

67200-2

67200-2

No. 67200-2-1

COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON

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CONSTANTIN HAPAIANU, an individual,  
Appellant

vs.

INDEMNITY COMPANY OF CALIFORNIA, a foreign corporation  
Respondent/Appellee

---

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

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HAPAIANU'S REPLY BRIEF

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STATE OF WASHINGTON  
2011 NOV - 8 AM 10:48

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**Reply to "INTRODUCTION" Appellee's Responsive Brief (hereafter "Response") at 1-3.**

There are misstatements and omissions in ICC's "introduction." Id. at 1-3. For example, ICC states the Sensitive Area Restoration Agreement ("SARA") required Hapaianu to perform wetland mitigation work (Id. at pp 1-2); but, the SARA clearly limits the scope and timeframe of this contractual duty. CP 70. First, the contract requires Hapaianu to perform the mitigation work which was a condition of his building permit; second, the duty to install ended when a building inspector issued a "final certificate of occupancy" ("FCO") certifying that Hapaianu had performed the mitigation conditions of his building permit. CP 70. In this regard, the SARA states: "The applicant shall install al sensitive area and/or buffer mitigation measures required by the above referenced Project/*Permit* by the time specified by the COUNTY, which is prior to the issuance of any occupancy permit." Id. (underline emphasis in original; italicized emphasis supplied) .

It is Hapaianu's position he complied with this contractual obligation<sup>1</sup> when the County issued an FCO allowing him to "use"<sup>2</sup> his

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<sup>1</sup> ICC contends throughout its response that Hapaianu does not contest he did not perform the mitigation conditions of his building permit Response at 2. This is not true. The record clearly establishes that County officials changed the location of Hapaianu's house on his lot on several occasions; further, that Hapaianu attempted to comply with those mitigation aspects of the permit following these changes and that the building inspector

home. As is stated in Appellant's Opening Brief ("OB") Hapaianu contends the County's issuance of the FCO constitutes conclusive evidence regarding his compliance with the conditions of his building permit, including the SARA's contractual provisions. OB 20-23.

Hapaianu also contends in this appeal that the Superior Court had no original subject matter jurisdiction under Const. art. IV § 6 to second guess the administrative issuance of the FCO. OB 22-23. The only way a Court can review the issuance of an FCO is by an appeal pursuant to LUPA, Ch. 36.70C RCW.

ICC misstates the nature and extent of the duty it owed King County to investigate the County's unilateral forfeiture claim. Response at 2. ICC claims it "had a statutory duty to investigate the claim within thirty days, and pay the claim if liability was reasonably clear". Id. ICC cites "WAC 284-30-330" in support of the 30-day requirement. Id. But this WAC contains no reference to a 30-day requirement. *See* WAC 284-30-330.

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confirmed his attempts were successful by issuing the FCO. CP pp. 189; 282:4 - 283:8; 1518:23 - 1520:13.

<sup>2</sup> An FCO is a land use decision under LUPA because it was the final decision allowing Hapaianu to live in his home. *See, e.g.*, RCW 36.70C.020 (2):

"Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, [\*\*\*] on: (a) An application for a project permit or other governmental approval required by law [\*\*\*] before real property may be improved, developed, modified, sold, transferred, or *used*, [\*\*\*].

RCW 37.70C.020[Emphasis Supplied].

ICC may have been referring to WAC 284-30-370, which states:

Every insurer must complete its investigation of a claim within thirty days after notification of claim, ***unless the investigation cannot reasonably be completed within that time.*** All persons involved in the investigation of a claim must provide reasonable assistance to the insurer in order to facilitate compliance with this provision. WAC 284-30-370 [Emphasis Supplied].

The language of the above WAC and case law construing it, make clear that an insurer can take longer than 30-days to investigate a claim where the investigation cannot reasonably be completed in that time. *See e.g., Rizzuti v. Basin Travel Service of Othello, Inc.*, 125 Wn. App. 602, 620, 105 P.3d 1012 (2005) ("As with other bases for a claim of bad faith, however, delay [beyond 30-days] does not constitute bad faith unless it is due to a frivolous and unfounded reason"); *Reichl v. State Farm Mut. Auto. Ins. Co.*, 75 Wn. App. 452, 458 - 459, 880 P.2d 558 (1994) (Finding of delay not warranted where insurer requested information from insured which was not provided).

