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NO. 67200-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

INDEMNITY COMPANY OF CALIFORNIA, a foreign corporation,

Respondent/Appellee,

vs.

CONSTANTIN HAPAIANU, an individual,

Appellant.

APPELLEE'S RESPONSIVE BRIEF

Alexander Friedrich, WSBA #6144
Facsimile: (206) 545-6828
Attorney for Respondent

YUSEN & FRIEDRICH
Attorneys at Law
215 NE 40th Street, Suite C-3
Seattle, WA 98105-6567
Telephone: (206) 545-2123
Facsimile: (206) 545-6828

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I. INTRODUCTION

This case arises from Appellant Constantin Hapaianu's ("Hapaianu") desire to build a house near a wetland on his property. As a condition of his building permit, King County required that Hapaianu sign a Sensitive Area Restoration Agreement ("SARA"), which required that he perform certain wetland mitigation work, as well as maintenance and monitoring of that work for a period of three (3) years. *CP 1440-1442*. The King County Code authorized King County to require that Hapaianu obtain a performance bond to guarantee completion, maintenance, and monitoring of the work outlined in the SARA. *K.C.C. 27A.30.010*.

Hapaianu approached Indemnity Company of California ("ICC") and asked it to furnish a performance bond on his behalf. *CP 1443*. However, before ICC would issue a bond, ICC required that Hapaianu sign an Indemnity Agreement. *CP 1443-1445*. The express terms of the Indemnity Agreement obligated Hapaianu to reimburse ICC for all losses and expenses that ICC may incur by reason of having furnished a bond on his behalf. *Id.* Significantly, the Indemnity Agreement granted ICC the "right in its sole and absolute discretion to determine whether any claims...shall be paid." *Id.*

When Hapaianu failed to perform the wetland mitigation work as required by the SARA, King County demanded that ICC honor its

performance obligations by either completing the work itself or forfeiting the bond proceeds. *CP 1446-1453*. Notably, ICC had a statutory obligation to investigate the claim within 30 days, and pay the claim if liability was reasonably clear. *See WAC 284-30-330*. Despite several written requests directed from ICC to Hapaianu asking him to assist in the investigation and despite ICC repeatedly warning him that it would be forced to conduct an unassisted evaluation of the County's claim if he did not participate, Hapaianu never responded. *CP 1475-1478*. Therefore, in accordance with its rights under the Indemnity Agreement and its contractual duties to the County, ICC settled the claim, which resulted in a \$10,020 loss. *Id.*

Hapaianu does not dispute that he signed an Indemnity Agreement; Hapaianu does not dispute the fact that he failed to complete the wetland mitigation work; and Hapaianu does not dispute that ICC suffered losses and expenses when it forfeited the bond. Nevertheless, Hapaianu argues for a variety of reasons that he is not required to repay ICC. ICC honored its contractual and statutory obligations to King County; now, it is Hapaianu's turn to honor his contractual obligations toward ICC. The Indemnity Agreement should be enforced as written, and Hapaianu should be held to his contractual undertakings.

Accordingly, both the trial court's decision to deny Hapaianu's Motion for Reconsideration and the trial court's summary judgment ruling in favor of ICC should be affirmed.

In his brief, Hapaianu raises several issues on appeal that have no bearing on the propriety of the trial court's decision to deny Hapaianu's Motion For Reconsideration of ICC's Motion For Summary Judgment for dismissal of Hapaianu's counterclaims or on the propriety of the trial court's decision to grant summary judgment on ICC's claim for indemnity. For instance, issues No. 1, 6, 7, 8, and 9 lack any relevance to the trial court's rulings as they pertain to ICC's claim for indemnity. Accordingly, ICC will address only those issues that it believes are pertinent to its indemnity rights on appeal.

II. STATEMENT OF THE CASE

A. The Surety Bond

ICC furnished a surety bond on behalf of Hapaianu, as principal, and in favor of King County, as obligee, in the penal sum of \$10,020. *CP 1436-1439*. The bond guaranteed that if Hapaianu did not perform certain wetland mitigation work in accordance with the SARA, ICC would either forfeit the bond to King County or arrange to perform the work itself. *Id.* As a precondition for executing the bond, ICC required that Hapaianu sign an Indemnity Agreement in which Hapaianu promised, among other

things, to reimburse ICC for any losses it might suffer as a result of having issued the bond. *CP 1443-1445*. Because Hapaianu failed to implement the wetland mitigation work, King County demanded forfeiture of the bond, and ICC suffered a payment loss of \$10,020. *CP 1446-1478*. Later, when ICC asked Hapaianu to comply with the Indemnity Agreement, he refused.

