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No. 74128-4-I

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

SOUNDBUILT NORTHWEST LLC, a Washington limited liability company and successor-in-interest to SOUND BUILT HOMES, INC.,

Appellant,

v.

COMMONWEALTH TITLE INSURANCE COMPANY, a Nebraska insurance company; and LAWYERS TITLE INSURANCE CORPORATION, a Nebraska insurance company,

Respondents.

RESPONDENTS' AMENDED OPENING BRIEF

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I. INTRODUCTION

Once again this Court has before it an appeal related to the breach of a settlement agreement between Soundbuilt and Commonwealth, although this time the appeal is from a jury verdict finding Soundbuilt in material breach.¹ The trial followed this Court's opinion in 2013 reversing Soundbuilt's attempt to have Commonwealth summarily declared in breach of the same agreement and remanding the case for full consideration of all claims and defenses. After remand, and despite this Court's previous reversal, Soundbuilt moved twice, unsuccessfully, to have Commonwealth declared in breach of the agreement as a matter of law. The trial court denied Soundbuilt's motions, and the case proceeded to a two week trial in August 2015.

At trial, both Soundbuilt and Commonwealth argued the other party materially breached the settlement agreement, and both sought the remedy of excusal from further performance. The parties largely agreed on the way the competing claims would be tried to the jury, including the manner in which the jury would be instructed on materiality, contract interpretation and breach. Applying these agreed instructions to the evidence, the jury concluded Soundbuilt was the only party to materially

¹ As used herein, "Commonwealth" refers collectively to Commonwealth Title Insurance Company and Lawyers Title Insurance Corporation, and "Soundbuilt" refers to Soundbuilt Northwest LLC, successor in interest to Sound Built Homes, Inc.

breach the agreement, thereby excusing Commonwealth from further performance. Although the jury found Commonwealth also breached the agreement a few months prior to Soundbuilt's material breach, it found Commonwealth's breach was not material.

As a result of the jury's clear verdict demonstrated by a special verdict form, the trial court entered judgment in Commonwealth's favor, ruling it owed no further performance obligation given Soundbuilt's material breach. It denied Soundbuilt's request for damages as a result of Commonwealth's nonmaterial breach because Soundbuilt was unable to establish any change in position as a result of this breach. Soundbuilt moved for reconsideration and for a new trial, claiming the jury's verdict was unsupported by the evidence. The trial court denied that motion.

Soundbuilt appeals the trial court's denial of its requested relief. But nowhere in its brief does Soundbuilt acknowledge its significant burden on appeal. Nor does it contend the trial court improperly limited its ability to present evidence in support of its arguments at trial. It simply disagrees with the verdict the jury reached after considering the evidence. Soundbuilt has failed to establish there was insufficient evidence to support the verdict, or the trial court otherwise erred in entering judgment for Commonwealth. The verdict and judgment should be affirmed.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the trial court abused its discretion in denying Soundbuilt's motion for a new trial on the grounds of insufficient evidence with respect to the jury's finding that Commonwealth's breach on July 13, 2010 was not material when the evidence in the record indicated the breach was a temporary delay in filing a bankruptcy motion that otherwise did not deprive Soundbuilt of the benefit of the settlement agreement?

2. Whether the trial court abused its discretion in denying Soundbuilt's motion for a new trial on the grounds of insufficient evidence with respect to the jury's finding that Soundbuilt materially breached the settlement agreement by negotiating an agreement to dismiss a pending appeal despite the parties' agreement that the issue of Commonwealth's liability would be determined through a final decision of the courts in that same case?

3. Whether the trial court abused its discretion in admitting limited testimony and argument regarding Soundbuilt's lost profits consistent with a pretrial ruling *in limine*?

4. Whether the trial court erred in denying Soundbuilt's claimed expectation damages as a result of Commonwealth's nonmaterial breach where Soundbuilt failed to establish any change in its position and any damages claimed were rendered speculative by its material breach?

III. STATEMENT OF THE CASE

A. Background and Negotiation of the Settlement Agreement

This dispute arises out of a settlement agreement between Commonwealth and Soundbuilt resolving a suit for specific performance of a land purchase and sale agreement. In 2004, the Dale Alan Land Development Company and Greg and Laurie Newhall (collectively, “DALD/Newhall”) agreed to sell certain property to Soundbuilt, but instead sold the land to Chelan Homes Inc. (“Chelan”). Soundbuilt sued DALD/Newhall. VRP 1000 (P. Brain). Although Soundbuilt was not out of pocket any money on the failed transaction, it did assess its potential lost profits. VRP 307-08 (G. Racca), 1000-01 (P. Brain). Rather than seek its lost profits as damages, Soundbuilt elected to pursue specific performance of the agreement. VRP 1000 (P. Brain).

As part of its purchase of the property, Chelan obtained a \$2.53 million title insurance policy from Commonwealth, which was later increased to \$5.83 million. Tr. Ex. 2. Because of the lawsuit between Soundbuilt and DALD/Newhall, Commonwealth conditioned issuance of its title policy on the execution of an indemnity agreement with DALD/Newhall (“Indemnity Agreement”). Tr. Ex. 1; VRP 406-07 (C. Brain). Chelan then purchased the property, and it was developed and

sold to 22 homeowners. Transnation, then an unrelated title insurance company, insured title on 21 of the 22 homes. VRP 405 (C. Brain).

In 2008, Soundbuilt prevailed in its lawsuit against DALD/Newhall. VRP 403 (C. Brain). Although it had opted for specific performance over damages, Soundbuilt wished to “monetize” its right to take the 22 homes that had been built on the land. VRP 751-52 (Kerruish). Soundbuilt filed a motion to join the homeowners in its case against DALD/Newhall. VRP 410, 416 (C. Brain). It then demanded Commonwealth pay \$8 million to avoid this “bomb being dropped” on the homeowners. Tr. Ex. 8; *see also* VRP 482 (C. Brain) (“The bomb was always taking the homes from the people who owned them.”), 1008 (P. Brain) (“Q: So you did, so to speak, drop the “bomb?” A: Yes.”). Soundbuilt urged Commonwealth to settle and attempt to recover the settlement cost from DALD/Newhall under the indemnity. Tr. Ex. 8.

Commonwealth retained Chris Brain to represent it in settlement negotiations with Soundbuilt, which was represented by his brother, Paul Brain, and David Kerruish. VRP 400, 402 (C. Brain). Chris Brain testified Commonwealth was not going to let the homeowners “hang” and was going to “make sure that they were taken care of” in the face of Soundbuilt’s threats. VRP 406. But he also testified Commonwealth expected DALD/Newhall to “vigorously defend” against enforcement of

the Indemnity Agreement in court, thereby making it difficult for Commonwealth to recoup any potential settlement funds it might pay to Soundbuilt. VRP 422. Chris Brain raised these concerns to Soundbuilt and testified about them to the jury. *See, e.g.*, VRP 476-77, 430, 489.²

It was precisely Commonwealth's concerns regarding the enforceability of the Indemnity Agreement that caused Soundbuilt's counsel to propose to Commonwealth a unique settlement mechanism. Tr. Ex. 11; VRP 755-57 (Kerruish). To address what he termed Commonwealth's "dilemma" regarding the indemnity, Mr. Kerruish proposed Soundbuilt would "share the risk" with Commonwealth in its indemnity litigation with DALD/Newhall. Tr. Ex. 11. In exchange for Soundbuilt's rights in the DALD/Newhall litigation, Commonwealth would make an initial up-front payment (negotiated to \$5 million). *Id.* In addition, if Commonwealth obtained a final court order finding DALD/Newhall liable for \$8 million, it would pay Soundbuilt the difference (negotiated to \$3 million). *Id.* But, in Soundbuilt's words, "[i]f the final court order excuses [DALD/Newhall] from their obligations under the indemnity, then [Soundbuilt] will not receive the additional payment." *Id.*; *see also* VRP 761 (Kerruish). In other words, the result of

² On appeal, Soundbuilt now contends Commonwealth never raised any such concern regarding the enforceability of the indemnity in the settlement discussions. Op. Br. at 22. But this is specifically contrary to its own counsel's testimony at trial. VRP 754-55 (Kerruish) (stating "I am sure that was part of our ongoing discussion" when asked about Commonwealth's risks under the indemnity).

the indemnity litigation would determine how much, if anything, Commonwealth would owe Soundbuilt above \$5 million. At the time, Soundbuilt stated its chances were only “better than even” it would receive anything more than the initial payment. Tr. Ex. 11.

At trial, the jury heard evidence regarding the negotiation of the mechanics of this split-payment term. Specifically, Mr. Kerruish presented a draft of the proposed agreement to Commonwealth. Tr. Ex. 29. Although the parties concurred Soundbuilt would assign control of the DALD/Newhall litigation³ to Commonwealth in exchange for an initial payment of \$5 million, the draft agreement provided Soundbuilt could regain control of the litigation if Commonwealth materially defaulted. *Id.* Similarly, although the parties concurred the amount of Commonwealth’s further liability over and above \$5 million would be determined by a final order in the indemnity litigation, the draft provided the result of any appeal from an initial trial court judgment could only increase, but not decrease, this amount. *Id.* In other words, under this draft, the appeal could only work as a one-way ratchet up if a trial court judgment of less than \$5 million was increased on appeal, but could not decrease the amount Commonwealth would owe if a trial court judgment of \$8 million was reduced or thrown out on appeal.

³ The DALD/Newhall litigation is the same case as this case between Commonwealth and Soundbuilt.

Chris Brain forwarded the draft agreement to Commonwealth's in-house counsel, David Zoffer, for review. VRP 436, 495 (C. Brain). In an email discussed extensively at trial, Mr. Zoffer objected to two provisions in the draft. Tr. Ex. 29. First, he objected to the language allowing Soundbuilt to regain control of the litigation. *Id.* (objecting to ¶ 5.2). Second, he objected to the provision allowing Commonwealth's liability to Soundbuilt to increase, but not decrease, depending on the outcome of the indemnity appeal. *Id.* (objecting to ¶ 5.3). After considering Mr. Zoffer's email, both Paul Brain and Mr. Kerruish accepted the changes and revised the final agreement to include them. VRP 763-67 (Kerruish); Tr. Exs. 26, 28, 30; VRP 436 (C. Brain).

On July 29, 2008, Soundbuilt and Commonwealth signed the final Settlement Agreement. Tr. Ex. 26. Commonwealth agreed to pay \$5 million to Soundbuilt in exchange for Soundbuilt's unconditional assignment of its rights in this lawsuit to Commonwealth. *Id.*, ¶¶ 5.1, 5.2. Commonwealth paid the initial \$5 million to Soundbuilt and was substituted for Soundbuilt in this case. VRP 781 (Kerruish). In addition to the initial \$5 million payment, Paragraph 5.1 stated Commonwealth would pay "up to" an additional \$3 million depending on the outcome of its litigation with DALD/Newhall. Tr. Ex. 26, ¶ 5.1. Soundbuilt attempts to paint the settlement as one for \$8 million, paid in two "tranches." Op.

Br. at 6. And citing the testimony of Chris Brain, it further claims the benefit to Commonwealth of the split-payment term was simply a deferral in the timing of the second \$3 million payment. *Id.* at 21. Not only is this contrary to the Agreement's language, but Chris Brain also testified this provision reduced Commonwealth's potential liability to Soundbuilt depending on the outcome of the indemnity litigation, including all appeals. VRP 490 (C. Brain). This was exactly what Soundbuilt contemplated when it suggested this settlement structure in the first place.

Tr. Ex. 11. As Paul Brain acknowledged:

Q: Would it have been a benefit to Commonwealth under the settlement agreement for the result of an indemnity battle to be that Commonwealth is owed less than \$8 million, plus interest, such that it would end up paying Soundbuilt less than the \$3 million contingency?

A: Sure.

VRP 1019.

Paragraph 5.3 of the final Agreement set forth Commonwealth's obligation to enforce its indemnity against DALD/Newhall. Specifically, it stated "Commonwealth shall seek a determination of the court" regarding DALD/Newhall's liability "as soon as reasonably possible." Tr. Ex. 26, ¶ 5.3. Based upon Mr. Zoffer's objections, the final version of this paragraph provided the final amount of any contingent payment would be adjusted either up or down depending on the outcome of the appeal of the

indemnity judgment. *Id.*; Tr. Ex. 28. Chris Brain testified there was never “any doubt” DALD/Newhall would appeal if they lost given their defenses to enforcement of the indemnity in the amount of \$8 million. VRP 500.

Other provisions of the Agreement set forth Soundbuilt’s limited rights with respect to Commonwealth’s litigation against DALD/Newhall. Paragraph 5.4 allowed Soundbuilt to review Commonwealth’s pleadings. Tr. Ex. 26, ¶ 5.4. But this paragraph clarified this “right of review is for informational purposes only,” and did not “create any right of [Soundbuilt’s] counsel to direct the litigation or edit the pleadings filed.” *Id.* Paragraph 5.7 further stated Soundbuilt’s limited role in the litigation: “[Soundbuilt] agrees to cooperate with . . . and support the litigation efforts of Commonwealth to enforce Commonwealth’s rights against DALD and Newhall.” *Id.*, ¶ 5.7.⁴

In discussing how these provisions worked together, Chris Brain testified it was “axiomatic that if we had the burden of going forward to get the judgment, that Soundbuilt would not do anything to interfere with our ability to do that.” VRP 444. He stated Soundbuilt had a “duty not interfere with us” and was not “free to do anything without our consent.” *Id.* In reviewing Paragraph 5.4 at trial, Mr. Kerruish was asked: “So

⁴ Soundbuilt attempts to argue this provision was not “material” based on the testimony of Chris Brain. Op. Br. at 26. But Chris Brain’s testimony was Paragraph 5.7 was not material “from the standpoint that it was negotiated or ever objected to,” not that it was not a material term of the Agreement. VRP 443 (emphasis added).

there's no dispute, is there, that Commonwealth had the right to direct the litigation against DALD/Newhall." His response: "No. I don't think there was." VRP 774.

