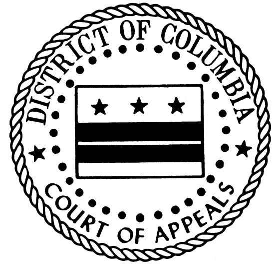

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In the Court of Appeals
For The District of Columbia

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Appeal No. 23-CV-298
Appeal No. 23-CV-299
****

GERARDINE LUMBIH,

Appellant,

vs.

CAROLYN WILSON, et. al.

Appellees

***

Appeal from the Superior Court for the District of Columbia
Case Nos. 2016 CA 005209 and 2018 CA 006980
(Judge Yvonne Williams)

***

BRIEF OF APPELLEE NTAKY MANAGEMNT, LLC

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CERTIFICATE REQUIRED BY RULE 28 (A)(1)
OF THE RULES OF THE DISTRICT OF COLUMBIA
COURT OF APPEALS:

The undersigned, counsel of record for Appellees, Ntaky Management LLC, certifies that the following listed parties appeared below:

Ntaky Management LLC.
Gerardine Lumbih
Carolyn Wilson

and the following attorneys entered their appearance on behalf of the parties:

Andrew J. Lavin, Brian L. Kass, and John E. Arness, II; Kass Legal Group, PLLC, as counsel for the Plaintiff/Cross-Plaintiff Ntaky Management LLC, and

Tyler J., King, Franklin Square Law Group and James A. Sullivan, Jr., Esq.
Miles & Stockbridge P.C., as counsel for Defendant/Third Party Plaintiff Gerardine Lumbih

Vanessa Carpenter Lourie, Esquire, Counsel for Defendant/Cross-Defendant Carolyn Wilson

These representations are made in order that judges of this court, inter alia, may evaluate possible disqualification or recusal.

Andrew J. Lavin, Esquire
Attorney for Ntaky Management LLC

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Appeal from the Superior Court for the District of Columbia
Civil Division - Case Nos. 2016 CA 005209 and 2018 CA 006980
(Judge Yvonne Williams)
***

BRIEF OF APPELLEE NTAKY MANAGEMENT LLC

I. <u>ISSUES PRESENTED</u>

A. Did the trial court (Judge Williams) abuse its discretion by not invoking its equitable powers to shift liability from Ms. Lumbih to Ms. Wilson??

B. Did the trial court (Judge Williams) err and/or abuse its discretion by finding that Ms. Lumbih did not establish that Ms. Wilson breached the deed of conveyance to Lumbih by failing to convey all of the real property described in the deed??

II. STATEMENT OF THE CASE

As between Appellant Gerardine Lumbih (hereafter "Lumbih") and Appellee Ntaky Management LLC (hereafter "Ntaky"), this is a case involving the legal determination of the location of a property boundary line separating two legal parcels of land in the District of Columbia and the associated rights of the owners of those two abutting parcels. The facts of the case below are substantially as stated in Lumbih's Brief, with the result that it was found that encroachments benefitting Lumbih are located on and burden land owned by Ntaky.

Ntaky was found to be the sole legal owner of Lot 826 in Square 3024 in fee simple and entitled to all rights attendant to such ownership at the risk, peril, and expense of Lumbih as to any encroachments.

Lumbih did not advance a claim for damages against Ntaky below and seeks on appeal to hold Appellee Carolyn Wilson liable for unspecified damages resulting from the finding as to ownership and for breach of contract in the sale of Lot 825 in Square 3024 to her in September of 2010.

The trial proceeded, and a declaratory judgment was entered on March 10, 2023 in favor of Ntaky as to the action to quiet title and for injunctive relief, and in favor of Appellee Carolyn Wilson as to Lumbihs Third-Party Claims against her. Ntaky was awarded injunctive relief in the form of permission to remove some of the established encroachments at the risk and expense of Lumbih. This appeal followed.

III. STATEMENT OF FACTS

As stated at JA 000001 through 000006, Appellee Wilson legally subdivided land formerly identified as Lot 824 in Square 3024 in the District of Columbia into three contiguous lots identified as Lots 825, 826 and 827 in the same Square 3024. Wilson subsequently

conveyed Lots 826 and 827 to Ntaky in August of 2009, and one year later conveyed the remaining lot 825 to Lumbih. It was later discovered that improvements appearing to benefit Lot 825 encroached over the lot line separating lots 825 and 826.

The trial court received evidence as to the precise location and dimensions of the two lots and the separating boundary line, the nature of the encroachments onto Lot 826, and as to actual and imputed knowledge available to Lumbih as to the existence of the encroachments and the dimensions of the real estate parcels involved.

