as the one initially contemplated by the parties. *Id.*; *see also* CP 7 (“the Company is hereby granted the right to rely upon this Agreement in issuing policies of title insurance with respect to the Land . . . [s]aid right shall extend to subsequent policies issued with respect to the Land.” The Newhalls suggest that whether they agreed to indemnify Commonwealth up to the current \$5,830,000 limit of the policy or the initial \$2,530,000 is a disputed issue of fact (Appellant's Brief at pp. 38-39), but the unambiguous language of the Indemnity precludes such an interpretation. When interpreting a contract, extrinsic evidence that “varies, contradicts or modifies the written language of the contract” is not admissible, nor is evidence of a party's unilateral or subjective intent as to the meaning of a contract term. *See Bort v. Parker*, 110 Wn.App. 561, 574, 42 P.3d 980 (2002).

2. Commonwealth Was Legally Liable for the Claim

The second element stated in *Cheney*—“that the indemnitee was legally liable to pay the claim”—has been referred to as the “actual liability” standard. *See Cheney*, 20 Wn. App. at 863 (holding “actual liability”

standard satisfied because trial court found indemnitee liable to claimant, notwithstanding trial court's holding that amount of settlement was excessive); *see also United Boatbuilders, Inc. v. Tempo Products Co.*, 1 Wn. App. 177, 181, 459 P.2d 958 (1969) (contrasting Washington's "actual liability" standard with "potential liability" standard of other jurisdictions, in which the burden of proof on the existence of liability shifts to the indemnitor). This standard simply reflects the rule that an indemnitee cannot recover for payments it made as a "volunteer." *See, e.g., Oregon-Washington R. & Nav. Co. v. Washington Tire & Rubber Co.*, 126 Wn. 565, 568, 219 P. 9 (1923) (stating that "a mere volunteer in the payment of such a claim cannot successfully maintain an action against another, claimed . . . to be the one liable for the payment thereof").

Consistent with the fact that an indemnitee can obtain indemnification for settlement payments, the "actual liability" requirement does not mean that the indemnitee must submit to suit or have a claim reduced to judgment before it can pay and seek indemnity. *See Cheney*, 20 Wn. App. at 862; *United Boatbuilders*, 1 Wn. App. at 180 ("[T]he fact that United's payment was voluntary and Frazier's claim was not reduced to judgment does not defeat the right of indemnification."). It would discourage settlement if an indemnitee had to wait to be sued and lose before he or she could recover from an indemnitor. As the court explained in *United Boatbuilders*, "a person confronted with an obligation that he cannot legally resist is not obliged to wait to be sued and lose an opportunity to compromise." *Id.* It is the fact of liability that matters

rather than the amount; the third *Cheney* element, that the settlement was reasonable, protects the indemnitor from an unreasonably high settlement payment. See *Cheney*, 20 Wn. App. at 863 (the indemnitee must “prove both that he was legally obliged to pay and that the amount paid was reasonable”).

Here, the claims at issue are numerous, and stem from SBH’s successful lawsuit against DALD and its right to specific performance on the real estate purchase and sale agreement between SBH and DALD. Commonwealth had substantial actual liability.

Judge Gonzalez awarded specific performance of the property on December 19, 2005. CP 797-809. Judge Gonzalez further held that this award applied to Chelan “and any successor from it” by virtue of the recorded *lis pendens*. CP 806. This ruling accords with the provisions of the *lis pendens* statute, RCW 4.28.320:

From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he or she were a party to the action.

The effect of a *lis pendens* is as follows:

The underlying purpose of a *lis pendens* is to give notice to anyone who subsequently deals with the property that such person or entity will be bound by the outcome of the action to the same extent as if it were a party to the action. The *lis pendens* has no effect on the substantive rights of the parties, but is merely a method of forcing a purchaser or encumbrancer under a subsequent recorded conveyance to

either set up that claim in the action or be bound by the judgment thereon.

*R.O.I., Inc. v. Anderson*, 50 Wn. App. 459, 748 P.2d 1136 (1988)

(emphasis added). Thus, a claim to title under the Title Insurers' policies arose no later than December 19, 2005.

