

67200-2

67200-2

No. 67200-2-1

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

CONSTANTIN HAPAIANU, an individual,
Appellant

vs.

INDEMNITY COMPANY OF CALIFORNIA, a foreign corporation,
Respondent/Appellee

APPEAL FROM SUPERIOR COURT FOR KING COUNTY
CAUSE NO. 09-2-40632-4SEA

APPELLANT'S OPENING BRIEF

Scott E. Stafne, WSBA # 6964
Attorney for Appellant

Stafne Law Firm
239 N. Olympic Avenue
Arlington, WA 98223
Phone: 360-403-8700
Fax: 360-386-4005

 ORIGINAL

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 AUG - 8 AM 11:18

TABLE OF CONTENTS

I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	1
III. STATEMENT OF ISSUES ON APPEAL	2
IV. STATEMENT OF CASE	4
1. Statement of Facts	4
2. Statement of Proceedings Below	11
V. ARGUMENT	19
1. The issuance of an FCO constitutes a final land use decision under LUPA	19
2. The surety agreement was void and unenforceable	23
a. The surety agreement violates the statute of frauds	26
b. The surety agreement is procedurally unconscionable and therefore void and unenforceable	27
c. The surety agreement is substantively unconscionable and therefore void and unenforceable	27
d. The attempt to enforce the surety agreement after the final occupancy permit was issued violated LUPA	27
e. The attempt to utilize the invalid surety agreement to coerce Hapaianu to enter into a new mitigation plan or pay for the County's use of the bond money somewhere else in King County violated the law related to "Vested Rights"	27

f.	Enforcement of the surety agreement under the circumstances of this case violated Const. art. XI, § 11	27
g.	Enforcement of the surety agreement under the circumstances of this case violated procedural due process guarantees under the Washington and United States Constitutions	28
h.	Enforcement of the surety agreement under the circumstances of this case violated procedural due process guarantees under the Washington and United States Constitutions	28
i.	Enforcement of the surety agreement under the circumstances of this case violated Const. art. I, § 10	28
3.	The Superior Court erred finding defendant ICC was entitled to summary judgment as a matter of law with regard to Hapaianu's counter claims and in failing to find that there were genuine issues of fact which precluded summary judgment in favor of ICC and MacWhinney	30
a.	The Superior Court erred in finding there were no deceptive practices as a matter of law	30
b.	The Superior Court erred in failing to conclude ICC owed Hapaianu an implied duty of good faith pursuant to the surety and indemnity agreements	31
c.	The Superior Court erred in finding Betsy Mac Whinney was not liable to Hapaianu as a matter of law under the facts proposed by the County Prosecutor	32
i.	Tortious Interference with a contract and/or Business expectancy	33
ii.	Misrepresentation and Fraudulent Concealment ..	35

d. The Superior Court erred in concluding there were no issues of facts precluding summary judgment in favor of ICC	35
i. There is a question of material fact regarding ICC's investigation of claim	36
4. The Superior Court erred in granting the County's motion to compel and awarding attorneys fees to the County. The Superior Court also erred in failing to award attorney fees to Hapaianu	39
5. The Superior Court erred its evidentiary rulings	42
a. The evidence before the Court related to ICC	42
b. The evidence before the Court related to MacWhinney ...	43
6. The Court erred in denying Hapaianu's motion for reconsideration	44
VI. REQUEST FOR ATTORNEY FEES	45
VII. REQUEST FOR NEW JUDGE	47
VIII. CONCLUSION	47

TABLE OF AUTHORITIES

A. Table of Cases:

State Cases

<i>Adler v Fred Lind Manor</i> , 153 Wn.2d 331, 347, 103 P.3d 773 (2004)	30, 31
<i>Amick v. Baugh</i> , 66 Wn.2d 298, 302, 402 P.2d 342 (1965)	24
<i>Applied Indus. Materials Corp. v. Melton</i> , 74 Wn.App. 73, 77, 872 P.2d 87 (1994)	44
<i>Balise v. Underwood</i> , 62 Wn.2d 195, 199, 381 P.2d 966 (1963)	36, 44
<i>Banuelos v. TSA Washington, Inc.</i> , 134 Wn. App. 607, 617, 141 P.3d 652 (2006)	45
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wn.2d 581, 594-5, 675 P.2d 193 (1983)	45
<i>Brust v. Newton</i> , 70 Wn. App. 286, 295, 852 P.2d 1092 (1993)	39
<i>Cf. Young v. Savidge</i> , 155 Wn. App. 806, 828, 230 P.3d 222 (2010)	29
<i>Chelan County v. Nykreim</i> , 146 Wn.2d 904, 52 P.3d 1 (2002)	22
<i>Clark County PUB. Util. District No. 1 v. Wilkinson</i> , 139 Wn.2d 840, 991 P.2d 161 (2000)	22
<i>Clements v. Travelers Indem. Co.</i> , 121 Wn.2d 243, 249, 850 P.2d 1298 (1993)	36
<i>Coggle v Snow</i> , 56 Wn. App 499, 504, 784 P.2d 544 (1990)	44

<i>Coleman v Altman</i> , 7 Wn. App. 80, 85-86, 497 P.2d 1338 (1972)	40, 42
<i>Conom v. Snohomish County</i> , 155 Wn.2d 154, 157, 118 P.3d 344 (2005)	23
<i>Davis v. Washington State Dept. of Labor & Industries</i> , 159 Wn. App. 437, 441-3, 245 P.3d 253 (2011)	23
<i>Davis v. West One Automotive Group</i> , 140 Wn. App. 449, 456, 166 P.3d 807 (2007)	36, 44
<i>Deep Water Brewing, LLC v. Fairway Resources Ltd.</i> , 152 Wn. App. 229, 215 P.3d 990, 1008 -1112 (2009)	33
<i>Deschenes v. King County</i> , 83 Wn.2d 714, 717, 521 P. 2d 1181 (1974)..	22
<i>Dussault ex rel. Walker-Van Buren v. American Intern. Group, Inc.</i> , 123 Wn. App. 863, 99 P.3d 1256 (2004)	35
<i>Felsman v. Kessler</i> , 2 Wn. App. 493, 468 P.2d 691(1970)	45
<i>Frank Coluccio Constr. Co. v King County</i> , 136 Wn. App. 751, 766, 150 P.3d 1147 (2007)	32
<i>Grant County Fire Protection District v. City of Moses Lake</i> , 150 Wn.2d 791, 810 83 P.3d 419 (2004)	26
<i>Habitat Watch v Skagit County</i> , 155 Wn.2d 397, 407, 120 P.3rd 56 (2005)	21
<i>Herzog Aluminum, Inc. v. General American Window Corp.</i> , 39 Wn. App. 188, 692 P.2d 867 (1984)	46, 47
<i>Industrial Indemnity Co. of the Northwest v Kallevig</i> , 114 Wn.2d 907, 917, 792 P.2 250 (1990)	36

<i>Ketcham v King County Medical Service Corp.</i> , 81 Wn.2d 565, 502 P.2d 1197 (1972)	25
<i>Lakes v. Vondermehden</i> , 117 Wn. App. 212, 70 P.3d 154 (2003)	39, 42
<i>Lamon v. McDonnell Douglas Corp.</i> , 91 Wn.2d 345, 349, 588 P.2d 1346 (1979)	36
<i>Lamphiear v. Skagit Corp.</i> , 6 Wn. App. 350, 361, 493 P.2d 1018 (1972)	42
<i>Liebergesell v. Evans</i> , 93 Wn.2d 881, 891 – 892, 613 P.2d 1170 (1980).	32
<i>Lonsdale v. Chesterfield</i> , 99 Wn.2d 353, 662 P.2d 385 (1983)	32
<i>Mannington Carpets, Inc. v. Hazelrigg</i> , 94 Wn.App. 899, note 8, 973 P.2d 1103 (1999)	45
<i>Meridian Minerals Co. v. King Cy.</i> , 61 Wn. App. 195, 203, 810 P.2d 31, review denied, 117 Wn.2d 1017, 818 P.2d 1099 (1991)	44
<i>Metropolitan Park District v Griffin</i> , 106 Wn.2d 425, 437, 732 P.2d 1093 (1986)	32
<i>Moore v. Pacific Northwest Bell</i> , 34 Wn. App. 448, 456, 662 P.2d 398 (1983)	36
<i>Mower v King County</i> , 130 Wn. App. 707, 719-720, 125 P.3d 148 (2005)	9
<i>Nicacio v. Yakima Chief Ranches, Inc.</i> , 63 Wn.2d 945, 389 P.2d 888 (1964)	45
<i>Owen v. Burlington Northern and Santa Fe R.R. Co.</i> , 153 Wn.2d 780, 108 P.3d 1220 (2005)	36, 39

