REAL ESTATE CASE LAW AND LEGISLATIVE UPDATE

Spring 2010

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REAL PROPERTY, PROBATE AND TRUST SECTION MEETING

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CASE LAW AND LEGISLATIVE UPDATE – SPRING 2010

The case law in this summary is organized under topical references for the general area of law primarily discussed in the case. This review covers recent decisions by the Court of Appeals starting in Volume 148 through Volume 153 of Washington Appellate Reports (Wn.App.) and Supreme Court Decisions in Volume 166 and Volume 167 of Washington Second Reports (Wn.2d). A summary of new laws enacted during the 2010 Regular and Emergency Sessions of the Washington Legislature affecting real estate transactions follows the case law summary.

Citations to cases within the last five years that relate to the same general topic appear at the end of the topical categories, but are not summarized.

CASE LAW UPDATE

I. Interests in Land

A. Conveyances/Estates

_Estate of Borghi, 167 Wn.2d 480 (2009)_

_Facts:_ Jeanette Borghi bought a residence on a real estate contract in 1966. She subsequently married. In 1975, a fulfillment deed was granted to Jeanette and her husband, Robert. Jeanette died intestate in 2005. Jeanette’s son by a prior marriage challenged the characterization of the house as community property. The trial court ruled that the property was community property and passed to Robert as the surviving spouse. The Court of Appeals reversed, and held that the property was Jeanette’s separate property, relying on _In re Estate of Deschamps_, 77 Wash. 514 (1914).

_Holding:_ The Supreme Court affirmed the Court of Appeals. The character of the property as separate property was determined at the time of acquisition. It is presumed to remain separate property, unless there is a demonstration of the intent to convert the property into community property. This is generally accomplished through a community property agreement or a quit claim deed. The Court specifically disapproved any reading of _In re Marriage of Hurd_, 69 Wn. App. 38 (1993) and _In re Marriage of Olivares_, 69 Wn. App. 324 (1993) that a gift presumption arises when the title to the property is changed from the name of the single spouse to both spouses.


_Facts:_ Albert Luth bequeathed certain property to the Kennewick Public Hospital District. The bequest provided as follows:

This devise is in perpetuity, and the property shall at no time be transferred, incumbered or otherwise alienated from the purposes herein expressed and intended, and if the same or any part thereof, shall at any time be conveyed,
transferred or incumbered, by deed, mortgage or otherwise, then in such case I do
device all of the above mentioned real estate to the County of Benton, and in
default thereof, to the State of Washington.

The Hospital sued to quiet title to the property in 2006. The State and County waived any claim
to the property. Any claim to the property by Luth’s other heirs was held by the Diocese of
Olympia for the Episcopal Church. The parties all agreed that the executory interest of the State
and County violated the rule against perpetuities and was therefore void. The trial court quieted
title in the District and the Diocese appealed.

**Holding:** The trial court was affirmed. The effect of striking the County and State’s
interest was to remove the condition of defeasibility. Once this condition was removed, the
conveyance was in fee simple absolute. The argument advanced by the Diocese that the
conveyance should be considered to be a fee simple determinable estate was rejected. There was
no indication in the language of the deed that indicated that Luth intended to create a reverter in
favor of his heirs. Further, if the conditions in the bequest were enforced, they would constitute
an unreasonable restraint on alienation.

**In re Deed to Camp Kilworth,** 149 Wn.App. 82 (2009)

**Facts:** William and Augusta Kilworth conveyed land now within Federal Way,
Washington, to the Boy Scouts of America in 1934. The deed contained express conditions that
that the Boy Scouts “shall never convey, lease or encumber said premises . . . and shall never
allow the same to come into the possession of any other party.” A reversionary clause provided
that upon violation of the express conditions, title would revert to Kilworth and their heirs “as
though this conveyance had never been made.” Due to changes in the surrounding area, the
Scouts initiated a lawsuit in 2006 to reform the deed to remove the reversionary clause so that
the property could be sold to fund activities at other Scout camps. The trial court ruled in favor
of the Scouts and the Kilworth heirs appealed.

**Holding:** The trial court erred in concluding that the conditions in the deed created a trust
that allowed the removal of the reversionary clause. Granting a gift does not create a trust
without the express intention to do so. The Court approved the guidelines in the Restatement
(Second) of Trusts § 11 (1959) which stated that the grant of an interest in property subject to
a condition subsequent does not, because of the condition, create a trust. The deed
unambiguously granted title to the Scouts so long as the Scouts followed certain conditions. If
the conditions were not met, the property reverted to the Kilworth heirs. The Court
differentiated the outcome in Niemann v. Vaughn Community Church, 154 Wash.2d 365, 113
P.3d 463 (2005), which dealt with a use restriction in a deed, but the instrument contained no
reversionary clause.


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B. Mining Claims


C. Fixtures

*No reported cases within the last five years.*

II. Purchase and Sale Transactions

A. Brokers/Brokerage Agreements

*Boguch v. The Landover Corporation, 153 Wn.App. 595 (2009)*

**Facts:** In February, 2001, Boguch entered into an exclusive listing agreement with Windermere for the sale of his waterfront residence in Hunts Point. The property was listed for $3.85 million; the price was subsequently reduced to $3.45 million, but no offers were received by March, 2002. In the course of marketing the property, the realtors had an aerial view of the property prepared which showed the boundaries to be more irregular than they actually were and created the impression that foliage on the adjoining property might interfere with views from the Boguch property. The property did not sell, and in 2004, Boguch became aware that the picture of the property posted on the Windermere website inaccurately depicted the property. He mentioned this to the realtors, who removed the picture from the website. Boguch allowed the listing to expire in July, 2004. Boguch listed the property with another realtor and sold the house in April, 2005 for $2.975 million. Boguch then sued Windermere for negligence, claiming that but for the inaccurate picture of the property, he would have sold the house sooner for a higher price. The trial court dismissed the claim on summary judgment and awarded attorney fees to the brokers involved in the lawsuit.

**Holding:** The dismissal was affirmed. When acting as a seller’s agent, a realtor owes the seller a nonwaiveable duty to exercise reasonable skill and care in representing the seller’s interests. RCW 18.86.040(1). To prevail on his claim, however, Boguch had to show that the negligence of the brokers was the proximate cause of his injury. To establish proximate cause, Boguch had to demonstrate that, if the realtors had not posted the photograph erroneously depicting his property’s boundary lines on the Internet, he would have sold the property on more favorable terms than he eventually did. None of the evidence that Boguch presented established this fact. The claim that the brokers breached their duty under Chpt. 18.86 RCW was a tort claim that did not arise under the brokers’ contract. Since the claim was not related to the contract, the trial court was in error in awarding fees based on the attorney fee provision in the contract.