On July 3, 2008, Judge Gonzalez recognized the effect of the *lis pendens* by "substituting" the homeowners and lenders as parties under CR 25(c), as opposed to "joining" them under CR 19. Judge Gonzalez added that "if ultimately we get there, I will order the transfer of the property, if that is required by law." CP 197, lines 4-8. Simply put, the Title Insurers faced an impending and imminent order granting SBH's motion to transfer the entire property to SBH and causing the homeowners to lose their homes.

Not only was Transnation subject to claims from its insureds, the homeowners, Commonwealth was also subject to claims from its insured, Chelan, because the homeowners had potential warranty claims against Chelan. In addition, both insurers faced the potential bad faith claims and Consumer Protection Act claims, particularly if the homeowners had been forced out of their homes. The potential costs included the cost of moving the homeowners, lost rent, reasonable costs to secure replacement properties, and payment of attorneys' fees for both the homeowners and the Title Insurers. Directly and indirectly, Commonwealth faced many millions in potential liability as a result of the SBH v. DALD litigation and *lis pendens*.

3. The Settlement Amount Was Reasonable

Finally, Commonwealth must demonstrate that the settlement amount is reasonable. *Cheney*, 20 Wn. App. at 863. The Title Insurers contend this element is not required here because it is supplanted by terms in the Indemnity Agreement. But even if reasonableness is a required element, the record demonstrates that the settlement amount was reasonable as a matter of law.

a. *The Indemnity Agreement supplants the reasonableness requirement*

The Indemnity Agreement expressly provided that if the Newhalls failed to clear title, then the Title Insurers were permitted to negotiate their own settlement and be promptly reimbursed for the entire amount:

If Indemnitor shall fail [to clear title], then the Company may do the same, and may pay, compromise or settle the Item, or any claim or demand based thereon if the Company deems such actions necessary for the protection of any of its Insureds under any policy, or of itself, and Indemnitor shall promptly reimburse the Company for any payment, expense or expenditure made or incurred in so doing.

CP 6-7. The Indemnity Agreement is unique in that the Newhalls promised both to clear title to the property and to indemnify the Title Insurers against any losses resulting from the Newhalls' failure to clear title. When DALD and the Newhalls failed to clear title, the Indemnity Agreement essentially transformed the Newhalls from indemnitors into absolute guarantors. The Indemnity Agreement specifically provided that

the Newhalls must make prompt reimbursement of all amounts paid by the Title Insurers that the Title Insurers “deem[ed] necessary for the protection of any of its Insureds under any policy, or of itself.” *Id.* This language is more expansive than the standard indemnity agreements seen in the case law, which are silent on this question of settlement reimbursement. In light of that silence, courts impose the reasonableness requirement. The explicit language of the Indemnity Agreement here replaces the reasonableness requirement with its own standard, under which the Newhalls must reimburse the Settlement Agreement without reference to reasonableness.

Here, the Newhalls failed to clear title through trial and through the appellate process. They failed on their legal theories against SBH, and they failed to reach any form of settlement. Even after the appeal was concluded, the Newhalls continued to breach the Indemnity Agreement by refusing to settle the case. They took unreasonable settlement positions by, for example, contending that “the extent of the actual damages to SBH is less than zero.” CP 903-05.

On May 21, 2007, the Title Insurers requested permission from DALD and the Newhalls to settle the case in accordance with the Indemnity Agreement because DALD and the Newhalls had failed to clear title 17 months after the specific performance award or six weeks after the Court of Appeals’ ruling. CP 852-55. DALD and the Newhalls authorized the Title Insurers’ settlement efforts under this provision. CP 857. After months of negotiations, Title Insurers reached the Settlement

Agreement, which they deemed necessary for the protection of their insureds. Under the terms of the Indemnity Agreement, DALD and the Newhalls were obligated to immediately reimburse the full value of this settlement, and their failure to do so constitutes a breach of the Indemnity Agreement as a matter of law.

b. *Alternatively, the settlement is reasonable as a matter of law*

Even if the Title Insurers must prove this element, the trial court properly held that the settlement was reasonable as a matter of law. Though cases dealing with this requirement in the context of the reimbursement of a settlement payment are scarce, cases deciding “reasonableness” in the insurance context are instructive.

If this matter had proceeded to a reasonableness hearing with witness testimony and fact finding, the only factors for the Court’s consideration of reasonableness would be “the existence of bad faith, collusion, and fraud in the settlement agreement.” *See Heights at Issaquah Ridge Owners Ass’n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 309, 187 P.3d 306 (2008) (setting forth limited factors for a reasonableness hearing on a contract, as opposed to tort, action).