In this case, there is a question of fact with regard to whether ICC conducted a good faith investigation before it paid off King County for the reasons set forth in the OB at 8-22; *see also, Industrial Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 918-9, 792 P.2d 520 (1990) (Finding sufficient evidence that a reasonable investigation by the insurer

would have revealed the error, the court affirmed the jury's verdict of bad faith investigation).

**Reply to "II STATEMENT OF THE CASE, A. The Surety Bond" Response at 3-4.**

ICC states Hapaianu was required to perform wetland mitigation work in accordance with the SARA, without ever citing to the contractual provisions which created that limited duty. Response at 3. Hapaianu was required only to perform that wetland mitigation which was a condition of his building permit. *See* CP 146 (SARA ¶ 1). Hapaianu claims to have performed the mitigation work required by his building permit. *See* note 1, *supra*. The official who is vested by law with making the determination as to whether Hapaianu performed the mitigation conditions of his building permit, the building inspector, approved Hapaianu's FCO. CP 1524-25. Under Washington law this constituted a judicially appealable decision under LUPA. *See* note 2, *supra*. After LUPA's 21-day limitations period expired these final administrative land use decisions were not judicially reviewable under any circumstances, even if the building inspector had illegally approved the FCO. *See* OB at 21 – 23 (and authorities cited therein).

ICC states: "[b]ecause Hapaianu failed to implement the wetland mitigation, King County demanded forfeiture of the bond" is an important

admission. Response at 4. ICC admits that the bond was forfeited because of a failure of performance of the mitigation condition of the building permit, and not with regard to any failure to monitor the performance of the mitigation. Id. If the planting installation was approved, the maintenance and monitoring obligations relating to that installation would be met by simply maintaining and monitoring the mitigation which had been approved. See CP 146. Hapaianu has done this. See note 1, *supra*.

**Reply to "II STATEMENT OF THE CASE, B. The Indemnity Agreement", Response at 4-5.**

Hapaianu admits the indemnity agreement contained the onerous terms set forth at Response at 4 -5. Hapaianu disputes that he, "knowingly, voluntarily, and intelligently," approved the surety agreement or that he had an opportunity to secure a *different* bond elsewhere. See *id*. The record clearly establishes Hapaianu was required to sign the surety agreement before he was ever provided with a copy of the SARA agreement<sup>3</sup>; notwithstanding that the purpose of the surety agreement was to insure performance of the unattached SARA. CP 196-219; 227-228; 285:4-8; 1520:14-21. Additionally it is undisputed that this was a surety agreement

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<sup>3</sup> The dates on the Surety Bond and the SARA document indicate they were signed on different days by Hapaianu. ICC's first motion for summary judgment indicates that ICC did not even have a copy of the SARA agreement in its files when it sued Hapaianu. See Declaration of Sean Wozney, CP 2-13. Wozney's declaration swears that he is the business records custodian and that "no changes or alterations have been made in these records [ICC's file on Hapaianu] since the date of origination." CP 2:23-3:1. If true, this means ICC sued Hapaianu without even having the original contract in hand. What type of good faith investigation is this?

King County required Hapaianu to sign as a condition for obtaining a building permit. CP 110:25-111:24. As ICC states in its original motion for summary judgment at CP 111:

[t]he surety bond is a form document - prepared by King County - and is a three party agreement between King County, ICC, and Hapaianu, obligating ICC to pay a penal sum to King County if Hapaianu does not perform all of the work set forth in the Agreement.

CP 111:13-17; *see also*, *KCC 27A.30.010*; *KCC 27A.30.080*.

**Reply to "II STATEMENT OF THE CASE, C. The Sensitive Area Restoration Agreement". Response at 4-5.**

ICC distorts the plain language of the SARA, which imposed upon Hapaianu the obligation to comply with the mitigation provisions of his building permit before the issuance of the FCO. *Id.* Hapaianu contends he complied with the terms of his building permit and that is why the building inspector issued the FCO. OB at 5-7. As Hapaianu's mitigation efforts were approved and are being maintained, there has never been any showing that Hapaianu has breached the maintenance and monitoring provisions of the contract.