B. The Indemnity Agreement

On July 30, 2000, Hapaianu signed an Indemnity Agreement. Pursuant to the Indemnity Agreement, Hapaianu contractually promised to both reimburse and protect ICC against all losses, claims, expenses, and attorney's fees for which ICC "shall become liable or contingently liable by reason of such suretyship..." *CP 1445*.

Most importantly, the Indemnity Agreement contained a "Right-to-Settle" provision. *CP 1445*. This clause granted ICC the exclusive right and absolute discretion to settle any claim made against the bond:

Surety shall have the exclusive right to determine whether any claim or suit shall, on the basis of liability, expediency or otherwise, be denied, paid, compromised, defended or appealed.

And last, but certainly not least, Hapaianu waived his right to notice from ICC of any claim or demand made against ICC or the bond. *CP 1445*.

Hapaianu agreed to the foregoing terms knowingly, voluntarily, and

intelligently. If Hapaianu did not approve of the terms, he had every right and opportunity to secure a surety bond elsewhere.

C. The Sensitive Area Restoration Agreement

The surety bond guaranteed that Hapaianu would install, maintain, and monitor the wetland mitigation measures as set forth in the SARA. *CP 1436-1439*. Anything short of Hapaianu's full compliance with the SARA triggered ICC's obligation to forfeit the bond. *CP 1440-1442*. Paragraph No. 1 required Hapaianu to "fully install all sensitive area and/or buffer mitigation measures" as required by King County. *Id.* In addition, Paragraph No. 8 required Hapaianu to "perform monitoring and maintenance...for three YEARS after the County approves installation." *Id.* Paragraph No. 10 provides that any failure to construct, maintain, and/or monitor the wetland mitigation plan shall constitute a default under the SARA. *Id.* In short, the SARA imposed three independent obligations upon Hapaianu: (1) installation, (2) maintenance, and (3) monitoring. *Id.* Noticeably, absent from Hapaianu's appellate brief are any facts showing that he complied (or even attempted to comply) with the requirements of the SARA.

D. Hapaianu's default and ICC's settlement of the claim

King County warned Hapaianu on multiple occasions that it planned to make a demand on the bond if he did not perform the wetland

mitigation work as required by the SARA. *CP 1446-1478*. For whatever reason, Hapaianu did not respond to any of ICC or King County's letters in which he was given advance notice of his default under the SARA and ICC imminent forfeiture of the Bond. *Id.*

On September 9, 2008, King County first notified Hapaianu that his performance bond might be in jeopardy. *CP 1446-1447*. On November 18, 2008, Hapaianu was again notified by King County that a claim would be made against the bond unless he completed the wetland mitigation work. *CP 1448-1450*. On July 7, 2009, King County first notified ICC and Hapaianu that it was making a claim on the bond. *CP 1451-1453*. On July 17, 2009, and again on August 10, 2009, ICC sent letters to Hapaianu asking him to "please list specific reasons for disputing any of the claimant's contentions, and enclose copies of all documentation which support your position." *CP 1454-1458*. On August 12, 2009, King County sent a letter to Hapaianu and to ICC informing both parties of Hapaianu's failure to implement the wetland mitigation work. *CP 1459-1468*. Despite repeated warnings from ICC and King County over an extended period of time, at no point during the investigative process did Hapaianu provide ICC with information to defend against King County's claims.