As between Lumbih and Ntaky, the sole issue presented to the trial court for resolution was the determination of the boundary line separating Lots 825 and 826 in Square 3024 and the resulting property rights of those two parties. JA 000010 – 11.

It was concluded that Ntaky was the fee simple owner of Lot 826 in Square 3024 and that Lumbih had undertaken to review the land records of the District of Columbia and to obtain a survey identifying the lot being purchased by her such that her claims against Wilson were dismissed.

The Lot 826 that was sold to Ntaky in August of 2009 had been legally subdivided to a width of twenty (20) feet fronting on 9th St. NW and that is what was conveyed to Ntaky and purchased by it for valuable consideration in an arms-length transaction. See Ntaky Exhibits 2, 3, 6 and 7.

These finding of fact and conclusions of law was supported by substantial evidence in the form of testimony by licensed District of Columbia Surveyor Anthony G. Currie and his boundary survey as to the location and dimensions of the boundary line separating Lots 825 and 826 in Square 3024 (Ntaky Ex. 7, 10/3/22 trial transcript at Pages 23 to 39 of Supp. to Joint Appendix), a Boundary Survey by licensed surveyor Bruce Landes admitted as Ntaky's Exhibit

6, Ntaky's earlier recorded deed admitted as Ntaky's Exhibit 3, and the Records of the Office of the Surveyor of the District of Columbia admitted as Ntaky's Exhibits 1 and 2.

Ntaky was not a party to any contract or agreement between Lumbih and Wilson and had no privity of contract with Lumbih. Ntaky Exhibits 3 and 4.

Ntaky has been paying the real property taxes on the entirety of Lot 826 in Square 3024 since August of 2009, and holds legal title to it as well. See Ntaky Exhibits 3 and 8.

Ntaky was awarded no damages against Lumbih at trial. The only "liability" Lumbih has is to limit her improvements and property interests within the confines of the Lot 825 that she owns. The thrust of the trial court's holding as between Ntaky and Lumbih is that Lumbih cannot use or occupy property which she does not own, and that Ntaky can use and occupy property that it does own.

Ntaky's crossclaim against Wilson was only advanced in terms of liability in the event the prayer for injunctive and declaratory relief was denied or dismissed. Given the finding that Wilson conveyed the entirety of Lot 826 to Ntaky which Ntaky had bargained to receive, the claim for damages against Wilson failed. JA 000011 at footnote 3 ("Because the Court has determined that Ntaky's quiet title claim has merit, it need not address Ntaky's damages claim against Ms. Wilson").

The Trial court found that Lumbih's breach of contract claim against Wilson depended upon whether the September 24, 2010 deed imposed on Wilson an obligation or duty to confirm that the lot dimensions were correct. JA 000013

Lumbih "obtained a survey of Lot 825 from Vyfhuis which, although it specified that it was "not a property line survey," was nonetheless incorporated into the deed by Dolphin." JA 000014.

There was evidence received that Lumbih was represented at all times by a real estate agent in her purchase and that the choice of a settlement agent belongs to the buyer, whether knowingly exercised or not. See Supp. to Joint Appendix at p. 215, lines 11-17 and Supp. to Joint Appendix at p. 216, lines 20-22.

There was evidence admitted at trial showing that Lumbih obtained a title report, a title abstract, a title binder, and title insurance covering both herself and her lender against defects in title to Lot 825 in Square 3024. See Ntaky Exhibit 10 (Lumbih's HUD-1 Settlement Statement for her purchase) at lines 1101, 1103, 1104, 1110, and 1111.

IV. SUMMARY

Appellant Gerardine Lumbih (hereafter "Lumbih") appeals the trial court's decision alleging that it was reversible error not to find that Appellee Carolyn Wilson (hereafter "Wilson"} breached her contract to sell Lumbih Lot 825 in Square 3024 as reflected in Lumbih's September 24, 2010 deed. Lumbih also alleges that the trial court abused its discretion in not applying principles of equitable indemnification to shift the burden of any damages sustained by Lumbih in the court's decision below to Wilson.

The trial court found that Wilson legally subdivided land formerly identified as Lot 824 in Square 3024 in the District of Columbia into three contiguous lots identified as Lots 825, 826 and 827 in the same Square 3024. Wilson subsequently conveyed Lots 826 and 827 to Ntaky in August of 2009, and one year later conveyed the remaining lot 825 to Lumbih. It was later discovered that improvements appearing to benefit Lot 825 encroached over the lot line separating lots 825 and 826. This case ensued in order to obtain the court's determination as to

the location of the separating property line and the rights of the parties with regard to any encroachments.