<i>Pacific Northwest Pipeline Corp. v. Myers</i> , 50 Wash.2d 288, 291, 311 P.2d 655 (1957)	42
<i>Parrish v. West Coast Hotel Co.</i> , 185 Wash. 581, 55 P.2d 1083 (1936) ..	25
<i>Pierce v. King County</i> , 62 Wn.2d 324, 334, 382 P.2d 628 (1963)	21
<i>Putman v. Wenatchee Valley Med. Ctr., P.S.</i> , 166 Wash.2d 974, 985, 216 P.3d 374 (2009)	29
<i>Reid Sand & Gravel, Inc. v. Bellevue Props.</i> , 7 Wn. App. 701, 704, 502 P.2d 480 (1972)	39, 40, 41, 42
<i>Samuels Furniture v. Department of Ecology</i> , 147 Wn.2d 440, 448-461, 54 P.3d 1194 (2002)	22, 23
<i>Santos v. Dean</i> , 96 Wn. App. 849, 219, 861, 982 P.2d 632 (1999)	39
<i>Schroeder v Fageol Motoer, Inc.</i> , 86 Wn.2d 256, 260, 544 P.2d 20 (1975)	31
<i>Skamania County v. Columbia River Gorge Comm'n</i> , 144 Wn.2d 30, 26 P.3d 241 (2001)	23
<i>State ex rel. Junker</i> , 79 Wn.2d 12, 26 482 P.2d 775 (1971)	44
<i>State v Kaiser</i> , 161 Wn. App. 705, 722, P.3rd (2011)	30
<i>State v. Ralph Williams' N. W. Chrysler Plymouth</i> , 87 Wn.2d 298, 553 P.2d 423 (1976)	30
<i>State v. Severns</i> , 19 Wn.2d 18, 20, 141 P.2d 42 (1943)	42
<i>State v. Shaw</i> , 75 Wn.2d 326, 338, 135 P. 20 (1913)	42

<i>State v. Speer</i> , 36 Wn.2d 15, 23, 216 P.2d 203 (1950)	42
<i>Stientjes Family Trust v. Thurston County</i> , 152 Wn. App. 616, note 8, 217 P.3d 379 (2009)	21
<i>Thola v Henscell</i> , 140 Wn. App. 70, 80-83, 164 P.2d 534 (2007)	34
<i>Thurston County v. Western Washington Growth Management Hearings Board</i> , 190 P.3d 38, 45, 164 Wn.2d 329 (2008)	21
<i>Twin Bridge Marine Park, L.L.C. v. State, Dept. of Ecology</i> , 162 Wn.2d 825, 175 P.3d 1050 (2008)	22
<i>Wenatchee Sportsmen v Ass'n v. Chelan County</i> , 141 Wn.2d 169, 4 P.3d 123 (2000)	22
<i>Woods v. Kittitas County</i> , 162 Wn.2d 597, 174 P.2d 25, 30 - 35, (2009)..	22
Federal Cases	
<i>Fuentes v Shevin</i> , 92 S.Ct. 1983, 407 U.S. 67 (1972)	25
<i>Hilao v Estate of Marcos</i> , 393 P.3d 987, 993 (9th Cir 2004)	4, 8
<i>Neustrom v Union Pacific R. Co.</i> , 156 F.3rd 1057 (10th Cir. 1998)	32
<i>Marybury v Madison</i> , 5 U.S. (1 Cranch) at 177 (need year)	43
<i>Mitchell v W.T. Grant</i> , 94 S.Ct. 1895; 416 U.S. 600 (1974)	25
Cases From Other Jurisdictions	
<i>Breceda v. Whi</i> , 224 S.W.3d 237 (Tex.2005)	19
<i>Fidelity and Deposit Co. v Davis</i> , 129 Kan. 790, 800 - 801, 824 P. 430 (1930)	28
<i>Hartford v Tanner</i> , 22 Kan.App. 64,73 910 P.2d 972 (1996)	28, 29, 32

<i>Pittsburgh Construction Company v. Griffith</i> , 834 A.2d 572, 2003 PA Super 374 (2003)	19
<i>PSE Consulting, Inc. v Frank Mercede and Sons, Inc.</i> , 267 Conn 279, 301 - 310, 838 A.2d 135 (2004)	32
<i>Ranger Ins. Co. v. Culberson</i> , 49 F.R.D. 181 (N.D.Ga.1969)	40

B. Constitutional Provisions:

Const. art. I, § 6	23
Const. art. I, § 10	3, 13, 16, 25, 28, 29
Const. art. I, § 12	26
Const. art. I, § 23	25
Const. art. IV	43
Const. art. IV, § 1	29
Const. art. XI, § 11	3, 13, 16, 27

C. Statutes:

State Statutes

Chapter 36.70C RCW	6, 8, 25
Chapter 19.72 RCW	24
RCW 3.76.030 (2)	22
RCW 4.84.330	46, 47
RCW 19.17.170	1, 3

RCW 19.36.010	3, 13
RCW 19.72.170	1, 16, 17, 26
RCW 19.86.090	45
RCW 36.70A	25
RCW 36.70C.020 (2)	20
RCW 36.70C.030	6, 21
RCW 36.70C.040	21
RCW 48.18.190	3, 13
RCW 97.72.170	24
Federal Statutes	
16 U.S.C. § 544m(a)	23
King County Ordinances	
KCC 16.02.480	6, 19, 20
KCC 16.02.480 (12).....	6, 20
KCC 20.20.020 E	21
Court Rules	
CR 36	39, 40, 41
CR 56(c)	35
RAP 18.1 (a)	45

I. INTRODUCTION

This appeal involves an indirect collateral attack of King County's issuance of a Certificate of Occupancy by way of judicial enforcement of a surety bond pursuant to the Superior Court's original jurisdiction. The appeal involves several issues of first impression. These include, but are not limited to, whether RCW 19.72.170, relating to surety bonds insulates municipal surety agreements from all legal defenses and Washington's rule that there is a duty of good faith implied in every contract. Further, whether King County can use surety bonds as a way of avoiding LUPA's limitations period.

II. ASSIGNMENTS OF ERROR

1.) The Superior Court erred in failing to find the issuance of a Final Occupancy Permit (FCO) pursuant to the King County Code constituted a final land use decision under LUPA.

2.) The Superior Court erred in allowing the surety insurer to enforce the surety bond based on King County's belated determination that Hapaianu had not performed the mitigation condition of his building permit.

3.) The Superior Court erred in holding RCW 19.17.170 renders all defenses to a surety agreement invalid.

4.) The Superior Court erred in deciding that MacWhinney's Requests for Admission (RFA) were proper and in not deciding Hapaianu's objections to such requests when ruling on the motions for summary judgment.

5.) The Superior Court erred in refusing to consider evidence submitted by Hapaianu in support of his motion for partial summary judgment and in defense of ICC's and MacWhinney's motions for summary judgment.

6.) The Superior Court abused its discretion in failing to grant reconsideration to consider deposition testimony which was presented late as a result of a snow storm but before the Superior Court had signed any written orders.

III. STATEMENT OF ISSUES ON APPEAL

1.) Whether King County's issuance of a FCO for Hapaianu's residence constituted a final land use decision under the Land Use Petition Act (LUPA)?

2.) Whether the Superior Court was required to give King County's final (unappealed) ministerial issuance of the FCO conclusive effect with regard to the fact that Hapaianu complied with the mitigation conditions of his building permit?

3.) Whether there is an implied duty of good faith in surety agreements?

4.) Whether RCW 19.17.170 insulates surety agreements from defenses based on the statute of frauds¹, procedural unconscionability², substantive unconscionability³, LUPA⁴, Washington's common law and statutes relating to "Vesting"⁵, Const. art. XI, § 11⁶, procedural due process⁷, substantive due process⁸, and Const. art. I, § 10⁹ ?

5.) Did the Superior Court err in finding defendant ICC was entitled to summary judgment as a matter of law with regard to Hapaiu's counter claims and in failing to find that there were genuine issues of fact which precluded summary judgment against ICC and MacWhinney?

6.) Whether Hapaiu's objections to Third Party Defendants' Request for Admission were proper under Washington law?

7.) Did the Superior Court err in refusing to consider evidence submitted by Hapaiu?

8.) Should Hapaiu be awarded attorney fees and costs?

¹ Hapaiu asserted the surety agreement in question violated RCW 19.36.010 and RCW 48.18.190. CP 754:15-756:11.

² See CP 756:12 - 758:3

³ See CP 758:4 -760:3.

⁴ See 760:4-763:4.

⁵ See 763:5-764:3.

⁶ See CP 764:4-765:26.

⁷ See CP 766:1-767:19.

⁸ See CP 767:120-768:25.

⁹ See CP 769:1 -770:17.

9.) If this case is reversed and remanded, should a different judge of the King County Superior Court be assigned to hear Hapaiu's case?

IV. STATEMENT OF CASE

1. *Statement of Facts*

Constantin Hapaianu obtained a building permit for his personal residence on May 2, 2000. Clerk's Papers (CP) 188 ¶1; 1518 ¶ 2. A special condition of the approval of that building permit was Hapaianu comply with a wetlands mitigation plan, which was approved in 2000. CP 1527. King County required Hapaianu to execute a surety bond requiring compliance with the mitigation plan. CP 110:25-111:5¹⁰.

A copy of the surety bond and the agreement relating to the mitigation plan¹¹ can be found in many places throughout the record. *See e.g.* Affidavit of Sean Wozney, CP 2-17 at 6-7¹²; Declaration of Alexander Frederich, CP 129, 149-152¹³; 152-153¹⁴; Declaration of Stafne, CP 196:-200; Declaration of Alexander Frederich, CP 253, 254-

¹⁰ See *Hilao v Estate of Marcos*, 393 P.3d 987, 993 (9th Cir 2004) (A party is bound by the concessions made in its brief)

¹¹ The Surety Bonds states in ¶ 1 that it is incorporating and attaching a "Sensitive Area Restoration Agreement" to the bond agreement. In Hapaiu's case no "Sensitive Area Restoration Agreement" was attached to the surety bond. *see infra*.