B. Indemnity Litigation and DALD/Newhall Bankruptcy

Consistent with the Settlement Agreement, Commonwealth promptly moved to enforce the Indemnity Agreement against DALD/Newhall for \$8 million. VRP 504 (C. Brain). On November 18, 2008, the trial court issued a letter ruling finding DALD/Newhall were obligated to indemnify Commonwealth for this amount. VRP 1149.⁵ In the face of this ruling, the Newhalls and DALD separately filed for Chapter 11 bankruptcy. *Id.* The automatic bankruptcy stay then took effect in the indemnity litigation, stopping further proceedings against both debtors.⁶ VRP 907 (Kerruish). Although the stay was in place, the trial court entered a void order against DALD/Newhall, which the Newhalls appealed on February 6, 2009 (the "*Newhall* Appeal"). Tr. Ex. 41; VRP 783 (Kerruish), 1149. The Newhalls then filed their opening brief on April 16, 2009, but the appeal was stayed thereafter. VRP 1149.

⁵ At the close of evidence, the jury was read an agreed stipulation containing dates not otherwise reflected in the trial exhibits. VRP 1149-50.

⁶ Under 11 U.S.C. § 362(a), a Chapter 11 bankruptcy filing imposes an automatic stay "against any act, judicial or otherwise, to collect a prepetition debt, enforce a lien, or exercise control over property of the debtor or the estate." *In re Stanwyck*, 450 B.R. 181, 191 (C.D. Cal. 2011).

Commonwealth retained attorney Jack Cullen to represent it in the bankruptcy proceeding. VRP 575 (Cullen). Mr. Cullen testified his first undertaking was to investigate the Newhalls' assets. VRP 581-82. It soon became apparent the Newhalls lacked sufficient assets to reorganize out of bankruptcy. VRP 590-92. On April 22, 2009, the Newhalls' counsel asked to convert the case to a Chapter 7 bankruptcy. *Id.*

Prior to the conversion to Chapter 7, Commonwealth and the Newhalls' bankruptcy counsel discussed stipulating to relief from the automatic bankruptcy stay to allow entry of the final indemnity judgment against DALD/Newhall. Tr. Ex. 43. Soundbuilt argued at trial Commonwealth breached the Settlement Agreement by failing to finalize this stipulation in February 2009. *See, e.g.*, VRP 1173, 1177-78. But the evidence at trial confirmed several issues with the stipulation were never resolved before the Newhall bankruptcy converted to Chapter 7. In particular, the stipulation required agreement from the DALD bankruptcy trustee to allow the appeal to advance against both debtors. Tr. Ex. 44, 46. Alternatively, a CR 54(b) certification would need to be entered to allow the judgment to be entered only against the Newhalls. *Id.* At trial, Mr. Kerruish acknowledged DALD did not sign the stipulation and a CR 54(b) certification was never sought. VRP 786-87, 899-900.

Because of the conversion of the bankruptcy to Chapter 7, control of the bankruptcy and the *Newhall* Appeal shifted from the Newhalls to the Chapter 7 trustee, Bruce Kriegman. VRP 809 (Kriegman), 593, 652 (Cullen). The jury heard evidence that, at the time Mr. Kriegman was appointed, all parties agreed there was nothing to do until he took some action regarding the Newhalls' appeal of the \$8 million indemnity judgment. Specifically, Mr. Kerruish wrote to Paul and Chris Brain stating his understanding "the Chapter 7 trustee is currently considering what, if any, action will be taken on the appeal in the future." Tr. Ex. 55; VRP 908-09. Chris Brain responded: "This is my understanding also and accordingly there is no reason to do anything unless the trustee goes forward." Tr. Ex. 55 (emphasis added). Mr. Kerruish testified he did not express disagreement with this statement and that nothing "prevent[ed]" him from doing so. VRP 909-10 (Kerruish). Paul Brain testified similarly. VRP 1015 (P. Brain).

Mr. Kriegman spent several months investigating the Newhalls' assets. VRP 810-11, 840-42, 853-54 (Kriegman). Mr. Cullen described the bankruptcy proceeding as "stony silent" during this time. VRP 594. Mr. Kriegman testified the Newhall bankruptcy "involve[d] more complex issues than, say, an average asset case." VRP 840. One of these issues was what action to take with respect to the *Newhall* Appeal. VRP 813-15

(Kriegman). Mr. Cullen testified there was “no reason” to pursue relief from stay to allow the *Newhall* Appeal to go forward while Mr. Kriegman was conducting his asset investigation. VRP 596. Rather, Mr. Cullen testified he believed forcing the trustee to take action at that point would have been “premature.” VRP 647-48.

Five months after his appointment, on August 5, 2009, Mr. Kriegman retained James Rigby as his counsel to handle the legal matters in the bankruptcy. VRP 811-12 (Kriegman), 593-94 (Cullen). On April 30, 2010, approximately sixteen months after the Newhalls filed their bankruptcy petition, Mr. Rigby began to take action regarding the *Newhall* Appeal. Mr. Rigby contacted Mr. Kerruish to ask for Soundbuilt’s position as to whether the trustee could settle Commonwealth’s claim given the existence of the Settlement Agreement. Tr. Ex. 63; VRP 919 (Kerruish). Specifically, Mr. Rigby asked if Commonwealth could agree to vacate its judgment against DALD/Newhall, thereby eliminating its claim in the bankruptcy. Tr. Ex. 63. Mr. Kerruish responded noting the Settlement Agreement required Commonwealth “to pursue in good faith the claims it has against [DALD/Newhall] to final conclusion.” Tr. Ex. 64 (emphasis added). He further stated: “Since [Soundbuilt] and Commonwealth both have interests in the resolution of the lawsuit, it seems that settlement discussions with both are needed.” *Id.* (emphasis

added). Mr. Kerruish testified he was being “honest” with Mr. Rigby in his letter about Soundbuilt’s understanding of the Settlement Agreement. VRP 920-22 (Kerruish). Mr. Cullen also testified he agreed with Mr. Kerruish that any deal with the trustee would require the approval of both Commonwealth and Soundbuilt. VRP 655 (Cullen).

A few months later, on July 6, 2010, Mr. Kerruish contacted Mr. Cullen regarding a potential settlement. Tr. Ex. 69. Mr. Kerruish proposed if Commonwealth reduced its bankruptcy claim, Soundbuilt would agree to reduce the sums due under the Settlement Agreement. *Id.* Alternatively, Mr. Kerruish stated Commonwealth should “proceed to seek a final adjudication of the claims against Newhall, consistent with the written settlement agreement.” *Id.*; VRP 931 (Kerruish). Mr. Kerruish’s letter further stated “[a]t some point the delay in pursuing the litigation becomes a breach of the settlement agreement.” Tr. Ex. 69. Mr. Kerruish acknowledged he did not tell Mr. Cullen Soundbuilt believed a breach had already occurred. VRP 933. Indeed, Mr. Kerruish testified he “didn’t ever say to Commonwealth, ‘You’re in breach, we think we have a remedy against you,’ anything like that.” VRP 934.

Mr. Cullen responded to Mr. Kerruish’s July 6 letter on July 13, 2010. Tr. Ex. 70. Mr. Cullen stated Commonwealth did not wish to settle and would instead move for relief from stay to complete the indemnity

litigation. *Id.*; VRP 659 (Cullen). Mr. Cullen testified he asked Mr. Rigby if, on behalf of the debtors, he would stipulate to relief from the automatic stay. Mr. Cullen further testified Mr. Rigby declined, stating Commonwealth should instead file a motion. Tr. Ex. 71; VRP 603-04, 661 (Cullen). Mr. Cullen testified he did not immediately prepare this motion due to other pressing matters. VRP 604 (“And this, honestly, got kind of put on the third stack, and I just didn’t get to it until mid-September[.]”). He further acknowledged he “should have gotten it done sooner,” VRP 605, but that he prepared the motion “as soon as [he] reasonably could.” VRP 662. Mr. Cullen filed the motion for relief from stay approximately three months after his July 2010 communication, on October 25, 2010. VRP 1149. The order lifting the stay was entered on December 20, 2010, allowing the *Newhall* Appeal to advance. *Id.*

Before relief from stay was finalized, however, Soundbuilt began unilaterally negotiating an agreement with Mr. Rigby to dismiss the *Newhall* Appeal. It did so despite having previously informed Commonwealth and Mr. Rigby of its belief that “settlement discussions with both” Commonwealth and Soundbuilt were necessary given each party’s interests in the *Newhall* Appeal. Tr. Ex. 64. Soundbuilt and Mr. Rigby reached an agreement in principle on September 9, 2010 (“Soundbuilt/Trustee Agreement”). Tr. Ex. 72. The agreement provided

the bankruptcy trustee, Mr. Kriegman, would dismiss the *Newhall* Appeal in exchange for Soundbuilt's promise to pay \$225,000 of the additional monies it hoped to receive from Commonwealth under the Settlement Agreement. *Id.*; VRP 935-36 (Kerruish). Mr. Kriegman acknowledged the estate would not have agreed to dismiss the *Newhall* Appeal without this promised payment from Soundbuilt. VRP 881 (Kriegman). This was because Mr. Kriegman believed the *Newhall* Appeal had merit and the estate could prevail on appeal. VRP 815, 855-56; *see also* Tr. Ex. 78, p. 6 (stating "Debtors' appeal of the Commonwealth judgment had merit and potential value to the estate").

Soundbuilt shared the trustee's sentiment regarding the merits of the *Newhall* Appeal. Paul Brain testified he was concerned this Court could reverse the indemnity judgment and send it back for trial. VRP 1021 (P. Brain); *see also* Tr. Ex. 109 (P. Brain stating: "Both counsel for [Soundbuilt] and the Newhall Estate . . . have testified that the most likely outcome of the appeal will be a remand for trial of the indemnity issues."). He further acknowledged the ultimate outcome of this litigation could result in Commonwealth owing Soundbuilt less than the additional \$3 million that would result from an affirmance of the \$8 million judgment. VRP 1021; *see also* VRP 950-51 (Kerruish).

Despite having agreed to “share the risk” with Commonwealth, Soundbuilt eliminated its side of the risk by inducing the trustee to dismiss the appeal. Tr. Ex. 72; *see also* Tr. Ex. 77 (Rigby stating Soundbuilt will “avoid the risk of the appeal overturning the judgment”); VRP 607 (Cullen) (“What it appeared to me was Soundbuilt wanted the appeal to go away, very badly, and was now willing to pay a lot of money to kill the appeal.”); VRP 952-53 (Kerruish) (“We paid \$225,000 to the trustee to have finality . . . regardless of what would have happened.”). The jury found this was a material breach of the Agreement. CP 2339-30.

Soundbuilt claims on appeal it negotiated the Soundbuilt/Trustee Agreement “with the knowledge of Commonwealth” and Commonwealth was “kept apprised of the settlement negotiations through January 2011.” Op. Br. at 7, 28-29. But the trial exhibits Soundbuilt cites for this proposition are either irrelevant or establish the contrary. *See, e.g.*, Tr. Ex. 77 (November 2, 2010 inquiry from Cullen asking what the basis was for the agreement reached two months prior). And Mr. Cullen testified he was unaware Soundbuilt was negotiating with the trustee without Commonwealth. VRP 663 (“Q: [D]id you have any knowledge that Soundbuilt and the trustee were cutting a deal?” A: No, I had no idea.”); *see also* VRP 664. Mr. Cullen further testified he never authorized Soundbuilt to do so. VRP 1139-40. Instead, he testified Soundbuilt’s

unilateral negotiations were “directly contrary to what I understood the rules to be that Kerruish had laid out.” VRP 600; *see also* VRP 683 (Cullen) (“The rules laid out by Kerruish back in May were there could only be a deal if all three parties agreed.”).

As Soundbuilt and the trustee finalized their agreement to present to the bankruptcy court, Commonwealth moved for relief from stay and the *Newhall* Appeal moved forward. VRP 671 (Cullen). Commonwealth filed its response brief in the *Newhall* Appeal on March 11, 2011 asking this Court to uphold the \$8 million judgment in full. VRP 1149, 512 (C. Brain). Although Soundbuilt claims without any reference to the record that Commonwealth “purposefully took a dive” in the appeal, Op. Br. at 2,⁷ Chris Brain testified to the contrary: “Q: Were you trying to lose the case on appeal? A: No. I’ve never tried to lose a case.” VRP 512; *see also* 781-82, 977-78 (Kerruish) (agreeing Commonwealth asked for the \$8 million judgment to be affirmed). The Newhalls filed their reply brief on May 9, 2011, and this Court held oral argument on September 6, 2011. VRP 1150. Following oral argument on the *Newhall* Appeal, Paul Brain wrote to Mr. Rigby asking to “get a ruling now” from the bankruptcy court

⁷ The *Newhall* Appeal was dismissed as a result of Soundbuilt’s agreement with the trustee, not because Commonwealth “took a dive” on appeal. To the extent Soundbuilt claims Commonwealth breached the Agreement by filing a response to the motion to withdraw the *Newhall* Appeal, Commonwealth did so based on this Court’s order and did not oppose dismissal. Tr. Exs. 114, 117; VRP 979-80 (Kerruish).

to approve the Soundbuilt/Trustee Agreement because he did not want to “take a chance that the Court of Appeals will issue a ruling” before the agreement could be approved. Tr. Ex. 107.