B. Claims Against Buyers/Sellers


**Facts:** Three actions were consolidated on appeal. Satomi LLC developed the Satomi Condominiums. The purchase agreement signed by the purchasers of the units contained an arbitration clause. After an action was commenced by the HOA against the developer, the developer sought to stay the action pending arbitration. The trial court denied the motion to compel arbitration. The Court of Appeals affirmed the trial court. Blakely Village developed a condominium project, and the same scenario followed – suit by HOA and motion to stay the proceedings pending arbitration. The trial court granted the motion, but lifted the stay following the Court of Appeals decision in Satomi. The trial court continued the stay with respect to all claims that did not arise under the Washington Condominium Act. The Pier at Leschi was a condominium conversion. An arbitration provision was included in a limited warranty provided to the buyers. Following a suit by the HOA, the trial court refused to enforce the arbitration provisions. The developers in all three cases asserted that the Federal Arbitration Act preempted the provisions of the WCA that required a judicial resolution of disputes associated with warranties imposed by the WCA.

**Holding:** The Supreme Court concluded that the agreements to purchase the condominium units with agreements affecting commerce. The substantial use of out of state materials in the projects rendered them subject to the Commerce Clause and thus within the scope of the FAA. The provisions of former RCW 64.34.100(2) requiring judicial resolution of all rights and obligations under the Condominium Act conflicted with the FAA and were preempted by the FAA. The current enforcement provision in the WCA allowed for arbitration pursuant to RCW 64.55.100, but the arbitration is non-binding. The FAA requires enforcement of binding arbitration agreements, and hence the current enforcement provisions of the WCA are preempted by the FAA. The Court determined that all of the owners in Blakely had agreed to arbitration. As to Leschi, the matter was remanded to the trial court for findings on this issue. Satomi had been settled during the pendency of the appeal, and the Court refused to consider this issue, since the case was moot. The Blakely HOA was bound by the arbitration provisions, since the only damage claimed related to the units, limited common areas and common areas, all of which are owned by the unit owners, as opposed to the HOA. The Court also rejected the HOA claim that the Blakely arbitration provisions were substantively or procedurally unconscionable.

**Torgerson v. One Lincoln Tower, 166 Wn.2d 510 (2009)**

**Facts:** In 2001, three real estate agents agreed to purchase condominium units in the Lincoln Square project in Bellevue, Washington. Each made a deposit and pledge a portion of commission that they would earn from selling units in the project. The purchase agreements provided that a breach by seller “shall enable Buyer, as its sole and exclusive remedy, to terminate this Agreement and recover from Seller that portion of the Deposit paid by Buyer” and recover any sums paid for the improvement of the unit. The project encountered financial difficulty and, after the project was conveyed to a new developer, who assumed the sales agreements, the buyers and seller had a disagreement resulting in the seller terminating the purchase agreements in 2004 and refunding the buyers’ deposits. The buyers sued for specific
performance, money damages and attorney fees. The seller admitted it had breached the agreement, but moved for summary judgment on the grounds that the sole remedy of the buyers was to receive a refund of their deposits. The trial court ruled in favor of the seller, and the Court of Appeals affirmed.

**Holding:** The seller’s position was upheld by the Supreme Court. The Court rejected the claims that the limitation on damages were either substantively or procedurally unconscionable, that the UCC doctrine that general remedies should be made available if a limited remedy causes of a failure of essential purpose and that the limitation violated public policy. The Court noted:

In this case, Buyers are licensed, experienced real estate agents charged with presenting the same purchase and sale agreement to other buyers that they themselves signed. ... They could hardly be said to have lacked meaningful choice. Unlike the vast majority of home buying consumers, these Buyers negotiated to put down only $5,000 deposits on properties that cost $332,220 and $1,318,000. Not only does this seem like a sweetheart deal, but the Buyers negotiated to pay the rest of the deposits in commissions from their work as agents for the condominium development, and that money was due only seven days prior to closing or at closing. The status of these Buyers as sophisticated real estate agents who had an opportunity to modify the contracts distinguishes this case from one involving the usual consumers in real estate transactions. Rather than hiding in a maze of fine print, the remedy limitation clause was in the same size font as other key provisions and set off in paragraph 21, which was clearly labeled "DEFAULT AND REMEDIES.


**Facts:** Four families sued Quadrant alleging various defects in homes which they had purchased. Quadrant sought to have the claims resolved by mediation; the trial court refused to stay the proceedings pending the arbitration. The trial court refused to enforce the arbitration provision on the grounds that the arbitration provision was unconscionable.

**Holding:** The Court of Appeals reversed. The arbitration clause was valid, and the arbitrator had jurisdiction to decide whether the agreement containing the clause requiring arbitration was valid. The trial court had jurisdiction only to entertain a challenge to the arbitration clause itself, not the entire contract which contained the arbitration agreement.

... if a party makes a discrete challenge to the enforceability of the arbitration clause, a court must determine the validity of the clause. RCW 7.04A.060(2). If the court finds as a matter of law that the arbitration clause is enforceable, all issues covered by the substantive scope of the arbitration clause must go to arbitration. RCW 7.04A.060(2), (3).

**Facts:** Morrison agreed to sell his property in Vancouver, Washington, to Killian. Killian intended to develop the property as a commercial development that might include condominiums. Morrison attached to the purchase agreement an addendum that was intended to grant him an option to acquire a residential unit in the development if constructed by Killian. As the transaction proceeded to closing, the parties could not agree upon the language of a memorandum to be recorded at closing that would evidence the option. The disagreement appeared to concern whether the option would be binding upon a purchaser from Killian in the event Killian sold the property to another developer. Morrison refused to close. Killian sued for specific performance. The trial court granted specific performance and also awarded Killian damages sustained by reason of the inability to complete the transaction to satisfy a Section 1031 deferred exchange and attorney fees.

**Holding:** The Court of Appeals reversed. The option language added to the purchase agreement resulted in the agreement becoming an agreement to agree. The language indicated that Morrison intended to negotiate a binding option as part of the transaction. The terms of that option were never finalized and therefore the entire agreement was not binding on either buyer or seller.

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**Facts:** Waters Edge Associates converted an 18 building, 138-unit apartment project into a condominium and sold the units. The HOA subsequently sued the developer for damages, alleging various theories, including misrepresentation, breach of implied warranties and various violations of the WCA. Some of the claims were dismissed as time barred. Farmers Insurance defended the developer, and appointed defense counsel. Farmers defended under a reservation of rights, and the defendants also retained coverage counsel. Ultimately, after various machinations among counsel, the defendants stipulated to a judgment of $8.75 million, with a covenant not to execute, paid $215,000 to the HOA and assigned any bad faith claim against Farmers to the HOA. The defendants were to be released, and the release was not conditioned upon the trial court’s determination that the settlement was reasonable. At the reasonableness hearing with the trial court, Farmers was allowed to intervene. The trial court determined that the $8.75 million settlement was not reasonable, and that a reasonable settlement would have been $400,000. The HOA moved for entry of the judgment against the defendants, which the trial court refused. The trial court then dismissed all of the remaining HOA claims.