The trial court received evidence as to the precise location and dimensions of the two lots and the separating boundary line, the nature of the encroachments onto Lot 826, and as to actual and imputed knowledge available to Lumbih as to the existence of the encroachments and the dimensions of the real estate parcels involved.

The trial court correctly concluded that Ntaky was the fee simple owner of Lot 826 in Square 3024 and that Lumbih had undertaken to review the land records of the District of Columbia and to obtain a survey identifying the lot being purchased by her such that her claims against Wilson were dismissed. The record belies the Lumbih's arguments on appeal and provides extensive support for the trial court's decision.

This appeal is about undisputed facts and a lack of evidence, circumstances, or good cause sufficient to disturb the decisions and actions of the trial court and remand the case as Lumbih requests, especially with regard to the legal conclusion that Ntaky is the sole fee simple owner as to the entirety of Lot 826 in Square 3024. The proper allocation of the law and the burdens of proof applicable in establishing lot lines in the District of Columbia leads this Court to this same conclusion as was reached by the Court below.

V. THE STANDARD FOR REVIEW

A judgment of any trial court is presumed to be valid. *Harvey v. United States*, 385 A.2d 36, 37 (D.C.App.1978); see *United States v. Alston*, 412 A.2d 351, 359 (D.C.App.1980) (en banc). A losing party who notes an appeal from such a judgment bears the burden of "convincing the appellate court that the trial court erred." *Harvey v. United States*, supra, 385 A.2d at 37; accord, *Higgins v. Carr Bros. Co*., 317 U.S. 572, 574, 63 S.Ct. 337, 338, 87 L.Ed.

468 (1943). In meeting that burden, it is appellant's duty to present this court with a record sufficient to show affirmatively that error occurred. *T.V.T. Corp. v. Basiliko*, 103 U.S.App.D.C. 181, 183, 257 F.2d 185, 187 (1958); see *Palmer v. Hoffman*, 318 U.S. 109, 116, 63 S.Ct. 477, 481, 87 L.Ed. 645 (1943); *Murchison v. Peoples Contractors, Ltd*., 250 A.2d 920, 922 n. 7 (D.C.App.1969); *D.C. Transit System, Inc. v. Milton*, 250 A.2d 549 (D.C.App.1969); *Walker-Thomas Furniture Co. v. Jackson*, 189 A.2d 123 (D.C. App.1963).

Lumbih contends that the trial court abused its discretion and/or made a reversible error of law by failing to invoke its equitable powers "to shift liability from Ms. Lumbih to Ms. Wilson, by reasoning that Ms. Lumbih had not provided a basis upon which to apply the doctrine of implied indemnity".

Absent a clear showing of an abuse of discretion, the trial court's exercise of its discretion either way will not be disturbed on appeal. *Brown v. Dyer*, 489 A.2d 1081, 1084 (D.C.1985); *Gordon v. Raven Systems & Research, Inc.*, 462 A.2d 10, 13 (D.C.1983).[1] [2]

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[1] "It is the responsibility of the trial court, when exercising its discretion, to fashion a ruling by balancing a variety of factors. Among those factors are the length of the pendency of the proceedings, the existence of bad faith or dilatory motive, prejudice to the opposing party, see Bennett v. Fun and Fitness of Silver Hill, 434 A.2d 476 (D.C. 1981); Randolph v. Franklin Investment Co., Inc., 398 A.2d 340, 350 (D.C.1979) (en banc), and we might add, the orderly administration of justice." Gordon v. Raven Systems & Research, Inc., 462 A.2d 10, 13 (D.C.1983)

[2] Resolving one of the issues in this case may involve an analysis of "discretion" as a legal concept, which the Court of Appeals did in *Johnson v. United States*, 398 A. 2d 354 (D.C. App. 1979), as follows:

Discretion signifies choice. First, the decision-maker exercising discretion has the ability to choose from a range of permissible conclusions. The decision-making activity is not ministerial and the various elements of the problem do not preordain a single permissible conclusion. Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L.Rev. 635, 636-37 (1971) [Rosenberg, Judicial Discretion]; Note, Perfecting the Partnership: Structuring the Judicial Control of Administrative Determinations of Questions of Law, 31 Vand.L.Rev. 91, 93-94 (1978) [Note, Perfecting the Partnership]. Second, the decision-maker can rely largely upon his own judgment in choosing among the alternatives. Although the act of choosing will be guided by various legal and other considerations, the decision-maker, and not the law, decides. Rosenberg, Judicial Discretion, supra at 636-37; Note, Perfecting the Partnership, supra at 93-94. In this sense, the core of "discretion" as a jurisprudential concept is the absence of a hard and fast rule that fixes the results produced under varying sets of facts. Langnes v. Green, 282 U.S. 531, 541, 51 S.Ct. 243, 75 L.Ed. 520 (1931).