Meanwhile, and without the assistance of Hapaianu, ICC investigated King County's claim by asking King County on July 17, 2009, and August 10, 2009, to provide ICC with documentation to support its demand. *CP 1469-1472*. On August 12, 2009, King County sent a letter to ICC stating that "[t]his plan has not been implemented as required." *CP 1459-1468*. King County enclosed a copy of the mitigation plan as evidence of what Hapainu had failed to complete. *Id.* In addition, on August 27, 2009, ICC's claims examiner, Mitch Petras, spoke with King County employee, Betsy Mac Whinney, by phone regarding Hapaianu's failure to complete wetland mitigation work. *CP 1473-1474*. After speaking with Mac Whinney, Petras understood that Hapaianu had failed to complete the mitigation work. *CP 1434 ¶ 18*. Mac Whinney maintains that "[i]t is now, and has always been my understanding that Hapaianu has not done any of the planting required under the permit conditions." *CP 1648 ¶ 12*. Mac Whinney also maintains that Hapaianu failed to comply with the SARA because he failed to monitor the plantings for three years. *CP 1649 ¶ 16*. This is an independent ground for King County's demand on the bond. *Id.*

Because Hapaianu failed to offer any defenses to King County's claim, ICC had no alternative but to rely solely on the evidence presented by King County. Ultimately, ICC settled the claim based on its

obligations under the terms of the surety bond and Washington's insurance regulations, as well as its rights under the Indemnity Agreement. *CP 1435 ¶ 19.*

On August 31, 2009, after weighing all the evidence produced by the County and having received no response from Hapaiianu to rebut the County's claim, and considering ICC's obligations under Washington's insurance regulations, ICC decided to settle the claim made by the County. *CP 1435; CP 1475-1478.* To date, Hapaiianu has failed and refused to comply with his obligations under the Indemnity Agreement. Instead, and in a deliberate effort to deflect attention from his breach, Hapaiianu has asserted a flurry of outrageous counterclaims against ICC and King County employees that have wasted precious judicial resources and have forced all parties to expend significant attorneys' fees and costs.

E. Procedural History

This appeal arises out of several motions for summary judgment filed by ICC, Hapaiianu, and King County. The first round of summary judgment motions consisted of (1) ICC moving for summary judgment to dismiss Hapaiianu's counterclaims for breach of contract and Consumer Protection Act violations; Hapaiianu moving for summary judgment that the surety bond, the SARA, and the Indemnity Agreement were unenforceable; and King County moving for summary judgment to

dismiss Hapaianu's Third-Party claims against two individual employees of King County's Department of Development and Environmental Services. *CP 109-127; CP 176-187; CP 1627-1645.*

The trial court summarily dismissed all of Hapaianu's counterclaims and third-party claims, and, similarly, denied Hapaianu's motion seeking to invalidate the enforceability of the surety bond, the SARA, and the Indemnity Agreement. *CP 1277-1279.* Hapaianu then moved for reconsideration, which the trial court denied in its entirety. *CP 1419.*

Having successfully dismissed Hapaianu's counterclaims, ICC moved for summary judgment on its claim for indemnity. The trial court granted summary judgment in favor of ICC awarding ICC its underlying damages, plus attorney's fees, costs, and interest. *CP 1613-1615.* Hapaianu now appeals the trial court's denial of his Motion For Reconsideration and the Order For Summary Judgment on ICC's claim for indemnity.

III.LEGAL ARGUMENT

A. STANDARD OF REVIEW

This Court reviews a trial court's denial of a motion for reconsideration for abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wn.App. 483, 497, 183 P.3d 283 (2008). A trial court abuses its

discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons. *Id.* An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court. *Id.* Accordingly, if a trial court's ruling is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld. *Showalter v. Wild Oats*, 124 Wash.App. 506, 101 P.3d 867 (2004).

When reviewing a trial court's summary judgment ruling, the appellate court engages in the same inquiry as the trial court. *Halleran v. Nu W., Inc.*, 123 Wash.App. 701, 709, 98 P.3d 52 (2004). The appellate court must affirm a ruling granting summary judgment if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c).

B. Response to Hapaianu's assertion that the "surety agreement" was void and unenforceable.

Hapaianu contends that the so-called "surety agreement" is unenforceable for a variety of reasons. To be clear, there is no such thing as a "surety agreement." Rather, there is (1) a surety bond; (2) whatever performance contract that the surety bond guarantees, which in this case, is the SARA; and (3) an Indemnity Agreement. Here, Hapaianu incorrectly conflates the surety bond, the SARA, and the Indemnity Agreement into what he describes as the "surety agreement."