The bankruptcy court ultimately approved the Soundbuilt/Trustee Agreement on December 23, 2011. Tr. Ex. 113; VRP 835 (Kriegman). By then, the *Newhall* Appeal was fully briefed and argued and awaiting decision. VRP 1150. This decision, and any resulting remand, would have determined whether Commonwealth owed Soundbuilt an additional \$3 million, an amount less than \$3 million, or nothing more. Because Soundbuilt paid the trustee to voluntarily withdraw the *Newhall* Appeal, however, the indemnity litigation was never decided. VRP 1150.

C. Procedural History, Trial and the Verdict

While the Soundbuilt/Trustee Agreement was pending before the bankruptcy court, Soundbuilt moved to enforce the terms of the Settlement Agreement in the trial court. VRP 1022 (P. Brain). Soundbuilt argued Commonwealth had breached the Agreement by objecting to the Soundbuilt/Trustee Agreement before the bankruptcy court. VRP 1023-25 (P. Brain). Soundbuilt did not argue Commonwealth had breached by failing to timely seek relief from stay. *Id.* The trial court denied Soundbuilt’s first motion, but granted its renewed motion. This Court reversed this decision and remanded the case for trial. *Commonwealth*

Land Title Ins. Co. v. Soundbuilt Northwest LLC, 175 Wn. App. 1004 (May 28, 2013) (unpublished opinion).

After remand, Soundbuilt twice unsuccessfully moved for summary judgment seeking both to declare Commonwealth in breach of the Agreement as a matter of law and to have its own actions declared to not be a breach. CP 97-123, 1549-72. (Soundbuilt erroneously asserts “both parties” moved for summary judgment, Op. Br. at 3, but Commonwealth did not.) The trial court denied both of Soundbuilt’s motions for summary judgment. CP 1519-23 (as clarified by CP 1544-48), 1987-90. Soundbuilt does not assign error to these orders.

The case was set for trial on August 26, 2015. Prior to trial, the parties had several hearings to discuss the manner in which the case would be tried to the jury, including what issues would be for the jury as opposed to the court. *See generally* 8/14/15 and 8/21/15 VRP. Soundbuilt again argued only Commonwealth’s breach should be tried to the jury. *E.g.*, 8/14/15 VRP at 9-10. The trial court rejected Soundbuilt’s arguments and ordered the questions of both party’s breach and materiality were for the jury, an order to which Soundbuilt does not assign error. 8/21/15 VRP 13-14, 24-25. Prior to trial, Commonwealth argued the measure of Soundbuilt’s damages if Commonwealth was found in breach was a question for the jury. VRP 45-46. Soundbuilt disagreed stating the issue

of damages should be handled by the court. *Id.* Agreeing with Soundbuilt's arguments, the trial court ruled the issue of damages would be reserved to the court and reiterated this ruling when considering the jury instructions and verdict form at the close of trial. VRP 45-46; 9/2/15 VRP at 26 (“[W]e’re not going to ask the jury to come up with an amount of damages . . . that was my order two weeks ago.”).

Consistent with the pretrial rulings, the parties submitted proposed verdict forms. The trial court largely adopted Soundbuilt’s verdict form, which presented the following questions to the jury: 1) whether either party breached the Agreement and if so, 2) the date on which the party breached and 3) whether the breach was material. VRP 1119-24.

The parties also filed various motions *in limine*. Relevant to the issues on appeal, Soundbuilt sought to exclude its 2005 report containing a calculation of its estimated lost profits as a result of DALD/Newhall’s repudiation of the land sale. CP 2208-09. In opposition, Commonwealth argued this evidence was relevant to show Soundbuilt’s willingness to share the risk with Commonwealth regarding enforcement of the indemnity, in part because Soundbuilt’s settlement with Commonwealth far exceeded any estimated losses. CP 2283-84. The trial court excluded the 2005 report, but allowed Commonwealth to elicit testimony regarding Soundbuilt’s motivation to enter the Settlement Agreement stating “the

jury has to know that this was a mutual agreement that both parties had something to lose, something to gain, and they entered into the agreement with that in mind.” VRP 241; *see also* CP 2308 (“Commonwealth may introduce evidence/argument to show Soundbuilt did share risk in the agreement[.]”). Soundbuilt does not assign error to this ruling on appeal.

The parties further addressed the proposed jury instructions. The trial court declined Soundbuilt’s requested instruction stating a breach of a “time is of the essence” clause is material as a matter of law. CP 2255; 9/2/15 VRP 20-22. Soundbuilt took exception to the trial court’s refusal to give this instruction, VRP 1130, but does not assign error to it on appeal. The trial court further accepted the parties’ agreed instructions regarding breach of contract, the duty of good faith and fair dealing, materiality and contract interpretation. CP 2340-45 (Instr. Nos. 6-11); VRP 1115-16 (presentation of instructions). Soundbuilt took no exception at trial to these instructions or to the verdict form. VRP 1130-31.

At the close of evidence, Soundbuilt argued Commonwealth breached the Agreement at multiple points in time, but asked the jury to conclude the first material breach occurred in February 2009 when the stipulated relief from stay was not finalized. *E.g.*, VRP 1173, 1177-78. Soundbuilt argued the jury could alternately conclude Commonwealth breached on July 13, 2010 when it said it would move for relief from stay

but did not do so until October 25, 2010. VRP 1174-75 (arguing a breach occurred when Cullen “dropp[ed] the ball” in not immediately moving for relief from stay); *see also* VRP 1172-73. Commonwealth argued its actions did not materially breach the Agreement, but that Soundbuilt’s agreement with the bankruptcy trustee was a material breach and deprived Commonwealth of the benefits it negotiated for in the Agreement. *E.g.*, VRP 1182-83, 1185-86, 1193-95, 1213-16.

The jury returned a verdict on September 4, 2015. CP 2339-30. The jury found Soundbuilt committed the only material breach of the Agreement on September 9, 2010, the date on which it entered into its agreement with the trustee to dismiss the *Newhall* Appeal. *Id.* The jury found Commonwealth committed a nonmaterial breach on July 13, 2010, the date on which Mr. Cullen stated Commonwealth would move for relief from stay, but then did not do so until October 25, 2010. *Id.* The jury thus rejected Soundbuilt’s arguments that Commonwealth had materially breached the Agreement as early as February 2009 (or at all). *Id.*

D. Post-Trial Motions and Rulings

Following the verdict, both parties submitted post-trial briefs seeking to have judgment entered in their favor. CP 2350-61, 2382-2410. Despite the jury’s finding it materially breached, Soundbuilt nonetheless asked the trial court to award it the full \$3 million it sought, plus interest.

CP 2382-2410. Alternatively, Soundbuilt argued for a new trial or modified verdict, claiming the verdict was unsupported by evidence or contrary to law. *Id.*

At the hearing on the post-trial motions, the trial court stated:

I believe that the non-material breach that the jury concluded that Commonwealth did in July of 2010 was consistent with Commonwealth's action to lift the stay later and to pursue the appeal. I think that the material breach that they found that Soundbuilt entered into in September of 2010, in fact, did excuse further performance by Commonwealth under the settlement agreement. I do not believe that Commonwealth owes any – Soundbuilt any additional payment under the terms of the settlement agreement. I believe that, therefore, there's – the judgment amount is zero.

9/17/15 VRP at 18-19. The court entered judgment in Commonwealth's favor. CP 2532-35. Consistent with its reservation of the issue of damages, it found Soundbuilt had failed to establish it was entitled to any damages as a result of Commonwealth's nonmaterial breach. *Id.*

On September 28, 2015, Soundbuilt moved for reconsideration or for a new trial under CR 59 again contending the jury's verdict was unsupported by substantial evidence and that it was entitled to damages.

CP 2539-51. In the argument on this motion, the trial court observed:

[W]hen the jury made their verdict, they ruled that by making a separate deal with the trustee, Soundbuilt breached the terms of the contract, and, therefore, effectively precluded Commonwealth from upholding the terms of the contract, and that their breach was material.

5/16/16 VRP at 17.⁸ The trial court further noted the jury's verdict indicated "that although Commonwealth did not act on the appeal with the proper kind of speed, and that was a breach, it was not a material breach, because they still moved to correct it, even if it was three months later." *Id.*; *see also id.* at 18 (observing Soundbuilt's breach was "much more substantial" than Commonwealth's breach). The trial court further stated "both of you had ample opportunity to present your respective sides, that you had every opportunity to present the evidence." *Id.* at 19.

I'm simply telling you what I understand the verdict to be, and how I interpret that verdict. I was here for the whole time, too, for the last seven or eight years. And I suspect, I think, that my understanding of the verdict is accurate.

Id. at 18. It denied Soundbuilt's motion for new trial. *Id.* at 19-20.

IV. ARGUMENT

A. **The Jury's Finding of Nonmaterial Breach by Commonwealth was Supported by Substantial Evidence.**

The jury determined Commonwealth non-materially breached the Agreement on July 13, 2010, the date on which Mr. Cullen stated he would move for relief from stay but did not do so until October 25, 2010. CP 2329-30. Soundbuilt does not contend the jury's selection of July 13, 2010 as the date of breach was unsupported by the evidence. Nor could it

⁸ Commonwealth's motion to supplement the record with the transcript of the May 16, 2016 hearing, which took place after the close of the record on review, is pending before the Court. A copy of this transcript is attached as Appendix A.

as this was a date it expressly argued to the jury. VRP 1174-75. It instead contends the jury's finding regarding the materiality of Commonwealth's breach was unsupported. Op. Br. at 5, 40. The trial court denied Soundbuilt's motion for a new trial on this ground. 5/16/16 VRP at 19-20. Its ruling is reviewed for an abuse of discretion. *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

“Where the proponent of a new trial argues the verdict was not based on the evidence, appellate courts review the record to determine whether there was sufficient evidence to support the verdict.” *Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 316, 372 P.3d 111 (2016). To grant a new trial, there must be “no evidence or reasonable inference from the evidence to justify the verdict.” CR 59(a)(7). All evidence must be viewed in the light most favorable to Commonwealth. *Sommer v. Dep't of Soc. & Health Servs.*, 104 Wn. App. 160, 172, 15 P.3d 664 (2001). Where reasonable minds could differ, courts will not disturb the jury's verdict. *Millies*, 185 Wn.2d at 317.

In reviewing this issue, the Court must determine whether there is “sufficient evidence to sustain the verdict under the instructions given.” *Washburn v. City of Fed. Way*, 169 Wn. App. 588, 599, 283 P.3d 567 (2012), *aff'd on other grounds*, 178 Wn.2d 732, 310 P.3d 1275 (2013)

(emphasis added). In Jury Instruction No. 9, the parties agreed to instruct the jury as follows regarding materiality:

A “material breach” is a breach that is serious enough to justify the other party in abandoning the contract. A “material breach” is one that substantially defeats the purpose of the contract, or relates to an essential element of the contract, and deprives the injured party of a benefit that he or she reasonably expected.

CP 2343. This agreed instruction is now law of the case. *Washburn*, 169 Wn. App. at 600 (“[I]nstructions given to the jury by the trial court, if not objected to, shall be treated as the properly applicable law.”). Thus, the only question on appeal is whether the evidence was sufficient to find Commonwealth’s breach on July 13, 2010 was not serious enough to justify Soundbuilt in abandoning the contract, or whether the breach otherwise substantially defeated the purpose of the contract or deprived Soundbuilt of a benefit it reasonably expected.

The evidence in support of the jury’s materiality finding is more than sufficient under this agreed instruction. On July 13, 2010, Commonwealth elected to move for relief from stay to pursue the *Newhall* Appeal instead of entering an agreement with Soundbuilt. Tr. Ex. 70. Although it did not file the motion immediately, it did file it within three months. VRP 1149. Jack Cullen testified as to the reason for the timing. VRP 604-05, 662. The order lifting the stay was then entered, and the *Newhall* Appeal moved forward. VRP 1149. Commonwealth’s actions

thus resulted in only a three-month delay in the process of obtaining relief from stay and a commensurate three-month delay in the *Newhall* Appeal.

There was no evidence presented indicating relief from the stay being granted in September 2010 (three months earlier) rather than December 2010 would have resulted in any meaningful earlier conclusion to the *Newhall* Appeal, such that any additional payment obligation of Commonwealth would have been triggered. At that point, the appeal was not fully briefed or argued. VRP 1149-50. And there was no decision in the *Newhall* Appeal as of January 13, 2012 when the trustee filed its motion to withdraw the appeal. The jury found that in the interim, on September 9, 2010, Soundbuilt materially breached the Settlement Agreement. CP2329-30. Accordingly, given the posture of the *Newhall* Appeal, Commonwealth's payment obligation, if any, could not have come due prior to Soundbuilt's material breach irrespective of Commonwealth's brief delay in seeking relief from stay. The jury's findings regarding the materiality of the party's respective breaches are thus harmonious.

In an effort to overcome the jury's verdict on materiality, Soundbuilt focuses on the purported importance of the timeliness provisions in the Agreement, including a general "time is of the essence" clause. Op. Br. at 10-14. It asserts a breach of such a general clause is always material as a matter of law. Op. Br. at 4-5, 36-37. But Soundbuilt

had asked the trial court to so instruct the jury, and the trial court refused to give Soundbuilt's proposed instruction stating it would be "reversible error in this case." CP 2255; 9/2/15 VRP 21-22. Although it took exception to this ruling at trial, VRP 1130, it does not assign error to it on appeal. It was required to do so under RAP 10.3(g). Absent a specific assignment of error, the trial court's decision on time is of the essence is also law of the case. *Noland v. Dep't of Labor & Indus.*, 43 Wn.2d 588, 590, 262 P.2d 765 (1953) ("No assignments of error being directed to any of the instructions, they became the law of the case[.]"). Soundbuilt's "time is of the essence" argument is inapposite.