Here, DALD and the Newhalls have never alleged any bad faith, collusion or fraud in this action. Nor could they. (They have correctly noted that Paul Brain and Christopher Brain are brothers, but they have not alleged any wrongdoing pertaining to the settlement or its negotiations. *See, e.g.*, Appellants’ Brief at p. 22, n.3.) There is no

support in the record that the Settlement Agreement was based on any bad faith, collusion, or fraud. Rather, the record reflects settlement negotiations involving numerous parties and counsel taking place over a span of years. After SBH prevailed in each successive stage of the litigation (e.g., trial, appeal, discretionary review, joining the homeowners), SBH's settlement demands increased. For example, SBH demanded \$6 million prior to the Court of Appeals' ruling. CP 822-24. SBH thereafter demanded \$6,750,000, but indicated that the number would rise to \$8.2 million if the Court of Appeals denied reconsideration. CP 842-43. On May 16, 2008, SBH demanded \$8 million, its "final" demand, adding that SBH would otherwise pursue title to the Property. CP 920. On July 3, 2008, SBH threatened that its final demand would jump to \$9.5 million upon any further ruling by Judge Gonzalez in SBH's favor. CP 204. Ultimately, the Title Insurers were able to negotiate an \$8 million settlement whereby Commonwealth paid \$5 million upon execution and an additional \$3 million contingent upon the Court's entry of the \$8 million judgment against the Newhalls under the Indemnity Agreement. CP 939-45. The contingent \$3 million portion of the settlement is not "illusory" (Appellant's Brief at pp. 41-42); SBH consistently rejected settlement offers lower than \$8 million, and Commonwealth's only other option was to allow SBH to proceed with enforcing specific performance. There is simply no evidence in the record of bad faith, collusion or fraud; summary judgment on the reasonableness element is therefore appropriate.

The settlement is also reasonable in light of the amounts at stake. Had SBH enforced its specific performance award, Commonwealth would have been responsible, at a minimum, for coverage up to its policy limit (\$5,830,000) and Transnation up to its policy limits on the 21 homeowner lots (\$8,246,566). Beyond the policy limits, the Title Insurers may have faced supplemental losses such as moving costs, lost rent, reasonable costs to secure replacement properties, potential insurance bad faith claims and Consumer Protection Act claims, payment of their own attorneys' fees and costs, the potential of having to reimburse the homeowners for their attorneys' fees and costs, and the bad publicity of evicting families from their homes.

Appellants failed to create any issue of fact to suggest unreasonableness. They did not plead or allege the existence of any "bad faith, collusion, and fraud in the settlement agreement." *Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 705, 187 P.3d 306 (2008) (limiting reasonableness determination in settlement of contract claim). Nor have they alleged that some other standard of "reasonableness" should apply (other than relying on *Moen*, which is wholly inapposite for the reasons explained above). Nor have they contested the losses faced by the homeowners and the Title Insurers upon the enforcement of the specific performance award. The Title Insurers faced losses well exceeding their policy limits, and the settlement amount paid was below those limits. Reasonableness was established as a matter of law.

**C. The Newhalls' Focus on Transnation Is Unavailing.**

The Newhalls' duty to indemnify extends to Transnation for the reasons explained below, but the issue is ultimately irrelevant. Whether or not the court is convinced that the Newhalls' duty to indemnify extends to Transnation, the court's summary judgment ruling should be upheld. As explained above, the three required elements are satisfied as a matter of law as to Commonwealth. The trial court's ruling reflects that and appears to be based solely on its consideration of the Newhalls' duty to Commonwealth, as when it wrote that "Commonwealth clearly has liability directly and indirectly to its insureds for liability created by the statutory warranty deed." CP 733.

The Newhalls misconstrue the basis of the court's ruling and focus a significant number of pages of their brief on estoppel. *See, e.g.*, Appellant's Brief at pp. 31-38. The Newhalls' estoppel theory rests on a single line in the court's letter ruling: "The fact that another title insurance company, Transnation . . . later issued policies to the individual home owners and participated in settling the case pursuant to previous court rulings does not change the fact that Commonwealth issued the initial policy that was relied on by Transnation and its insureds." CP 733. It is far from clear—based on this one line—that the trial court ruled as it did based on a theory of estoppel.