**Holding:** The judgment was affirmed. The trial court properly considered the relevant factors related to the proposed settlement. The trial court properly considered the defenses that the defendants had to the HOA claims in concluding that the settlement was unreasonable. Given that the HOA had released all of its claims against the defendants, the dismissal of the case was appropriate rather than entry of a judgment that was not supported by any findings made by the trial court.
**Thompson v. Lennox, 151 Wn.App. 479 (2009)**

**Facts:** Thompson sold a lot to Lennox subject to height restriction that was intended to preserve Thompson’s view. During the construction of Lennox’s house, a dispute developed as to the allowable height of the house and Lennox ultimately prevailed. She was awarded $60,000 in attorney fees and costs. Thompson appealed, but failed to file an opening brief. The matter was remanded to superior court for “further proceedings in accordance with the determination of that court.” Two months after the ruling dismissing the appeal, Lennox sought an award of additional attorney fees. The trial court awarded fees incurred by Lennox on appeal. Thompson appealed.

**Holding:** The Court of Appeals held that the trial court was without authority to award additional fees. After the mandate was issued by the Court of Appeals, Lennox was foreclosed from seeking fees on the appeal. Those fees and costs should have been sought from the appellate court while the appeal was pending.


**Facts:** The Jackowskis purchased a home located in Mason County from the Borchelts in 2004. In completing the Form 17, the Borchelts checked the “no” box as to whether there had been any soil instability. There was also attached to the Form 17 a letter from the County regarding critical areas that referred to a geotechnical report that had been obtained by the Borchelts. This material was provided to the Jackowskis. The sale closed on June 30, 2004. On February 3, 2006, the house slid causing damage to the sheetrock and doors to stick. Jackowski sued the Borchelts seeking rescission or damages for fraud, negligent misrepresentation and fraud; they also sued their broker and the sellers’ broker alleging that they knew or should have known that the property was in a landslide area and failed to disclose that fact. The trial court dismissed the claims against Borchelts relating to fraud, breach of contract, rescission and negligent misrepresentation on the grounds that the economic loss rule barred these actions. The claims against the buyers’ brokers were also dismissed on the economic loss rule. The trial court also struck the plaintiffs’ jury demand.

**Holding:** The Court of Appeals agreed with the trial court that the claims relating to misrepresentation were barred by the economic loss doctrine. The Court rejected the Jackowskis’ attempt to characterize all of the claims as arising from a life threatening situation, and therefore exempt from the economic loss rule. The trial court erred, however, in dismissing the claims against their broker. The Jackowskis alleged that the brokers breached their fiduciary duty and, pursuant to RCW 18.86.110, these common law claims were retained by the Jackowskis. The Court held that RCW 18.86 does not abrogate professional and common law duties of agents and these claims are not barred by the economic loss rule. Similarly, the claim for rescission was outside of the economic loss rule and Jackowski should be allowed to pursue the claim for rescission based upon alleged misrepresentations. The breach of contract claims against the Borchelts were not properly before the court and the trial court erred in dismissing these claims. Although the trial court properly dismissed the fraud claims relating to the location of the property in a landslide area, the dismissal of fraud claims relating to the presence of fill on the property were in error, since there was no evidence presented that demonstrated that this
condition was either known to Jackowski or easily discoverable. Finally, given the mixed legal/equitable nature of the claims, the trial court did not err in striking the jury demand.


**Facts:** DeMers sold a house to Cox in 2000. DeMers had owned the house since 1977, but had used the house as a rental since 1995. Cox purchased the house for $162,500, which was $5,000 below the asking price. DeMers agreed to pay for a roof inspection, pest inspection and a septic inspection. No warranties were made by DeMers concerning the physical condition of the house. DeMers did deliver a Form 17 Disclosure Statement to Cox that did not note any defects and contained the admonition that the buyer should retain an inspector. Cox, against the advise of the realtor, did not have the house inspected and waived contingencies. The pest inspection, performed by O’Brien, did not note any problems with the house. After closing, Cox noticed cracked and loose bathroom tiles and discovered that the walls of the bathroom and sun room were rotten. O’Brien returned to the house and performed some corrective work. In December, 2001, Cox sued O’Brien for damages arising from a negligent inspection. In August, 2004, O’Brien filed an amended answer and third party complaint adding DeMers as a defendant. Cox settled with O’Brien and received an assignment of his indemnity claim against DeMers which was based on an indemnity provision in the pest inspection contract. The trial court dismissed the indemnity claim on summary judgment. Following a trial, on December 11, 2007, the trial court concluded that the Coxes had failed to make a prima facie case for their remaining unjust enrichment claim; the trial court dismissed this claim. The trial court also ruled that the economic loss rule barred the Coxes’ counterclaims against the DeMers for negligent representation and fraudulent representation, denied the Coxes’ cross motion for partial summary judgment, and dismissed their claims against the DeMers as a matter of law.

_Holding:_ On appeal, the Court of Appeals agreed that the economic loss rule precluded recovery on misrepresentation claims. Coxes sought economic damages to compensate them for the cost of repairing the structural damage to their home. But because these damages were purely economic, the economic loss rule precludes the Coxes from recovering in tort on their contract claim against the DeMers. As to the unjust enrichment claim, the Court held that because DeMers did not know of the defective condition of the house, one of the elements of establishing unjust enrichment – knowledge of receipt of the benefit (i.e. receipt of a purchase price more than the value of the house) – was not established and the claim was properly dismissed.


**Facts:** Cleaver developed several residential lots on a bluff overlooking Puget Sound. The bluff was broken by three “benches” or level areas – one about 20 feet above the water; the second, or intermediate bench at about 200 feet above the water and the upper bench several feet above the intermediate level. Cleaver constructed a house on the upper level and a sports court on the intermediate level on Lot A. Extensive drainage systems were installed and landscaping planted in order to stabilize the bluff area from possible landslides. Jaeger sold Lot A to Cleave in May, 2001. In late 2001, following heaving rains, a landslide occurred on the intermediate level resulting in a drop in the land by 22 inches. Jaeger retained a consultant to advise on stabilizing the area, but not all of the recommendations of the consultant were followed.
spring of 2003, another landslide occurred and the ground dropped 3 feet. Jaeger sued Cleaver in July, 2003, claiming damages from alleged acts of negligence and faulty construction. In January, 2006, another landslide occurred causing the land to drop 8 feet on the north side of the sports court and up to 20 feet on the south side of the sports court. Following a lengthy trial, the jury found that Jaeger had suffered more than $400,000 in damages, but that Jaeger’s own negligence was responsible for 85% of the loss. A judgment of $65,716.80 was entered against Cleaver.

