

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.

Nos. 74128-4-I, consolidated with 75994-9-I.

Court of Appeals of Washington, Division One.

Filed: August 28, 2017.

Appeal from King County Superior Court, Docket No. 04-2-09599-9, Judgment or order under review,
Date filed 09/18/2015, Judge signing: Honorable Richard F. Mcdermott.

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UNPUBLISHED OPINION

MARY KAY BECKER, J.

Substantial evidence supports the jury's verdict that **Soundbuilt's** breach was material and
Commonwealth's was not. **Soundbuilt** has not met its burden to prove that it is entitled to damages.
As the prevailing party, **Commonwealth** is entitled to attorney fees and costs under the settlement
agreement. We affirm.

FACTS

This case concerns a settlement agreement between appellant **Soundbuilt Northwest LLC** and
respondent **Commonwealth Land Title** Insurance Company. The underlying facts are discussed in
two previous appeals in the same matter: *Sound Built Homes, Inc. v. Dale Alan Land Dev. Co.*, noted

at 137 Wn. App. 1055 (2007), review denied, 163 Wn.2d 1009 (2008), and **Commonwealth Land Title Ins. Co. v. Soundbuilt Nw. LLC**, No. 68547-3-I (Wash. Ct. App. May 28, 2013) (unpublished), <http://www.courts.wa.gov/opinions/pdf/685473.pdf>.

To summarize, in 2004, the Dale Alan **Land** Development Company (DALD) and its principal, Greg Newhall, agreed to sell a 22-lot plat in Covington, Washington, to **Soundbuilt**. Instead, they sold the property for a higher price to a different **land** developer, Chelan Homes Inc. **Soundbuilt** sued DALD/Newhall for repudiation of the purchase and sale agreement and recorded a lis pendens against the property.

Chelan Homes obtained a **title** insurance policy from **Commonwealth**. Due to the lis pendens, **Commonwealth** conditioned issuance of its **title** policy on the entry of an indemnity agreement with DALD. DALD agreed to indemnify **Commonwealth** and hold it harmless from any loss or liability arising out of the policy. The indemnity agreement was signed in July 2004.

Chelan Homes built and sold 22 homes. **Commonwealth** agreed to insure **title** on behalf of the purchasers. Then **Soundbuilt** prevailed on its repudiation claim, and the trial court ordered specific performance of the purchase and sale agreement. This court affirmed.

Soundbuilt sought to enforce the specific performance order against the 22 homeowners. **Commonwealth** intervened and filed a third party claim to enforce the indemnity agreement against DALD/Newhall.

Desiring to prevent enforcement of the specific performance order that would cause the homeowners to lose their titles, **Commonwealth** entered into settlement negotiations with **Soundbuilt**. The record reflects that **Soundbuilt** made an initial settlement demand to **Commonwealth** of \$8 million all cash in exchange for **Soundbuilt** releasing its right to specific performance and the lis pendens.

The \$8 million settlement demand was in excess of **Commonwealth's title** policy limits, which initially were \$2.53 million and were later increased to \$5.83 million. **Commonwealth** was concerned that paying **Soundbuilt** \$8 million would undermine the indemnity claim in two ways. First, DALD/Newhall could argue that **Commonwealth** settled as a volunteer and was not entitled to indemnification. Second, DALD/Newhall could argue that the indemnification obligation was limited to the policy limits.

Responding to these concerns, **Soundbuilt** proposed to share the risk with **Commonwealth** in the indemnity litigation against DALD/Newhall. **Soundbuilt** proposed that the \$8 million be split into a \$5 million immediate payment and a \$3 million payment contingent on **Commonwealth** getting a final judgment enforcing the indemnity agreement. **Commonwealth** agreed.

Under the settlement agreement, **Soundbuilt** agreed to transfer to **Commonwealth** the right, **title**, and interest of **Soundbuilt** in its specific performance lawsuit, the original purchase and sale agreement between **Soundbuilt** and DALD/Newhall, and the lis pendens filed by **Soundbuilt**. In this manner, **Commonwealth** stepped into **Soundbuilt's** shoes in **Soundbuilt's** litigation with DALD/Newhall, while also maintaining its own indemnity claim against DALD/Newhall. In return, **Commonwealth** immediately paid **Soundbuilt** \$5 million. **Soundbuilt** was entitled to receive an additional \$3 million from **Commonwealth**, contingent on judicial resolution of **Commonwealth's**

right to indemnity from DALD/Newhall. A key term of the settlement agreement made it **Commonwealth's** responsibility to seek a final court ruling on the indemnity obligation "as soon as reasonably possible."