**Reply to "II STATEMENT OF THE CASE, D. Hapaianu's default and ICC's settlement of the claim", Response, at 5-8.**

There is a question of fact as to when Hapaianu received any notices from the County and if Hapaianu received any notices from ICC. *See* CP 287:11 -18. There are also questions of fact about the good faith

nature of ICC's investigation of King County's claim. *See* OB 8-11; 35-39; *see also* note 2, *supra*.

ICC's contention that Hapaianu has "asserted a flurry of outrageous counterclaims against ICC and King County employees that have wasted precious judicial time" (Response at 8) is way off mark. *See* *infra*.

**Reply to "III LEGAL ARGUMENT, B. Response to Hapaianu's assertion that the surety agreement was void and unenforceable." Response at 10-16.**

#### **Subject Matter Jurisdiction and LUPA**

Although ICC does not discuss LUPA first in its argument, Hapaianu will do so because LUPA deprived the superior court of subject matter jurisdiction to second guess the un-appealed FCO. *Washington State Department of Labor & Industries*, 159 Wn. App. 437, 441-3, 245 P.3d 253 (2011) (A Superior Court has no subject matter jurisdiction to exercise original jurisdiction with regard to issues which are reserved by statute to the Court's appellate jurisdiction); *see also* OB 19-23 (authorities cited therein). ICC makes no argument that the Superior Court has any authority to second guess the final land use decision made by the building inspector. Rather, it asserts this is a matter between King County and Hapaianu:

[i]t was King County that enforced the surety bond and the SARA, not ICC. ICC simply enforced the indemnity bond. The indemnity bond is a private contractual agreement between ICC and Hapaianu exclusively. Whether King County violated LUPA is of no consequence to ICC's contractual rights against Hapaianu.

Response at 13.

ICC is incorrect. On its face, the SARA agreement, which ICC apparently had no access to (*see* CP 2-13 and note 2, *supra*), ends any duty to install plants at the time of "issuance of any occupancy permits." CP 146. No one has ever disputed that this clause of SARA refers to the FCO, which the County issued to Hapaianu. The door is no longer open for ICC or the County employees to invoke a superior court's original jurisdiction to undo the legal consequences of the building inspector's final determination (that Hapaianu had complied with the mitigation conditions of his building permit). *See* OB, 19-23; *see also, Brotherton v. Jefferson County*, 160 Wn. App. 699, 703-705, 249 P.3d 666 (2011).

In *Brotherton* Thomas and Cassandra Brotherton challenged a County's denial of their request for a waiver from state and local sewage system regulations, arguing that the local ordinance governing waivers, conflicted with state law and was unconstitutionally vague. *Brotherton* , 160 Wn. App. at 703. The County argued *for the first time on appeal*, that

the Brothertons' complaint was untimely filed under LUPA. *Id.* Division

II held:

We first consider whether the Brothertons' complaint is untimely under LUPA. Although the County did not raise this issue in its summary judgment motion, LUPA provides "the exclusive means of judicial review of land use decisions." RCW 36.70C.030(1). Parties may raise issues concerning jurisdiction for the first time on appeal. RAP 2.5(a)(1).

LUPA's stated purpose is "timely judicial review." RCW 36.70C.010; *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406, 120 P.3d 56 (2005)." LUPA establishes a uniform 21-day deadline for appealing the final decisions of local land use authorities and is intended to prevent parties from delaying judicial review at the conclusion of the local administrative process. *Habitat Watch*, 155 Wn.2d at 406, 120 P.3d 56; RCW 36.70C.040(3). Land use decisions become unreviewable if not appealed to a superior court within LUPA's specified timeline. *Habitat Watch*, 155 Wn.2d at 406-07, 120 P.3d 56; RCW 36.70C.040(2) ("A land use petition is barred, and the court may not grant review, unless the petition is timely filed...." ). "[E]ven illegal decisions must be challenged in a timely, appropriate manner." *Habitat Watch*, 155 Wn.2d at 407, 120 P.3d 56 (citing *Pierce v. King County*, 62 Wn.2d 324, 334, 382 P.2d 628 (1963)).