Applying the standard of review concerning the court's failure or refusal to invoke any equitable powers to find Ms. Wilson liable to the parties on account of any damages associated with the boundary line properly leads to the conclusion that the decision rendered below should be affirmed.

VI. ARGUMENT

Ntaky admits to being a bit confused concerning the errors alleged and the relief sought in Lumbih's Brief (hereafter, the "Brief"). Ntaky takes no position concerning any damage claims of Lumbih against Wilson, as Ntaky was not named in those claims and shares no privity of contract with Lumbih.

To the extent that the Brief seeks to: 1) change the boundary line separating Lumbih's Lot 825 in Square 3024 and Ntaky's Lot 826; 2) otherwise reduce the dimensions of Ntaky's

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The trial court nevertheless must choose wisely so that its judgment reflects "a discretion exercised not arbitrarily or willfully but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." Id. This is to say neither that a determination committed to the trial court's discretion is freed from the restraints of fact and 362*362 the reasoned dictates of law nor that judgment and choice play no part in a trial court's determination of law and fact in a case. The one proposition is untenable; the other is unrealistic. As in its other decision-making activity, the court's substantial freedom of choice in an exercise of discretion must be tempered by rationality.

The concept of "exercise of discretion" is a review-restraining one. The appellate court role in reviewing "the exercise of discretion" is supervisory in nature and deferential in attitude. Cf. Ethyl Corp. v. EPA, 176 U.S.App.D.C. 373, 405-09, 541 F.2d 1, 33-37, cert. denied, 426 U.S. 941, 96 S.Ct. 2663, 49 L.Ed.2d 394 (1976); Greater Boston Television Corp. v. FCC, 143 U.S. App.D.C. 383, 392-94, 444 F.2d 841, 850-52 (1970), cert. denied, 403 U.S. 925, 91 S.Ct. 2229, 29 L.Ed.2d 701, reh. denied, 404 U.S. 877, 92 S.Ct. 30, 30 L.Ed.2d 125 (1971).

An area of trial court discretion is a pasture in which the trial judge can roam and graze freely rendering rulings his appellate betters might not have made, unless and until the higher court fences off a corner of the pasture by announcing that a rule of law covers the situation and has been violated. Until that occurs, the trial judge, wielding discretionary power, need not be right by appellate court lights in order to be upheld. Even if the appellate judges disagree with his call, they will defer to him. [Rosenberg, Judicial Discretion, supra at 650.]

Consequently, when the primary focus of the trial court's role shifts from the facts and law to the sound exercise of judgment, the appellate court, in its review capacity, does not render its own decision of what judgment is most wise under the circumstances presented. Rather, it examines the record and the trial court's determination for those indicia of rationality and fairness that will assure it that the trial court's action was proper.

Matters are committed to the discretion of the trial court and reviewed only for abuse of that discretion to reap the benefits of certain perspectival and institutional advantages.

Lot 826 (and in so doing reduce Ntaky's land ownership rights and its attendant benefits); or 3) impose liability for Lumbih's claimed damages upon Ntaky; Ntaky opposes as stated in the instant brief.

A. **Lumbih sought only to quiet title to a portion of lot 826 in her name and did not otherwise seek an award of damages against Ntaky**.

The claims in the consolidated causes of action presented to the trial court below were as follows:

1. Ntaky's complaint against Lumbih alleging (Count One) Continuing Trespass to Real Property, (Count Two) Nuisance, (Count Three) Monetary Damages, and (Count Four) Injunctive Relief. See Supp. to Joint Appendix at p. 226.
2. Ntaky's Crossclaim against Wilson seeking (Count One) Claim for Damages in the form of Indemnification and (Count Two) Claim for monetary Damages in the event Ntaky is not declared to be the fee simple owner of Lot 826 in Square 3024 in its entirety. See Supp. to Joint Appendix at p. 234.
3. Lumbih's Counterclaim against Ntaky for (Count One) Constructive Trust, (Count Two) Action to Quiet Title, (Count Three) Adverse Possession, (Count Four) Easement, and (Count Five) Negligence. See Supp. to Joint Appendix at p. 242.
4. Lumbih's Third-Party Complaint against Wilson for (Count One) Indemnification/Contribution, (Count Two) Negligence, and (Count Three) Breach of Contract. See Supp. to Joint Appendix at p. 248.