Payment by DALD/Newhall under the indemnity agreement was not a sure thing. **Soundbuilt** and **Commonwealth** knew that the result of the indemnity litigation might be to establish DALD/Newhall's obligation to indemnify **Commonwealth** completely, not at all if the indemnity was not effective, or somewhere in between. They also understood that **Commonwealth** might not be able to collect on any indemnity judgment it obtained against DALD/Newhall. They agreed that if and when DALD/Newhall's liability for indemnifying **Commonwealth** was legally established, **Commonwealth** would pay **Soundbuilt** up to an additional \$3 million, even if **Commonwealth** was unable to collect from DALD/Newhall:

Contingency for Reduction in Balance Due. **Commonwealth** shall seek a determination of the court that DALD and Greg Newhall are obligated to indemnify **Commonwealth** for sums paid to SBH, and that **Commonwealth's** payments to SBH were not made as a volunteer. Such determination shall be sought by **Commonwealth** as soon as reasonably possible after **Commonwealth's** payment of the \$5,000,000 described in Paragraph 5.2. In the event that DALD and Newhalls are found to be liable to pay **Commonwealth** the full \$8,000,000 amount which **Commonwealth** has agreed to pay SBH, SBH shall be entitled to the remaining \$3,000,000 described in Paragraph 5.1.

In the event that the King County Superior Court fails to find that DALD and Newhall are liable to **Commonwealth** for all sums that **Commonwealth** has agreed to pay to SBH, and sets a lower sum (or no sum) as the sum for which DALD and Newhall are liable to **Commonwealth**, then the balance owed SBH shall be reduced so that, when added to the \$5,000,000 already paid to SBH, the total shall equal the sum that the King County Superior Court determines DALD and Newhall are obligated to pay to **Commonwealth** (but in any event SBH shall be entitled under this Agreement to retain all \$5,000,000 paid).

In the event that DALD and Newhall's liability is later increased on appeal, the principal balance due SBH shall likewise be increased to conform with the appellate court's decision increasing the sum that DALD and Newhall are obligated to pay to **Commonwealth** on account of **Commonwealth's** payment to SBH; however, in no event shall the appellate court decision increase the principal balance of the additional sum above the \$3,000,000.00 plus interest due SBH. In no event shall **Commonwealth's** obligation to make payment to SBH be dependent upon **Commonwealth's** ability to collect the sums adjudged to be due from DALD or Newhall.

In keeping with its obligation to seek a court ruling "as soon as reasonably possible," **Commonwealth** promptly moved for summary judgment on its indemnity claim against DALD/Newhall and requested judgment for \$8 million. On November 18, 2008, the trial court issued a letter ruling granting **Commonwealth's** motion. The court later entered a final judgment for the full \$8 million plus prejudgment interest, attorney fees, and costs.

Progress toward **Soundbuilt's** objective of receiving an additional payment from **Commonwealth** soon slowed when DALD/Newhall appealed the indemnity judgment to this court and also filed for chapter 11 bankruptcy. On being informed of the bankruptcy filing, this court stayed the appeal of the indemnity judgment against DALD/Newhall on May 8, 2009.

The bankruptcy case was converted to a chapter 7 proceeding because DALD/Newhall lacked sufficient assets to reorganize out of bankruptcy. Control of the bankruptcy case and the indemnity appeal shifted to the bankruptcy trustee.

On July 6, 2010, David Kerruish, one of **Soundbuilt's** attorneys, wrote to Jack Cullen, who represented **Commonwealth's** interests as a creditor in the bankruptcy. Kerruish proposed that if **Commonwealth** would reduce its claim from DALD/Newhall in the bankruptcy, **Soundbuilt** would reduce the amount owed by **Commonwealth** under the settlement agreement. Otherwise, Kerruish wrote, **Commonwealth** should "proceed to seek a final adjudication of the claims against Newhall, consistent with the written settlement agreement." His letter stated that "at some point the delay in pursuing the litigation becomes a breach of the settlement agreement."

On July 13, 2010, Cullen responded that **Commonwealth** did not want to settle. He represented, however, that in order to complete the indemnity appeal, **Commonwealth** would move for relief from the bankruptcy stay.

Soundbuilt believed **Commonwealth** was delaying resolution of the indemnity appeal to avoid having to make the contingent payment to **Soundbuilt**. According to **Soundbuilt's** closing arguments, **Commonwealth** originally thought Newhall had enough money to pay "every penny" of the indemnity obligation and wanted to move forward quickly. But when **Commonwealth** found out Newhall had no assets, **Commonwealth** "slowed, then stopped, and then actually started blocking efforts to get the final, nonappealable order that it had agreed to get."