¹² This was the first time the surety bond was filed with the Superior Court. As can be seen it does not included the mitigation agreement which is guaranteed by the bond and which is supposed to be attached.

¹² Copy of Hapaianu's mitigation agreement with King County. (This is the agreement which the surety bond agrees to insure is performed as is supposed to be attached and made a part of the surety agreement.

¹³ This is a copy of the surety agreement between King County, ICC, and Hapaianu.

¹⁴ This is a copy of the indemnity agreement between ICC and Hapaianu.

256¹⁵, 257-259¹⁶, Declaration of Mitch Petras, 1433, 1437-1329¹⁷, 1441-1442¹⁸.

Although the form "subdivision" surety agreement states at ¶ 1 "[t]he principal has executed an 'Agreement' entitled "Sensitive Area and Restoration Agreement, a copy of which is attached hereto and incorporated herein by this reference" it is undisputed that this agreement requiring "compliance" and "monitoring" of the mitigation plan was not attached to the agreement when Hapaianu was required to sign it. CP 227-228, 285 ¶ 12.

The location of Hapaianu's home and well were moved after the approval of the mitigation plan and before the issuance of his final certificate of occupancy. CP 282:8-283:8; 1519:11-CP1520:13. Hapaianu obtained a FCO for his residence on January 16, 2008. CP 189:1-8; 1519 ¶3. A Copy of Hapaianu's FCO is attached at CP 1524-1525. CP 1519 ¶3. The original FCO is a single page document with printing on the front and

¹⁵ This is a copy of the mitigation agreement. Frederich notes it was signed by Hapaianu on July 27, 2000. It is more significant from Hapaianu's perspective that the County did not sign the Agreement until August 1, 2000. August 1, is also the date the SARA recites the agreement was entered into, which is a different date the surety agreement was signed.

¹⁶ This is a copy of the surety agreement which was signed by Hapaianu on July 31, 2000.

¹⁷ This is a copy of the surety bond dated July 31, 2000.

¹⁸ This is a copy of the Sensitive Area Restoration Agreement (SARA) executed by Hapaianu on July 27, 2011 and King County on August 1, 2000

back. Id. The FCO allowed Hapaianu to occupy his house. CP 189:1-8; 1519 ¶3; 1524-1525.

At all material times KCC 16.02.480 provided in pertinent part:

After final inspection, if no violations of the code or of related land use and public ordinances, rules, and regulations have been discovered or if such violations have been discovered and corrected, the building official shall issue a final certificate of occupancy which shall contain the following:

* * *

12. Any special stipulation and special conditions of the building permit.

See KCC 16.02.480 (12).

No special stipulations or special conditions were identified by the building official who issued the FCO. CP 1524-1525.

Ch. 36.70C RCW was in effect on January 16, 2008, the day Hapaianu was granted an unconditional FCO to use his house. At all material times then and thereafter RCW 36.70C.030 provided in pertinent part: "(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, ...".

On November 18, 2008 King County, through an employee, wrote Hapaianu about his property:

At this time no mitigation plan has been implemented and the house location may have changed from the location on the approved Enhancement Plan dated 6/29/00 (attached) from what you tell me. From the 2007 aerial photograph (attached)

it also appears that additional impacts have occurred including a garden to the northeast of the driveway, approximately 20' of wetland buffer encroachment to the southwest of the home (outside BSBL), a 17'-21' well access road (a maximum 8" road was approved as temporary impact) which is still being used, and additional wetland impacts observed further north. Due to these additional impacts, the approved Enhancement Plan (6/29/00) will need to be modified prior to implementation. ...

Since your original plan was approved we have developed a mitigation reserves program, which allows for off-site initiation in some cases when it is appropriate on encumbered sites such as yours. A fee is paid into the program for offsite mitigation which relieves you from all responsibilities of future planting and monitoring. ...

Due to your non-compliance to the Variance L99VA306 and Mitigation bond A00BN410, you must contact us by December 15, 2008 as to how you plan to proceed in reaching compliance to the Critical Area Variance. ...

CP 188-9 ¶4; 193-5.

Hapaianu believed the county official who signed the FCO had determined that he complied with the mitigation agreement as it was a condition of his building permit. CP 189:10-16. County records provided to Hapaianu indicate some persons at the county also believed this might be the case. CP 281:4-282:3; 407-408¹⁹.

¹⁹ This is a document Hapaianu obtained through discovery from the County. It is a copy of the same letter which is set forth at CP 193-5, but contains the following handwritten message:

sent out --
Frustrating as 898R2432 has rec'd final and EO700005 on building for early occupancy was closed without critical area review and compliance

CP 407

As it turns out King County has a policy in place whereby it has determined not to appeal land use decisions, like Hapaianu's FCO, pursuant to the provisions of Ch. 36.70C RCW set forth above. CP 1291:8-1297:8; 864:21-865:10; 898:12-912:5; 1223:5-1229:6; 788 ¶ 4, 771:10-20. Rather, King County avoids having to appeal land use decisions by using surety bonds to contract around LUPA's stringent 21 day appeal limitation. *Id.* See also CP 298-330 (letter from King County prosecutor to Hapaianu's counsel dated April 23, 2010.²⁰)

The County required ICC pay the surety bond pursuant to the agreement to which the County, ICC, and King County were parties. CP 111:5-25²¹. There was a factual dispute between Hapaianu and ICC and third party defendant King County as to the good faith of ICC's investigation prior to paying the bond money to ICC. CP 19:16-26:6 (Amended Complaint); 234-246 (Stafne declaration with attachment²²); 779:3-780:3; 779:8-782:21; 1504:15-1505:19. ICC claimed Hapaianu did not respond promptly enough to its investigation and therefore it paid the County in good faith. CP 117:23-119:20; CP 129:3-175. Hapaianu

²⁰ The response by Hapaianu's counsel to the King County prosecutor is at CP 296.

²¹ Hapaianu does not accept the legal conclusions set forth in this portion of ICC's brief. But to the extent this portion of the brief sets forth facts, Hapaianu contends ICC is bound to them. See *Hilao v Estate of Marcos*, 393 P.3d 987, 993 (9th Cir 2004) (A party is bound by the concessions made in its brief)

²² The attachment to Stafne's declaration (CP 238 -246) is a King County pamphlet regarding frequently asked questions related to surety bonds.

responded that at the time ICC sent him letters he was out of state, but was available by phone. CP 287:11-18. *See also* 1520:22-1521:5. Hapaianu asserted ICC sent certified letters to the County regarding the investigation, but not to him. *Id.* Similarly, the ICC representative called MacWhinney as part of its investigation, but never tried to call Hapaianu. *Id.* Hapaianu also asserted ICC requested a "punch list" from the County which was needed to complete its investigation, but never got that evidence. *See* CP 364²³. Petras indicated to the County that in order to collect on the bond they would have to first show plants were installed and that the mitigation plan was not working. CP 803:37:19-805:45:10. Petras writes in an August 16, 2008 letter to MacWhinney:

"To determine whether the County is timely in its claim, Indemnity Company of California shall require information and documentation which shows when the County approved the principal's installation of the sensitive area and mitigation measures..."

According to Petras, MacWhinney told him on August 27, 2010 that the project was "finaled" in 2008 and that the plants had been installed. CP 799:23:5-800:27:2. *See also* CP 1434 ¶ 17; 1474 (Written memorandum memorializing MacWhinney's statements to Petras.) MacWhinney was correct with regard to Hapaianu's FCO being issued on

²³ The term "punch list" is commonly used to determine what, if any, conditions remain to be performed before a type 1 land use decision will be issued. *See e.g. Mower v King County*, 130 Wn. App. 707, 719-720, 125 P.3d 148 (2005)

January 16, 2008. CP 191-192. However, the statement that the plants had been installed was not true. Indeed, MacWhinney states in a declaration that she never told Petras that plants had been installed. CP 1481 ¶ 12. This is significant as Petras testified MacWhinney's statements that a FCO had been issued as a result of, among other things, performance of the plantings which were a condition of Hapaianu's building permit was the reason ICC paid the bond. CP 810:66:20-68:15. ICC stated in discovery responses that MacWhinney's inaccurate statements on August 27, 2010, *i.e.* that plantings had been installed, were material to its payment of the bond to King County. CP 861:12-862:10.

The SARA signed by Hapaianu states in the first paragraph of the "Terms of the AGREEMENT" that:

1. The APPLICANT shall fully install all sensitive area and/or buffer mitigation measures required pursuant to the above referenced project/Permit by the time specified by the County, which is prior to the issuance of any occupancy permit (unless approved in writing by the Director of DDES). ... All improvements shall be installed to the specifications of the Director of DDES.

King County publishes a pamphlet regarding "commonly asked questions" about performance surety bonds. CP 238-246. One of the questions set forth in this pamphlet is "When and How is Money Returned?". CP 242. The answer provided by King County in the publication is:

The Department will not release performance bonds until all of the following conditions are met:

*Permit fees have been paid to date

*Any applicable maintenance, maintenance/defect, maintenance guarantees have been posted.