All of Lumbih's Counterclaims against Ntaky were dismissed by Judge Jose Lopez's July 19, 2021 grant of partial summary judgment in favor of Ntaky except for her Count Two Action to Quiet Title. JA 000004 – 000005 & Supp. to Joint Appendix at p.254. This count for all intents and purposes was the mirror image of Ntaky's claim for Injunctive Relief in that it sought a declaration that Lumbih was the fee simple owner of a portion of Lot 826 in Square 3024, and not Ntaky. As between Lumbih and Ntaky, the sole issue presented to the trial court for resolution was the determination of the boundary line separating Lots 825 and 826 in Square 3024 and the resulting property rights of those two parties. JA 000010 – 11.

Lumbih did not seek an award of damages against Ntaky in the Court below.

B. **Wilson lacked the capacity to transfer title to any portion of lot 826 to Lumbih after she had already sold the entirety of lot 826 to Ntaky. Lumbih's deed identifies the property sold to her by Wilson as lot 825 in square 3024 and that is what was transferred to Lumbih. The Trial court correctly concluded that Ntaky is the fee simple owner of the entirety of Lot 826 in Square 3024.**

The Trial court determined and declared that Ntaky is the sole legal and equitable owner of the entirety of Lot 826 in Square 3024 in the District of Columbia. JA 000001 -16. This finding of fact and conclusion of law was supported by substantial and compelling evidence in the form of testimony by licensed District of Columbia Surveyor Anthony G. Currie and his boundary survey as to the location and dimensions of the boundary line separating Lots 825 and 826 in Square 3024 (See Supp. to Joint Appendix at p.23 to 39, and 274), a Boundary Survey by licensed surveyor Bruce Landes admitted as Ntaky's Exhibit 6, Ntaky's earlier recorded deed admitted as Ntaky's Exhibit 3, and the Records of the Office of the Surveyor of the District of Columbia admitted as Ntaky's Exhibits 1 and 2. The court correctly noted, and based its decision on, the legal conclusion that "to the extent the September 24, 2010 deed purported to transfer some of Lot 826 to Ms. Lumbih, it was ineffective. This is because '[w]hen [two] or more deeds of the same property are made to bona fide purchases for value without notice, the deed or deeds which are first recorded according to law shall be preferred.' D.C. Code § 42-406. As the deed to Ntaky preceded the deed to Ms. Lumbih—and the Parties do not appear to contest any issues of recordation—Ntaky's deed is preferred." JA 000008.

As of the date of Lumbih's acquisition of Lot 825 in Square 3024 as manifested by her deed admitted as Ntaky's Exhibit 4, Wilson did not own ANY PORTION of Lot 826 to legally transfer to Lumbih. Ntaky's Exhibits 3 and 4. Lumbih's deed was admitted into evidence as

Ntaky's Exhibit 4. It identifies the property sold to her by Wilson as lot 825 in square 3024 and that is what was transferred to Lumbih.

There is no basis to overturn or reverse the legal conclusion reached by the trial court that Ntaky is the fee simple owner of lot 826 in square 3024 in its entirety.

C. **The trial court did not have any power to modify or alter the records of the Surveyor for the District of Columbia or the Recorder of Deeds for the District of Columbia, could not modify Ntaky's deed to lot 826 in square 3024, and there is no basis to impose liability against Ntaky in favor of Lumbih for damages associated with her claims against Wilson**.

Ntaky is unclear concerning the intent and impact of Lumbih's Brief and its allegations. Specifically, it does not know precisely what to make of Lumbih's assertion at pages 3 and 4 of her Brief where it states:

> The Trial Court should have exercised its equitable powers to fashion a just result between the parties because the Court found the boundary line to be out of place in the sense that it would have befitted all involved the boundary line were aligned with the "facts on the ground". In other words, if the property line was "in the right place" it would have run between the two pertinent addresses in a place that obviated the trespass, thereby eliminating Ms. Lumbih's liability to Ntaky, and allowing Ntaky to proceed with any potential sale, free and clear of the cloud on title. Having found that Ntaky had superior title and that the boundary line thus established was unworkable between Ntaky and Ms. Lumbih, the Trial Court should have invoked its equitable powers to find Ms. Wilson liable to the parties on account of any damages associated with the boundary line.