Soundbuilt feared that this court would reverse the \$8 million judgment on the indemnity claim and remand it for trial, a further delay. And the ultimate outcome after a trial might leave **Commonwealth** owing **Soundbuilt** less than the full \$3 million. **Soundbuilt** wanted to accelerate getting to a final court ruling that would trigger a payment of \$3 million. **Soundbuilt** explored with the bankruptcy trustee a proposal to dismiss DALD/Newhall's indemnity appeal.

On September 9, 2010, the bankruptcy trustee agreed, subject to court approval, to dismiss the indemnity appeal in exchange for **Soundbuilt's** promise to pay the bankruptcy estate \$225,000 of the additional \$3 million payment **Soundbuilt** hoped to receive from **Commonwealth**.

Cullen, meanwhile, delayed for several months before filing **Commonwealth's** motion for relief from the bankruptcy stay on October 25, 2010. The bankruptcy court granted relief from the stay in December. This court entered an order on December 20, 2010, permitting the indemnity appeal to go forward.

Commonwealth opposed permitting the bankruptcy trustee to withdraw the indemnity appeal. As a creditor, **Commonwealth** objected that the trustee's agreement with **Soundbuilt** was based on

guesswork and assumptions and was not economically sound. Over **Commonwealth's** objection, the bankruptcy court gave its approval on December 23, 2011.

On January 13, 2012, the trustee moved this court to withdraw the pending Newhall indemnity appeal. Oral argument had been heard two months earlier, and the parties were awaiting this court's decision. The motion to withdraw was granted, and the appeal was dismissed on February 29, 2012. This left in place the trial court's \$8 million judgment against DALD/Newhall as the final court determination of the indemnity litigation. From **Soundbuilt's** perspective, it was time for **Commonwealth** to make the contingency payment of \$3 million.

Soundbuilt moved the trial court to enforce the settlement agreement. Using summary judgment procedure, the trial court granted the motion and ordered **Commonwealth** to pay **Soundbuilt** \$3 million plus interest, attorney fees, and costs. **Commonwealth** appealed. On May 28, 2013, this court found genuine issues of fact concerning the proper interpretation of the settlement agreement and reversed and remanded for trial.

At trial, each party accused the other of breach. The jury found that **Soundbuilt** breached the settlement agreement on September 9, 2010. This was the date **Soundbuilt** reached the agreement with the bankruptcy trustee to dismiss Newhall's appeal. The jury found that **Commonwealth** breached the settlement agreement on July 13, 2010. On that date, Cullen represented that **Commonwealth** would move for relief from stay so that the indemnity appeal could proceed, but he delayed several months before doing so. The jury found that **Soundbuilt's** breach was material and **Commonwealth's** was not.

After the jury verdict, both parties sought judgment. On September 18, 2015, the court entered judgment for **Commonwealth**. "**Commonwealth's** performance under the contingent payment term of the Settlement Agreement is excused as of the date of **Soundbuilt's** material breach of the Settlement Agreement on September 9, 2010, and **Commonwealth** does not owe **Soundbuilt** any further amount under the Settlement Agreement." The trial court denied **Soundbuilt's** request for damages.

Soundbuilt moved for reconsideration or a new trial under CR 59, requesting damages and arguing that the jury's verdict was unsupported by substantial evidence. The court denied **Soundbuilt's** motion. **Soundbuilt** appeals.

COMMONWEALTH'S NONMATERIAL BREACH

Soundbuilt argues substantial evidence is lacking to support the jury's finding that **Commonwealth's** breach—Cullen's delay in seeking permission to move the indemnity appeal forward—was not material.

We 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). There must be "no evidence or reasonable inference from the evidence to justify the verdict or the decision." CR 59(a)

(7). It is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence. Millies, 185 Wn.2d at 316. However, where reasonable minds could differ on the question, the court will not disturb the jury's verdict. Millies, 185 Wn.2d at 317.

We review the sufficiency of the evidence in light of the instructions given. Millies, 185 Wn.2d at 313. When there is no objection to the jury instructions, they become the law of the case. Millies, 185 Wn.2d at 313.

Without objection, the court instructed the jury on the definition of material breach:

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*.

Instruction 9 (emphasis added).

There was a delay of about three months from the day in July 2010 when Cullen said he would move for relief from the bankruptcy stay until the day he actually did so in October 2010. Cullen testified that he should have filed the motion sooner but "got swamped" with other cases. It was during this delay, in September 2010, that **Soundbuilt** reached an agreement with the trustee to withdraw the appeal.