Remarkably, Hapaianu argues that the bond issued by ICC on his behalf and at his request is void and unenforceable. Essentially, Hapaianu argues that ICC has no right to reimbursement under the Indemnity Agreement because it paid out on a bond that was invalid. As surety, ICC can only assert those defenses available to its principal. Truly, had ICC taken the position that its bond was invalid and asserted this defense in opposition to King County's claim, it would be in the midst of a bad faith claim under Washington's Insurance Fair Conduct Act.

First, Hapaianu argues that the bond is unenforceable because the SARA was not attached when Hapaianu signed the bond and, therefore, it violates the statute of frauds. This argument fails for two primary reasons. First, the SARA was incorporated by reference into the surety bond. In *Knight*, the court specifically held that incorporation by reference is sufficient to incorporate a document into a contract without the burden of physical attachment. *Knight v. Am Nat'l Bank*, 52 Wn.App. 1, 6, 756 P.2d 757 (1988). If the Court were to follow Hapaianu's logic, every contract which relies upon the phrase "incorporated herein by this reference," as an instrument to avoid the physical attachment of documents, would be null and void. This would be an absurd result.

Second, RCW 19.72.170 expressly validates surety bonds regardless of any defects in form, substance, or condition. RCW

19.72.170 seeks to prevent parties to a surety bond from avoiding their obligations under the bond by reason of minor technicalities. The Washington legislature, concerned that sureties would shirk their commitments by reason of minor imperfections in bonds, enacted this provision to hold sureties to their bonded obligations. One can only imagine the problems that municipalities and construction companies would face if surety companies could simply declare a bond invalid because of misspellings, missing signatures, or unattached documents. ICC should not be punished for honoring the force and effect of its commitment to King County.

Hapaianu also argues that the surety bond, the SARA, and the Indemnity Agreement are procedurally and substantive unconscionable. These arguments are both misplaced and entirely without merit. Hapaianu's procedural unconscionability argument fails because Hapaianu requested, reviewed, and signed the surety bond. His decision to request a surety bond from ICC was an act of free will and for his own personal gain – that is, to obtain a building permit for his house. Accordingly, his argument that he lacked a meaningful opportunity to review the terms of the above-referenced contracts is without merit. Second, Hapaianu's argument that the surety bond, the SARA, and the Indemnity Agreement are substantively unconscionable fails because the surety bond and the

performance agreement are required by law. King County Code 27A.30.080 and 27A.30.010 authorize the County to require surety bonds as performance guarantees and also authorize the County to enforce the bonds upon the principal's default. Hapaianu's unconscionability arguments are more properly directed at the legislature, not the courts.

Hapaianu next argues that enforcement of the "surety agreement" after the final occupancy permit was issued violated LUPA, which renders the Indemnity Agreement unenforceable. True to form, Hapaianu's argument is misplaced. It was King County that enforced the surety bond and the SARA, not ICC. ICC simply enforced the Indemnity Agreement. Hapaianu is unable to cite any legal authority that stands for the proposition that an Indemnity Agreement is rendered unenforceable by the acts of a third-party – in this case, King County. The Indemnity Agreement is a private contractual relationship between ICC and Hapaianu, exclusively. Whether King County violated LUPA is of no consequence to ICC's contractual rights as against Hapaianu.

Next, Hapaianu goes on to cite a series of violations of the Washington State and United States Constitutions. Again, much like Hapaianu's arguments that enforcement of the so-called "surety agreement" is unconscionable and violates LUPA, these arguments are misplaced because the Washington State and United States Constitutions

ordinarily govern only conduct of the state's own agents or those acting under the color of state law. *State v. Walter*, 66 Wn.App. 862, 867, 833 P.2d 440 (1992). It is well-settled that private conduct is not controlled by the Washington State or United States Constitutions. *See Kennebec, Inc., v. Bank of the West*, 88 Wn.2d 718, 721, 565 P.2d 812 (1977). Because this entire lawsuit is premised on a breach of contract claim between a private insurance company and a private individual, Hapaianu cannot establish a constitutional claim.