To the extent that Lumbih is including Ntaky in the reference to "the parties" and is trying to suggest that the lot line separating the two subject parcels should have been relocated by the trial court, Ntaky denies that there was any legal or just basis for a court of law to do that. It is not fair or equitable to alter the land records of the District of Columbia and those of the Office of the Surveyor of the District of Columbia to benefit Lumbih's interests to the diminishment and prejudice of Ntaky's interests.

Ntaky disputes Lumbih's assertion that declaring that the property line separating Lots 825 and 826 in Square 3024 be moved to benefit Lumbih's interest and align with the exterior wall of the encroachment onto Lot 826 would "*befit*" Ntaky. Such a result would have taken 20-40% of Ntaky's frontage on 9th St. NW and greatly diminish the value, potential and utility of its real property interests. See Ntaky Exhibits 6 and 7, testimony of Nelson Ramos at 10/4/22 Trial transcript, P.19 at line 19 to P. 20, line 2. Ntaky has been paying the real property taxes on the entirety of Lot 826 in Square 3024 since August of 2009, and holds legal title to it as well. See JA 000106 lines 18-21 & Supp. to Joint Appendix at p. 266 & 275 (Ntaky Exhibits 3 & 8).

Lumbih's unsupported statement at page 4 of the Brief that "Ms. Wilson conveyed a lot of land to Ntaky that was too wide" is also a false one. The Lot 826 that was sold to Ntaky in August of 2009 had been legally subdivided to a width of twenty (20) feet fronting on 9th St. NW and that is what was conveyed to Ntaky and purchased by it for valuable consideration in an arms-length transaction. See Supp. to Joint Appendix at p. 265, 266, 272, & 274 (Ntaky Exhibits 2, 3, 6 and 7).

Ntaky disputes Lumbih's characterization of its complaint against Lumbih for declaratory relief quieting title to real property held in its name. At page 4 of the Brief Lumbih suggests that "Ntaky had sued Ms. Lumbih for something that Ms. Wilson had done, and not for something that Ms. Lumbih had done." The record is clear that Ntaky sued Lumbih to remove encroachments existing on its property that benefitted Lumbih and which Lumbih had refused to remove voluntarily. Essentially, it was an *in rem* proceeding seeking declaratory and injunctive relief. See Supp. to Joint Appendix at 226. The complaint was not filed to protest something Wilson had done. If so, Wilson would have been joined as a party to that complaint.

Ntaky's crossclaim against Wilson was only advanced in terms of liability in the event the prayer for injunctive and declaratory relief was denied or dismissed. See Supp. to Joint Appendix at 234. Given the finding that Wilson conveyed the entirety of Lot 826 to Ntaky which Ntaky had bargained to receive, the claim for damages against Wilson failed. JA 000011 at footnote 3 ("Because the Court has determined that Ntaky's quiet title claim has merit, it need not address Ntaky's damages claim against Ms. Wilson"). For this reason, Ntaky is confused by Lumbih's allegation on appeal that "the Trial Court abused its discretion by concluding that Ntaky's claims against Ms. Wilson were irrelevant once it determined the quiet title claims in Ntaky's favor." Brief at page 5. If the crossclaim allegation only ripened if and to the extent that Ntaky was not found to be the fee simple owner of Lot 826 in its entirety, how is it possible to fault the trial court in finding that the claim was irrelevant since Ntaky WAS found to be the fee simple owner of Lot 826?

At trial, Lumbih had opposed Ntaky's quiet title claim by suggesting that the doctrines of laches and mutual mistake applied to negate Ntaky's claim. Laches was found not to apply given the fifteen year statute of limitations applying to claims involving title to real property. JA 000008 – 000009. Neither did the court find applicability of the doctrine of mistake given that Ntaky's "August 21, 2009 deed (Ntaky Exhibit 3) demonstrates that Ntaky intended to purchase all of Lot 826." JA 000010. The fact that there was no privity of contract between Ntaky and Lumbih is also relevant to the mistake argument. The court was not "thoroughly satisfied" by the evidence submitted by Lumbih, and that is what was required in order to find that there had been a mutual mistake requiring equitable reformation. There is no basis to hold that this finding involved an abuse of discretion by the trial court requiring reversal or remand when it was a finding supported by evidence admitted at trial. See, e.g. JA 000010.

This same finding speaks against use of the doctrine of equitable indemnification against Ntaky's interest in Lot 826 (if that is what the Brief seeks to do). Ntaky was not a party to any contract or agreement between Lumbih and Wilson and had no privity of contract with Lumbih. To apply the doctrine of equitable indemnity (also known as implied indemnity) there needs to be a relationship between the parties involved. There is no prior relationship between Ntaky and Lumbih. If there is found to be some abuse by the lower court in not applying the doctrine as Lumbih alleges, it should not affect Ntaky's declaratory judgment that it owns all of lot 826.