Holding: The jury verdict was affirmed. Substantial evidence was presented that Jaeger’s own actions contributed to the loss. Evidence was presented that the sump pump that was part of the drainage system was allowed to become repeatedly clogged and failed; Jaeger’s use of water was excessive for the capacity of the property’s septic tank; and Jaeger cleared vegetation that had been planted to stabilize the slope. Substantial evidence also supported the claim that Jaeger failed to mitigate damages – the consultant’s recommendations were not followed after the 2001 slide; test bores were delayed following the initial slide which would have revealed the extent of drainage problems and a proposed retaining wall (and other less expensive alternatives) was not installed. The trial court did not err in instructing the jury on the theories of comparative negligence and failure to mitigate damages. The Court also rejected Jaeger’s claims that the verdict should be increased to do substantial justice and that the trial court properly refused to allow testimony that Jaeger’s property insurance refused to pay any damages caused by the landslides. There was no evidence to support the allegation that the jury assumed that Jaeger had received insurance funds and there was no evidence presented to rebut Jaeger’s explanation that the retaining wall was not installed because of the lack of funds, the trial court did not abuse its discretion in refusing testimony concerning the lack of coverage.


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C. Claims Against Third Parties


III. Title Insurance

Campbell v. Ticor Title, 166 Wn.2d 466 (2009)

Facts: In Vickery divided a parcel located in Stevens County into three separate lots, A, B, and C. In 1996, a pedestrian easement was granted for the benefit of Lot C over Lot B so that the owner of Lot C would have access to Deer Lake. The easement was intended to run adjacent to Lot A. Campbell purchased Lot A in 2001 and Edward purchased Lot C in 2005. After he learned that the easement was unusable because the owner of Lot B had constructed a house over the easement area, Edwards sued various parties, including Campbell, seeking a reformation of various deeds to relocate the easement onto Lot C. Campbell tendered defense of the claim to Ticor Title Insurance Co., which had insured Campbell’s deed. Ticor denied coverage and refused to defend. Campbell sued Ticor for declaratory relief and damages. The trial court entered summary judgment in favor of Ticor and the Court of Appeals affirmed.

Holding: The summary judgment was affirmed. Ticor’s duty to defend is established according to Washington law dealing generally with the duty of an insurer to defend. While the duty to defend may be broader than the duty to indemnify under the policy, the insured was required to establish that the allegations contained in Edwards’ complaint were conceivably covered by the Ticor policy. Two policy exclusions – the exclusion for encumbrances not revealed by public records and for encumbrances arising after the date of the policy were applicable to Edwards’ claims. The Court rejected Campbell’s’ argument that the public records exclusion was inapplicable because the easement was revealed by a recorded survey, since anyone examining the record title for Lot A would conclude that the easement as created by the public records did not affect, and was not intended to affect, Lot A. Since there was clearly no coverage under the policy, Ticor had no duty to defend.
IV. Real Property Lending Transactions

A. Usury

*Mackey v. Maurer, 153 Wn.App. 107 (2009)*

**Facts:** On January 4, 2006, Maurer loaned Mackey $4,500, which Mr. Mackey agreed to repay within 30 days. Mackey agreed to pay $500 in interest. Mackey also owed Maurer’s brother approximately $400. Mackey agreed to repay both debts for a total of $5,500 and to sign a quit claim deed to his home in favor of Maurer. On February 1, 2006, Mackey gave Maurer $5,000. Mr. Mackey paid the principal amount of the loan, plus one-half of the contracted interest. Mackey agreed to pay Mr. Maurer the remaining $500 on February 4, 2006. Mackey failed to pay the remaining $500 and Mr. Maurer attempted to evict Mackey from his home for failure to pay the additional $500. Mackey filed an action against Maurer seeking to quiet title in Mackey’s name and alleging statutory and common law usury and a violation of chapter 19.86 RCW, the Washington Consumer Protection Act (CPA). Before trial, Maurer conveyed the house back to Mackey. The trial court found common law usury, but dismissed the statutory claim for usury as time barred and refused to award treble damages under the CPA.

**Holding:** The judgment was affirmed. A plaintiff-debtor may seek application of RCW 19.52.030’s penalties only by an action under RCW 19.52.032, and (2) RCW 19.52.032’s six-month statute of limitations barred Mackey’s statutory usury claim. RCW 19.52.036 provides that “[e]ntering into or transacting a usurious contract” constitutes an unfair or deceptive act or practice occurring in trade or commerce. The statute does not differentiate between establishing a usurious contract’s existence by a common law claim or a statutory usury claim. However, on appeal, Mackey presented no argument that the final three elements needed to establish a private CPA claim were proven (public interest, damage and proximate cause), and the Court refused to review the trial court order because it was inadequately briefed.

B. Priority

*Haselwood v. Bremerton Ice Arena, 166 Wn.2d 489 (2009)*

**Facts:** Bremerton Ice Arena obtained a concession from the City of Bremerton to construct an ice arena on property owned by the City. BIA borrowed $3,775,000 from Haselwood to finance the project, which was secured by a deed of trust recorded against the property comprising the concession area and all improvements. RV Associates was a subcontractor on the project whose work included excavation, installation of below grade utilities and paving. Haselwood’s deed of trust was recorded on September 12, 2002. RV began its work on September 13, 2002. BIA failed to pay RV at the end of its job, and RV filed a lien claiming more than $100,000 was due. BIA defaulted on the Haselwood loan, and Haselwood sued to foreclose its lien. The trial court held that the deed of trust had priority over the lien claim. The Court of Appeals reversed in part, holding that the lien attached only to the improvements installed by RV and the lien was prior to the deed of trust based on the relation back provisions of RCW 60.04.061.
**Holding:** The Supreme Court affirmed the Court of Appeals. Since BIA did not own the land on which the project was developed, the RV lien could only attach to those improvements to the land that were installed by RV. The RV lien had priority over the deed of trust because RV’s work commenced one week prior to the recording of the deed of trust. The Court rejected the argument that the lien could only attach to “land” for purposes of application of the relation-back statute.


**C. Actions to Collect**

**Alhadeff v. The Meridian on Bainbridge Island, LLC, 167 Wn.2d 601 (2009)**

**Facts:** Kitsap Credit Union made a loan to The Meridian on Bainbridge Island, LLC to construct a condominium project. As part of the loan conditions, Meridian obtained from Alhadeff a $1 million letter of credit to serve as additional equity for the project. Alhadeff entered into an agreement with Meridian to provide the letter of credit in exchange for 10% of the profits from the venture. Wells Fargo issued the LOC to KCU. The LOC required that KCU certify in connection with each draw on the LOC that no event of default existed under the loan at the time of the draw. KCU subsequently drew the entire LOC in three separate draws in 2004. At the time of each draw, KCU wrongly certified as to the status of the loan. Following a default on the loan by Meridian in 2006, Alhadeff sued KCU to recover the proceeds of the LOC. The trial court dismissed the claim on the basis of a one-year statute of limitations in the Article 5 of the UCC. The Court of Appeal reversed, holding that the statute of limitations did not apply to Alhadeff’s common law claims of misrepresentation and breach of contract claims.