Moreover, it is the party asserting the unconstitutionality of an action that bears the burden of establishing that state action is involved. *City of Pasco v. Shaw*, 161 Wn.2d 450, 460, 166 P.3d 1157 (2007). Here, Hapaianu has failed to assert, let alone establish, any facts to suggest that ICC was acting as an agent of King County. Quite literally, Hapaianu cannot, and has not, produced one fact tending to show that ICC and King County conspired to deprive Hapaianu of his constitutional rights.

Finally, Hapaianu goes on to argue that the "conclusive evidence" clause in the Indemnity Agreement is unenforceable. Once again, Hapaianu's argument is misplaced because ICC did not rely on the "conclusive evidence" clause in enforcing the Indemnity Agreement. Rather, ICC relied on the "Right-to-Settle" provision within the Indemnity Agreement to authorize its settlement with King County. This clause

permits ICC to discharge its own and Hapaianu's obligations without waiting for the County to file suit, and without endangering its indemnity rights. *Transamerica Ins. Co. v. Bloomfield*, 401 F.2d 357, 362 (6th Cir. 1968). Thus, this provision allows ICC to effectively and efficiently resolve claims, seek immediate reimbursement from the indemnitor, and avoid unnecessary and costly litigation. *Id. at 363*.

The provisions cited above, although strict, are common in indemnity contracts, and they have been uniformly sustained and upheld, subject only to the condition that payment is made in good faith. *Fid. and Deposit Co. of Md. v. Bristol Steel & Iron Works, Inc.*, 722 F.2d 1160, 1163 (4th Cir. 1983). It is believed that the "expense, delay, trouble and risk of loss to the [surety] is a sufficient safeguard against an unwarranted payment." *Engbrock v. Federal Ins. Co.*, 370 F.2d 784, 786 (5th Cir. 1967).

Hapaianu fails to cite any legal authority in Washington, or elsewhere, that would support his argument that the Indemnity Agreement that he signed is unenforceable. Where there is an express indemnity agreement, the rights of the parties are governed by the terms of the contract. *Commercial Ins. Co. of Newark, N.J. v. Pacific-Peru Constr. Corp.*, 558 F.2d 948, 953 (9th Cir. 1977). Washington law has long recognized the right of a surety to be indemnified under the terms of a written Indemnity Agreement. Indemnity Agreements are valid and

enforceable contracts. *Continental Casualty Co. v. Seattle*, 66 Wn.2d 831, 405 P.2d 581 (1966); *New Amsterdam Casualty Co. v. Hamilton*, 123 Wash. 147, 212 Pacific 147 (1923). Generally, the terms of a General Indemnity Agreement will be enforced as written. *U.S. Fid. & Guar. Co. v. Napier Elec. & Constr. Co.*, 571 S.W.2d 644, 646 (KY.App. 1978). Accordingly, this Court should affirm the trial court's rulings and hold Hapaianu to terms of his agreement.

C. Response to Hapaianu's assertion that ICC committed CPA violations.

Hapaianu makes the baseless assertion that ICC's issuance of a surety bond and Indemnity Agreement constitutes an unfair and deceptive business practice in violation of Washington's Consumer Protection Act. Remarkably, it was Hapaianu who approached ICC and requested that ICC issue the surety bond, which necessarily included the Indemnity Agreement. These contracts were not foisted upon Hapaianu without any opportunity for review – quite the contrary, they were requested and freely signed by Hapaianu.

Hapaianu's assertion that the sale of surety bonds is a per se CPA violation is both ironic and entirely without merit. Ironic, because surety bonds are, in fact, generally employed to provide financial security and consumer protection in the construction and motor vehicle industry;

without merit because the King County Code authorizes the County to require performance bonds to secure the completion of improvements. *See K.C.C. 27A.30.010.* Moreover, Hapaianu's assertion that the enforcement of this bond constitutes a CPA violation fails because K.C.C. 27A.30.080 authorizes King County to demand – in its sole discretion – that ICC remit payment under the bond. Hapaianu cannot show that ICC committed an unfair or deceptive act or practice by selling or enforcing the terms of the surety bond, especially when both the sale and enforcement of the bond are authorized by law. As a result, Hapaianu cannot meet the first element of the *Hangman Ridge* test, which is fatal to Hapaianu's CPA claim. 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

D. Response to Hapaianu's argument that ICC breached the implied duty of good faith and fair dealing under the surety bond and the Indemnity Agreement.