*Brotherton*, 160 Wn. App. at 703-705.

The *Brotherton* court held the superior court could not bootstrap itself into obtaining jurisdiction over a land use decision, after LUPA's limitations period had run, if a final land use decision was a basis for the belated lawsuit. *Id.* at 704. The same is true here. The County and ICC cannot contract with a homeowner so as to give a superior court

jurisdiction which has been taken away by law. *See also*, RCW 36.70C.030 (1) (This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions....). The Superior Court had no authority to grant ICC any relief whatsoever. Therefore, the issue as to whether LUPA applies is critical to ICC's case against Hapaianu. If the Superior Court had no jurisdiction to enforce the indemnity agreement, which was based on the County's admitted attempt to circumvent LUPA, ICC cannot utilize the judiciary to enforce its illegal contract. *See infra*.

If ICC were acting in good faith it would have attempted to determine whether it had joined the County in an unlawful attempt to break Washington law and asked for it's payment back from King County pursuant to paragraph 3 of the Surety Bond, which states in part: "Any funds provided by the surety in excess of that expended to remedy noncompliance with the agreement shall be returned to the surety upon completion of the remedial work and payment of the outstanding fees." CP 149.

#### **Withdrawal of Statute of Frauds Contention**

ICC next argues that requiring Hapaianu to sign the surety agreement without access to the SARA does not violate the Statute of Frauds. Response at 11(citing *Knight v. Am Nat'l Bank*, 52 Wn. App. 1, 6,

756 P.2d 757 (1988)). There is some authority to support ICC's position and therefore Hapaianu will withdraw his statute of frauds argument while reserving his contention that requiring Hapaianu to sign the surety agreement without access to the SARA was a factor which rendered the agreements unconscionable. *See infra*.

#### **RCW 19.72.170**

ICC appears to argue that a surety bond is not a contract. *See* Response p.10. To be clear, there is no such thing as a 'surety agreement'. This statement is contrary to the statement in ICC's motion for summary judgment that the "surety bond ... is a three party agreement between King County, ICC, and Hapaianu...." CP 111:13 - 14. Our Supreme Court has held "... if the language of a bond is plain and unambiguous, it is interpreted under general contract principles, giving the terms their usual meaning." *Hewson Const., Inc. v. Reintree Corp.*, 101 Wn. 2d 819, 826, 685 P.2d 1062 (1984).

In Hapaianu's OB he contends that RCW 19.72.170 is unconstitutional under the Equal Protection Clause of the United States Constitution and the Privileges and Immunities Clause of the Washington Constitution because it purports to give surety bonds protections which are not afforded to other contracts. *See* OB, at 23-30; *see also, Hewson Const.*, 101 Wn. 2d at 826.

ICC does not respond to this argument. Rather, it concedes that RCW 19.17.170 treats surety bonds differently for purposes of "minor technicalities." In this regard ICC argues in its Response at pages 11-12:

[\*\*\*] RCW 19.72.170 expressly validates surety bonds regardless of any defects in form, substance, or condition. RCW 19.73.190 seeks to prevent parties to a surety bond from avoiding their obligations under the bond by reason of *minor technicalities*. 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, or unattached documents.

Response at 11-12.

In this case we are not dealing with misspellings, but we are dealing with unattached agreements. ICC's argument lacks legal merit because the statute is not limited to "minor technicalities" and even if it were, there would still have to be a rational basis for construing illegal surety agreements differently from all other agreements. Const., art. 1 §12; *Grant County Fire Protection District v. City of Moses Lake*, 150 Wn.2d 791, 810, 83 P.3d 419 (2004); *see also*, OB 23-26. Hapaianu's opening brief was not asserting that the surety documents involved in this case violate technicalities. *See generally*, OB 23-30. His argument was that the boilerplate surety agreements were required by County ordinance, written by the County so that the County had discretion to ignore final LUPA decisions, and could illegally penalize a homeowner. *See Id.* Hapaianu's

position was that under these facts the agreements and the process for securing them, taken together, violated laws and constitutional rights. *Id.*

### **Unconscionability.**

In its Response to Hapaianu's argument the surety agreement, SARA, and related indemnity agreements, are substantively and procedurally unconscionable; ICC argues this cannot be: (a) "because the surety bond and performance agreement are required by law," and (b) Hapaianu signed the agreements in order to be able to obtain a permit to build his home. Response at 12-13.