Moreover, the Newhalls have not identified any basis for requiring a division of liability between Commonwealth and Transnation other than *Moën*, which is inapposite. Significantly, Commonwealth itself, not

Transnation, actually paid the \$5 million that has already been paid. (The Newhalls appear to acknowledge this fact in their brief at p. 41.) Thus, there is no need to prove “how the \$5,000,000 payment to SBH was apportioned between” the Title Insurers. *See* Appellants’ Brief, at pg. 43.

While Transnation, as title insurer to the homeowners, was plainly liable for losses arising out of the litigation and specific performance award, Commonwealth also faced substantial liability. If the Court enforced the specific performance award against the homeowners—which it fully intended to do—they would have significant claims against Chelan, which Chelan would in turn tender to Commonwealth. Commonwealth could very well have been subject to liability for the entire amount of the losses suffered by the homeowners. The fact that Transnation and Commonwealth worked together to settle with SBH should not defeat Commonwealth’s ability to recover on its express indemnification agreement with the Newhalls. Commonwealth was working in its best interests and those of its insured when it cooperated with Transnation to resolve the litigation and paid the first \$5 million of the settlement.

There is no injustice here: the Newhalls breached their agreement with SBH to sell the property to a higher bidder and willingly entered into a broad indemnification agreement with Commonwealth in order to complete the sale to Chelan. They profited from that sale while gambling that SBH’s lawsuit would fail. The Newhalls had an affirmative duty to do all things necessary to clear title to the property, and when they failed

to do so, Commonwealth exercised its right under the indemnification agreement to do so. The only way Commonwealth could clear title was to agree to pay SBI \$8 million.

1. The Newhalls' Intent to Indemnify Transnation Is Evidenced by the Indemnity Agreement and the Newhalls' Consistent Actions and Representations

Nonetheless, the Newhalls' duty to indemnify extends to Transnation as a matter of law. While it is true that “[i]n general, only an indemnitee or someone in his right is entitled to sue on a contract to indemnify,” *Simons v. Tri-State Constr. Co.*, 33 Wn. App. 315, 323, 655 P.2d 703 (1982), this argument fails here because the Newhalls intended to indemnify Transnation, as evidenced both by the terms of the Indemnity Agreement and by DALD and the Newhalls' consistent and continuous actions and representations.

Indemnity agreements are interpreted according to the ordinary rules of contract interpretation. See *MacLean Townhomes, LLC v. America 1st Roofing & Builders Inc.*, 133 Wn. App. 828, 831, 138 P.3d 155 (2006). One such rule is the “context rule,” articulated in *Berg v. Hudesman*, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990). “Courts faced with questions of contract interpretation must discern the intent of the contracting parties, and may consider extrinsic evidence to the contract itself for that purpose, even when the contract terms are not themselves ambiguous.” See *Hearst Comm., Inc. v. Seattle Times Co.*, 120 Wn. App. 784, 791, 86 P.3d 1194 (2004). Relevant extrinsic evidence may include:

(1) subject matter and objective of the contract, (2) all circumstances surrounding its formation, (3) the subsequent acts and conduct of the parties, (4) the reasonableness of the respective interpretations advocated by the parties, (5) statements made by the parties in preliminary negotiations, and (6) usage of trade and course of dealings.

*See* 25 DeWolf & Allen, Wash. Prac.: Contract Law & Prac. § 5.6 at p. 146 (2d ed. 2007).

Contract interpretation under the “context rule” remains a question of law subject to determination on summary judgment in either of two scenarios: (1) where only one reasonable inference can be drawn from the extrinsic evidence, or (2) where the interpretation does not depend on the use of extrinsic evidence. *See Hearst Comm.*, 120 Wn. App. at 791.

The Newhalls rely on *Simons v. Tri-State Constr. Co.*, 33 Wn. App. 315, 655 P.2d 703 (1982), and *Del Guzzi Construction Co., Inc. v. Global Northwest, Ltd., Inc.*, 105 Wn.2d 878, 719 P.2d 120 (1986) to support their affirmative defense regarding Transnation. In *Simons*, a contractor executed an agreement to indemnify the City of Hoquiam from any liability claims resulting from the contractor’s work. *See* 33 Wn. App. at 325. The court found “nothing in the agreement to suggest that anyone other than the City was to benefit from this agreement.” *Id.* As a result, the court rejected a claim brought by a third-party homeowner against the contractor based on the indemnity agreement. *Id.* The court acknowledged that the homeowner could have maintained the claim had it been a third-party beneficiary of the contract. *See id.* at 323 (noting that “one not a party to a contract may sue on an agreement if the parties

intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract”) (internal quotation omitted). In *Del Guzzi*, the court also held that the indemnification agreement in question was not intended to benefit a third party.