Moreover, the instructions allowed Soundbuilt to argue to the jury that the timeliness provisions of the Agreement were relevant to whether any breach by Commonwealth was material. This is consistent with Washington law. As stated in *Local 112, I.B.E.W. Bldg. Ass'n v. Tomlinson Dari-Mart, Inc.*, 30 Wn. App. 139, 142, 632 P.2d 911 (1981): "[T]he mere fact [the] agreement declares time to be of the essence does not necessarily make it so; it is only one of many factors to be considered." And while courts have found a breach material as a matter of law when a contract includes both a provision setting forth a specific time for performance and a time is of the essence clause, Mr. Kerruish testified the Settlement Agreement did not specify a time for performance. *See,*

e.g., *CHG International, Inc. v. Robin Lee, Inc.*, 35 Wn. App. 512, 514-15, 667 P.2d 1127 (1983); VRP 989.⁹ Ignoring this authority, Soundbuilt instead “rephrases” language from *Cartozian & Sons, Inc. v. Ostruske-Murphy, Inc.*, 64 Wn.2d 1, 5, 390 P.2d 548 (1964) to support its claim. Op. Br. at 37. But the *Cartozian* court did not state a delay breach is always material when the parties agree to make time of the essence. Rather, its holding was consistent with the authority above establishing the materiality of a breach must be determined by looking at “all of the circumstances surrounding the contract.” *Cartozian*, 64 Wn.2d at 5-6. Soundbuilt ignores this language in its brief.

In an effort to further obfuscate the basis for the verdict, Soundbuilt constructs a straw man argument by contending the only evidence supporting the verdict was Soundbuilt’s failure to “instruct” Commonwealth to seek relief from stay. Op. Br. at 38 (“So, what was the evidence before the jury . . . it appears to be the fact that prior to July 10, 2010, Soundbuilt did not instruct Commonwealth to seek relief from stay.”). It then states any such evidence cannot support the jury’s verdict because the Agreement did not require notice of breach. *Id.* at 39.

Tellingly, Soundbuilt does not cite a single instance where Commonwealth

⁹ Specifically, a jury question presented to Mr. Kerruish asked: “Q: When the settlement agreement was written, could Soundbuilt and Commonwealth have agreed to specific dates as to when the length of time becomes unreasonable.” Mr. Kerruish responded: “A. Yes. There could have been dates that would have been identified as expecting action within a range of time periods, if the parties had thought about it.” VRP 989.

argued notice was required. Instead, what the evidence established, and what Commonwealth argued, was Soundbuilt's conduct indicated Soundbuilt itself did not believe Commonwealth to be in breach on the dates it argued to the jury.

For example, Mr. Kerruish told Commonwealth "at some point" a delay would become a breach, but he acknowledged he never told Commonwealth it had breached by failing to timely act. VRP 934; *see also* VRP 658 (Cullen agreeing Kerruish is not "the kind of guy who beats around the bush"). The jury also heard evidence Mr. Kerruish told the bankruptcy trustee in the course of negotiating the Soundbuilt/Trustee Agreement that Soundbuilt was not entitled to default interest under the Settlement Agreement, the import being that Soundbuilt did not believe a default existed at that time despite its after-the-fact claims that Commonwealth was then in breach. Tr. Ex. 72; VRP 936-38 (Kerruish). Similarly, Chris Brain testified his brother Paul Brain "was not going to let sleeping dogs lie . . . if he thought we were not being diligent, he would have let us know." VRP 527; *see also* VRP 524 (C. Brain stating "knowing who was involved on the other side . . . they would let us know it was too long"). But instead of urging Commonwealth to take some action in the bankruptcy, Soundbuilt's counsel agreed there was "no

reason to do anything” unless the trustee decided to go forward with the *Newhall* Appeal. Tr. Ex. 55.¹⁰

After hearing the evidence regarding the purported importance of the timeliness provisions and the parties’ conduct during the *Newhall* bankruptcy proceeding, the jury rejected Soundbuilt’s argument Commonwealth breached as early as February 2009. It instead found Commonwealth breached on July 13, 2010 by delaying the filing of its motion for relief from stay for three months. Even without any evidence regarding Soundbuilt’s conduct, the short duration of this delay is alone sufficient to support the verdict. As the trial court stated in denying Soundbuilt’s motion for new trial:

I got the sense from the verdict of the jury, and from going back and looking at all the instructions, and everything that the jury, the finder of fact, felt that **although Commonwealth did not act on the appeal with the proper kind of speed, and that was a breach, it was not a material breach, because they still moved to correct it, even if it was three months later**, but that by their action, Soundbuilt had effectively precluded any action on the part of Commonwealth.

5/16/16 VRP 17 (emphasis added). The trial court did not abuse its discretion in denying a new trial on this ground.

¹⁰ Moreover, before this case was remanded for trial, Soundbuilt’s sole argument relating to Commonwealth’s ostensible breach involved Commonwealth’s objections to the Soundbuilt/Trustee Agreement before the bankruptcy court, not Commonwealth’s alleged failure to timely seek relief from stay. VRP 1022 (P. Brain).

B. The Jury's Finding of Material Breach by Soundbuilt was Supported by Substantial Evidence.

There is no dispute Soundbuilt entered into the Soundbuilt/Trustee Agreement to have the *Newhall* Appeal dismissed. The issue presented to the jury was whether this agreement breached any terms of the Settlement Agreement or the duty of good faith and fair dealing. The jury found it was a material breach. The evidence at trial was sufficient to support this verdict under the instructions given. *Washburn*, 169 Wn. App. at 599.

In addition to the materiality jury instruction referenced above, the jury was instructed how to interpret the contract under Soundbuilt's proposed jury instruction. CP 2342; VRP 1116-17. In Jury Instruction No. 8, the jury was instructed to interpret the contract to "give effect to the intent of the parties at the time they entered the contract." CP 2342. The jury was further instructed it should consider not just the language of the Agreement itself, but the extrinsic evidence regarding its formation and performance, including "all the facts and circumstances leading up to and surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations offered by the parties." *Id.* The jury was further instructed in Instruction No. 11 "there is an implied agreement by each to do nothing that will hinder, prevent, or interfere with the performance of the contract terms." CP 2345. This same instruction stated:

If Commonwealth proves by a preponderance of the evidence that Soundbuilt interfered with or prevented Commonwealth from obtaining a final, non-appealable order against DALD/Newhall as provided in the Settlement Agreement, then Commonwealth was excused from performing its duty of payment.

Id. Soundbuilt did not take exception to any of these instructions at trial and cannot challenge them on appeal. *Hudson v. United Parcel Serv., Inc.*, 163 Wn. App. 254, 269, 258 P.3d 87 (2011) (“Instructions to which no exceptions are taken become the law of the case.”) (quotation omitted).

The evidence at trial was more than sufficient under these instructions to find Soundbuilt materially breached the Agreement by inducing the trustee to dismiss the *Newhall* Appeal. Specifically, the jury heard evidence the parties agreed in Paragraphs 5.1 and 5.3 the amount of Commonwealth’s additional liability to Soundbuilt, if any, over \$5 million would be determined by a final non-appealable order (including appeals) determining the liability of DALD/Newhall under the Indemnity Agreement. *See, e.g.*, Tr. Ex. 26; VRP 770-71 (Kerruish). The jury heard evidence Soundbuilt proposed this settlement structure to “share the risk” with Commonwealth. Tr. Ex. 11. The evidence established Commonwealth negotiated for the right to have the amount of its liability adjusted not only up, but also down, depending on the outcome of an appeal of the indemnity judgment, which appeal was pending when Soundbuilt intervened. Tr. Ex. 28; VRP 490 (C. Brain) (explaining

various liability scenarios depending on litigation outcomes), 764-68 (Kerruish) (acknowledging Commonwealth “bargained for” this right). And it heard evidence it would be a “benefit” to Commonwealth if the ultimate outcome of the appeal was a judgment of less than \$8 million, a path foreclosed by Soundbuilt’s actions. VRP 1019 (P. Brain).

Moreover, the jury heard Soundbuilt originally sought the right to regain control of the litigation in the event Commonwealth breached, but Commonwealth demanded the removal of that term from the final Settlement Agreement. Tr. Ex. 28. Instead, the Agreement set forth Soundbuilt’s limited role in the litigation, where Soundbuilt agreed it would cooperate with Commonwealth and support its litigation efforts (§ 5.7), but Soundbuilt had no right to “direct the litigation” with DALD/Newhall (§ 5.4). Soundbuilt acknowledged this at trial: “Q: So, just between Soundbuilt and Commonwealth . . . Commonwealth had the right to direct litigation; correct? A: Yes. I think that’s what is says, yeah.” VRP 772-74 (Kerruish).

The jury also heard evidence regarding the performance of these terms. Specifically, in response to Mr. Rigby’s questions regarding the possible settlement of Commonwealth’s bankruptcy claim, Soundbuilt underscored both parties would need to participate in such discussions because both parties had “interests in the resolution” of the *Newhall*

Appeal. Tr. Ex. 64. Although Soundbuilt's counsel claimed at trial he only meant both parties had to weigh in on the particular offer on the table, VRP 922-23 (Kerruish), this was not how Commonwealth's counsel understood the restriction. VRP 683 (Cullen) ("The rules laid out by Kerruish back in May were there could only be a deal if all three parties agreed."). It was the jury's role, consistent with Instruction No. 8, to consider this evidence and determine its weight and credibility. *See, e.g., State v. Wilson*, 141 Wn. App. 597, 608, 171 P.3d 501 (2007).

Based on the evidence of the negotiations, the contract language and the parties' course of performance, the jury concluded Soundbuilt's agreement with the trustee to dismiss the *Newhall* Appeal materially breached the Settlement Agreement. Soundbuilt attempts to avoid this outcome by arguing no construction of the evidence could support this verdict. To do so, it misrepresents Commonwealth's arguments, attributing two "contentions" to Commonwealth that were not argued to the jury. Op. Br. at 7. Specifically, it claims Commonwealth argued it was entitled to a decision on the merits of the *Newhall* Appeal in order to "delay payment of the remaining \$3 million . . . as long as possible." Op. Br. at 7. It further claims Commonwealth argued Soundbuilt could not settle with the trustee to dismiss the *Newhall* Appeal because it had assigned its rights in this litigation to Commonwealth. *Id.* It then devotes

the majority of its briefing to debunking these “contentions.” Op. Br. at 15-31. But, as explained above, the evidence and argument Commonwealth presented to the jury was 1) the Agreement required Commonwealth to litigate its indemnity claim against DALD/Newhall and entitled it to do so without Soundbuilt’s interference, 2) the results of this litigation would determine any further payment obligation to Soundbuilt and 3) Commonwealth agreed with Soundbuilt any settlement of the indemnity litigation would require both parties’ participation. *E.g.*, Tr. Exs. 11, 26, 28, 64; VRP 1192-95, 1198, 1204-06, 1213. Soundbuilt’s arguments sidestep all of this evidence and argument.

Soundbuilt’s “sufficiency of the evidence” claim is, in reality, an argument it could not have materially breached the Agreement as a matter of law because no term prevented it from reaching the deal it unilaterally negotiated with the trustee. *See, e.g.*, Op. Br. at 44 (arguing there is no “provision in the Agreement which was intended to address the contingency that the appeal would pass under the control of a Bankruptcy Trustee”). This was the argument Soundbuilt twice unsuccessfully raised on summary judgment. CP 108-113 (arguing Soundbuilt/Trustee Agreement did not breach Settlement Agreement as matter of law); CP 1561-63 (arguing any breach by Soundbuilt was not material as matter of law). The trial court denied these motions and ordered the questions of

breach and materiality go to the jury, which then rejected Soundbuilt's claims. Soundbuilt does not argue the jury should not have decided these issues. Nor could it as it agreed to present the questions of breach and materiality to the jury by failing to take exception to Instructions 6-11 and the verdict form. VRP 1130-31; *Washburn*, 169 Wn. App. at 599. It instead attempts to construct a sufficiency of the evidence claim to reargue its unsuccessful legal position. Its efforts fail based on the record presented to the jury under agreed or unchallenged instructions.

Soundbuilt focuses its remaining arguments on Paragraph 5.3, claiming it is a "condition subsequent" with no performance obligation. Op. Br. at 41-42. Soundbuilt ignores the opening clause of this provision, which states "Commonwealth shall seek a determination of the court that DALD and Greg Newhall are obligated to indemnify Commonwealth for sums paid to [Soundbuilt]." Tr. Ex. 26, ¶ 5.3 (emphasis added). Instead, it quotes language later in the paragraph describing how to apply the result of this court determination. But this language does not transform Commonwealth's obligation to obtain a court determination into a condition subsequent. And although it now contends this paragraph does not contain a performance obligation, Soundbuilt repeatedly argued Commonwealth breached this provision by failing to timely act in pursuing the *Newhall* Appeal. *E.g.*, VRP 1159-62. The duty of good faith

and fair dealing “casts on each party a duty not to interfere with the other party’s performance.” *State v. Trask*, 91 Wn. App. 253, 272-73, 957 P.2d 781 (1998). Soundbuilt’s agreement to have the *Newhall* Appeal dismissed interfered with Commonwealth’s performance obligation.

Soundbuilt further contends because the Agreement did not specifically say whether “either side might buy assets in a bankruptcy,” its actions could not be a breach. Op. Br. at 24, 44. This argument is yet another rehashing of its unsuccessful summary judgment arguments. As set forth above, the parties agreed the amount of Commonwealth’s liability would be determined through the indemnity litigation. It is undisputed that the indemnity litigation continued post-bankruptcy. VRP 1149-50. The litigation was dismissed based on a deal Soundbuilt struck with the trustee without Commonwealth’s assent. Whether or not this action can be considered a purchase of an asset or not, the result deprived Commonwealth of benefits bargained for under the Agreement.