In *Caglioti v. District Hosp. Partners, Lp*, 933 A.2d 800 (D.C. 2007), the court noted that "[w]e have previously recognized a cause of action for equitable indemnity whereby one of the several persons liable for the same harm, or an exacerbation of the harm, discharges their liability, and then seeks to be indemnified by the non-settling parties. Washington Hosp. Ctr., supra, 722 A.2d at 332; see also RESTATEMENT (THIRD) OF TORTS § 22 (2003)".

In general, "[i]ndemnity is a common law remedy that arises from an express or implied contract giving the right of complete reimbursement to one party who has been compelled by law to pay what the other party should pay ... [a]n obligation to indemnify exists where the equities of the case and the relationship of the parties support shifting responsibility from one party to another." Howard Univ. v. Good Food Servs., Inc., 608 A.2d 116, 122 (D.C. 1992) (internal citation omitted); accord Nat'l Health Labs., Inc. v. Ahmadi, 596 A.2d 555, 557-58 (D.C.1991). "Unlike contractual indemnity, equitable indemnity is based upon principles of equity and 'implied out of a relationship between the parties to prevent a result which is unjust" Caglioti, supra, citing Howard Univ., supra, 608 A.2d at 123.

The DCCA's prior analysis indicates that there needs to be a contract (implied or express) between the alleged tortfeasor (Lumbih), who has been compelled by law to pay, and the party that should pay and/or be found liable (Wilson). There is no contract between Ntaky and Lumbih which either party breached. Lumbih may have the right to receive reimbursement from Wilson for any demonstrated damages due to Ntaky enforcing its declaratory judgment, but this would be an issue of responsibility for damages incurred by Lumbih shifting to Wilson since the Lumbih's deed created a contractual relationship between only them.

It is significant that Ntaky was awarded no damages against Lumbih at trial. The only "liability" Lumbih has is to limit her improvements and property interests within the confines of the Lot 825 that she owns. The thrust of the trial court's holding as between Ntaky and Lumbih is that Lumbih cannot use or occupy property which she does not own, and that Ntaky can use and occupy property that it does own.

In short, there is no basis for an application of equitable indemnification principles shifting burdens or liabilities to Ntaky here, and there were no facts in support of a conclusion that there was an abuse of discretion by the trial court by not reconfiguring Lot 826 in Square 3024 to Ntaky's detriment. There is no basis to overturn or reverse the legal conclusion reached by the trial court that Ntaky is the fee simple owner of lot 826 in square 3024 in its entirety, and there is no basis to impose liability against Ntaky in favor of Lumbih for damages associated with her claims against Wilson. If there is a belief that there was an error somewhere in conveying property interests, the party responsible for those errors should bear the consequences. Ntaky is not the responsible party. Imprecision or lack of attention to detail by Lumbih and/or Wilson or their contractors could be. Burdening and punishing Ntaky is not appropriate and only widens the sphere of possible damages, prejudice, and harm. Ntaky's land

and contract rights are entitled to the protection of the court and the judgment entered in the case below.

D. **The Trial court correctly concluded that Lumbih sufficiently undertook an effort to examine the District of Columbia Land Records to retain responsibility for the risk of a partially inaccurate description of Lot 825 in Square 3024 contained in her deed of conveyance.**

The Trial court found that Lumbih's breach of contract claim against Wilson depended upon whether the September 24, 2010 deed imposed on Ms. Wilson an obligation or duty to confirm that the lot dimensions were correct. JA 000013. In evaluating this issue, citing Maryland law, the court observed that "if . . . the means of knowledge are at hand, and the purchaser undertakes to make an examination of the land records, he cannot say that he was deceived and injured by misrepresentations of the vendor. . . . Thus, the crucial question is whether [the plaintiff]—by himself or through his agent—undertook an examination of the land records. (Id. at 1050 (emphasis original))." JA 000014. The court went on to note that Lumbih "obtained a survey of Lot 825 from Vyfhuis which, although it specified that it was "not a property line survey," was nonetheless incorporated into the deed by Dolphin." JA 000014. There was evidence received that Lumbih was represented at all times by a real estate agent in her purchase (10/3/2022 Transcript at p. 215, lines 11-17.; 10/03/2022 Transcript at p. 216, lines 20-22, JA 000038), and that the choice of a settlement agent belongs to the buyer, whether knowingly exercised or not.[3] In addition, there was evidence admitted at trial showing