Soundbuilt contends the jury should have found that the delay rendered **Commonwealth's** performance untimely. We disagree. Substantial evidence supports the date of breach found by the jury. And the record does not compel a finding that the three-month delay by Cullen was material. The indemnity appeal had not yet been fully briefed. **Soundbuilt** does not show that accelerating the indemnity appeal by three months would have discouraged **Soundbuilt** from its effort to have the appeal withdrawn. The jury could find that **Soundbuilt** was deprived of the right to a contingency payment by its own conduct in cutting off the indemnity appeal prematurely, not by **Commonwealth's** delay.

Soundbuilt argues that because the settlement agreement has a "time is of the essence" clause, **Commonwealth's** alleged breach by failure to timely perform is material as a matter of law. We are not persuaded. To make this argument, **Soundbuilt** rephrases a holding from Cartozian & Sons, Inc. v. Ostruske-Murphy, Inc., 64 Wn.2d 1, 5, 390 P.2d 548 (1964). Noting that the contract in that case did *not* have a "time is of the essence" provision, the court held that the question whether a delay in performance was a material breach depends on the surrounding circumstances. **Soundbuilt** cites no case holding that the converse is true where a contract *does* have a "time is of the essence" clause.

We conclude there was sufficient evidence for the jury to find that **Commonwealth's** breach, a three-month delay, was not material.

SOUNDBUILT'S MATERIAL BREACH

Soundbuilt contends substantial evidence was lacking to support the finding that its agreement with the trustee constituted a material breach. As above, we review the sufficiency of the evidence in light of the instructions given. Millies, 185 Wn.2d at 313.

In addition to the material breach instruction quoted above, the jury was instructed that **Commonwealth** was excused from paying **Soundbuilt** the contingent payment of up to \$3 million if **Commonwealth** proved that **Soundbuilt** interfered with or prevented **Commonwealth** from obtaining a final, nonappealable order against DALD and Newhall:

If one party enters into a contract with another, there is an implied agreement by each to do nothing that will hinder, prevent, or interfere with the performance of the contract terms.

....

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.

Instruction 11.

The jury was instructed to interpret the settlement agreement as to give effect to the intent of the parties at the time they entered the agreement, considering the apparent purpose of the contract and the facts and circumstances surrounding the making of the agreement:

A contract is to be interpreted to give effect to the intent of the parties at the time they entered the contract.

You are to take into consideration all the language used in the contract, giving the words their ordinary meaning, unless the parties intended a different meaning.

You are to determine the intent of the contracting parties by viewing the contract as a whole, considering the subject matter and apparent purpose of the contract, 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.

Instruction 8.

The settlement agreement stated in paragraph 5.3 that "**Commonwealth** shall seek a determination of the court that DALD and Greg Newhall are obligated to indemnify **Commonwealth**." The agreement provided in paragraph 5.4 that **Soundbuilt's** attorneys "shall be entitled to review, prior to filing, all pleadings filed by **Commonwealth** related to the performance of" the settlement agreement but that "this right of review is for informational purposes only, and does not create any right of SBH's counsel to direct the litigation or edit the pleadings filed." A reasonable interpretation of these provisions is that **Commonwealth** would control the indemnity litigation against DALD and Newhall.

A proposed term of the agreement would have returned the right to control the indemnity litigation to **Soundbuilt** if **Commonwealth** materially defaulted on its performance described in the settlement agreement. The jury heard evidence that **Commonwealth** successfully negotiated to eliminate this provision. Thus, the jury could readily conclude that **Soundbuilt** did not have the right to control the indemnity litigation.

Cullen testified that he did not know **Soundbuilt** was making a deal with the bankruptcy trustee and that he did not authorize **Soundbuilt** to do so. He said **Soundbuilt's** unilateral negotiations were "directly contrary to what I understood the rules to be" that **Soundbuilt's** attorney had laid out.

The attorneys who negotiated the settlement agreement on behalf of the parties testified as to their interpretations of the settlement agreement. Chris Brain, one of **Commonwealth's** attorneys, testified it was "axiomatic that if we had the burden of going forward to get the judgment [against Newhall], that **Soundbuilt** would not do anything to interfere with our ability to do that." He stated that **Soundbuilt** had a "duty not to interfere with us" and was not "free to do anything without our consent." Kerruish testified that there was no dispute that **Commonwealth** had the right to direct the litigation against DALD and Newhall.

From this evidence, the jury could find that **Soundbuilt's** agreement with the trustee breached the agreement by preventing **Commonwealth** from performing its obligation to seek a final, nonappealable order against DALD and Newhall. The jury could find that **Soundbuilt's** breach was material in that it deprived **Commonwealth** of a benefit that **Commonwealth** reasonably expected. As a result of **Soundbuilt's** interference with the appeal, the trial court judgment setting the indemnity obligation at the full \$8 million was left standing, when it might have been reduced or eliminated if the appeal had gone forward. **Commonwealth's** payment to **Soundbuilt** under the contingent payment term of the settlement agreement then would have been reduced or eliminated accordingly.