Hapaianu argues that ICC breached the duty of good faith and fair dealing with respect to the surety bond and the Indemnity Agreement. In making this assertion, Hapaianu fails to cite one provision in either the surety bond or the Indemnity Agreement that was breached. Generally, a breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Northwest Indep. Forest Manuf. v. Dep't of Labor & Indus.*, 78 Wn.App.707, 712, 899 P.2d 6, citing *Larson v. Union Inv. & Loan Co.*,

168 Wn.2d 5, 10 P.2d 557 (1932). Here, Hapaianu has no legally sustainable claim against ICC when the Indemnity Agreement creates no duties from ICC to Hapaianu that could have been breached. This is especially true when the express language of the Indemnity agreement places every contractual duty on Hapaianu. A careful analysis of the Indemnity Agreement demonstrates that Hapaianu's counterclaims are baseless because the Indemnity Agreement imposes duties solely on Hapaianu. The sole purpose of the Indemnity Agreement is to protect ICC from loss. Accordingly, Hapaianu's argument that ICC breached the Indemnity Agreement is tenuous at best. As for the surety bond, its sole purpose is to protect the beneficiary under the bond, King County. Thus, Hapaianu cannot claim that he was deprived of any rights under the bond when ICC honored its contractual duties to pay valid claims to King County. Furthermore, Hapaianu cannot claim that he was deprived of any rights under the Indemnity Agreement because its sole purpose is to protect ICC.

By the express terms of the Indemnity Agreement it is readily apparent that Hapaianu assumed contractual duties owing towards ICC, and that ICC did not assume any contractual obligations that could give rise to a claim for breach of contract. In fact, if anyone is guilty of acting without good faith, it is Hapaianu because he violated WAC 284-30-370

when he failed to assist ICC in its investigation. Similarly, the express terms of the surety bond impose duties running from ICC to King County, exclusively. ICC could not possibly have breached its duty of good faith and fair dealing when neither contract imposed express contractual duties on ICC for the benefit of Hapaianu. Moreover, ICC could not have acted without good faith when ICC paid King County in accordance with its duties under the surety bond, its rights under the Indemnity Agreement, and in accordance with Washington's insurance regulations, WAC 284-30-330 and WAC 284-30-370.

E. Response to Hapaianu's argument that summary judgment on ICC's claim for indemnity was in error.

Courts have recognized that the one exception to enforcement of a principal's liability under an Indemnity Agreement is the surety's bad faith or fraudulent payment. *Engbrock v. Federal Ins. Co.*, 370 F.2d at 786; *U.S. Fid. & Guar. Co. v. Feibus*, 15 F. Supp. 2d 579, 585 (M.D. Pa. 1998), *aff'd* 185 F.3d 864 (3rd Cir. 1999). Thus, a claim of fraud or bad faith acts as a defense and, if properly supported, creates a genuine issue of material fact. *U.S. Fid. & Guar. Co. v. Feibus*, 15 F. Supp. 2d at 585, 587. Bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or improper motive. *Id* at 586. Thus, a lack of diligence or negligence is not the

equivalent of bad faith – indeed, even gross negligence cannot support a finding of bad faith. *Id.* Bad faith requires a showing of recklessness or improper motive such as self-interest or ill will. *Polselli v. Nationwide Mut. Fire Ins. Co.*, 23 F.3d 747, 751 (3d. Cir. 1994). Here there is not one shred of evidence to even remotely suggest that ICC made payment to the King County in bad faith. And without any evidence of bad faith, there are no material issues of fact that can reverse the trial court’s enforcement of the Indemnity Agreement on appeal.

The evidence shows that ICC paid King County based upon its good faith belief that Hapaianu failed to complete the wetland mitigation work required by the SARA. *CP 1432-1478*. In fact, King County communicated on several occasions to ICC that Hapaianu had failed to complete the wetland mitigation work. *Id.* More than that, though, Hapaianu does not dispute that he did not complete the work in accordance with the SARA.