**Holding:** The trial court dismissal was affirmed. The Supreme Court found that there was no contract directly between Alhadeff and KOC. Section 5-115 of Article 5 of the UCC establishes a strict 1-year statute of limitations for all actions arising to enforce any right or obligation arising under Article 5. The trial court correctly concluded that Alhadeff’s claim arose as a result of the breach of the warranty in Section 5-103 that the beneficiary has the right to draw on the LOC. Since Alhadeff had no independent contract with KCU, his action for recovery of the proceeds wrongfully drawn necessarily had to arise under the warranty contained in Article 5. Hence, the 1-year statute of limitations applied and the claim was barred.


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D. Mortgage Insurance

No cases in last five years.

V. Landlord Tenant


**Facts:** The Dill asserted a claim against their landlord, Equity Residential Properties, asserting that ERP disposed or destroyed property in storage in violation of the Landlord Tenant Act. For purposes of mandatory arbitration under MAR, the Dills waived any damages in excess of $50,000. An arbitrator awarded $45,000 in damages and in a separate award, granted the Dills $27,300 in attorney fees and $975.55 in costs, pursuant to RCW 58.18.230(4). ERP appealed to King County Superior Court, seeking a reduction of the total award to $50,000. The trial court entered judgment on the award without modification and also granted an additional $3,000 in attorney fees.

**Holding:** The award was affirmed. The remedy for an unsatisfactory arbitration award are either a trial de novo or, under limited circumstances, a motion to vacate the judgment on the award. A trial de novo is the sole way to appeal an adverse arbitration award under Chpt. 7.06 RCW arbitration. No appeal is allowed from the entry of the award and ERP’s appeal was rejected. The Dills were award additional fees on appeal.


**Facts:** Optimer leased commercial space from RP Bellevue pursuant to a lease executed in 1997. In April 2008, Optimer demanded arbitration pursuant to a lease provision to resolve certain lease disputes. Optimer prevailed on certain issues at the arbitration and was awarded attorney fees. RP filed a motion to vacate the award, claiming that the arbitrator exceed its authority. The trial court affirmed the award, holding that the parties had contractually waived their right to challenge the results of the arbitration.

**Holding:** The Court of Appeals held that the revised Uniform Arbitration Act, Chpt. 7.04A RCW, applied to the arbitration provision in the lease. By its terms the Arbitration Act applied to all arbitration provisions even if entered into before the effective date of the act on July 1, 2006. The Arbitration Act makes unenforceable contractual provisions waiving the right of a party to seek certain judicial reviews, and the trial court erred in concluding that it did not have jurisdiction to hear RP’s challenge to the arbitration award.


**Facts:** Rousey was a victim of domestic violence. Her landlord, Indigo Realty sought to evict her because of damage to the premises caused by Rousey’s ex-domestic partner. The case was voluntarily dismissed and Rousey sought to have her name redacted from the court records to preserve her ability to rent other premises. The trial court refused her request.
Holding: The trial court was reversed. GR 15 granted authority to the trial court to redact the pleadings to remove Rousey’s name. The trial court failed to apply the five-part test in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30 (1982) in reviewing Rousey’s motion. The matter was remanded to the trial court to consider the motion in light of the factors stated in Ishikawa.


Facts: Whisnand rented residential property from Leda for $800 per month. He rented on a month-to-month basis and there was no written lease. On either January 30 or 31, 2008, Leda posted a document entitled "NOTICE TO TERMINATE TENANCY" on the front door of the residence that Whisnand had been renting. The notice informed Whisnand that Leda was terminating his tenancy effective February 29, 2008. Whisnand did not move out at the end of February, and on March 1, 2008, Whisnand was served with a summons and a complaint for unlawful detainer. These pleadings were filed at the Snohomish County Superior Court on March 5, 2008. On March 13, 2008, Whisnand filed a pro se pleading styled "NOTICE OF APPEARANCE AND ANSWER BY AFFIDAVIT." An order to show cause was granted which ordered Whisnand to appear on April 1, 2008, and raise any defense as to why he should not be removed from the property. The day after the court entered that order, Whisnand mailed two $400 money orders to Leda, with the word "RENT" hand-written upon them. Leda immediately handed the money orders over to his attorney, who deposited them in his trust account. At the show cause hearing, the court commissioner refused to allow Whisnand to testify that the tenancy ran from the 15th of each month to the following 15th and refused to allow any examination of Leda. The commissioner issued a writ of restitution at the conclusion of the hearing.

Holding: The Court of Appeals rejected Whisnand’s claim that the tendering of the rent checks created a new tenancy. While it is true that in an action for unlawful detainer based upon the nonpayment of rent, the landlord waives prior breaches by accepting rent after serving the notice to quit, this was not an action to terminate a tenancy based upon the nonpayment of rent. The action was based upon Whisnand holding over as a tenant after receiving notice his month-to-month tenancy was terminated. No reason need be given for such termination; there is no "breach" at issue, and thus nothing that the voluntary payment of delinquent rent can "cure." Given that Whisnand's eviction could not be forestalled by the payment of delinquent rent, there was no support for his argument that Leda lost the right to have the property restored because of Whisnand's unsolicited rent payment. The Court held, however, that the commissioner erred in not allowing testimony concerning a possible defense to the timeliness of the notice of termination based upon a rental period measured from the 15th day of each month:

... the proper procedure by which a trial court should conduct a RCW 59.18.380 show cause hearing is as follows: (1) the trial court must ascertain whether either the defendant's written or oral presentations potentially establish a viable legal or equitable defense to the entry of a writ of restitution; and (2) the trial court must then consider sufficient admissible evidence (including testimonial evidence) from parties and witnesses to determine the merits of any viable asserted defenses. Because RCW 59.18.380 contemplates a resolution of the issue of
possession based solely on the show cause hearing, the court must either manage its examination in a sufficiently expeditious manner to accommodate its calendar while still preserving the defendant's procedural rights, or it must briefly set the matter over for a longer show cause hearing in which those rights are respected.


**Facts:** Padilla was a long-time resident of Harvest Manor Estate Mobile Home Park. The manager of the park, Commonwealth Real Estate Services, served Padilla with 15-day notices under the Mobile Home Landlord Tenant Act (RCW 59.20) for alleged violations of park rules relating to the maintenance of Padilla’s home. The notices were served on November 20, 2006, June 21, 2007 and July 23, 2007. Following the last notice, Commonwealth commenced an unlawful detainer against Padilla based on RCW 59.20.080(1)(h), which allows termination of a tenancy if three 15-day notices have been properly given within any twelve month period. Commonwealth continued to accept rent from Padilla following the issuance of third 15-day notice and following the commencement of the unlawful detained. The trial court dismissed the action.