But in sharp contrast to the contracts in *Simons* and *Del Guzzi*, the Indemnity Agreement here provided:

THE INDEMNITOR FURTHER AGREES that the Company is hereby granted the right to rely upon this Agreement in issuing policies of title insurance with respect to the Land, whether or not Indemnitor is the person ordering the same, regardless of any change in ownership, title or interest in the Land, or of any change of Indemnitors’ interest therein. Said right shall extend to subsequent policies issued with respect to the Land.

CP 7. Similarly, it covered all losses “arising directly or indirectly out of the issuance of any future policy(ies) covering the Land.” CP 6. In other words, the Newhalls promised to clear title and resolve the litigation, and they promised to indemnify all resulting damages and losses on any and all subsequent title policies on the Property. Because the Indemnity Agreement extends to all “subsequent policies issued with respect to the Land,” Transnation’s policies are necessarily included within its scope.

The Newhalls’ intention to cover subsequent policies is further demonstrated by their “subsequent acts and conduct” to Transnation. First, the Newhalls agreed to pay and did pay for counsel to represent the homeowners (that is, Transnation’s insureds) under the Indemnity

Agreement. Second, on May 3, 2007, DALD and the Newhalls confirmed in writing to Mr. Kindinger that the Indemnity Agreement extended to the Transnation policies and would extend to any subsequent policy issued on the Property. CP 849-50. Finally, not once during the extensive communications and correspondence did DALD or the Newhalls dispute coverage to Transnation or its insureds under the Indemnity Agreement. See, e.g., CP 820-24, 903-05, 914-15. In sum, the Indemnity Agreement and all extrinsic evidence supports the conclusion that Transnation also has a right to indemnification from DALD and the Newhalls.

2. The Newhalls' Defense Against Transnation Should Alternatively Be Rejected Under Equitable Estoppel

The Newhalls' defense against Transnation should additionally be rejected under equitable estoppel because Transnation relied upon DALD and the Newhalls' previous actions and representations which are in conflict with the Newhalls' current arguments. *See East Lake Water Ass'n. v. Rogers*, 52 Wn. App. 425, 430, 761 P.2d 627 (1988). In *East Lake*, the court dismissed a party's claim based on equitable estoppel where (i) the party's previous admission, statement, or act was inconsistent with the claim afterwards asserted; (ii) the other party relied upon the previous admission, statement, or act; and (iii) the other party would be injured if the first party were now allowed to contradict or repudiate the previous admission, statement, or act. *See id.* Here, DALD and the Newhalls did not challenge Transnation's coverage under the Indemnity Agreement until well after execution of the Settlement

Agreement. Such a challenge should be barred when it is plainly at odds with the history of representations and actions by DALD and Newhall prior to settlement, upon which Transnation relied.

Commonwealth tendered a defense based on the homeowners' claims, and DALD and Newhall accepted this tender. DALD and Newhall thereafter paid for Transnation's attorneys' fees, participated in settlement negotiations with SBH, and even authorized Title Insurers to directly negotiate the settlement. At no time did they dispute the applicability of the Indemnity Agreement to both Title Insurers (rather, they confirmed it), and they may not do so now.

**D. The Trial Court's Denial of the Newhalls' Request for a Continuance Was Not an Abuse of Discretion.**

A trial court's ruling on a motion for a continuance is reversible only for manifest abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (1990). That is, the court of appeals will reverse the trial court's decision only where the trial court exercised its discretion on "untenable grounds, or for untenable reasons." *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn. App. 899, 901, 973 P.2d 1103 (1999).

A trial court may deny a motion for continuance when: 1) the moving party does not offer a good reason for the delay in obtaining the evidence; 2) the moving party does not state what evidence would be established through the additional discovery; or 3) the evidence sought will not raise a genuine issue of fact. *Id.* at 903; *Gross v. Sunding*, 139 Wn. App. 54, 68, 161 P.3d 380 (2007) (rejecting continuance because no

good reason for delay and desired evidence would not raise an issue of fact).