*The development has been inspected; and

*The Director has determined that the conditions and requirements of the permit/approval have been met and final construction approval, if applicable has been granted. The procedure for redeeming your guarantee depends on the type of project.

CP 242.

Another disputed fact issue is whether under the circumstances of this case ICC has paid the surety bond in good faith or has appropriately mitigated its damages. *Compare surety bond*, CP 1437 ¶ 3 ("... Any funds provided by the surety in excess of that expended to remedy noncompliance with the Agreement shall be returned to the Surety upon completion of the work and payment of outstanding fees.") with Hapaiuanu's testimony at 1521 ¶ 15 ("King County has not performed any mitigation with plantings on my property.")

2. Statement of Proceedings Below

This case involves a request for a jury trial de novo after an arbitration award. CP 14-17. The claims before the Court are set forth in Hapaiuanu's Answer, Affirmative Defenses, Counter Claims, and Third

Party Claims. CP 18-27. The third-party defendants were two King County employees, Betsy MacWhinney (MacWhinney) and Pesha Klein (Klien). Plaintiff alleged they were acting outside the scope of their authority, but now understands this is not the case and that King County has a policy in place to utilize surety bonds to avoid LUPA's limitations period.

During discovery, MacWhinney and Klein moved to compel Hapaianu to admit or deny RFAs. CP 28-74. Hapaianu declined to admit or deny the RFAs because they required admissions of the central claims involved in the litigation and conclusions of law. CP 75-101. Both Hapaianu and the County's employees requested attorney fees. CP 37:3-37:7; 84:18-85:18. The Superior Court granted the County employees' motion and order Hapaianu to pay \$1,250.00 in attorney fees. CP 107-108.

ICC, MacWhinney, and Hapaianu filed cross motions for summary partial judgment. CP 109-124 (ICC's motion); CP 176-187 (Hapainu's motion). ICC moved for dismissal of Hapaianu's counter claims, including Hapaianu's Consumer Protection Act (CPA) claim (CP 113:7-122:18) and breach of contract claims. ICC argued it had no duties under the Surety Agreement or the Indemnity Agreement. CP 122:18-123:25.

Hapaianu moved for a partial summary judgment that 1.) the FCO granted Hapaianu was a final land use decision pursuant to LUPA; 2.) as a consequence of that final land use decision the mitigation provisions of the permit were deemed to have been complied with as a matter of law; and 3.) that King County had no authority to require development of a new mitigation plan after Hapaianu's final occupancy permit had been approved and not appealed. CP 176-187

In response to ICC's motion for summary judgment Hapaianu asserted the surety agreement and the indemnity agreement were void and unenforceable. CP 754:14-770:18. Hapaianu's arguments in this regard were based on the statute of frauds²⁴, procedural unconscionability²⁵, substantive unconscionability²⁶, LUPA²⁷, Washington's common law and statutes relating to "Vesting"²⁸, Const. art. XI, § 11²⁹, procedural due process³⁰, substantive due process³¹, and Const. art. I, § 10³².

MacWhinney moved for summary contending that she could not be liable to Hapaianu as a matter of law.

²⁴ Hapaianu asserted the surety agreement in question violated RCW 19.36.010 and RCW 48.18.190. CP 754:15-756:11.

²⁵ See CP 756:12 - 758:3

²⁶ See CP 758:4 -760:3.

²⁷ See 760:4-763:4.

²⁸ See 763:5-764:3.

²⁹ See CP 764:4-765:26.

³⁰ See CP 766:1-767:19.

³¹ See CP 767:120-768:25.

³² See CP 769:1 -770:17.

While the cross motions for summary judgment were pending Hapaianu moved "for production of the original surety agreement and/or objection to surety agreement being considered for any purposes other than unconscionability". CP 220-226. Hapaianu's motion was based on the fact the SARA was not attached to the surety agreement when Hapaianu signed the surety agreement. CP 221:15-223:6. In this regard, Hapaianu argued, among other things:

... [T] the surety agreement is a three party agreement whereby the surety obligates itself to put up a bond to perform that attached agreement between King County and the permit applicant. Because payment of the surety bond is based on non-performance of the agreement attached to the form surety contract, the King County boilerplate surety agreement provides in pertinent part: "The principal has executed an 'Agreement' entitled 'Sensitive Area Restoration Agreement', *a copy of which is attached hereto and incorporated herein by this reference*". [Emphasis Supplied]

However, as the Court can see from Exhibit B to Frederick's declaration the Sensitive Area Restoration Agreement that was supposed to be attached to the boilerplate surety agreement is not attached. Because the surety agreement is designed only to insure performance of an attached agreement to the surety agreement, the failure to attach the agreement between King County and Hapaianu means there was no contract ICC was required to pay a bond with regard to.

CP 221:23-222:12. The Court granted Hapaianu's motion to produce the original surety agreement. CP 262-265. At the bottom of the Order, the Court wrote: "In granting this motion it should not be considered, in any

way, an endorsement of Hapaianu's theory. Cases are best decided on the merits, not technicalities." CP 265.

In response, to Hapaianu's motions for partial summary judgment ICC argued, without citation to any authority, that regardless of whether LUPA prohibited a collateral attack on the issuance of the FCO this had nothing to do with its indemnity claim. CP 268:23-269:19. The only fact which was relevant, according to ICC, was that it suffered a loss pursuant to the surety agreement. *Id.* ICC took no position with regard to the merits of Hapaianu's motions for partial summary judgment regarding LUPA. CP 270:1,

The King County attorney representing MacWhinney argued in response to Hapaianu's motion for summary judgment the Superior Court should not reach the LUPA issues because King County was not a named party. CP 817:14-818:3. The County also argued the LUPA issues raised were irrelevant to the lawsuit before the Court. CP 818:4-823:3. Finally, a deputy for King County Prosecutor argued the merits of Hapaianu's motion for summary judgment. CP 823:4-825:15. Significantly, the deputy County attorney admitted the County uses surety agreements to avoid LUPA's limitations period and Washington's policy favoring the finality of land use decisions. In this regard, the King County prosecutor argued:

Hapaianu's argument seems to be that because King County can no longer seek compliance with the permit conditions by withholding the FCO, it cannot seek compliance by any other means. But there is no logical basis for this position. To use an example, if a door has multiple locks, and one lock breaks, the other locks are not also rendered useless. On the contrary, their purpose is to operate as additional safeguards.

CP 824:19-23.

ICC's reply to Hapaianu's claim that the surety agreement was void and invalid (CP 754:14-770:18) appears only to address Hapaianu's statute of frauds defense. CP 831:3-831:17. Certainly, ICC's reply does not specifically address Hapaianu's arguments claims that the three party surety agreement was void and unenforceable because of procedural unconscionability³³, substantive unconscionability³⁴, LUPA³⁵, Washington's common law and statutes relating to "Vesting"³⁶, Const. art. XI, § 11³⁷, procedural due process³⁸, substantive due process³⁹, and Const. art. I, § 10⁴⁰. However, ICC does state (in an argument which appears to apply to the Statute of Frauds) that "RCW 19.72.170 expressly validates surety bonds regardless of any defects to form, substance, or condition".

CP 831:15-16.

³³ See CP 756:12 - 758:3

³⁴ See CP 758:4 -760:3.

³⁵ See 760:4-763:4.

³⁶ See 763:5-764:3.

³⁷ See CP 764:4-765:26.

³⁸ See CP 766:1-767:19.

³⁹ See CP 767:120-768:25.

⁴⁰ See CP 769:1 -770:17.

For purposes of her motion, MacWhinney asked the Court to assume she knew the surety agreement was invalid and unenforceable.

The Superior Court dismissed Hapaianu's motions for partial summary judgment because it found an FCO was not a final land use decision under LUPA.

As to defendant Hapaianu's summary judgment, as I have said, probably ad nauseum, I can find no case that finds a certificate of occupancy is a final land use decision that extinguishes the restoration agreement the defendant had with the county. I can find no support for that proposition anywhere.

CP 1358:7-12. *See also* CP 1358:15-1360:1; 1360:5-1362:21.

The Court dismissed Hapainu's CPA claims because it found no evidence of issues as to material fact. "There is no unfair or deceptive act. ..." CP 1354:10-14. The Superior Court dismissed Hapainu's contract claims because "[u]nder the indemnity agreement there is no duty of ICC to Hapaianu, the defendant. Without duty there can be no breach of duty." CP 1355:5-8. The Court also stated (apparently with regard to the statute of frauds):

I find the security <sic> agreement of the agreement, the contract, the contracts, does not violate the statute of frauds. In addition, RCW 19.72.170 states that no bond will be void because of a technicality. It states it in different words, but that's how I translated it.

CP 1355:17-1356:23.

Hapaianu filed a motion for reconsideration. CP 1280-1308. Among other things, Hapaianu challenged the Superior Court's failure to consider any of the evidence he submitted in ruling on the cross motions for summary judgment. Id. In support of his motion to reconsider, Hapaianu relied on all of the evidence which had been submitted to the Court pursuant to the cross-motions for summary judgments. 1283:10-1286:5. Hapaianu claimed the Court erred in not considering any of the evidence he submitted and in failing to rule on his arguments that the surety agreement was void. CP 1300-1303:20.