Under the parties’ agreed instructions, the jury was directed to consider extrinsic evidence, including the course of performance, when deciding the parties’ intent in entering the Agreement. CP 2342. It was further instructed only a material breach would justify a party in abandoning a contract. CP 2343. And it was instructed Commonwealth’s performance would be excused if it proved Soundbuilt interfered with or

prevented Commonwealth from obtaining a final order against DALD/Newhall. CP 2345. Soundbuilt did not take exception to any of these instructions. Applying these instructions to the evidence, the jury found Soundbuilt materially breached by entering into its agreement with the trustee to dismiss the appeal. Sufficient evidence supports this verdict.

C. Evidence and Argument Related to Lost Profits was Proper.

Soundbuilt next contends certain evidence and argument regarding its “lost profits” were improper and prejudicial. Op. Br. at 44-46. It is unclear from its argument whether Soundbuilt contends the trial court’s evidentiary rulings on this issue were in error or whether Soundbuilt is claiming Commonwealth’s counsel improperly argued this issue to the jury. Soundbuilt does not cite a single case or rule in support of either proposition. Nor does it identify any relief it seeks as a result of this purported error. It has failed to properly brief its assignment of error, and the Court should decline to consider it on appeal. *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (“We will not consider an inadequately briefed argument.”); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument unsupported by citation to record or authority not considered).

To the extent the Court does consider this argument, Soundbuilt cannot establish any error related to the admission of limited testimony

and argument regarding the financial impacts on Soundbuilt from the repudiation of its contract with DALD/Newhall. The only testimony regarding this issue Soundbuilt cites in its brief was a single question in the examination of Paul Brain. Op. Br. at 32. Commonwealth asked Mr. Brain if one of the rationales for Soundbuilt selecting specific performance over lost profits was because “economically, that looked like a better path for Soundbuilt?” VRP 1000. The trial court overruled Soundbuilt’s relevance objection to this question. VRP 1001. Soundbuilt does not argue this ruling was “manifestly unreasonable” or “based on untenable grounds” such that it constituted an abuse of discretion. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 864 P.2d 937 (1994). Indeed, the trial court’s ruling was consistent with its pretrial ruling *in limine* on lost profits, to which Soundbuilt assigns no error. But even if the admission of this testimony was somehow error, Soundbuilt cannot establish any prejudice as a result of this single question posed to its own counsel in the settlement transaction. “Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial.” *Brown v. Spokane Cty. Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Soundbuilt does not even attempt to argue such prejudice here.

Soundbuilt further claims Commonwealth’s counsel improperly argued the issue of lost profits in closing. Op. Br. at 35, 45-46. The sole

statement Soundbuilt identifies is Soundbuilt’s \$8 million settlement demand “had nothing to do with the amount of money Soundbuilt was out of pocket” and “nothing to do with their lost damages and their lost profits.” Op. Br. at 46 (quoting VRP 1189). To obtain a new trial for alleged misconduct of counsel, a party must establish (1) the conduct complained of is misconduct, (2) the misconduct is prejudicial in the context of the record, (3) the moving party objected to the misconduct at trial, and (4) the misconduct was not cured by the court’s instructions. *Teter v. Deck*, 174 Wn.2d 207, 226, 274 P.3d 336 (2012) (citing *Aluminum Co.*, 140 Wn.2d at 539). Soundbuilt does not cite this test in its brief.

At the outset, Soundbuilt has failed to establish Commonwealth’s argument was misconduct or that it suffered any purported prejudice in the context of the trial record. Indeed, the trial court properly overruled Soundbuilt’s objection in closing. VRP 1189. It did so because the argument was within the scope of its prior rulings and consistent with the evidence elicited at trial. Ignoring the record on this point, Soundbuilt wrongly asserts there was never “any evidence” offered regarding the amount Soundbuilt was out of pocket or its damages and lost profits to support this statement in closing. Op. Br. at 34. But at trial, without any objection from Soundbuilt, Soundbuilt’s owner testified as follows:

Q. And when you said that you bought the property, just to be clear, **you didn’t actually pay for the property; did you?**

A. **No.** We had a Purchase and Sale Agreement to close on the property when they developed, got done completing the lots.

Q. Okay. **So you weren't out of pocket, for example, any money to purchase that property?**

A. **No.**

VRP 307-08 (G. Racca) (emphasis added). Similarly, Paul Brain testified Soundbuilt had “rejected” a lost profits remedy in favor of specific performance because DALD was a single asset entity and there was “no realistic basis” to recover damages against it absent “extended litigation.” VRP 1000-01. Commonwealth’s statements in closing simply restated Mr. Racca’s testimony (to which Soundbuilt did not object) and Mr. Brain’s testimony (which was properly admitted). Commonwealth did not, as Soundbuilt repeatedly claims, argue Soundbuilt would receive a “windfall” if allowed to recover more under the Agreement. Op. Br. at 33, 35, 45. As with many of Soundbuilt’s arguments, this is a construction of the trial proceeding unsupported by the actual record.

Finally, Soundbuilt never requested a curative instruction and has not now argued the conduct was “so flagrant that no instruction can cure it.” *Teter*, 174 Wn.2d at 225. Indeed, Soundbuilt never raised the issue of misconduct before the trial court at all. Soundbuilt has waived any claim of misconduct here. *City of Bellevue v. Kravik*, 69 Wn. App. 735, 743, 850 P.2d 559 (1993) (“To preserve an error relating to misconduct of

counsel, a party should object to the statement, seek a curative instruction, and move for a mistrial or new trial.”). For each of these reasons, Soundbuilt’s “lost profit” argument does not support reversal.

D. The Trial Court Properly Denied Soundbuilt Damages as a Result of Commonwealth’s Nonmaterial Breach.

Soundbuilt finally contends the trial court erred by failing to award it damages for Commonwealth’s nonmaterial breach of the Settlement Agreement, claiming it is entitled to \$3 million plus interest as expectation damages (the full amount it sought at trial). Op. Br. at 46-48. The trial court properly rejected this argument and entered judgment in Commonwealth’s favor. CP 2534. This judgment should be upheld because Soundbuilt cannot demonstrate its economic position changed due to Commonwealth’s nonmaterial breach such that it would be entitled to expectation damages. Rather, Soundbuilt’s own material breach prevented the final determination of what further amount, if any, Commonwealth would owe it under the Agreement. The judgment was entirely consistent with the jury instructions and the verdict, and it should be upheld.

Soundbuilt concedes expectation damages are the only measure of damages to which it could possibly be entitled as a result of the verdict. Op. Br. at 47. Expectation damages are those intended to put the injured party in “as good a position as that party would have been in had the contract been performed.” *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d

146, 155, 43 P.3d 1223 (2002) (internal quotation omitted). Thus, under the facts here, Soundbuilt would need to establish some damage or change in its economic position as a result of the three-month period of time between July 13, 2010 and October 25, 2010 during which Commonwealth prepared and filed its motion for relief from stay. *See Rathke v. Roberts*, 33 Wn.2d 858, 866, 207 P.2d 716 (1949) (goal of contract damages is to “place the plaintiff in the position he would be in if the contract had been fulfilled”).

Soundbuilt does not contend it suffered any such change in position, nor did it seek to adduce evidence at trial of any such change of position. Nor could it, as the only result of the brief delay between July and October 2010 was to extend the *Newhall* Appeal timeline by three months. As set forth above, Commonwealth’s payment obligation could not have come due in that period of time because the *Newhall* Appeal had not been fully briefed or argued. VRP 1149. Thus, Soundbuilt was not entitled to any “compensation for [Commonwealth’s] defective performance” because it experienced no change in its economic position as a result. Op. Br. at 47 (citing *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 589, 167 P.3d 1125 (2007)).

Soundbuilt attempts to manufacture some conflict between the judgment, the jury instructions and the verdict, but none exists. Op. Br. at

35. Soundbuilt claims because the definition of breach contained in the jury instructions included the element of damage, the jury must have found Soundbuilt was damaged as a result of Commonwealth's breach. But as Soundbuilt concedes, the jury also was instructed that "[t]he Judge will determine whether damages will be awarded to either party and, if so, the amount, based on your verdict." CP 2340. Soundbuilt agreed with this approach prior to trial, took no exception to this instruction at trial and does not assign error to it on appeal. It cannot use this as a basis to overturn the judgment when it itself agreed the trial court would determine the amount of damages based on the verdict. *City of Seattle v. Patu*, 108 Wn. App. 364, 374, 30 P.3d 522 (2001) ("Under the doctrine of invited error, a party may not request an instruction and then later complain on appeal that the instruction was given[.]").

Unable to show any change in position to warrant expectation damages, Soundbuilt instead contends it is entitled to \$3 million, claiming this was the amount the parties "clearly and reasonably contemplated" Commonwealth would pay when entering the Agreement. Op. Br. at 47. At its core, Soundbuilt's argument is the Court should overlook the terms of the Agreement, which made payment of up to \$3 million contingent on a final court determination of the Newhalls' liability, and its own material breach of the Agreement, and instead award it its full remedy as a result of

Commonwealth's nonmaterial breach. Soundbuilt cites no proposition of law that would permit such an outcome. Only a material breach may excuse the other party's performance. *See, e.g., DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.*, 179 Wn. App. 205, 220, 317 P.2d 543 (2014). And where there are competing claims of breach of the same contract, the first material breach excuses any further performance by the other party. *See City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 646-47, 211 P.3d 406 (2009) (City's material breach in refusing to accept and process permit excused Church's promise not to erect tent city despite Church's prior breach in failing timely to submit permit application). The parties agreed to instruct the jury to this effect in Jury Instruction No. 9. CP 2343 ("A 'material breach' is a breach serious enough to justify the other party in abandoning the contract.").

Commonwealth is not arguing Soundbuilt's claim for damages was "discharged" by Soundbuilt's subsequent material breach of the Agreement. Op. Br. at 48 (quoting Restatement (Second) of Contracts § 237, comment e). Rather, the trial court properly found Soundbuilt suffered no damages from Commonwealth's nonmaterial breach in delaying seeking relief from stay, during which time Soundbuilt materially breached the Agreement. It is Soundbuilt which effectively contends its material breach should be discharged by Commonwealth's nonmaterial

breach. This is directly contrary to the law. And Soundbuilt's material breach of the Agreement (which resulted in dismissal of the *Newhall* Appeal before any decision could issue) further renders any amount it might claim as damages speculative and unrecoverable. *See Wilkerson v. Wegner*, 58 Wn. App. 404, 409-10, 793 P.2d 983 (1990). Put another way, Soundbuilt's actions assured that the *Newhall* Appeal, the result of which would determine whether and in what amount an additional payment might be owed, would never be decided.

As a factual matter, Soundbuilt also is incorrect that "both parties clearly and reasonably contemplated" the indemnity would be enforceable for \$8 million. Op. Br. at 47-48. Soundbuilt cites to the self-serving testimony of Paul Brain (VRP 1042-43) and Mr. Kerruish (VRP 363) for this proposition, but this testimony was contradicted by that of Chris Brain. Chris Brain never testified the indemnity would be enforceable for the full \$8 million. Op. Br. at 48. Instead, he testified: "I was confident I had an enforceable indemnity agreement. I've always said it was about the amount; okay? Those are two different issues." VRP 519 (emphasis added); *see also* VRP 429-30, 476-77, 489. Indeed, Commonwealth's concern regarding the enforceability of the indemnity was precisely why Soundbuilt proposed the risk-sharing settlement structure in the first place. Tr. Ex. 11. And, at the time, Soundbuilt believed the chances of collecting

the additional \$3 million were only “better than even.” Tr. Ex. 11. Its position on appeal cannot be squared with the record.

The trial court properly found Soundbuilt could not establish any expectation damages as a result of Commonwealth’s nonmaterial breach. Because the jury’s finding that Soundbuilt materially breached the Agreement excused Commonwealth’s further performance as a matter of law, the trial court properly entered judgment in Commonwealth’s favor.

E. Commonwealth is Entitled to Its Attorneys’ Fees on Appeal.

The Settlement Agreement provides the prevailing party in any action to enforce the Agreement is entitled to its attorneys’ fees and costs. Tr. Ex. 26 (¶ 5.13).¹¹ Commonwealth requests such an award on appeal.¹²

V. CONCLUSION

The jury concluded Soundbuilt was the only party to materially breach the Settlement Agreement while Commonwealth’s breach was nonmaterial. As a result of this verdict, the trial court properly entered judgment in Commonwealth’s favor and denied Soundbuilt damages in this case. The verdict and judgment should be affirmed in all respects.

¹¹ An award of fees is appropriate under RCW 4.84.330 and RAP 18.1. *See also Marine Enterprises, Inc. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 774, 750 P.2d 1290 (1988) (“A contract which provides for attorney’s fees to enforce a provision of the contract necessarily provides for attorney’s fees on appeal.”).

¹² Pursuant to RAP 14.4(c), Commonwealth also will seek the costs incurred in Case No. 68547-3-1 if it is successful on the appeal of this matter.

RESPECTFULLY SUBMITTED this 20th day of October, 2016.

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APPENDIX A

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SOUNDBUILT NORTHWEST, LLC,) No. 04-2-09599-9 KNT
a Washington limited) (Lead)
liability company and) COA No. 74128-4-I
successor-in-interest to)
SOUND BUILT HOMES, INC.,)

Plaintiff,)

v.)

POST-TRIAL PROCEEDINGS

COMMONWEALTH LAND TITLE)
INSURANCE COMPANY, a)
Nebraska insurance)
company; and LAWYERS TITLE)
INSURANCE CORPORATION, a)
Nebraska insurance)
company,)

Defendants.)