But these ordinances and RCW 19.72.190, (which purports to exempt bonds from legal norms related to contracts generally) substantiate the adhesive (take it or leave it) nature of these contracts<sup>4</sup>, notwithstanding the fact that they sanctioned illegal behavior by the County which triggered events which injured Hapaianu and deprived him of his constitutional rights.

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<sup>4</sup> Whether a contract is one of adhesion depends upon an analysis of the following factors: " (1) whether the contract is a standard form printed contract [all three of the agreements were standard form printed agreements], (2) whether the contract was prepared by one party and submitted to the other on a take it or leave it basis [The surety agreement and SARA were prepared by the County. The Indemnity Agreement was prepared by ICC and all three were required to be signed in order for Hapaianu to obtain a building permit], and (3) whether there was no true equality of bargaining power between the parties. [There was no equality in bargaining power between Hapaianu, a Romanian immigrant and ICC and the County.]" *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 393, 858 P.2d 246 (1993).

Procedural unconscionability is the lack of a meaningful choice, considering all the circumstances surrounding the transaction including "[t]he manner in which the contract was entered,' whether each party had 'a reasonable opportunity to understand the terms of the contract,' and whether 'the important terms [were] hidden in a maze of fine print ...' ". *Schroeder v. Fageol Motors*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975)(quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)). In this case ICC admits Hapaianu was required by King County ordinance to sign the bond ensuring performance of the SARA. It is undisputed that at the time Hapaianu was required to sign the bond ensuring performance of the SARA, he had no access to the SARA. Therefore, important terms were not even accessible when he was required to sign the contract. Under these circumstances RCW 19.72.170 should not save the defective surety bond. The statute's attempt to make everything in the surety agreement "perfect" (*i.e.* legal and constitutional even though it was not) magnifies the procedurally unconscionable nature of these related agreements.

It is important to carefully consider the language of the surety bond and indemnity agreement alongside the county attorney's argument that a purpose of these related agreements was to allow King County, through ICC, to circumvent LUPA's 21 day limitations period. *See* CP 823:4-

825:14. Hapianu's argument seems to be that because King County can no longer seek compliance with the permit conditions by withholding the FCO, it cannot seek compliance by any other means. But there is no legal or logical basis for this position. To use an example, if a door has multiple locks, and one lock brakes, the other locks are not also rendered useless. On the contrary, their purpose is to operate as additional safeguards.

RCW 36.70C.030 (1) provides the "exclusive lock" for final land use decisions as a matter of law. *See* OB, 19-23; *Brotherton*, *supra*. The effect of these agreements was to intentionally violate Hapianu's rights as a landowner. Surely, ICC is not blind to this fact. Indeed, one of the factors supporting the substantive unconscionability of ICC's contract and procedures relating thereto is ICC's calculated efforts to join the County in violating LUPA or simply being deliberately indifferent to their joint violation of Hapianu's rights.

ICC's own argument in its summary judgment motions, establish the intended impact of these contracts on Hapianu: "it is in King County's sole discretion to determine whether the conditions of the Agreement have been satisfied and whether the surety bond shall be collected." CP 111:7 - 9.

Further, ICC admits:

[T]he surety bond, which he [Hapianu] admittedly solicited and requested from ICC, provides that any estimate submitted by King County to ICC for payment

“[m]ay not be challenged or otherwise disputed by the Principal or Surety.” In addition, K.C.C. 27A.30.010 provides that King County shall have the *sole discretion to determine whether the applicant has complied with the terms of the Agreement*<sup>5</sup> and whether the surety bond shall be collected to finish the work. CP 119, lines 5 - 11.