The Court denied the motion for reconsideration. CP 1419.

Thereafter, Hapaianu's counsel asked ICC's counsel to bring a summary judgment motion to determine whether in light of the Court's breach of contract rulings there remained any factual issues left for trial. 1502:5-11. ICC did so. CP 1420-1431. In response to ICC's motion Hapaianu relied upon all the evidence which had been previously presented to the Court with regard to the cross motions for summary judgment and the motion for reconsideration. 1502: 12-1503:26. Although there was no objection to this evidence, the Superior Court's order indicates the Court did not consider this evidence. CP 1614:7-1615-14.

V. ARGUMENT

1. The issuance of an FCO constitutes a final land use decision under LUPA.

Although an FCO is mandated by the International Building Code⁴¹ there appear to be only twenty cases in United States jurisdictions that use the term. Two of these cases are unreported Washington decisions. None of the decisions are "on point" with regard to the issue of whether the issuance of a final occupancy permit is a land use decision under Washington law. But several make clear that the issuance of a final occupancy permit does have land use consequences. *See e.g. Pittsburgh Construction Company v. Griffith*, 834 A.2d 572, 2003 PA Super 374 (2003); *Breceda v. Whi*, 224 S.W.3d 237 (Tex.2005).

Gene Miller, a planner who has frequently dealt with FCOs, testified:

Certificates of Occupancies are a jurisdiction's certification that construction satisfies all codes and building standards. It is my understanding that a certificate of occupancy was approved in this case. Based on my experience as a planner this would indicate to me that a property qualified building inspector made a ministerial decision approving the consequences and all conditions relating to the building permit. ...

CP 728:11 - 20.

⁴¹ See CP 729 ¶ 5 & 6 (Miller's declaration); CP 711:1 -712:16 (Williamson's declaration). *See also* KCC 16.02.480.

In this case it is undisputed that the mitigation plan which is at issue in this appeal was a condition of the building permit. The issuance of the FCO deemed this condition of Hapaianu's building permit to have been performed. *See* KCC 16.02.480, which states in pertinent part:

After final inspection, if no violations of the code or of related land use and public ordinances, rules, and regulations have been discovered or if such violations have been discovered and corrected, the building official shall issue a final certificate of occupancy which shall contain the following:

* * *

12. Any special stipulation and special conditions of the building permit.

See KCC 16.02.480 (12).

RCW 36.70C.020 (2) provides in pertinent part:

(2) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or *used*, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses; [Emphasis Supplied]

The FCO issued by a building inspector allowed Hapaianu to occupy, i.e. use, his house as a result of the inspector's determination that Hapaianu had complied with "special conditions of the permit". As this

Court can see the FCO is unconditional. CP 284:18-19; 705-706 (Copy of two sides of certificate of occupancy). The building inspector had authority to make these Type 1 land use determinations pursuant to KCC 20.20.020 E. *See also* CP 713:3-16. The Superior Court erred in not concluding as a matter of law that the County's issuance of Hapaianu's FCO constituted a final land use decision under LUPA

Hapaianu's FCO was issued January 16, 2008. Any appeal of the Building Inspector's determination that Hapaianu had complied with the requirements of his building permit was required to have been brought within 21 days. RCW 36.70C.030 and 040. Under LUPA even illegal land use decisions "must be challenged in a timely, appropriate manner." *Habitat Watch v Skagit County*, 155 Wn.2d 397, 407, 120 P.3rd 56 (citing *Pierce v. King County*, 62 Wn.2d 324, 334, 382 P.2d 628 (1963)); *Stientjes Family Trust v. Thurston County*, 152 Wn. App. 616, note 8, 217 P.3d 379 (2009).

The legislature and judiciary have both endorsed Washington's policy of finality limiting Superior Courts' jurisdiction to review and judicially modify decisions relating to municipal land use actions. In *Thurston County v. Western Washington Growth Management Hearings Board*, 190 P.3d 38, 45, 164 Wn.2d 329 (2008) the Supreme Court explained the basis of Washington's strong finality policy for land use

decisions by reiterating "[i]f there were not finality, no owner of land would ever be safe in proceeding with development of his property."⁴² Cases which have followed this policy while applying land use statutes include, but certainly are not limited to: *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.2d 25, 30 - 35, (2009); *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002); *Wenatchee Sportsmen v Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000). The Superior Court was required to have followed this policy in this case and was precluded from exercising original jurisdiction in any manner which was not consistent with the County's final land use decision.

RCW 3.76.030(2) states: "A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court...". Our Supreme Court has held that governmental authorities cannot collaterally attack final land use decisions under LUPA by mounting an attack based on another statute. *See e.g. Twin Bridge Marine Park, L.L.C. v. State, Dept. of Ecology*, 162 Wn.2d 825, 175 P.3d 1050 (2008) (LUPA's 21 day jurisdictional limitation precluded Department of Ecology's enforcement action pursuant to Shorelines Management Act); *Samuels Furniture v Department of Ecology*, 147

⁴² This quote was taken from *Deschenes v. King County*, 83 Wn.2d 714, 717, 521 P. 2d 1181 (1974) *overruled in part by*, *Clark County PUB. Util. District No. 1 v. Wilkinson*, 139 Wn.2d 840, 991 P.2d 161 (2000).

Wn.2d 440, 448-461, 54 P.3d 1194 (2002) (LUPA's 21 day jurisdictional limitation precluded Department of Ecology's enforcement action pursuant to Shorelines Management Act); *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 26 P.3d 241 (2001) (construing a federal act, 16 U.S.C. § 544m(a)), no collateral attack on a local final land use decision can be made when no timely appeal is filed). If state and federal statutes do not provide a basis for a collateral challenge to a final land use action, then certainly an unconscionable contract written by King County should not provide a basis for the Superior Court to ignore the consequences of a final land use decision. *See* Const. art. I, § 6 (Superior Court may only exercise appellate jurisdiction as prescribed by law.) *See e.g. Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005) (Any Superior Court review of a final land use decision involves an exercise of the Superior Court's appellate jurisdiction); *Davis v. Washington State Dept. of Labor & Industries*, 159 Wn. App. 437, 441-3, 245 P.3d 253 (2011) (A Superior Court has no subject matter jurisdiction to exercise original jurisdiction with regard to issues which are reserved by statute to the Court's appellate jurisdiction.)

2. The surety agreement was void and unenforceable.

ICC's contended in its reply to Hapaianu's arguments the surety agreement was invalid and unenforceable that:

RCW 97.72.170 expressly validates surety bonds regardless of any defects in form, substance, or condition. RCW 19.72.170 seeks to prevent parties to a surety bond from avoiding their obligations under the bond by reason of minor technicalities.

CP 831:15-17.

To the extent ICC is arguing RCW 97.72.170 insulates a King County prepared and required surety contract between King County, ICC, and Hapaianu from having to comply with the United States and Washington Constitutions and Washington law, Hapaianu respectfully disagrees.

RCW 19.72.170 provides:

No bond required by law, and intended as such bond, shall be void for want of form or substance, recital, or condition; nor shall the principal or surety on such account be discharged, but all the parties thereto shall be held and bound to the full extent contemplated by the law requiring the same, to the amount specified in such bond. In all actions on such defective bond, the plaintiff may state its legal effect, in the same manner as though it were a perfect bond.

RCW 19.72.170 has never been interpreted by an appellate court. Indeed, only 6 Washington appellate cases have even mentioned any provision in Chapter 19.72 RCW. It appears this Chapter has been in force since 1854. According to the Supreme Court, this Chapter attempts to codify mid-eighteenth century case law relating to sureties. *Amick v. Baugh*, 66 Wn.2d 298, 302, 402 P.2d 342 (1965).

Hapaianu would ask this Court to take judicial notice that a lot of judicial and statutory evolution has occurred since 1854. *See e.g. Fuentes v Shevin*, 92 S.Ct. 1983, 407 U.S. 67 (1972); *Mitchell v W.T. Grant*, 94 S.Ct. 1895; 416 U.S. 600 (1974). Ch. 36.70C RCW (LUPA); RCW 36.70A (GMA).

Freedom to contract is a right founded upon both the United States and Washington Constitutions. *Ketcham v King County Medical Service Corp.*, 81 Wn.2d 565, 502 P.2d 1197 (1972). "No state shall ... pass any Bill of Attainder, ex post facto law, Or Law impairing the Obligation of Contracts..." U.S. Const. art. I, § 10. "No bill of attainder, ex post facto law, Or law impairing the obligations of contracts shall ever be passed." Const. art. I, § 23. Although freedom of contracts must give way to appropriate state legislation relating to the state's police powers, *Parrish v. West Coast Hotel Co.*, 185 Wash. 581, 55 P.2d 1083 (1936), King County cannot require citizens to agree to surety agreements that are contrary to state and federal law.

This Superior Court's view that this statutory provision enacted in 1847 favors surety bond contracts over all other contracts appears to be accurate. However, to the extent this legislation was intended to favor surety agreements so that such contracts do not have to comply with Washington law there are "equal protection" and "privileges and

immunities" issues under the United States and Washington Constitutions respectively.

"The aim and purpose of the special privileges and immunities provision of Const. art. I, § 12, of the state constitution and of the equal protection clause of the fourteenth amendment of the Federal constitution is to secure equality of treatment of all persons, without undue favor on the one hand or hostile discrimination on the other."