We conclude there was sufficient evidence for the jury to find that causing the indemnity appeal to be withdrawn was a material breach by **Soundbuilt**.

LOST PROFITS

Commonwealth argued in closing that the \$8 million demanded by **Soundbuilt** in the settlement agreement negotiations was unrelated to **Soundbuilt's** lost profits: "Now, the \$8 million that they [**Soundbuilt**] demanded, and you heard about that demand, that had nothing to do with the amount of money that **Soundbuilt** was out of pocket. It didn't pay anything on the deal that fell through. It had nothing to do with their lost damages and their lost profits." **Soundbuilt** objected to the argument but the court overruled the objection.

Soundbuilt describes the argument as "a naked appeal to the jury to punish **Soundbuilt** for being greedy—an invitation to the jury to simply ignore the parties' agreement."

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, (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).

Soundbuilt has not established that **Commonwealth's** argument was misconduct. Gary Racca, **Soundbuilt's** owner, testified without objection that he did not actually pay for the 22-acre property and was not out of pocket any money for purchasing it. And **Soundbuilt** does not explain how the argument was prejudicial in the context of the entire record. The record included the settlement agreement and numerous witnesses from both parties testifying in detail about the circumstances leading up to the settlement agreement and the settlement negotiations. We reject the argument that **Commonwealth** committed misconduct in closing.

SOUNDBUILT'S DAMAGES

After the verdict, **Soundbuilt** asked the court for an award of \$3 million in expectation damages based on the jury's finding that **Commonwealth** was in breach. The court ruled that **Soundbuilt** was not entitled to damages, attorney fees, or costs. **Soundbuilt** assigns error to this ruling.

The burden of proving damages is on the party seeking them. 224 Westlake, LLC v. Engstrom Props., LLC, 169 Wn. App. 700, 729, 281 P.3d 693 (2012). The general measure of damages for breach of contract is that the injured party is entitled to (1) recover all damages that accrue naturally from the breach and (2) be put into as good a pecuniary position as he would have had if the contract had been performed. 224 Westlake, LLC, 169 Wn. App. at 729.

Soundbuilt's agreement with the bankruptcy trustee, not **Commonwealth's** delay, stopped the indemnity appeal and is the reason the parties will never know how the appeal would have been resolved. **Soundbuilt** has not carried its burden of proving it was damaged by **Commonwealth's** three-month delay in pursuing the indemnity appeal.

Soundbuilt unpersuasively argues that the trial court's denial of damages is inconsistent with the jury verdict. The jury's finding that **Commonwealth** committed a nonmaterial breach does not imply a finding that **Soundbuilt** was entitled to an award of damages. We find no error in the ruling denying damages to **Soundbuilt**.

ATTORNEY FEES

The trial court awarded **Commonwealth** \$1,175,689.00 in attorney fees and \$70,045.31 in costs as the prevailing party in a contract action with a provision for attorney fees to the prevailing party. **Soundbuilt** contends the court erred in its determination that **Commonwealth** was a prevailing party because when the jury determined that both parties breached the contract, neither party prevailed.

A prevailing party has been defined as one who obtains judgment in its favor, Seashore Villa Ass'n v. Hugglund Family Ltd. Partnership, 163 Wn. App. 531, 547, 260 P.3d 906 (2011), review denied, 173 Wn.2d 1036 (2012), and also as one against whom no affirmative judgment is entered, Eagle Point Condominium Owners Ass'n v. Coy, 102 Wn. App. 697, 706, 9 P.3d 898 (2000). Here, the trial court

entered judgment in favor of **Commonwealth**. There was no affirmative judgment entered against **Commonwealth**.

Soundbuilt portrays this case as one in which there is no prevailing party for the purpose of awarding attorney fees because both parties prevailed on major issues. This case does not fall into that category because **Soundbuilt** was not afforded any measure of relief. See generally *Eagle Point Condo. Owners Ass'n*, 102 Wn. App. at 706-14. We affirm the award of attorney fees and costs to **Commonwealth**.

As the prevailing party, **Commonwealth** is also entitled to attorney fees and costs for this appeal, including those incurred in the now-consolidated appeal from the award of attorney fees and costs below and the associated supplemental briefing.

Affirmed.

MICHAEL SPEARMAN and ANN SCHINDLER, JJ., concurs.

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