-----)

14-2-01805-3 KNT
COA No. 74128-4-I

COMMONWEALTH LAND TITLE)
INSURANCE COMPANY, a)
Nebraska insurance)
company; and LAWYERS TITLE)
INSURANCE CORPORATION, a)
Nebraska insurance)
company,)

Plaintiffs,)

v.)

SOUNDBUILT NORTHWEST, LLC,)
a Washington limited)
liability company and)
successor-in-interest to)
SOUND BUILT HOMES, INC.,)

Defendant.)

May 16, 2016

1 CAPTION - 2

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VERBATIM REPORT OF PROCEEDINGS

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BEFORE THE HONORABLE RICHARD F. McDERMOTT

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May 16, 2016

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Maleng Regional Justice Center

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Kent, Washington

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APPEARANCES:

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REPORTED BY: BRIDGET O'DONNELL, RPR, CRR
 Official Court Reporter
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P R O C E E D I N G S

May 16, 2016

THE COURT: Good afternoon, everyone.

MR. HOWARD: Good afternoon, Your Honor.

MR. LAWRENCE: Good afternoon, Your Honor.

THE COURT: Please be seated.

Gentlemen, here we are, 2016. Let me go through just for a moment, there are a number of motions and requests before the Court. I'd like to go through them one by one. I'm not sure I can make a decision on every single one of them today, but I think I can decide on a number of them. So I would like to be able to go ahead and do that.

The first one that I want to take up is Soundbuilt's CR 59 Motion for Reconsideration or a New Trial.

Mr. Howard, good afternoon.

MR. HOWARD: Good afternoon.

THE COURT: I have the rule before me. I have gone through your brief, and the response.

And can you point out to me how CR 59 would allow me to grant your motion? Because I don't see it, quite frankly.

MR. HOWARD: Your Honor, our motion covers two alternate elements.

1 THE COURT: Thank you very much.

2 You guys, throughout this entire case, and God
3 knows how you have been before me for about seven or
4 eight years now in one way or another, you are more than
5 welcome to sit and speak while you're sitting. I have
6 no problem at all with that.

7 Mr. Segal, is that really you underneath all that
8 hair?

9 MR. SEGAL: I'm afraid so, Your Honor. It's nice
10 to see you again.

11 THE COURT: I had to do a double-take. But it is
12 nice to see you as well.

13 MR. HOWARD: I think he looks good, Your Honor.

14 THE COURT: Mr. Howard, I'm used to seeing you
15 with a beard. Although, I must say, it's a bit whiter
16 than it used to be.

17 MR. HOWARD: Thank you, Your Honor. But that
18 just shows something that neither of us wants to
19 discuss.

20 THE COURT: We got here, and we're very grateful
21 for whatever we have.

22 So, Mr. Segal, look at that. He looks like Paul
23 Bunyon or something. My gosh. All right.

24 MR. HOWARD: He looks very distinguished to me,
25 now.

1 THE COURT: Indeed he does. It looks good.

2 I just have to make sure it's you.

3 MR. SEGAL: It's me, Your Honor.

4 THE COURT: All right.

5 Now, the CR 59 motion, I want to take that first
6 because, Mr. Howard, I don't see it, and I want you to
7 try and show me. I've got the rule right in front of
8 me. So it has to qualify under one of nine different
9 exceptions. Please tell me what you think.

10 MR. HOWARD: The portion where there's two
11 elements of relief we're seeking, one of them is
12 challenge, the other is not, and this motion is in the
13 alternative. But the point being, I mean, I have to
14 give a little background to explain why.

15 This Court reserved to itself the issue of
16 damages. We had moved for a judgment explaining
17 damages, but the issue of how you did or did not
18 determine Soundbuilt's damages was made implicitly in
19 your ruling for the judgment, and that's the issue we
20 seek to reconsider.

21 You made a finding of zero damages, which we
22 think actually is inconsistent with the jury verdict and
23 in error. And I don't have my rule book in front of me.
24 As such, it's not one of those things which is
25 foreclosed by (j)59, and it is an effort to have you

1 reconsider your ruling, not the jury's, on the issue of
2 how you determined Soundbuilt's damages to be zero. Or
3 if you didn't, that was implicit in the judgment you
4 entered.

5 THE COURT: I think that that was part of the
6 ruling. I think you were right the first time.

7 MR. HOWARD: I think it's implicit in the
8 judgment you entered. And that is the portion we think
9 this Court should have a chance to remedy in view of,
10 well, for example, the jury instructions that would have
11 required the jury to find there were damages in order to
12 answer Question Number 1 as it did. And it's important
13 for this Court to fix a matter, as a matter of law,
14 which is currently in error in the judgment that has
15 been entered.

16 In addition, though, the part that isn't in the
17 alternative is a new trial on the issue of those
18 damages, which actually is an issue which is not
19 upsetting the current jury verdict, but an issue which
20 the judge had reserved to itself. Which, frankly, Your
21 Honor, no one in this room contemplated the fact pattern
22 we're presented with by the jury verdict.

23 And as such, the issue of what the damages are
24 that arise with Commonwealth's first breach and
25 Soundbuilt's subsequent breach was not presented to the

1 jury in that fashion. And so the alternative portion of
2 the motion which has not been challenged by CR 59(j),
3 would still be before you. Although it is, since you
4 reserved the issue to yourself, something that you can
5 remedy as a matter of law, because it's an incorrect
6 legal ruling, given that the jury had to have found
7 damages in order to answer Question Number 1 by Jury
8 Instruction Number 6.

9 And then I have further argument, Your Honor, but
10 I think we're at a procedural point. So I don't want to
11 put my entire argument into the procedural point, which
12 is just that I respond to your question, which I hope I
13 did adequately enough.

14 THE COURT: You did. But you can go ahead and
15 finish your argument, because then I want their
16 response.

17 MR. HOWARD: Okay. Thank you, Your Honor.

18 Damages were an element of Jury Instruction
19 Number 6. Without damages, the jury could not have
20 awarded -- assuming the jury followed the instructions,
21 the jury could not have answered Question Number 1 "yes"
22 without finding that Soundbuilt was damaged.

23 The judgment that was entered found those damages
24 to be zero, which is inconsistent with the jury
25 answering Question Number 1.

1 Further, Instruction Number 11, which the jury
2 presumably followed, would indicate that as soon as
3 breach is found, and this is not limited to material
4 breach, the condition was excused; that is to say, the
5 final nonappealable order. So, if the jury followed
6 this Court's instructions, damages must be awarded in
7 some amount.

8 Now, this Court has before it all the information
9 it needs to make certain determinations. And I believe
10 the Court implicitly found in a sense zero damages in
11 your ruling before. But there are at least other
12 options. Immediate default, two percent penalty would
13 apply. Immediate default, interest would apply.

14 And, bluntly, there is zero authority in
15 Washington or elsewhere that supports the idea that a
16 subsequent breach, even a material breach, would excuse
17 prior performance. And, in fact, by the authority we
18 provided you both from the Restatement and Washington
19 law, a subsequent breach, even if material, does not
20 excuse the prior claim for damages.

21 So, based upon the jury instructions this Court
22 presented, and I believe Number 6 was not objected to by
23 Counsel for Commonwealth, there must be damages for
24 Soundbuilt in some amount, whether it's the minimum of
25 the penalty, two percent, plus default interest, or

1 whether, pursuant to Instruction 11, it's an
2 acceleration of the payment due, and then due before the
3 subsequent breach, which would still not be excused by a
4 subsequent breach, that amount must be addressed. And
5 to find it is zero is contrary to the instructions given
6 to the jury, and contrary to Washington law.

7 Commonwealth has argued effectively that their
8 subsequent breach extinguishes any obligation on the
9 belief that there is still some speculative time in the
10 future when it might have become due. But by the
11 Court's own instructions, that condition was excused on
12 the date in July of 2010, that the jury found
13 Commonwealth in breach.

14 So, although this might be off by a couple
15 hundred, because it's not an exact two-month period, at
16 the very least, Soundbuilt would be entitled to two
17 percent default and two percent interest for \$120,000 in
18 damages, based upon the clear language of the contract,
19 when they did not pay.

20 Now, the Court could read that contract and issue
21 a full disclosure as giving them 30 days to pay from the
22 point of acceleration. It would still be three percent
23 due now and a judgment entitled to Soundbuilt in that
24 amount. I do not need to push this any further, since
25 we have several motions to argue, Your Honor.

1 Those jury instructions require this Court to
2 address the issue of Soundbuilt's damages. And
3 Soundbuilt's damages for that period, for the first
4 breach, are not zero, nor are they extinguished or
5 excused by any subsequent breach. That is what we seek
6 to have reconsidered. That is what we seek to have this
7 Court address directly, or with a new trial on the
8 specific issue of damages in that period.

9 THE COURT: Thank you, Mr. Howard.

10 MR. HOWARD: Thank you, Your Honor.

11 THE COURT: Mr. Lawrence, do you, or your bearded
12 friend, or anybody else want to respond?

13 MR. LAWRENCE: Well, if Mr. Segal wants to
14 respond, I don't want to take the spotlight. But I'm
15 not quite sure exactly whether we're here for the
16 arguments that were made before Your Honor entered its
17 judgment, or we're here on a MOTION FOR RECONSIDERATION,
18 where Your Honor hasn't even asked for a response.

19 The arguments really were set forth in our
20 briefing, upon which you already ruled. And so I'm a
21 little bit -- I don't know where you want me to start.
22 And under Rule 59, there's no way to --

23 THE COURT: I would like you to respond to the
24 argument that Soundbuilt is entitled to some -- once
25 there was a breach by Commonwealth, and the jury found

1 that there was a breach, that, therefore, Soundbuilt was
2 entitled to some damages.

3 MR. LAWRENCE: Again, this has been argued
4 before, but let's start from the basic premise what this
5 case has been about from day one.

6 There's actually one thing, I believe, that the
7 parties agreed upon throughout the course of the trial,
8 and that is that there has to be a material breach of
9 the contract to excuse performance of the contract.
10 That's been what this case has been about from day one.

11 Soundbuilt, Commonwealth's claim has always been
12 that there was a material breach by Soundbuilt, which
13 excused Commonwealth's payment of specific performance.
14 We acknowledge that at the end of the day, we didn't
15 make a payment; the question was whether there was a
16 material breach that excused the performance.

17 And faced with this argument, Soundbuilt replied:
18 No, we did not breach, and, regardless, you guys
19 materially breached first. So that excused Soundbuilt
20 of any performance.

21 The case was tried; the jury spoke. And with
22 respect to material breach, which was what this case was
23 all about, because that's the only thing that excuses
24 performance, the jury found that only Soundbuilt
25 materially breached the agreement.

1 And based on that finding, the Court
2 appropriately found, and based on what had been the
3 undisputed premise of this case, that you needed to show
4 a material breach in order to excuse performance, that
5 the judgment that was entered was appropriately entered.

6 Up until, I think, today, up until today, the
7 only argument that Soundbuilt ever made about what they
8 were entitled to was the full shebang; in other words,
9 the \$3 million, plus the default interest, plus
10 interest.

11 Because their whole argument, up until ten
12 minutes ago, when Mr. Howard spoke, was all about how
13 everything was immediately due; they were excused from
14 performance; that there is nothing that their material
15 breach could have affected; and that they were due
16 therefore -- I forget -- \$5.6 million, is what they had
17 asked for previously.

18 Now we're hearing a variation of that: Well,
19 maybe not \$5.6 million. Maybe some interest. You know,
20 that's all new stuff. We haven't had a chance to brief
21 it or argue it. But the point being is that they can't.
22 Given the jury verdict, given the evidence that you
23 heard, there are no damages that would be awarded.

24 What we're talking about, as you'll recall, is a
25 three-month period between when Mr. Cullen told

1 Soundbuilt that they were not going to agree with the
2 trustee and were going to move forward with a motion for
3 relief from stay, which we know was filed that October.

4 Prior to that, we now know that the jury has
5 found it was a material breach by Soundbuilt when they
6 entered into an agreement with the trustee. And the
7 idea that there was any damage during that period of
8 time, it's not really a cure question, although cure is
9 one way to look at it; it is what is the result of that
10 three-month delay that they can argue should be awarded
11 damages.

12 And the reality is there's no way to have gotten
13 to a point where there was a payment obligation due by
14 Commonwealth prior to the material breach by Soundbuilt.
15 So there was no obligation to pay at the time of the
16 material breach, and the material breach by Soundbuilt
17 obviated any obligation of Commonwealth to pay.

18 That was what was argued to the Court in summary
19 judgment, that was argued to the Court in pretrial
20 briefing, it was argued to the jury, it was argued to
21 the Court in post-trial briefing, and that's where we
22 are today, with the jury having found, despite strong
23 arguments made to the jury about materiality, that only
24 Soundbuilt materially breached the agreement. So,
25 basically, we think that there are both procedural

1 problems with this particular motion, and that it's a
2 reconsideration motion with no basis for it.

3 It's also barred by 59, because it really is the
4 exact same motion and argument that you heard before
5 entering the judgment, and you just can't reargue these
6 things again and again and again, according to the rule.

7 So, both, procedurally, this should be denied,
8 and substantively. Again, there's been no showing based
9 on any evidence that was before the jury, that there was
10 any inconsistency or damage, that that ought to be
11 allowed.

12 And the last point I would make is that we all
13 agreed, including Soundbuilt, that the damages were not
14 the concern of the jury. The judge was going to look at
15 that based on the jury's findings. That's exactly what
16 happened.

17 And based on the jury's findings and based on,
18 again, the continual positions of both parties about the
19 impact of what a material breach is or not, Your Honor
20 came to the right conclusion.