Grant County Fire Protection District v. City of Moses Lake, 150 Wn.2d 791, 810 83 P.3d 419 (2004).

In this case it is obvious that a purpose of RCW 19.72.170 is to provide undue favoritism for the surety industry with regard to the law of contracts generally. Such favoritism is particularly inappropriate in this case because the municipality which enacted the "law" requiring this surety agreement is also the author of the surety agreement and a party to the surety agreement. Under these circumstances the favoritism being afforded King County and its partner, ICC, under the contract against Hapaianu and other principals violates Const. Art. I, § 12 because it gives them special privileges and immunities *vis a vis* Hapaianu, a land owner. It also violates the equal protection clause as applied in this case because there is no rational basis for enacting a law resolving all contractual issues in favor of one party to a specific contract.

a. The surety agreement violates the statute of frauds.

Hapaianu incorporates herein the arguments advanced at CP
754:16-756:11.

b. The surety agreement is procedurally unconscionable and therefore void and unenforceable.

Hapaianu incorporates herein the arguments advanced at CP
756:12-758:3.

c. The surety agreement is substantively unconscionable and therefore void and unenforceable.

Hapaianu incorporates herein the arguments advanced at CP 758:4-
760:3.

d. The attempt to enforce the surety agreement after the final occupancy permit was issued violated LUPA.

Hapaianu incorporates herein the arguments advanced at CP 760:4-
763:4.

e. The attempt to utilize the invalid surety agreement to coerce Hapaianu to enter into a new mitigation plan or pay for the County's use of the bond money somewhere else in King County violated the law related to "Vested Rights".

Hapaianu incorporates herein the arguments advanced at CP 763:5-
764:3.

f. Enforcement of the surety agreement under the circumstances of this case violated Const. art. XI, § 11.

Hapaianu incorporates herein the arguments advanced at 764:4-
765:26.

g. Enforcement of the surety agreement under the circumstances of this case violated procedural due process guarantees under the Washington and United States Constitutions.

Hapaianu incorporates herein the arguments advanced at 766:1 - 767:19.

h. Enforcement of the surety agreement under the circumstances of this case violated procedural due process guarantees under the Washington and United States Constitutions.

Hapaianu incorporates herein the arguments advanced at 767:20 - 768:26.

i. Enforcement of the surety agreement under the circumstances of this case violated Const. art. I, § 10.

Hapaianu incorporates herein the arguments advanced at 767:1 - 770:17.

Additionally Hapaianu adds as authority for this argument *Fidelity and Deposit Co. v Davis*, 129 Kan. 790, 800 - 801, 824 P. 430 (1930) and *Hartford v Tanner*, 22 Kan.App. 64, 73 910 P.2d 972 (1996).

In *Fidelity and Deposit Co. v Davis*, 129 Kan. 790, 800 - 801, 824 P. 430 (1930) the Court held that a "conclusive evidence" clause in an indemnification contract given by a principal to a surety was invalid because it violated public policy by making the court's function a ministerial one. The court noted that the indemnity contract left the court with nothing to do but enter judgment in favor of the surety. *Id.* In a later

case, one where the indemnity language was virtually identical to that contained in the indemnity contract being challenged here, the Court held the indemnity contract violated public policy. The Court stated:

"[The indemnity agreement] gives Hartford total discretion in handling claims. Hartford's actions are 'final, conclusive, and binding' on the principal and indemnitor. Such contract provisions hold Hartford to no standard other than its own expediency. This court's previous opinion in the case held that "[p]aragraph 11 of the present agreement has the same effect as conclusive evidence clause' We hold the language is contrary to public policy" *Hartford v Tanner*, 22 Kan.App. 64, 73 910 P.2d 972 (1996).

In Washington judicial determinations are to be finally determined by the judiciary. Const. art. IV, § 1. The surety contract in question violates Hapaianu's access to the Court under Const. art. I, § 10 by giving King County the ultimate power to determine whether the contract has been complied with. *See Sandin* testimony set forth at CP 1291:16-1294:16.

Washington Courts hold the legislature cannot restrict access to the Court's by statute. *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 985, 216 P.3d 374 (2009). *Cf. Young v. Savidge*, 155 Wn. App. 806, 828, 230 P.3d 222 (2010). If the legislature cannot restrict a citizen's access to the Courts by statute, there is no reason to hold a municipality can prevent access to the Courts by writing up a surety

agreement which provides the municipality has the unilateral to determine whether the surety agreement has been breached.

3. The Superior Court erred finding defendant ICC was entitled to summary judgment as a matter of law with regard to Hapaiu's counter claims and in failing to find that there were genuine issues of fact which precluded summary judgment in favor of ICC and MacWhinney.

a.) The Superior Court erred in finding there were no deceptive practices as a matter of law.

ICC contended that Hapaiu's claim ICC attempts to enforce invalid and unenforceable surety bonds constituted and unfair and deceptive practices was outrageous because King County required such bonds. CP 117. Because the Superior Court never considered Hapaiu's argument the surety agreement was invalid and unenforceable, it erred as a matter of law in finding there were no possible deceptive acts and practices. This is because unconscionable and illegal contracts violate the Consumer Protection Act. *State v Kaiser*, 161 Wn. App. 705, 722, P.3rd (2011). *See also State v. Ralph Williams' N. W. Chrysler Plymouth*, 87 Wn.2d 298, 553 P.2d 423 (1976).

In determining whether agreements are unconscionable and unfair, courts should examine “[t]he manner in which the contract was entered, whether [a party] had ‘a reasonable opportunity to understand the terms of the contract,’ and whether ‘the important terms [were] hidden in a maze of fine print.’” *Adler v Fred Lind Manor*, 153 Wn.2d 331, 347, 103 P.3d. 773

(2004). *See also Schroeder v Fageol Motor, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975).

In this case it is undisputed Hapaianu was required to enter into the surety agreement. The boiler plate surety agreement was designed so as to guarantee the performance of an attached "subdivision" agreement with King County. In Hapaianu's case there was no agreement attached to the surety agreement. CP 227-228. The agreement which was insured to be performed by the surety agreement had not even been signed and executed before the surety agreement went into effect. CP 227-228.

In summary, if Hapaianu is correct in his defense the surety agreement was void, then the Superior Court erred as a matter of law in not taking this into account when considering whether ICC engaged in "unfair and deceptive" practices.

b.) The Superior Court erred in failing to conclude ICC owed Hapaianu an implied duty of good faith pursuant to the surety and indemnity agreements.

ICC argued that as a matter of law it owed no duties of good faith to Hapaianu. CP 122:18-123:123:25. The trial court agreed. This was error.

While there is no dispute the language of the surety bond gives ICC the right to exercise its discretion in the amount of the bond to pay King County, this discretion must be exercised consistently with the duty

of good faith implied to all contract. *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 662 P.2d 385 (1983); *Metropolitan Park District v Griffin*, 106 Wn.2d 425, 437, 732 P.2d 1093 (1986); *Liebergessell v. Evans*, 93 Wn.2d 881, 891 – 892, 613 P.2d 1170 (1980); *Frank Coluccio Constr. Co. v King County*, 136 Wn. App. 751, 766, 150 P.3d 1147 (2007).

While there are different rules regarding indemnity contracts in different states, every state which subscribes to the rule that contracts have an implied duty of good faith, as does Washington, applies this rule to indemnity agreements and surety bonds. *See e.g. PSE Consulting, Inc. v Frank Mercede and Sons, Inc.*, 267 Conn 279, 301 - 310, 838 A.2d 135 (2004); *Hartford v Tanner*, 22 Kan.App.2d 64, 910 P.2d 872 (1996). *Cf. Neustrom v Union Pacific R. Co.*, 156 F.3rd 1057 (10th Cir. 1998) (Rejecting contract of adhesion analysis because there was no disparity of bargaining power. *Id.*, at 1062) There is no sound policy reason why an implied duty of good faith should not be implied to surety and indemnity agreements, especially where the very purpose of the agreement is admitted to include avoidance of having to comply with LUPA's limitations period.

c. The Superior Court erred in finding Betsy MacWhinney was not liable to Hapaianu as a matter of law under the facts proposed by the County Prosecutor.

It was Hapaianu's position that he complied with the conditions of the building permit under the factual circumstances of this case. CP

189:10-17; 281:22-283:3; 282:9-283:11. If MacWhinney did not agree Hapaianu had complied, MacWhinney (like everyone else) was required to appeal the building inspector's FCO pursuant to LUPA. *See supra*.

MacWhinney conceded for purposes of her motion for summary judgment that the trial court should assume she knew the surety agreement was unenforceable because a FCO had been issued. Further, MacWhinney conceded for purposes of the motion the trial court should assume that MacWhinney lied to ICC about the "plantings" so as to cause ICC to seek indemnity from Hapaianu. MacWhinney's MFSJ, p. 7:4 – 11⁴³.