Here, at least two of those grounds existed. The Newhalls' motion for a continuance was an eleventh-hour attempt to stall a summary judgment hearing they knew about for three months. They provided no excuse for the delay in seeking the evidence they maintained was necessary. Moreover, the evidence they identified that they were seeking was largely irrelevant and would not have created any genuine issues of material fact. As such, the trial court did not abuse its discretion.

The Title Insurers filed their complaint against the Newhalls in July 2008, following a lengthy litigation of the underlying *SBH v. DALD* action. The Title Insurers did not move for summary judgment until October 17, 2008, more than three months later. That was ample time for the Newhalls to have conducted additional discovery, and indeed the Newhalls presented no excuse to justify their failure to obtain the evidence they claimed to be seeking. That alone is enough to hold that the trial court did not abuse its discretion.

The Newhalls now claim that they did not know Larry Leggett's testimony would be "central" until receiving the motion for summary judgment (Appellant's Brief, p. 47), but that claim is not credible. Mr. Leggett was claims counsel for the Title Insurers and was involved in the dispute from the beginning. CP 772. He submitted declarations in support of the Title Insurers' earlier motions. *See, e.g.*, CP 1-4. He also signed the Title Insurers' discovery responses, which were received by the

Newhalls on September 26, nearly a month before the summary judgment motion was filed, and which identified Mr. Leggett as a person with knowledge. CP 363-64, 369. Lack of foresight does not constitute “good reason” for delay.

The Newhalls have not alleged that they changed counsel shortly before their summary judgment opposition was due, as was the case in *Coggle*, the sole case on which they rely. *Coggle*, Wn. App. at 508. Moreover, it would have prejudiced the Title Insurers if the hearing had been delayed and the Newhalls had filed bankruptcy before the indemnity claims could be resolved.

Though the Newhalls identify depositions and subjects for discovery, the evidence thereby elicited would not create issues of fact on summary judgment. Their continuance motion was properly denied for this reason, as well. *See Gross*, 139 Wn. App. at 68; *Mutual of Enumclaw Ins. Co. v. Patrick Archer Constr., Inc.*, 123 Wn. App. 728, 744, 97 P.3d 751 (2004) (rejecting continuance because proposed discovery was legally irrelevant given court’s interpretation of insurance contract; thus, “the desired evidence does not raise a genuine issue of material fact”); *cf. Coggle*, 56 Wn. App. at 511 (granting continuance where proposed expert testimony would rebut movant’s expert declaration and raise issue of fact on “compliance with the standard of care and causation”).

Most of the evidence now identified by the Newhalls (Appellant’s Brief at pp. 45-46), such as “evidence regarding any actual claims to or losses of either Transnation or Commonwealth” relates to their misguided

claims that Commonwealth must have been subject to an actual lawsuit before it could recover indemnification; that the payment must be divided between Commonwealth and Transnation; and that Commonwealth must prove its actual damages. This evidence could not raise any genuine issues of material fact. The same is true of the other evidence identified by the Newhalls, that pertaining to the intent of the Indemnity Agreement. The Indemnity Agreement is unambiguous with respect to the Newhalls' indemnity obligations.

**E. Title Insurers Have Moved for Re-Entry of the Summary Judgment Order**

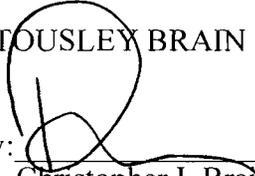
The trial court issued its letter ruling granting summary judgment to the Title Insurers on November 18, 2008, CP 725-26, but the final Order was not issued until January 6, 2009. CP 747-52. The Newhalls assert that the final Order is void because it was issued after DALD/the Newhalls filed for bankruptcy in December 2008, invoking the automatic stay. However, this issue is moot. After the bankruptcy stay was lifted, Title Insurers moved the Court for re-entry of the summary judgment order. The trial Court has not yet ruled on the motion, which was noted for March 7, 2011. However, the motion was unopposed, and Title Insurers anticipates that the Court will re-enter the order. Title Insurers will notify this Court upon re-entry of the summary judgment order.

**V. CONCLUSION**

For the reasons set forth above, the court should affirm the trial court's order granting summary judgment and also denying 56(f) continuance.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of March 2011.

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