21 THE COURT: All right. Thank you.

22 Mr. Howard, do you want to respond? You've got
23 two minutes. Go ahead.

24 MR. HOWARD: I'll use less.

25 Your Honor, Jury Instruction 11, I believe, does

1 support acceleration, because it extinguishes the
2 requirement. We argued that already. Although I don't
3 know that we pointed out to the Court the implication in
4 the jury instructions themselves. The damages were
5 reserved to you.

6 We are appropriately pointing out by CR 59 that a
7 legal error, inconsistent with the jury results in this
8 case, should be fixed before this matter goes up on
9 appeal. That's what we ask you to do at this time.

10 He raised the issue of cure. I have that, also,
11 in my outline. I think it relates to another. But this
12 case isn't about cure. They didn't allege it; they
13 didn't plead it. And I can deal with that later if it
14 becomes relevant in another one of the motions.

15 THE COURT: Motion is denied.

16 I believe that the jury verdict was pretty clear.
17 I don't think that there was any error under CR 59 to
18 support revisiting this, to support granting your motion
19 for a new trial or reconsideration.

20 Believe me, I've looked at all these pleadings
21 carefully. I've looked at the jury verdict. I've been
22 looking through some of my notes; I have a large box.
23 Plus, I have some of the material that is still in my
24 office from all of this. And I think the jury has
25 spoken.

1 And the case law is really clear about granting a
2 motion for reconsideration pursuant to CR 59, and it is
3 a rather extraordinary remedy, quite frankly.

4 And I think, especially here, where my
5 recollection is that there were actually more exceptions
6 to the jury instructions taken by Commonwealth than
7 there were by Soundbuilt, and the jury nevertheless
8 found that although Commonwealth breached, Soundbuilt's
9 breach was material.

10 And I think, in view of that, and in view of all
11 the litigation that we've had up to this point in time,
12 and the particular predisposition of the Appellate
13 Courts not to entertain motions for new trial unless
14 there's something extraordinary going on, and there is
15 not, that that is not the case in this matter.

16 Therefore, I will deny your motion. I do not
17 believe that CR 59 merits or allows it in this case.
18 All right. That's the first issue.

19 Mr. Howard, what issue would you like to take
20 next?

21 MR. HOWARD: Your Honor, my outline, I put down a
22 renewal of our issues on materiality as a matter of law,
23 and no evidence that Soundbuilt actually breached as a
24 separate issue. Although your ruling just now may have
25 intended to incorporate that, those issues I believe are

1 legal issues we do not want to waive with respect to any
2 reconsideration.

3 But if one actually reads this contract, there is
4 nothing in it that Soundbuilt actually breached. They
5 had to imply a new term. And that was a portion of our
6 motion for reconsideration, and for new trial, also,
7 that there is nothing in the contract itself that
8 Soundbuilt breached.

9 THE COURT: Well, I didn't have the benefit of
10 talking with the jury; you all did. But it is my
11 observation that when the jury made their verdict, they
12 ruled that by making a separate deal with the trustee,
13 Soundbuilt breached the terms of the contract, and,
14 therefore, effectively precluded Commonwealth from
15 upholding the terms of the contract, and that their
16 breach was material.

17 I got the sense from the verdict of the jury, and
18 from going back and looking at all the instructions, and
19 everything that the jury, the finder of fact, felt that
20 although Commonwealth did not act on the appeal with the
21 proper kind of speed, and that was a breach, it was not
22 a material breach, because they still moved to correct
23 it, even if it was three months later, but that by their
24 action, Soundbuilt had effectively precluded any action
25 on the part of Commonwealth.

1 And that was how I felt the jury ended up
2 concluding. And I think that there's plenty of briefing
3 that I received from the Commonwealth attorneys that,
4 quite frankly, I agreed with, in terms of the argument
5 that that is the ultimate result that the jury came up
6 with.

7 And, so, in other words, both parties were
8 somewhat in breach, but the breach of Soundbuilt was
9 much more substantial, because it basically precluded
10 Commonwealth from being able to effectively pursue the
11 appeal. And whether I agreed with that myself or not
12 isn't particularly important.

13 I previously ruled in Soundbuilt's favor. I was,
14 quite frankly, a bit surprised when the Court of Appeals
15 reversed that ruling and remanded it for a trial.
16 Apparently the Court of Appeals knew more about that
17 issue than I did, because of the ensuing jury verdict.

18 But I'm not about to overrule or overturn that
19 jury verdict. I'm simply telling you what I understand
20 the verdict to be, and how I interpret that verdict. I
21 was here for the whole time, too, for the last seven or
22 eight years. And I suspect, I think, that my
23 understanding of the verdict is accurate. At least I
24 believe it is. And, so, I don't know where that puts
25 you, Mr. Howard, with all of your motions.

1 But if my understanding of the jury verdict is
2 accurate, then your motions for alternative relief, or
3 for a new trial, or a judgment, an additional judgment
4 have to be denied, it seems to me. And I don't believe
5 that those are necessarily the results I would have
6 made, had there not been a jury trial.

7 MR. HOWARD: Well, we've made our record. That's
8 well-established. We're just trying to give Your Honor
9 a chance to fix a few aspects we believe to be contrary
10 to law.

11 THE COURT: Well, and I appreciate that,
12 Mr. Howard. And I certainly welcome the Court of
13 Appeals telling me what they think. But at this point
14 in time, it's clear to me that I should not overturn or
15 disrupt what has been decided.

16 And I must tell you, I thought both of you had
17 ample opportunity to present your respective sides, that
18 you had every opportunity to present the evidence. I
19 don't think there was any evidence that I tried to
20 include -- or I don't think I excluded anything that
21 would have prevented the jury from getting a total
22 picture of what happened.

23 And that was my goal, was to make sure that the
24 jury had all the facts before them so that they could
25 make the right decision. And they made what they felt

1 was the right decision, and I'm not in a position to be
2 overturning that. So all of your post-trial motions, I
3 think, Mr. Howard, have to be denied for that reason.

4 MR. HOWARD: Well, then, Your Honor, that would
5 take us to, I believe, Commonwealth's motions, for which
6 I would yield the floor.

7 THE COURT: Well, I guess that would.

8 Mr. Lawrence, go ahead, sir.

9 MR. LAWRENCE: Sure. First, I will note that I
10 was hoping that we would get a chance to talk about the
11 Mariners, since they are doing so well, despite last
12 weekend. Maybe after.

13 THE COURT: Well, I was at the game on Sunday.
14 And I can tell you that Felix was superb and did not
15 deserve to lose that game. But that has been the case
16 for him probably 50 times in his career.

17 So I read something a while back that indicated
18 that, according to Major League Baseball, Felix
19 Hernandez is the number-one pitcher in the history of
20 Major League Baseball for lack of support.

21 MR. LAWRENCE: Is that right? And he had the
22 worst record in what they call the ultra quality start,
23 which is two runs or less over seven innings.

24 THE COURT: And that should have been an ultra
25 quality start. But Vincent gave up that fateful hit in

1 the bottom of the 9th, or top of the 8th. But, anyway,
2 c'est la vie.

3 Nevertheless, we certainly seem to be a more
4 exciting and competitive team than we've been in several
5 years, which is a good thing for baseball fans.

6 MR. LAWRENCE: It is. It is.

7 THE COURT: So I'm cautiously hopeful.

8 MR. LAWRENCE: It will be a much more fun season
9 regardless.

10 So, onto attorneys' fees, I think, in some ways,
11 the attorneys' fees issue arises just from what you were
12 saying, Your Honor, in that I think you have properly
13 interpreted what the jury decided.

14 And we believe that what the jury decided
15 demonstrates pretty clearly that Commonwealth was the
16 prevailing party. So, if you look at the cases, there
17 are a couple of things that the Court --

18 THE COURT: Let's get down to the nitty gritty.
19 I read over all your stuff, and you know I try and do
20 that. So I have some real issues.

21 I think that Mr. Howard made some significant
22 inroads with me, in terms of his response to your
23 request for fees, and I would like your response. You
24 can do it orally, or you can send me something.

25 One, Commonwealth was in breach.

1 Two, I can't award appellate fees. Not going to
2 happen. So anything that is awarded by me would have to
3 be from when the Court of Appeals sent it back to me and
4 retried it.

5 Three, I'm assuming that you are proceeding on
6 the agreement, which calls for fees, rather than on any
7 other fee award basis. Lord knows there are very few
8 bases from which we can award fees in this state.

9 But the contract itself provides a basis, so I
10 want you to address the issue of: Does Commonwealth's
11 breach somehow preclude or mitigate the award of
12 attorneys' fees to Commonwealth, even though, yeah,
13 Soundbuilt breached?

14 And that's what the jury found. They found it
15 was material. I understand that. But, you know, as to
16 the attorneys' fees question, how am I going to
17 interpret the fees? That doesn't go to the
18 reasonableness of the fees, which seems to me is a
19 secondary issue as well.

20 MR. LAWRENCE: So let me start by -- I know you
21 read the cases -- citing the case of Reece. The Reece
22 case might be the most instructive case here, because,
23 in that case, there was some relief granted to the
24 defendant, some relief granted to the plaintiff, and
25 what the Court noted at the end of the day in awarding

1 fees is that the plaintiff ended up with what they
2 wanted from the lawsuit, the ability to build a house.

3 In looking at it from that lens, we got what we
4 wanted from the lawsuit and Soundbuilt didn't.
5 Soundbuilt sought a large multi-million-dollar award; we
6 sought a defense verdict, that we owed them nothing.
7 They got an award of no damages. We got exactly what we
8 wanted at the beginning of the case; that is, a defense
9 verdict, that we them owed nothing.

10 The road to get there, again, what really this
11 fight was about was the materiality of breach, of
12 potential materiality of breach. And, again, on that
13 point, we got what we wanted, that their breach was
14 material, and they did not.

15 So, if you look at the result from the jury and
16 consider what was asked for by the parties at the
17 beginning of the case, what was asked for by the parties
18 during the trial, and what the result of the verdict and
19 the judgment were, we got what we asked for; Soundbuilt
20 didn't get anything.

21 And I think when there's a prevailing party
22 standard, or the affirmative judgment standard, that
23 means that Commonwealth was the prevailing party in
24 terms of the contract, and we are only seeking fees
25 under the contract.

1 Now, it is accurate and there's been no effort to
2 try to segregate out, that one could argue that some
3 amount of our fees should be discounted for not
4 prevailing on every issue. That's, again, relatively
5 standard. But we haven't really seen any effort to do
6 that by Soundbuilt.

7 They've argued that this is too large, that there
8 are too many lawyers. I don't think that it's too
9 large, or that there were too many lawyers. This was an
10 effort, a \$6 million -- \$5.6 million claim. It was
11 litigated, as Your Honor knows, we all know, for a very
12 long time.

13 We had lots of discovery; we had depositions; we
14 had summary judgments, multiple summary judgments. We
15 had the unfortunate circumstance of having a trial,
16 gearing up for trial, having it rescheduled, having to
17 gear up again. That adds to the cost of this.

18 But, fundamentally, the first issue is, is
19 Commonwealth the prevailing party or the substantially
20 prevailing party or not? And, again, if you look at
21 what we sought, and this is what the courts look at, and
22 what was achieved, at the end of the day, what was the
23 affirmative award, Commonwealth was the prevailing
24 party. And I think that is what the jury found, and I
25 think what Your Honor accurately found.

1 Now, as I said, we can talk about whether or
2 not -- and I don't know if you want to talk about it
3 here, whether we made a sufficient showing of the
4 adequacy of the fees. I think we have.

5 We submitted a declaration that included, I
6 guess, what's really undisputed about our hourly rates,
7 we used the coding system. And we have a problem.
8 Obviously, we can't give the full entries to the
9 opposing side, because that would reveal privileged
10 stuff in the middle of litigation.

11 THE COURT: You have to speak a little slower and
12 a little louder for the court reporter, please.

13 MR. LAWRENCE: Sorry. We can't give the entire
14 narrative to the opposing side, because that would be
15 revealing confidential attorney/client information. And
16 we've offered to give it to Your Honor, if Your Honor is
17 interested.

18 What we've presented is using what I think is
19 relatively standard, the ABA Litigation Codes. And I
20 don't know if Your Honor is familiar with them, but it's
21 a very typical recording system that lawyers do now,
22 where you break down your task into two separate codes,
23 one describing what you were doing, like reviewing,
24 reviewing, writing, attending a deposition, and the
25 other, talking about the type of activity it was,

1 dispositive motions, for example. And we've taken those
2 ABA Litigation Codes, and that's how we actually billed
3 our client in this case, and presented those in the
4 declaration on fees, really trying to give as much
5 information as possible.

6 And then we further supplemented that with a
7 narrative description over, you know, discrete periods
8 of time over the task in a bigger picture that we were
9 conducting, whether it be discovery, or responding to
10 summary judgment motions.

11 But I feel like we have given a really complete
12 picture, as far as one could give, without revealing
13 privileged information to the Court and to Commonwealth
14 about our attorneys' fees. And I really think -- sorry,
15 to Soundbuilt.

16 And I really think it's Soundbuilt's obligation
17 to come forward and show why those fees were not
18 reasonable, or why they should be reduced. Or if they
19 want to argue that, well, we won on breach, and so some
20 adjustment ought to be made, they should make that
21 argument.

22 They could have gone through and said, well, it
23 looks to us like -- and I'm not going to advocate for
24 them too much -- but it looks like three percent of the
25 fees were related to that breach that they lost, so

1 we'll discount that by three percent. They didn't do
2 that.

3 So, here we are, relatively far down in this
4 case, several months after trial, on the verge of an
5 appeal, where we are asking for a fee award, which,
6 depending upon what Your Honor says, may or may not be
7 subject to an appeal, too. It may be something that is
8 appealed, where the jury clearly found, and I think Your
9 Honor found that we are the substantially prevailing
10 party under the case law in Washington. And under the
11 contract between the parties, the substantially
12 prevailing party is entitled to fees.