**Holding:** The trial court was affirmed. The MHLTA was the functional equivalent of an unlawful detainer statute and must be construed strictly in favor of the tenant. The well-established rule in Washington is that if a landlord accepts rent with knowledge of a prior breach of a lease covenant, the landlord waives the right to evict based on the breach. Commonwealth’s acceptance of rent following the issuance of the third 15-day notice waived the landlord’s right to terminate the lease based on the issuance of the third notice.

_Little Mountain Estates Tenants Ass’n v. Little Mountain Estates MHC, LLC, 146 Wn.App. 546 (2008)_ – Enforcement of waivers under MHLTA.
VI. Easements/Covenants


Facts: In 1982, a group of landowners in Stevens County created a 60-foot wide mutual easement for ingress and egress over an existing road that serviced all of the properties. Haynes owned property that was not included within the original property benefited from the easement, and Haynes had alternative access to his property. Hayne’s son-in-law owned a parcel adjacent to the Hayne’s parcel, and this adjacent parcel was benefited by the mutual easement. After discovering that his residence encroached on adjacent property owned by his son-in-law, Haynes received a quit claim deed to a portion of the property that was originally benefited by the mutual easement. Haynes and his son-in-law began using the easement for all terrain vehicles and other recreational uses. Snyder, a property owner benefited by the mutual easement, sued to enjoin the use by Haynes and the use of the property for off-road vehicle purposes. The trial court entered in injunction prohibiting Hayne’s use of the easement and prohibiting off-road vehicles from operating on the easement.

Holding: The trial court was affirmed. The conveyance was construed to sever the parcel conveyed to Haynes from the dominant estate and incorporate the parcel into the parcels owned by Haynes. The easement was not transferred as an appurtenant right to the parcel conveyed to Haynes. Substantial evidence supported the trial court finding that the easement was misused by off-road vehicles, since those vehicles were not a means of legal ingress or egress to and from the property. The matter was remanded to the trial court to revise the terms of the injunction to comply with CR 65(d).


Facts: Kalich sued Clark in District Court to recover $1,833 in costs incurred in paving an easement road used by both parties. The court entered a judgment in favor of Kalich. Clark and Kalich agreed that the District Court did not have subject matter jurisdiction, since the action was grounded in equity. Clark demanded $10,000 in attorney fees to voluntarily dismiss the action. Kalich refused; Clark appealed to superior court. The trial court agreed that the action was grounded in equity and reversed the judgment. The court then awarded $15,000 in attorney fees to Clark. On a motion for reconsideration, the court reversed its award on the theory that since the district court lacked jurisdiction, the superior court likewise lacked appellate jurisdiction to hear the appeal.

Holding: The Court of Appeals reversed. A court has jurisdiction to award costs, including attorney fees, even where it determines that it lacks personal jurisdiction over a party or subject matter jurisdiction over the claim, as long as a statute authorizes the award. The superior court had jurisdiction over Clark’s appeal of the district court’s judgment. CRLJ 72. And it, therefore, had authority to award attorney fees to Clark if a statute authorized the award even though the court ultimately voided the district court judgment for lack of subject matter jurisdiction. Clark was entitled to fees under RCW 4.84.250, 290, since he prevailed on the appeal and offered to settle the matter for less than his final award. Fees were also awarded on appeal.

Facts: Ahlquist granted an access easement over his property to allowed adjacent property to be developed as a residential subdivision. One of the conditions of the easement was that the houses would not interfere with the view of Lake Chelan from the restaurant on the Ahlquist property. When plans for development revealed that the houses would obstruct views, the owner of the restaurant property who had purchased it from Ahlquist sued the developer of the residential tract and the homeowners’ association established in connection with the development. When a lot owner commenced construction of a house, the lot owner was added as a defendant. The trial court awarded $245,000 in damages based on the diminution of value to the restaurant property as a result of the loss of the view of the lake, plus attorney fees and costs.

Holding: The Court of Appeals rejected the developer’s argument that the easement agreement had not been mutually negotiated and should be construed against the owner of the restaurant property. The finding that the easement was intended to protect views from the restaurant and that houses that were built to a height greater than 16 feet interfered with that view was supported by substantial evidence. The view protection provisions in the easement did not merge into a subsequent right-of-way deed, and the view protection provisions were covenants running with the land. The damages were supported by substantial evidence. The trial court applied the appropriate judgment rate of interest applicable to contracts. The attorney fee award was remanded for further proceedings to enter findings concerning the reasonableness of hours spent and non-duplicative effort.


Facts: Ross and Schwartzberg acquired a lot in Cattle Point Estates on San Juan Island in 1997. Bennett bought a lot in CPE in 2004. In 2002, the HOA for the subdivisions adopted a policy that prohibited rentals of property within CPE for periods of less than 30 days. Ross applied for appropriate business licenses necessary to rent his property on an overnight basis and did so intermittently during 2004 through 2006. In May, 2007, Ross and Schwartzberg commenced a declaratory judgment action to prohibit future transient rentals, rely on a prohibition in the CC&Rs encumbering CPE which stated in part:

[a]ll parcels within said property shall be used for residence purposes only and only one single family residence may be erected on each such parcel. . . [a]ny member may delegate, in accordance with the By-Laws [sic], his right of enjoyment to the common areas and facilities to the members of his family, friends and tenants.

The trial court issued an injunction prohibiting Bennett from renting the property for less than thirty days.

Holding: The Court of Appeals reversed. The trial court erroneously concluded that the rental of the property on a transient basis created a “business” rather than a residential use. Restrictions on use imposed by covenants were to be narrowly construed, favoring the free use of property by its owner. The Court declined to differentiate between long-term and short-term rentals of the property.
On its face, the CPE Covenant does not prohibit the short-term rental of Bennett's house to a single family who resides in the home. The CPE Covenant merely restricts use of the property to residential purposes. Renting the Bennett home to people who use it for the purposes of eating, sleeping, and other residential purposes is consistent with the plain language of the CPE Covenant. The transitory or temporary nature of such use by vacation renters does not defeat the residential status.

_Viking Props., Inc. v. Holm, 155 Wn.2d 112 (2005)_ – Severance of covenant.
_Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass’n, 156 Wn. 2d 253 (2006)_ – Scope of railway right of way easement.

VII. Liens/Judgments/Attachments

_Thompson v. Hanson, 167 Wn.2d 414 (2009)_

_Facts:_ Thompson obtained a $68,000 judgment against PVH as a result of PVH’s default under a purchase agreement for a newly constructed house. PVH was insolvent at the time the judgment was rendered. Thompson then sued Hanson, an owner of PVH, claiming that PVH had transferred property to Hanson in fraud of creditors. The trial court found that the transfer was fraudulent under the UFTA, and entered a judgment for $89,000 against Hanson. The Court of Appeals affirmed, holding that the intent of Hanson was not relevant in determining whether a constructively fraudulent transfer had occurred.