Given these concessions, the issue before this Court is whether a County official who knowingly acts to subvert a citizen's rights under the law and cause that citizen financial harm may be liable for any of the common law torts pled by Hapaianu.

i.) Tortious Interference with a contract and/or Business expectancy

MacWhinney's first argument was that because King County was a party to the surety agreement she could not be held liable for an interference with the surety contract. Hapaianu disagrees. *See Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 215 P.3d 990, 1008 -1112 (2009) (Company officer held liable for tortious

⁴³ Due to an oversight this document was not designated as a part of the record. This oversight will be corrected promptly and Hapaianu will then provide this Court with accurate citations to these Clerk's Papers.

interference to a contract company was a party to because officer acted in bad faith.) The key criteria as to whether an employee or officer can be held liable with regard to tortious interference is whether the employee acted in good faith. Here, the County concedes that for the purposes of this motion for summary judgment the Court must assume MacWhinney knew the surety agreement was not enforceable and lied to Petras to have it enforced. M&K MFSJ, p. 7:4 – 11. These concessions admit such facts and inferences from such facts sufficient to establish MacWhinney's liability for tortious interference with a contract and/or business expectancy.

MacWhinney argues that there is absolutely no support for an inference that MacWhinney acted intentionally to interfere with the indemnity contract. But MacWhinney admits the trial Court should have assumed she knew the surety agreement was not enforceable and that she lied to get ICC to enforce it so as to cause Hapaianu to have to repay ICC. Seeking to enforce a surety agreement by way of a lie certainly creates an inference that MacWhinney's conduct was intentional. Circumstantial evidence, such as that generated by MacWhinney's concessions, is sufficient to support a verdict for tortious interference with a contract or business expectancy. *See Thola v Henscell*, 140 Wn. App. 70, 80-83, 164 P.2d 534 (2007)

ii.) Misrepresentation and Fraudulent Concealment

MacWhinney also asserted notwithstanding her concessions that she was entitled to a summary judgment as a matter of law on Hapaianu's misrepresentation and fraudulent concealment claims. In *Dussault ex rel. Walker-Van Buren v. American Intern. Group, Inc.*, 123 Wn. App. 863, 99 P.3d 1256 (2004) this Court held an insurer owes duty to third-party claimant to refrain from intentional tortious acts. Hapaianu contends that the same principles should apply to a public official who knowingly violates the law to cause a citizen harm.

Given that MacWhinney has essentially conceded the existence of an intentional tort against Hapaianu, *Dussault*, 123 Wn. App. 870, she cannot escape liability on summary judgment by saying she only made the misrepresentations to ICC, when she expected ICC to take action against Hapaianu.

d. The Superior Court erred in concluding there were no issues of facts precluding summary judgment in favor of ICC.

Summary judgment is appropriate only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c). The court must consider the facts submitted and all

reasonable inferences from those facts in the light most favorable to the nonmoving party. *Davis v. West One Automotive Group*, 140 Wn. App. 449, 456, 166 P.3d 807 (2007); *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). The purpose of summary judgment, after all, is to avoid a "useless trial." *Davis*, at 456; *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979) (quoting *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963)). "Where there is a genuine issue as to any material fact, however, a trial is not useless, but is absolutely necessary." *Moore v. Pacific Northwest Bell*, 34 Wn. App. 448, 456, 662 P.2d 398 (1983).

A Superior Court can resolve issues of fact upon summary judgment only where reasonable minds can reach but one conclusion. *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 108 P.3d 1220 (2005).

- i.) There is a question of material fact regarding ICC's investigation of claim.

The failure to conduct a good faith insurance investigation constitutes an unfair and deceptive practice under the CPA. *Industrial Indemnity Co. of the Northwest v Kallevig*, 114 Wn.2d 907, 917, 792 P.2 250 (1990). ICC claims it conducted a good faith investigation because Hapaianu did not respond to letters in a two week period.

Hapaianu contends that a material issue of fact is created from the following facts and inferences from facts: 1.) No SARA agreement was attached to the surety agreement in the possession of ICC. CP 2-7 (Affidavit of Sean Wozney); 2.) ICC paid King County the surety bond because it believed the claim was undisputed as Hapaianu did not respond to two requests for information in a less than a month period. CP 801:31:20-32:23; 803:37:19-804:41:8; 3.) ICC corresponded with Hapaianu's through regular mail and Petras was not aware as to whether Hapaianu received either of his default letters. CP 797:16:1-798:17:8. *See also* 1434 ¶¶ 12 & 13; 1455-6: 1458; 4.) Hapaianu did not receive ICC's letters because he was out of state. CP 287:11-25; 1520:22-1521:5; 5.) Petras' requests to obtain information from King County were received by King County and followed up with a call to Betsy MacWhinney. CP 799:23:5-24:24; 1434 ¶ 17, 1474; 6.) King County did not respond to most of ICC's requests for evidence regarding Hapaianu's alleged default of the SARA. CP 798:19:6-20; 801:34:21-803:37:23; 7.) Typically ICC investigators make as many calls as possible when investigating a claim. Petras is not sure why he did not call Hapaianu. He had Hapaianu's phone number in the ICC file. CP 811:71:14-23; 8.) ICC does a lot of business with King County. 809:64:1-5; 9.) King County prepared the surety bond form used in this case. CP 111:13-16; 798:18:13-20; 10.) ICC is required

to use King County's surety form, which requires the SARA be attached to the surety form. CP 111:13-14; 27 ¶1; 11.) The SARA had not been executed by the County when the surety agreement was signed. *Compare* CP 150 (signature page of surety agreement) with CP 255 (recital that SARA was entered into on August 1, 2000) with CP 256 (signature date under signature for the County); 12.) ICC was entitled to obtain a refund of any money it sent King County which was not used for mitigation on Hapaianu's lot and no mitigation has taken place on Hapaianu's lot. CP 149 ¶ 4; 1521 ¶15; and 13.) ICC could have asked for its money to be returned because the SARA was not attached to the surety agreement, thus voiding the surety agreement. *See supra*.

Additionally, it should be noted MacWhinney disputed that she told Petras that Hapaianu had installed plantings in 2008. CP 1481 ¶ 12. Petras testimony is directly contrary. CP 810:66:20-68:15. There are four factual inferences which flow from this disputed testimony: 1.) that there was an honest mistake; or 2.) that MacWhinney realized Petras would more likely provide the bond money if she indicated the planting had been approved with the occupancy permit therefore triggering the monitoring aspects of the bond. *See* CP 810:66:20-68:14; or 3.) that Petras wrote the note in order to trigger payment of the bond. *Id.*; or 4.) MacWhinney and

Petra agreed that Petras would provide the documentation necessary to trigger the bond. *Id.*

In any event, the Superior Court should not have resolved the material factual inferences created by the above evidence as a matter of law because reasonable minds could have come to different conclusions. *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 108 P.3d 1220 (2005).

4. The Superior Court erred in granting the County's motion to compel and awarding attorneys fees to the County. The Superior Court also erred in failing to award attorney fees to Hapaianu.

"The purpose of CR 36 requests for admission is to eliminate from controversy factual matters that will not be disputed at trial, not legal conclusions" See *Lakes v. Vondermehden*, 117 Wn. App. 212, 70 P.3d 154 (2003); *Santos v. Dean*, 96 Wn. App. 849, 219, 861, 982 P.2d 632 (1999); *Brust v. Newton*, 70 Wn. App. 286, 295, 852 P.2d 1092 (1993); *Reid Sand & Gravel, Inc. v. Bellevue Props.*, 7 Wn. App. 701, 704, 502 P.2d 480 (1972). In *Lakes* a plaintiff argued defendant's admissions pursuant to CR 36 that certain medical treatments were medically necessary rendered the costs of those treatments certain for the purposes of treating the costs as liquidated damages. The Court of Appeals disagreed relying on the purpose behind Washington's CR 36. In support of its position for not treating the admissions as admitted for purposes of

computing damages the Court cited *Coleman v Altman*, 7 Wn. App. 80, 85-86, 497 P.2d 1338 (1972).

In *Coleman v Altman*, supra., the central issue before the Court was whether a plaintiff was in a crosswalk when she was hit. The defendant promulgated a RFA that she was not in the crosswalk. Counsel for the plaintiff inadvertently did not respond to the RFA. The Court of Appeals held a response was not necessary because the request was not proper. In this regard, the Court stated:

The purpose of Rule 36 is to eliminate from controversy matters which will not be disputed. It was not designed to discover facts but to circumscribe contested factual issues in a case so that issues which are disputed may be clearly and succinctly presented to the trier of facts. *Ranger Ins. Co. v. Culberson*, 49 F.R.D. 181 (N.D.Ga.1969).

Upon the record before us, we hold that the trial court correctly concluded the requested admission was not a proper inquiry and the Altmans were not required to answer it.

Coleman, 7 Wn at 86.

In *Reid Sand & Gravel, Inc. v. Bellevue Props.*, 7 Wn. App. 701, 704, 502 P.2d 480 (1972) this Court similarly stated:

the procedure for obtaining admissions of fact it to be used to obtain admission of facts as to which there is no real dispute and which the adverse party can admit cleanly, without qualifications. Typical of such facts are delivery, ownership of an automobile, master and servant relationship, and other facts of that nature which are not in dispute and of which an admission will greatly facilitate the proof at the trial. It is not

intended to be used to cover the entire case and every item of evidence."