13 And in the contractual language, it's a "shall."
14 It's mandatory language. And I think the only issue
15 really before Your Honor is the reasonableness of those
16 fees, or whether some part of those fees should be
17 adjusted to reflect the fact that we didn't win 100
18 percent on everything; we just won on everything that
19 counts.

20 And since we haven't heard any specific objection
21 from Soundbuilt, I think, at this point, we are entitled
22 to a full fee award.

23 THE COURT: Thank you, sir.

24 Mr. Howard.

25 MR. HOWARD: Mr. Lawrence addressed, I believe,

1 more than you asked him to, and I think we've gotten on
2 to more than one question. Let me address the first
3 question that you asked first.

4 Your Honor was correct, given the way you ruled
5 on the judgment, with both parties in breach, it's
6 appropriate to find no substantially prevailing party,
7 since both sides prevailed on proving the other side was
8 in breach.

9 The most analogous case is the Sardam case, at 51
10 Wn. App. 908, which supports this, despite the fact that
11 in that case, in that case, the plaintiff got an award,
12 but for less than they wanted.

13 The Court of Appeals upheld on appeal the trial
14 court's determination that there was no substantial
15 prevailing party, and upheld the trial court's finding
16 that the fees would go to neither side.

17 Similarly, in that case, it points out this is a
18 mixed question of fact and law. There will be deference
19 to Your Honor if you find that there is no prevailing
20 party because both sides proved the other in breach.

21 Now, with respect to the rest of what
22 Mr. Lawrence addressed, with respect to the amount of
23 fees, we did object in our response, pointing out they
24 provided no detail to allow us to determine what they
25 did, insofar as we couldn't send this to an expert and

1 say, tell us what they did and didn't do was reasonable.
2 And the burden of proving reasonableness of fees isn't
3 upon us to object; it's upon the party seeking the fees.

4 And they have to prove such things. When you
5 read the various cases, like the Nordstrom case, and the
6 Boeing case, and the American Nursery Products case,
7 they have to convince Your Honor it was appropriate to
8 have five billing people here for parts of trial. And
9 if you take a look at those cases, it will point out the
10 fact that we did it with two people at trial, would be a
11 fair comparison.

12 But we can't even analyze that, based upon the
13 lack of information they've given us to support their
14 claim for fees. They did not give us the detail that
15 would allow us, to prove to Your Honor that their fees
16 were reasonable. And the amount, that would require
17 supplemental briefing and greater detail, that we could
18 then give to an expert to challenge. We don't have that
19 information from them.

20 And the burden is on them to prove the
21 reasonableness of their fees, which they have not done.
22 And we believe Your Honor was correct in finding no
23 substantially prevailing party based upon the Sardam
24 case, and the fact that both sides proved the other side
25 to be in breach. So fees should be denied.

1 THE COURT: I don't think I've made that finding
2 yet, Mr. Howard. I alluded to the fact that both
3 parties were able to get the jury to rule that they were
4 in breach. But I did rule that the material breach was
5 the breach of Soundbuilt, not the breach of
6 Commonwealth.

7 MR. HOWARD: I may have misunderstood your
8 ruling.

9 THE COURT: So I have not made a ruling on
10 whether or not there was a prevailing party. However, I
11 do intend to do that as part of this.

12 MR. LAWRENCE: I didn't mean to interrupt.

13 THE COURT: You're not interrupting. It's your
14 turn.

15 MR. LAWRENCE: There is not a single case in the
16 entire history of the state of Washington, in which a
17 defendant has gotten a zero verdict, a defense verdict,
18 and not been awarded fees.

19 The case that they cite was a case where both
20 parties fully recovered affirmatively in their claims.
21 But, again, what was recovered by Soundbuilt? Zero.
22 This was a defense verdict.

23 And, again, it would be extraordinary for this
24 Court not to award attorneys' fees when there is a
25 defense verdict.

1 As to the reasonableness, again, I think there
2 was more than sufficient information for them to go
3 through and raise issues about the particular use of
4 attorneys at particular points in time. I don't think
5 we could provide more information without breaching
6 privilege.

7 We would be happy -- I don't want to burden Your
8 Honor, but if you want to look at our bills, we would be
9 happy to have you do that. But Your Honor --

10 THE COURT: I'm not sure I would be happy about
11 it, Mr. Lawrence.

12 MR. LAWRENCE: I'm not sure you would be, either,
13 but we have nice bills. But, you know, as we indicated,
14 we, substantially, in certain cases, do reduce and not
15 charge as part of our attorneys' fees petition where
16 there was duplication of effort.

17 And, for example, we had some people in the
18 courtroom here who were here observing, because they are
19 young lawyers. And we like to support the idea that
20 young lawyers get to see an opportunity in trial, and we
21 didn't charge either the client, nor are we trying to
22 charge Soundbuilt for time that was observational and
23 learning.

24 Yes, we had three lawyers more actively involved,
25 compared to their two, but I don't think that that's a

1 distinction that matters at the end of the day. What
2 matters is that what the jury found and the judgment
3 Your Honor entered, a defense judgment, zero owed, and
4 on that basis, we are the prevailing party, we are
5 entitled to fees.

6 I believe we've made a sufficient showing, but if
7 Your Honor wishes to review our bills to confirm what's
8 in our affidavit, we would be happy, as much as you will
9 be reluctant, to do so.

10 THE COURT: All right. Thank you, Mr. Lawrence.
11 Anything in response, Mr. Howard?

12 MR. HOWARD: I believe if you review the Sardam
13 case --

14 THE COURT: That's cited at 51 Wn. App. 908?

15 MR. HOWARD: Yes. In that case, I believe there
16 was a party that received a zero defense that didn't get
17 anything.

18 MR. LAWRENCE: We just looked the case up a
19 second ago. It's not true. We just read the case after
20 he cited it to confirm our understanding. That's not
21 the case.

22 THE COURT: Well, I will read it.

23 MR. LAWRENCE: You will read it.

24 THE COURT: I will read it. I must admit --
25 Mr. Howard, here's what I'm going to do: I'm going to

1 go back and look at everything that has been given to me
2 on the issue, including reading over that case. I
3 apologize to everyone that I did not get all of that
4 done in preparation for today. I got everything else
5 done, but not that; I got part of it done.

6 But I want to go back and re-read everything so
7 that whatever I do I feel comfortable with, and I'm sure
8 it will be included in whatever the Court of Appeals
9 sees, regardless of how I rule. That's fine.

10 I must indicate to you that I'm inclined -- I
11 mean, when I first went over all of this stuff, I
12 certainly was inclined to rule that Commonwealth was the
13 substantially prevailing party.

14 I will read over the cases, and will give a long,
15 hard look, Mr. Howard, to see if I'm going to change my
16 mind. If that is indeed the case, then they're entitled
17 to attorney's fees pursuant to the contract.

18 If that isn't the case, then it's for me to
19 determine what's reasonable and what's not reasonable.
20 I can tell Commonwealth right now that \$1 million in
21 attorneys' fees is not, in my mind, reasonable.

22 So I'll go through and I will try and come up
23 with an amount that I think is reasonable and reflect
24 what I believe to be a Downtown Seattle participation in
25 a two-week trial, in front of a jury, in King County

1 Superior Court, and all of the expert witnesses that you
2 had to hire and pay, and all of those kinds of things.
3 Because it seems to me that that's reasonable.

4 I'm not sure that I'm going to award anything
5 before the Court of Appeals' final ruling. I don't
6 think I probably will. I think I'm going to confine my
7 award, if I make it, to what occurred after the Court of
8 Appeals' ruling. But that means that we had several
9 motions down here.

10 I remember Mr. Segal being down here on a couple
11 of motions, arguing, I believe, sitting in the same seat
12 he's sitting at right now, and made several arguments in
13 preparation for the trial, pretrial motions, and
14 rulings. So I think that that's all fair game.

15 So I'm going to take a look and see what I can
16 come up with, and go from there.

17 Mr. Lawrence.

18 MR. LAWRENCE: I have a clarifying question.
19 Maybe Mr. Segal has something here. The rationale on
20 the Court of Appeals issue, is that because -- did I
21 understand that you're saying that you did not feel you
22 had authority to enter fees on that, and only the Court
23 of Appeals does?

24 THE COURT: There's a lot of attorneys' fees that
25 I don't believe I have authority to enter. That's

1 correct.

2 MR. SEGAL: If I could just make a comment on
3 that, Your Honor, and then Your Honor can take it into
4 consideration when you're reviewing materials? I will
5 be very brief.

6 THE COURT: Mr. Segal, go right ahead.

7 MR. SEGAL: Thank you. It was an unusual
8 circumstance, but what happened at the Court of
9 Appeals -- this was the prior appeal -- is that the
10 Court of Appeals initially awarded fees in
11 Commonwealth's favor.

12 And Soundbuilt's appellate counsel at that time
13 came back and made a motion for reconsideration, saying,
14 you know, that was a reversal of a summary judgment. In
15 order to determine which of these two parties gets fees
16 resulting from this appeal, because there was an
17 entitlement, you need to determine who is the prevailing
18 party ultimately in the case itself.

19 And, so, on that basis, the Court of Appeals
20 ruled on reconsideration that whoever was the prevailing
21 party on remand, they would be the party that would have
22 the entitlement to fees.

23 And, so, I understand that Your Honor has to make
24 that determination, but I simply wanted to point that
25 out. And I believe that that briefing and analysis is

1 contained in our fees motion.

2 THE COURT: Thank you, Mr. Segal.

3 MR. SEGAL: Thank you.

4 THE COURT: Mr. Howard?

5 MR. HOWARD: Two minutes. I found what the Court
6 of Appeals order says, Your Honor, which they didn't
7 move to clarify or seek to elaborate. It's clear. No
8 fees from that appeal. We stand on the order.

9 THE COURT: Okay. I saw that in your material.

10 All right. It is the 16th of May. I will work
11 on this case as much as I possibly can.

12 We have a very intense criminal case that is
13 being tried this week in my courtroom, and so I probably
14 won't finish this until the weekend because of my
15 schedule with the other case.

16 It's a Child Molestation in the First Degree, and
17 it's a pretty intense case, involving several lawyers,
18 and we're partway through it. So that will have to get
19 a little bit of priority.

20 But I will have some time this afternoon, and
21 evenings, and the weekend, and I will get you a decision
22 early next week.

23 MR. HOWARD: Your Honor, you have left one --

24 THE COURT: By Monday or Tuesday, I hope.

25 MR. HOWARD: You have left one very small issue,

1 but there is one request for leave from Commonwealth,
2 which is their cost bill.

3 THE COURT: Go ahead.

4 MR. HOWARD: Well, all I would say is the case
5 law is clear it's limited to 4.84.010. And I went
6 through laboriously all their costs and didn't see any
7 that fall within 4.84.010, after the date of the offer.

8 And, so, the only attorneys' fees they should be
9 awarded are the statutory attorneys' fees of \$200, based
10 upon their submission, and all those other costs are not
11 taxable costs under the statute.

12 THE COURT: Which one of you wants to respond to
13 that?

14 MR. LAWRENCE: Well, I think the basic point is
15 that they're awardable under the contract, regardless of
16 what the statute says.

17 THE COURT: Mr. Howard, that's how I took it. I
18 really did. And I think that the statutory costs
19 covered by the statute you cited, I don't think the
20 terms of the contract limit their costs to that. I just
21 don't. So I feel comfortable making that ruling.

22 So, having said all of that, I'm going to go back
23 in and read some more and try and come up with what I
24 think is a reasonable ruling, and I will have Lisa email
25 you a copy of that order.

1 However, Mr. Lawrence, if you or Mr. Segal would
2 send me an order today reflecting what I ruled in open
3 court.

4 MR. LAWRENCE: We will, Your Honor. Thank you.

5 THE COURT: Thank you. Is there anything else
6 that we haven't covered?

7 Mr. Brain, it's nice to see you back there.

8 MR. BRAIN: It's nice to see you, too.

9 THE COURT: As I said, the last time I saw you,
10 you had been dangerously silent.

11 MR. BRAIN: I had intended to wear an interesting
12 tie for you.

13 THE COURT: It looks good, actually.

14 But, all of you, it really is nice to see you
15 all. I've enjoyed having you in this courtroom, and I
16 wish you all success.

17 You know, this is the kind of case where someone
18 has to win and someone has to lose, and it doesn't make
19 it any easier for me, because you're all good people.
20 And I think it's been a privilege to hear this case.

21 So, thank you, all.

22 MR. HOWARD: Thank you, Your Honor.

23 MR. LAWRENCE: Thank you, Your Honor.

24 MR. SEGAL: Thank you, Your Honor.

25 (End of proceedings.)

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

SOUNDBUILT NORTHWEST,
LLC, a Washington limited liability
company and successor-in-interest
to SOUND BUILT HOMES, INC.,

Appellant,

v.

COMMONWEALTH LAND
TITLE INSURANCE COMPANY,
a Nebraska insurance company; and
LAWYERS TITLE INSURANCE
CORPORATION, a Nebraska
insurance company,

Respondents.

No. 74128-4-I

PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the
United States, a resident of the State of Washington, over the age of 21
years, competent to be a witness in the above action, and not a party
thereto. On the 20th day of October, 2016, I caused to be served a true
copy of the following documents upon the parties listed below:

1. Respondents' Amended Opening Brief;
2. Letter to the Clerk of the Court Re Amending Opening Brief;

and

CERTIFICATE OF
SERVICE - 1

PACIFICA LAW GROUP LLP
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SUITE 2000
SEATTLE, WASHINGTON 98101-3404
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STATE OF WASHINGTON
COURT OF APPEALS

3. Proof of Service.

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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 20th day of October, 2016.



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