Accordingly, there is no evidence to show that ICC paid King County in bad faith. Rather, the only evidence presented in this matter shows that ICC paid King County in accordance with its duties under the surety bond, its rights under the Indemnity Agreement, and in accordance with WAC 284-30-330 and WAC 284-30-370. ICC had a contractual and a statutory duty to satisfy King County’s claim against the bond if it was

“reasonably clear” that Hapaianu failed to complete the wetland mitigation work. *WAC 284-30-330*. Moreover, ICC was required to settle the County’s claim within 30 days, unless the investigation could not be completed within that time. *WAC 284-30-370*. Having received no evidence from Hapaianu (over the course of two months) to rebut King County’s claim, ICC was contractually and statutorily bound to forfeit the bond proceeds.

As reiterated above, ICC made several requests that Hapaianu assert his defenses to King County’s claim; however, for reasons unknown to ICC, Hapaianu failed to cooperate in the investigation and never disclosed his defenses. Mitch Petras sent two written requests asking Hapaianu to provide ICC with information supporting his defenses and Hapaianu never responded. *CP 1454-1458*. Ultimately, Hapaianu’s failure to assist ICC in its investigation, coupled with the County’s letters setting forth Hapaianu’s liability, played a significant role in ICC’s good faith decision to pay the County. Without any showing that ICC acted in bad faith, the Court can reach but one conclusion – that ICC is entitled to enforcement of the Indemnity Agreement.

Even reviewing all evidence in the light most favorable to Hapaianu, there is still no evidence to show that ICC settled with the County in bad faith. Hapaianu must live by the terms of the Indemnity

Agreement, which entitles ICC to repayment for all claims paid by it in the absence of fraud or collusion. Although Hapaianu has concocted the position that ICC acted without good faith, he fails to acknowledge that every action undertaken by ICC finds ample support in the Indemnity Agreement. Hapaianu's allegations of unreasonableness, without more, are insufficient, as a matter of law, to reverse the trial court's Order for Summary Judgment in favor of ICC.

F. ICC requests that this court award attorney's fees and costs on appeal.

Under RAP 14.2, this Court may award costs to the prevailing party on appeal. ICC respectfully requests an award of its costs incurred on this Appeal. Furthermore, pursuant to RAP 18.1, this Court may award reasonable attorney's fees or expenses on review. ICC is legally entitled to attorney's fees pursuant to the terms of the Indemnity Agreement which require Hapaianu to reimburse ICC for attorney's fees and expenses incurred by reason of ICC's role as surety. Accordingly, ICC respectfully requests an award of its attorney's fees and expenses incurred on this Appeal.

IV. CONCLUSION

It was incumbent upon Hapaianu to come forward with evidence that ICC conducted its investigation in bad faith or that ICC forfeited the

bond in bad faith. Hapaianu has failed to do so. There is no evidence that ICC performed its investigation in bad faith, or that ICC's forfeiture of the bond was motivated by ill will or improper motive. ICC has fully disclosed every step of its investigation of King County's claim, which supports its decision to honor its bonded obligations. There is not one sliver of evidence to suggest that ICC acted in bad faith or unreasonably.

The Court should grant ICC's Motion for Summary Judgment because Hapaianu is contractually obligated to reimburse ICC for all losses and expenses incurred under the bond. No facts or law support any other reading of the Indemnity Agreement. To date, ICC has suffered losses and expenses for which it has not been reimbursed, and ICC must now continue to incur significant attorneys' fees and costs to enforce the contract on appeal. The bottom line is that Hapaianu has materially breached the Indemnity Agreement and ICC is entitled to reimbursement pursuant to its terms.

RESPECTFULLY SUBMITTED this 4 day of October 2011.

YUSEN & FRIEDRICH

By 
Alexander Friedrich, WSBA # 6144
Paul Friedrich WSBA #43080
Attorneys for Respondent
Indemnity Company of California

DECLARATION OF SERVICE

Vanessa Stoneburner declares:

On October 4, 2011, I mailed a copy of the
foregoing document by United States first-class mail, with
proper postage affixed, to:

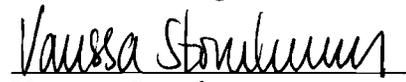
Scott Stafne
Attorney at Law
239 N. Olympic Avenue
Arlington, WA 98223

Devon Shannon
Attorney at Law
516 Third Avenue
W400
Seattle, WA 98104

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

EXECUTED THIS 4th day of October, 2011 at

Seattle, Washington.


Vanessa Stoneburner