In *Reid Sand & Gravel, Inc.*, 7 Wn. App. at 704-705

Hapaianu objected that third party defendants' requests for admission were not properly framed pursuant to Washington's CR 36. CP 77-101. For example, the requests asked Hapaianu to admit he entered into agreements, rather than asking Hapaianu to admit the documents purporting to be agreements were genuine copies of the documents Hapaianu signed. Hapaianu pointed out that the dictionary defines the term "agreement" as "a contract legally executed and binding". Hapaianu objected to signing any RFA which could be interpreted to mean that the agreement was binding. CP 76:6-20.

The trial court disagreed with Hapaianu and required that he respond to the RFAs. CP 107-108. Hapaianu admitted several of the requests, but reiterated his objections. CP 132-145. ICC relied upon Hapaianu's responses in support of its motion for summary judgment. CP 128-145. However, the trial court never ruled on the objections as part of its summary judgment rulings.

Hapaianu reiterates here his contention that the Requests for Admission were not proper and should not been propounded to Hapaianu

for the reasons set forth in *Lakes, Reid Sand and Gravel, and Coleman*.

Hapaianu also requests this Court rule on his objections.

5. The Superior Court erred its evidentiary rulings.

a. The evidence before the Court related to ICC

The Superior Court's order granting ICC's motion for summary judgment regarding Hapaianu's defenses indicate the Court did not consider Stafne's declaration or any of the evidence incorporated as part of Stafne's declaration and the evidence relied upon in Hapaianu's response brief, even though ICC offered no objection to such evidence. *Compare* CP 1608 (Order granting summary judgment) with CP 1516-1517 (Stafne Declaration) and 1501:21-1503:26 (Response brief setting forth evidence and pleadings being relied upon in response to motion for summary judgment.) "Where the evidence offered is admissible in part, objection must be made to the part which is inadmissible or the objection is of no avail." *Lamphiear v. Skagit Corp.*, 6 Wn. App. 350, 361, 493 P.2d 1018 (1972); *Pacific Northwest Pipeline Corp. v. Myers*, 50 Wn.2d 288, 291, 311 P.2d 655 (1957). No error can be predicated upon a general objection unless the particular testimony or evidence could not be admissible under any conceivable theory. *State v. Speer*, 36 Wn.2d 15, 23, 216 P.2d 203 (1950); *State v. Severns*, 19 Wn.2d 18, 20, 141 P.2d 42 (1943); *State v. Shaw*, 75 Wn.2d 326, 338, 135 P. 20 (1913).

Absent a specific objection to the evidence and argument presented to a Superior Court in response to a summary judgment, a Superior Court has a duty to decide the legal issues presented based on the evidence proffered to it. Const. art. IV; Separation of Powers doctrine; *Marybury v Madison*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province of the judiciary to declare what the law is.")

Similarly, ICC did not object to any of the evidence submitted in support of the initial cross motions for summary judgment and the Court erred in excluding that evidence. *Id.*

b. The evidence before the Court related to MacWhinney

MacWhinney moved to strike "irrelevant and misleading declarations to Hapaianu's response" as well as the declarations of Miller and Williamson, CP 833-836. The Court granted that motion, including the striking of paragraphs 2 through 5 and 13-17 of Hapaianu's motion and Exhibits 1 through 3 of Hapaianu's declaration. But in its order, the Court indicated that it did not consider any evidence presented by Hapaianu at all. P 1604-1606. The Court has no right to exclude evidence absent a specific objection. *See supra.*

The Court erred in striking all of Hapaianu's evidence for the reasons stated in Hapaianu's motion for reconsideration at CP 1288:10-1297:8, which is expressly incorporated herein.

6. The Court erred in denying Hapaiianu's motion for reconsideration.

A ruling on a motion for reconsideration is within the discretion of the trial court and is reversible only for a manifest abuse of discretion. *Coggle v Snow*, 56 Wn. App 499, 504, 784 P.2d 544 (1990). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Junker*, 79 Wn.2d 12, 26 482 P.2d 775 (1971).

In *Davis v. West One Automotive Group*, 140 Wn. App. 449, 166 P.3d 807, 813 (2007) the Washington Court of Appeals stated:

“This case serves to remind us of our Supreme Court's observation in *Balise* [v. Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963)]: "The object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact." *Balise*, 62 Wn.2d at 199.

In *Applied Indus. Materials Corp. v. Melton*, 74 Wn. App. 73, 77, 872 P.2d 87 (1994) the Court observed:

"In the context of a summary judgment, unlike a trial, there is no prejudice to any findings if additional facts are considered. *Meridian Minerals Co. v. King Cy.*, 61 Wn. App. 195, 203, 810 P.2d 31, review denied, 117 Wash.2d 1017, 818 P.2d 1099 (1991). "Although not encouraged, a party may submit additional evidence after a decision on summary judgment has been rendered, but before a formal order has been entered." *Meridian Minerals*, 61 Wn. App. at 202-03, 810 P.2d 31."

The only reason some deposition testimony of the county officials was delayed is because a snow storm cancelled the taking of earlier depositions. CP 1310. However, it was submitted to the Court before the Court entered written judgments. Until a formal order granting or denying the motion for summary judgment is entered, a party may file affidavits to assist the court in determining the existence of an issue of material fact. *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn. App. 899, note 8, 973 P.2d 1103 (1999); *Felsman v. Kessler*, 2 Wn. App. 493, 468 P.2d 691(1970); *Nicacio v. Yakima Chief Ranches, Inc.*, 63 Wn.2d 945, 389 P.2d 888 (1964).

It was manifestly unreasonable for the Superior Court to have not considered deposition testimony that was delayed as a result of an act of God.

VI. REQUEST FOR ATTORNEY FEES

Pursuant to RAP 18.1 (a) Hapaianu requests payment of his attorney fees and costs on appeal pursuant to the Consumer Protection Act. RCW 19.86.090. *See e.g. Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 594-5, 675 P.2d 193 (1983); *Banuelos v. TSA Washington, Inc.*, 134 Wn. App. 607, 617, 141 P.3d 652 (2006).

Hapaianu also requests payment of his attorney fees and costs on appeal based on the language of the Indemnity Agreement and RCW

4.84.330. The Indemnity Agreement states:

IN CONSIDERATION of the execution of such bond and in compliance with the promise made thereto, the undersigned hereby agree for themselves and their personal representatives, successors and assigns, jointly and severally, as follows:

1. To reimburse Surety, upon demand for all payments made for; and to indemnify and keep Surety indemnified from: a.) all ... expense, including attorney fees...

CP 6.

RCW 4.84.330 provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

RCW 4.84.330 applies even where the contract itself is found to be invalid. In *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984), the court engaged in an extensive

analysis of the language and purpose of RCW 4.34.330, concluding that "the broad language '[i]n any action on a contract' found in RCW 4.84.330 encompasses any action in which it is alleged that a person is liable on a contract." *Herzog*, 39 Wn. App. at 197. As discussed in *Herzog*, the mutuality of remedy intended by the statute supports an award of attorney fees to a prevailing party under a contractual provision if the party-opponent would have been entitled to attorney fees under that same provision had that opponent prevailed, even when the contract itself is found invalid. *Herzog*, 39 Wn. App. at 195-97.

VII. REQUEST FOR NEW JUDGE

If this case is remanded, Hapaianu respectfully requests this Court order a new judge preside over this case. This request is based on the Court's reluctance to consider any evidence Hapaianu presents. It is also grounded in the Judge's statements about the his perception of how the government is treating Hapaianu, CP 1358:13-1360:1, and his statements about Hapaianu's having to be a "rich man" to afford counsel. CP 1363:49:4-5.

VII. CONCLUSION

This Court should 1.) reverse the Superior Court's order granting summary judgment in favor of ICC regarding Hapaianu's counterclaims; 2.) reverse the Superior Court's order granting

summary judgment in favor of ICC regarding Hapaiianu's defenses; 3.) reverse the Superior Court's order granting summary judgment in favor of MacWhinney. 4.) This Court should also rule with regard to the effect of Hapaiianu's objections to the RFAs. 5.) This Court should determine what evidence is admissible for consideration pursuant to the various motions for summary judgment before the Superior Court. 6.) This Court should also determine whether the Superior Court abused its discretion by refusing to consider deposition testimony that was filed late because of a snow storm.

Respectfully Submitted this 5th day of August, 2011, at
Arlington, WA.



Scott E. Stafne
WSBA #6964

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 AUG -8 AM 11:18

No. 67200-2-I

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

CONSTANTIN HAPAIANU, an individual,
Appellant

vs.

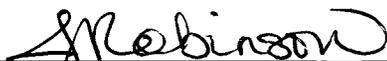
INDEMNITY COMPANY OF CALIFORNIA, a foreign corporation,
Respondent/Appellee

APPEAL FROM SUPERIOR COURT
FOR KING COUNTY
CAUSE NO. 09-2-40632-4SEA

DECLARATION OF SERVICE/MAILING

I, Jennifer Robinson, declare under the penalty of perjury that I served a copy of Appellant's Opening Brief on Appellees' attorneys, by depositing a copy of these documents with the U.S. Postal Service addressed to Alexander Friedrich and Paul Keane Friedrich, Yusen & Friedrich Attorneys at Law, 215 NE 40th Street, Suite C-3, Seattle, WA 98105-6567; and Devon N. Shannon, King County Prosecuting Attorney, 516 3rd Ave., Rm W400, Seattle, WA 98104-2388.

Dated: August 5, 2011, at Arlington, Washington.



Jennifer Robinson

 ORIGINAL