Thus, the provisions of this "three party agreement," provides that King County, a governmental entity, can in its *sole discretion* determine whether, and what amount, to collect from Hapaianu and ICC for the violation of an unattached SARA without Hapaianu having any recourse to the judiciary whatsoever. The Indemnity contract makes King County's illegal post-LUPA limitations period a contract decision that Hapaianu did not comply with and the mitigation provisions of his permit not subject to challenge even though state law requires King County to honor its final land use decisions. *See supra*. In this regard, the indemnity agreement states in pertinent part:

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

1. To reimburse Surety, upon demand for all payments made for and to indemnify and keep indemnified Surety from:
  - a. all loss contingent loss, liability, and contingent liability claim, expenses, including attorney fees, for which Surety shall become liable or shall become contingently liable by

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<sup>5</sup> The only way a decision can be made regarding an FCO is pursuant to LUPA. *See Supra*.

reason of such suretyship, whether or not Surety shall have been paid at the time of the demand;

2. 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. An itemized statement of the payments made by the Surety for loss, contingent loss, liability or contingent liability, and/or expense, sworn to by an officer of Surety, or voucher or vouchers for such payments, shall be prima facie evidence of the obligation of the undersigned to reimburse surety.

ICC asserts the above "right to settle clause" gave "ICC the exclusive discretion to determine whether, and upon what terms," to settle bond claims. CP 118:1-2. Hapaianu contends that terms of these agreements, *i.e.* the surety bond, the indemnity agreement, and the later disclosed and signed SARA, are substantively unconscionable because their intent is to allow King County to use ICC as a proxy to violate Mr. Hapaianu's constitutional and legal rights.

**ICC attempts to collect indemnity constitutes state action under the circumstances of this case.**

Next ICC argues:

Hapianu goes on to cite a series of violations of the Washington and United States Constitutions. Again, much like Hapaianu's arguments that enforcement of the so-called "surety agreement" is unconscionable and violate LUPA these arguments are misplaced because the Washington State and United States Constitutions ordinarily govern conduct of the state's own agents acting under color of state law. 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, 565 P.2d 812 (1977)*. Because the 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.

Response Brief, p. 14. ICC did not raise this argument before the Superior Court.

The problem with ICC's analysis on appeal is that it flatly concludes it is a private actor, without any consideration as to whether its participation in King County's attempts to violate the law rendered it a state actor<sup>6</sup>. For example, ICC ignores the following language of *Kennebec*, which held a foreclosure pursuant to RCW Chapter 61.24 which did not constitute state action. In that opinion, the Court makes clear that its failure to find state action was based on the "non-coercive" nature of the statute:

RCW 61.24 is entirely non-coercive. The state takes only a neutral position. It neither commands nor forbids non-judicial foreclosure. If the parties elect to contract and use the deed of

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<sup>6</sup> Private parties can become instruments of the state. However, in some cases a private party may be subject to the constraints of the constitution without having been found a state actor. See e.g. *Alderwood Assocs. v. Washington Envtl. Coun.*, 96 Wn.2d 230, 635 P.2d 108 (1981) (A 4-member plurality of the Supreme Court maintained that there was no "state action" requirement under the free speech and initiative provisions of the state constitution. Justice Dolliver concurred that there was no state action requirement for the initiative provision, but not the free speech provision); *Southcenter Joint Venture v. National Democratic Policy Committee*, 113 Wn.2d 413, 780 P.2d 1282 (1989); (Six members upheld Alderwood's holding that state action is required for a violation of Washington's free speech protections and affirmed that action by a mall prohibiting access to persons for soliciting signatures on initiative violated the constitutional right to initiatives.); *Walmart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 989 P.2d 524 (1999) (reaffirming the holdings on *Southcenter*, but refusing to apply private property that did have the characteristics of a public mall.

trust device, the statute regulates its manner of operation almost solely for the protection of the debtor. But the state does not involve itself in the transaction in any significant manner; its involvement at most is passive.

*Kennebec, Inc. v. Bank of the W.*, 88 Wn. 2d at 721-726.

ICC also cites *City of Pasco v. Shaw*, 161 Wn. 2d 450, 460, 166 P.3d 1157 (2007), a case involving the Fourth Amendment and CONST., Article I§7. In *Pasco* the Court stated:

Whether state action has occurred depends on the circumstances of a given case. A person is a state actor if that person functions as an agent or instrumentality of the state. In making this determination, Washington courts look to “the capacity in which [a person] acts at the time of the search” rather than to the person's primary occupation. “Critical factors ... include [1] whether the government knew of and acquiesced in the intrusive conduct and [2] whether the party performing the search intended to assist law enforcement efforts or to further his [or her] own ends.” (internal citations omitted).