_Holding:_ The UFTA, RCW 19.40.041, defines a fraudulent transfer as one made with the intent to hinder or delay creditors or because of the lack of payment of reasonably equivalent value for the transferred asset. Once a fraudulent transfer is established, a judgment against the first transferee is permitted, and there is no requirement to establish intent on the part of the transferee. The Court rejected the argument that the amount of the mortgage debt assumed by Hanson in the transfer should be an offset against the Thompson judgment. The net equity value
of the property at the time of transfer was still in excess of $100,000, which was greater than the amount of the debt owed to Thompson.


Facts: Treiger and Owens were married in 1997, separated in 2000 and were divorced in 2002. Both Owens and Treiger filed bankruptcy proceedings. In a settlement agreement, the trustee in Treiger’s bankruptcy conveyed all of his interest in the residence which the couple owned in exchange for $215,000 from Owens. In Owens’ bankruptcy, the house was conveyed to her. In 2006, in a state court proceeding, the Superior Court entered a supplementary decree awarding one half of the proceeds from the sale of the house to Treiger. The decree was recorded by Treiger on October 27, 2006. In November, 2006, Bank of America obtained a judgment against Owens for $593,519.24. BofA obtained a writ of attachment against the residence in December, 2006 and the property was sold in 2007. The proceeds from the sale were placed in a trust, and BofA commenced a declaratory judgment to determine the priority of the claims against the proceeds. The trial court ruled that the decree granting Treiger one-half of the sale proceeds was not a judgment and the BofA lien was paid prior to Treiger sharing in the net proceeds. Treiger was awarded proceeds to pay certain money judgments that he had recorded against the property arising from the divorce.

Holding: On appeal, the trial court was reversed. The trial court was correct in its characterization of the house as Owens’ separate property, but was in error in ruling that the divorce decree was not a judgment. RCW 26.09.010(5) provides that the term “[dissolution] decree” includes the term “judgment.” “A judgment creates a lien against real estate in each county where the judgment is recorded.” RCW 4.56.190 and .200 provides that the judgment is a lien on real property of the judgment debtor from the date the judgment is entered in the county in which the real property is located. The supplemental decree was a judgment which created a lien on the property from the date of entry. The judgment lien was prior to BofA’s pre-judgment writ of attachment. Other orders entered in the divorce proceeding and recorded by Treiger were not judgments since they did not make a final adjudication of the rights of the parties.


Facts: Ms. Baker was awarded a $2 million judgment to be paid in $20,000 monthly installments as part of a divorce proceeding. Mr. Baker failed to make payments totaling $100,000. Ms. Baker sought to execute on Mr. Baker’s residence, which he had received from his parents and which had been awarded to him in the divorce proceeding. The trial court awarded a monetary judgment to Ms. Baker, but exempted the property from execution as Mr. Baker’s homestead.

Holding: The Court of Appeals rejected Ms. Baker’s contention that the homestead exemption applied either to the residence or to vacant land, but not both. RCW 6.13.010(1) stated in part:

[T]he homestead consists of the dwelling house . . . in which the owner resides or intends to reside, with appurtenant buildings, and the land on which the same are
situated and by which the same are surrounded, or improved or unimproved land owned with the intention of placing a house or mobile home thereon and residing thereon.

The unimproved parcels adjacent to the property on which the house was constructed constituted land surrounding the dwelling residence and were thus part of the homestead and were exempt from execution.


**Facts:** Diane Hill embezzled over $2 million from Douglas. Hill and her husband, Forrest, declared bankruptcy in 1991, but only the husband was discharged from the embezzlement debt. Douglas retained a judgment against Diane Hill and the marital community. In 2000, Forrest acquired a house in Island County as his separate property. He later quit claimed a one-half interest to Diane. In October, 2002, Douglas filed the judgment with the Island County Superior Court, but did not record it. In December, 2002, Diane quit claimed her interest in the house to Forrest. In 2006, Douglas commenced an action to set aside the deed to Forrest and Douglas claimed that Diane’s interest in the house had been fraudulently transferred. The trial court dismissed the claim.

**Holding:** The trial court was in error when it concluded that Douglas had not claim to set aside the transfer because of the failure to record the judgment. The trial court erroneously concluded that since Douglas had not recorded the judgment to create a lien on the house, the transfer by Diane did not result in any harm to Douglas. Douglas was clearly a “creditor” and had a “claim” as defined by UFTA (RCW 19.40). On its face, the transfer was made for inadequate consideration at a time when Diane was insolvent in light of her obligation under the bankruptcy judgment, which constituted constructive fraud under RCW 19.40.041. The transfer was intended to delay or hinder the enforcement of the Douglas judgment and should be set aside. The Court also rejected the argument that the house had at all times been Forrest’s separate property.

VIII. Homeowners' Associations


Facts: Abers owned two lots in Fawn Lake, a 510-lot recreational property subdivision in Mason County. The subdivision was administered by a Maintenance Commission established pursuant to recorded restrictive covenants. The covenants provided in part that "charges and assessments by the Commission shall be levied in equal proportions against each and every residential lot, or in accordance with service rendered directly to each such residential lot.” Abers combined his two lots pursuant to a Mason County procedure intended to allow an owner of adjacent lots to build across lot lines. Abers contended that the combination was undertaken after discussions with the Commission indicated that following the combination, Abers would pay assessments for only one lot, instead of two. The Commission continued to charge Abers for two lots, and in 2001, the Commission commenced a declaratory judgment action to establish that the assessments were proper. The trial court granted a summary judgment in favor of the Commission.

Holding: The trial court was affirmed. The Court rejected Abers argument that the definition of “lot” in the covenants should be construed to mean a building lot, as opposed to the platted lots. Abers understood the definition of lot to mean the platted lots as evidenced by the payment of dues and assessments on the two separate lots since the time Abers purchased the lots. The Court also rejected the contention that water hookups should be charged on a per owner basis, rather than on a per lot basis. Significantly, the covenants did make some charges based on a per owner basis, so the drafters of the covenants certainly know how to draft such a provision had they intended to do so. The Mason County lot combination procedure could not alter the contractual arrangement that Abers had with the Commission to pay dues and assessments on a per lot basis. Finally, even though Abers used only one set of utility services for the combined lots, the Commission was not required to base its homeowners' fee assessment on the "services rendered." The "or" in the charges and assessments provision gave the Commission the discretion to choose one of two ways to levy charges, and it chose the option of levying against each lot.


IX. Landowner Tort Liability to Others/Insuring Real Property

A. Rules of Liability

_Gates v. Port of Kalama, 152 Wn.App. 82 (2009)_

Facts: Gates slipped and fell on property owned by the Port of Kalama. Prior to commencing an action to recover damages, she did not did not file a verified claim with the Port.

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The Port moved to dismiss the claim for failure to comply with RCW 4.96.020. Gates subsequently filed a verified claim with the Port and unsuccessfully moved the trial court for permission to nullify her prior service of process to allow filing a new complaint within 60 days after submitting a verified claim against the Port. The trial court also refused to dismiss the action on the Port’s motion for summary judgment. The trial court certified its decision to the Court of Appeals.