[3] Lumbih offers a self-serving and unsubstantiated conclusion at JA000038 that " Ms. Wilson's testimony about this was not credible because she suggested that Ms. Evan's was Ms. Lumbih's choice, but Mr. Nelson and Ms. Lumbih both testified that Mr. Wilson brought them to Ms. Evans." The possibility that an agent or a party might have made a referral or suggestion for a settlement agent does not override the right of a buyer to choose. Lumbih had an agent representing her, and that agent could have advised to go somewhere else or suggest one on her own.
22. Dolphin and Evans was selected by Lumbih as the settlement agent and handled the closing on the sale of Lot 825 to Lumbih on behalf of Lumbih. 10/04/2022 Transcript at p. 97, lines 8-14; Transcript at p. 114, lines 17-

that Lumbih, as any buyer of real property using a consumer loan must do, obtained a title report, a title abstract, a title binder, and title insurance covering both herself and her lender against defects in title to Lot 825 in Square 3024. See Ntaky Trial Exhibit 10 (Lumbih's HUD-1 Settlement Statement for her purchase) at lines 1101, 1103, 1104, 1110, and 1111. This paired with the constructive and imputed knowledge of the prior recording of Ntaky's deed a year earlier and the records of the Office of the Surveyor for the District of Columbia provides more than ample and substantial basis for the trial court's finding that Lumbih undertook to examine relevant land records and did not just blindly rely on any representation of Wilson.

VII. CONCLUSION

The reasons for affirming the decision of the Trial Court below as to the rights and interests of Ntaky are made clear by reviewing:

a) Ntaky Exhibits 1,2,3,4,6, and 7 (Supp. to Joint App. 234-251);

b) the March 10, 2023 Final Order and judgment below;

c) Judge Jose Lopez's July 19, 2021 grant of partial summary judgment in favor of Ntaky. See Supp. to Joint Appendix at p. 254.

d) the portions of the record referenced in Ntaky's brief above.

In the Court's review of the proceedings below, as stated in ***Rosenberg***, Judicial Discretion, supra at 650, the "area of trial court discretion is a pasture in which the trial judge can roam and graze freely rendering rulings his appellate betters might not have made, unless and until the higher court fences off a corner of the pasture by announcing that a rule of law

19;.10/03/2022 Transcript at p. 210, lines 22-25. In any event, Ntaky was not responsible for any error at settlement, and it already owned lot 826 in any event.

covers the situation and has been violated. Until that occurs, the trial judge, wielding discretionary power, need not be right by appellate court lights in order to be upheld. Even if the appellate judges disagree with his call, they will defer to him."

Lumbih cannot avoid the impact of the records of the Office of the Surveyor for the District of Columbia, the Office of the Recorder of Deeds for the District of Columbia, and the actions of agents serving her in the purchase of real property interests acting on her behalf by ignoring records and documents which would have clearly identified and telegraphed the problem she now complains of. She proceeded at her own risk.

To the extent her appeal seeks to alter the boundary line separating Lots 825 and 826 in Square 3024, her appeal must fail. As stated above, Ntaky takes no position on claims Lumbih may have against Wilson. To the extent that the Court of Appeals finds that there was an exercise of discretion in finding that Ntaky is the sole fee simple owner of Lot 826 in Square 3024 and that Lumbih held no rights, equitable or otherwise, as to any portion of that land, there is no basis to hold that there was an abuse of that discretion. To the extent that the Court of Appeals finds that the conclusion reached by the court below as to Ntaky's rights and interests result from rule of law and not the exercise of discretion, there is no basis to reverse those findings and take property rights away from Ntaky. Where misrepresentations and frivolous claims are advanced as a substitute for good cause and a good faith request for exercise of the court's discretion, the decision not to exercise the requested discretion is both justified and non-reviewable.

WHEREFORE, it is respectfully requested that this Honorable Court deny Gerardine Lumbih's appeal as to Ntaky Management LLC and affirm the decision of the Superior Court in establishing that Ntaky Management LLC is the sole legal owner of Lot 826 in Square 3024

in fee simple and entitled to all rights attendant to such ownership at the risk, peril, and expense of Lumbih as to any encroachments, with all costs assessed to Lumbih.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that on the 5th day of February 2024, a copy of the foregoing Appellee's brief and all supporting materials was sent by first class mail, postage prepaid, to

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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Andrew J. Lavin
Signature

23-CV-298 & 23-CV-299
Case Number(s)

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Name

2/05/2024
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