The *Pasco* court cites and discusses *Kuehn* as a case in which private parties (parents) were deemed to be agents of the state where they chaperoned a school event. *Kuehn v. Renton School Dist. No. 403*, 103 Wn.2d 594, 694 P.2d 1078 (1985). In *Kuehn* our Supreme Court held:

It makes no difference whether the search was conducted by the band director, the principal, or the parents. When a private person is acting under the authority of the state, Fourth Amendment protections apply. *United States v. Walther*, 652 F.2d 788 (9th Cir.1981); see *Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S.Ct.2022, 2048, 29 L. Ed.2d 564 (1971); it is clear that the parents conducted the search with the sanction and enforcement authority of the school officials.

*Id.*

Here Hapaianu alleges the ordinances are more than "passive" and ICC admits this. In this regard, ICC stated in its motion for summary judgment, that King County ordinance required Hapaianu to obtain the surety bond. *See* CP 110:24 -111:16. ICC admits King County wrote the "form" surety bond, which gave King County final and judicially unreviewable power to contractually reverse a final administrative land use decision made in Mr. Hapaianu's favor under LUPA. *Id.* Then ICC asserts RCW 19.72.170 protected the surety bond and its offspring (the unattached SARA and the indemnity agreement) from any meaningful constitutional or any other legal challenge because the statute required the bond to be considered a "perfect bond"<sup>7</sup>. Here, we do not have a "[s]imple enactment of a statute permitting, but not requiring, private conduct with no further significant participation by the state..." *Ludwig v. Dep't of Ret. Sys.*, 131 Wn. App. 379, 384 (2006) (citing *Long v. Chiropractic Soc'y of Wash.*, 93 Wn.2d 757, 762, 613 P.2d 124 (1980)). Here, we have

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<sup>7</sup> RCW 19.72.190 provides:

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

*Id.* [emphasis supplied].

ordinances which require the signing of an adhesion contracts by a homeowner to, among other things, impose "another governmental lock" upon his right not to have to litigate final land use decisions forever. The contract is intended to, and the County applies it in such a way as to evade the County's obligation under LUPA, timely appeal land use decisions. Thus, King County can and does maliciously and unlawfully apply its adhesion contracts in such a way that surety companies are contractually bound to penalize homeowners in violation of LUPA and the United States and Washington Constitutional provisions . *See* CP 751:24-770:17.

By penalizing homeowners unlawfully pursuant to the whim of the County, ICC became so entwined with the state action so as to become a state actor. The Superior Court should not have enforced ICC's unlawful indemnity agreement in violation of Hapaiianu's constitutional and legal rights for the reasons set forth at CP 754:14-770:17. *See e.g., Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 511 P.2d 1002 (1973); *Shelley v. Kraemer*, 334 U.S. 1, 14 -18, 92 L. Ed. 1161, 68 S. Ct. 836 (1948).

#### **Const. Art I § 10**

Hapaiianu argued ICC violated Const. art. I §10 by preventing his access to the judicial function of the Superior Court. CP 767:1 - 770:17 and OB at 28 - 30. Hapaiianu cited two Kansas cases which relied upon

conclusive evidence clauses to hold that the indemnity agreements being reviewed in those cases violated public policy because they left the Court with nothing to do but render a judgment enforcing the indemnity agreement. Id. But Hapaianu also argued at page 29 of the OB:

In Washington judicial determinations are to be finally determined by the judiciary. Const. art. IV §1. The surety contract in question violates Hapaianu's access to the Court under Const. Art I§10 by giving King County ultimate authority to determine whether the contract has been complied with.

OB at 29.

ICC appears to argue that it did not violate Const. art. I §10 because it did not rely on a "conclusive damages" clause, but only on its "Right to Settle" provision. Response at 14-15. But under the circumstances of this case such a defense amounts to nothing more than a sleight of hand. In either event, both ICC and the County are attempting to circumvent LUPA and violate Hapaianu's constitutional rights without affording him any meaningful access to the Superior Court to invoke the law to stop these illegal actions.

**Reply to "ARGUMENT, C. Response to Hapaianu's Assertion that ICC committed CPA violations." Response at 16-17.**

Hapaianu will rely on pages 30-31 of his OB as his legal response to ICC's argument. Hapaianu would point out that ICC's first paragraph of this argument on page 16 is based on wholly unsubstantiated facts.

Response at 16. Hapaianu would also note there are many factual disputes regarding the underlying ICC's factual contention that it did not commit unfair and deceptive trade practices. *See* OB 36-39.

**Reply to "ARGUMENT, D. Response to Hapaianu's argument that ICC breached the implied duty of good faith and fair dealing under the surety bond and indemnity agreement." Response at 17-19**

ICC claims: "Hapaianu fails to cite one provision in either the surety bond or the indemnity agreement that was breached." Response at 17. This is not true. Paragraph 1 of the SARA states: "The applicant shall install al sensitive area and/or buffer mitigation measures required by the above referenced Project/*Permit* by the time specified by the COUNTY, which is prior to the issuance of any occupancy permit." CP 70 (underline emphasis in original; italicized emphasis supplied). ICC and the County breached this agreement by not honoring the consequences of the FCO.

It is not immediately clear whether ICC is stating that there is no implied good faith duty under a surety and/or indemnity agreement. To the extent, ICC's contention is that there is no good faith Duty, Hapaianu will rely on his OB at 31-32 to counter this argument. To the extent ICC is claiming to have actually performed this duty there exists a legitimate question of fact. *See* OB 35-39.

**Reply to: "Response to Hapaianu's argument that summary judgment on ICC's claim for indemnity was in error," Response at 19-22.**

As should be clear from the foregoing Hapaianu claims ICC did not pay the bond in good faith. Indeed, even now ICC could ask for its bond money back based on paragraph 3 of the surety bond agreement because King County has not expended any money in mitigation of Hapaianu's property. CP 35. The superior court erred by finding that this case was not full of contested issues of fact. CR56. *See* Opening Brief, pp. 30-39.

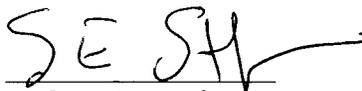
**Reply to "ARGUMENT, F. ICC requests that this Court award attorney fees on appeal," Response p. 22**

Hapaianu contends attorney fees and costs should be awarded to him. *See* OB, pp. 45-47.

**CONCLUSION**

As ICC sets forth no further responsive arguments, Hapaianu has nothing left which to reply. Hapaianu requests relief with regard to those issues ICC chose not to contest. Hapaianu also requests that the decisions of the Superior Court to which Hapaianu has replied to be reversed.

Respectfully Submitted, this 11<sup>th</sup> Day of November, 2011.



Scott E. Stafne  
WSBA 6964

No. 67200-2-1

COURT OF APPEALS DIVISION ONE  
OF THE STATE OF WASHINGTON

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CONSTANTIN HAPAIANU, an individual,

Appellant

Vs.

INDEMNITY COMPANY OF CALIFORNIA, a foreign corporation,

Respondent/Appellee

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APPEAL FROM SUPERIOR COURT

FOR KING COUNTY

CAUSE NO. 09-2-40632-4SSEA

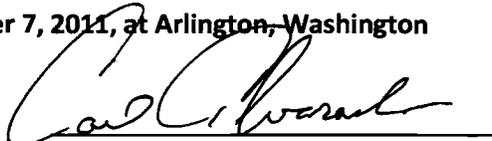
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DECLARATION OF SERVICE/MAILING

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I, Carl Alvarado, declare under the penalty of perjury that I served a copy of Hapaianu's Reply Brief by depositing a copy of this document with the U.S Postal Service addressed to: Alexander Friedrich and Paul Keane Friedrich, Yusen & Friedrich Attorneys at Law, 215 NE 40<sup>th</sup> Street, Suite C-3, Seattle WA 98105-6567; and, Devon N. Shannon, King County Prosecuting Attorney, 516 3<sup>rd</sup> Ave., Rm400, Seattle, WA 98104-2388.

Dated: November 7, 2011, at Arlington, Washington



Carl Alvarado

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