**Holding:** The Court of Appeals held that the claim statute did not require a verified claim to be submitted to the Port to pursue the claim. Gates complied with the statutory requirements to “locate and describe” the circumstances of her injury. Under RCW 4.96.010 and former RCE 4.96.020(3), she had satisfied the conditions precedent to pursue here claim.


**Facts:** Wirtz helped Grillogly fell some trees on Grillogly’s father’s property in Longview. One of the trees split, causing a cable to hit Wirtz in the head and rendering him unconscious. He subsequently sued Grillogly alleging various theories of negligence. The trial court dismissed the claim on the grounds that Wirtz assumed the risk of injury when he agreed to participate in the tree removal activity.

**Holding:** The dismissal was affirmed. Reasonable minds could not differ on the issue of whether Wirtz assumed the risk of inherent in felling trees. He knew of the risks and he voluntarily participated in the activity. The issue of Wirtz’s status as an invitee rather than a licensee on the property was not addressed, since his assumption of the risk was dispositive of his claims.

**Curtis v. Lein, 150 Wn.App. 96 (2009)**

**Facts:** Curtis was an invitee on property owned by Lein. Curtis walked onto a wooden dock over a pond on the property and fell through the boards. She suffered a broken leg and sued Lein, claiming that Lein knew or should have known about the dangerous condition of the dock and failed to remedy that condition. The trial court dismissed the claim on summary judgment.

**Holding:** The dismissal was affirmed. As an invitee, Curtis was owed a duty of care that requires the landowner to keep the premises in a reasonably safe condition. However, in Washington, liability for the landowner only attaches if the condition is known or should have been known upon an inspection. Curtis alleged that the doctrine of *res ipsa loquitur* to establish liability. While it is true that the failure of the dock was such that application of the doctrine would infer that a dangerous condition existed on the land, the doctrine does not automatically imply that Lein had knowledge of that condition. The evidence presented showed that Lein was unaware of any defect or dangerous condition with respect to the dock and, in light of that lack of knowledge, dismissal was appropriate.

Facts: A fight started at the Long Lake campground after Todd Hegel accused Jesse Van Scoik, Ms. Van Scoik's son, of whistling inappropriately at Mr. Hegel's 14-year-old sister. During the fight, Penny Van Scoik intervened to protect Jesse and was hit on the head with a metal baseball bat by Shauna Van Zandt. The campground was operated on a non-fee basis by DNR, which contracted with Kodiak to provide security services. Ms. Van Scoik sued Shauna Van Zandt, DNR, and Kodiak. The trial court entered a default judgment against Ms. Van Zandt and granted summary judgment dismissing the case against DNR and Kodiak.

Holding: The Court of Appeals rejected the claims of DNR and Kodiak that RCW 4.24.210 provided immunity to them from this action. The Court held that RCW 4.24.210 did not grant immunity for intentional injuries, and as a result, DNR and Kodiak had no immunity from Ms. Van Zandt's intentional injuries. Applying common law standards to the claims, however, the Court determined that there was no duty owed by either DNR or Kodiak to Van Zandt and her claims were properly dismissed.


B. Insurance Coverage - Homeowners & Property


Facts: In September, 2004, the Petersons met with their insurance agent from Big Bend Insurance Agency. The agent was told that the Petersons want to be certain that their insurance was adequate to rebuild their house. The agent said that he would use a replacement cost formula to determine the amount. The calculation was made, but the policy was renewed for only $193,000, which were the old limits increased by inflation. Using the replacement cost formula would have resulted in policy limits of $240,000. The house was destroyed by fire in November, 2004. The cost of replacing the home was estimated to be $328,000. The insurance company paid the policy limits to the insured. The Petersons sued the company and the insurance agent alleging various theories of liability. The trial court concluded that the agent had breached its duty to the Petersons and awarded damages equal to the difference between the policy amount and the $240,000 estimated replacement cost. The Consumer Protection Act claim was dismissed as were the claims against the insurance company.

Holding: The agent breached its duties to the Petersons by (1) not utilizing the standard cost guide questionnaire to obtain accurate, detailed information from the Petersons, (2) not entering complete information about the home into the cost guide software, (3) not utilizing the
formula to calculate replacement value limits on the home, and (4) not informing the Petersons that the cost guide formula was not used to estimate the home’s replacement value for the policy. The trial court correctly concluded that the measure of damages should be based on the $240,000 estimate that would have been included in the policy, rather than the full replacement cost. The agent never promised to procure a policy that fully covered a total loss, but rather only promised to obtain an estimate using an industry formula. The trial court did err in dismissing the CPA claim, since the actions of the agent in effect misrepresented the policy limits to the Petersons in violation of RCW 48.30.090. The matter was remanded for calculation of CPA damages and attorney fees.


Facts: Ledcor was the general contractor for a 25-unit condominium project in Bellevue. Although Ledcor had its own insurance, it required all of its subcontractors to obtain commercial general liability polices with Ledcor named as an additional insured. Mutual of Enumclaw insured Zanetti, a subcontractor doing siding work. Following completion of construction, the HOA sued the developer, who in turn sued the general contractor, alleging various construction defects. Ledcor tendered the defense of the HOA claim to MOE, and although MOE accepted the tender with a reservation of rights, MOE never actively defended Ledcor. The HOA suit was settled for $1.25 million and Ledcor paid $105,000 of the settlement from its own funds. MOE did defend Zanetti in Ledcor’s claim against the subcontractor and ultimately paid $236,000 in damages to HOA. Ledcor then sued MOE alleging bad faith and breach of the duty to defend. The trial court found that MOE failed to promptly investigate the claim and provide a defense, as required by the policy and that these actions were also a violation of the Consumer Protection Act. However, Ledcor suffered no damages as a result of MOE’s bad faith conduct, so the trial court awarded no damages and no award under the CPA.

Holding: The Court of Appeals affirmed the trial court. The delay in accepting the defense and failure to assign counsel constituted bad faith, and the Court rejected MOE’s argument that it was excused from defending because Ledcor was being actively defended by other counsel. The Court also rejected Ledcor’s claim that the damages resulting from the bad faith should be the entire $1.25 million settlement amount. MOE was responsible for only those breaches covered by its policy, and Ledcor was unable to demonstrate any damage suffered as a result of MOE’s delay and failure to defend. Similarly, the failure to establish damage resulted in no award under the CPA.


Facts: In 1991, Walla Walla College purchased three fiberglass underground storage tanks from 3-D, who installed the tanks. Ten years later, approximately 10,000 gallons of gasoline leaked from one tank into the ground. Great American Insurance, now Ohio Casualty, issued policies to 3-D that insured Walla Walla College under commercial general liability policies from January 23, 1990, until January 23, 1992. Walla Walla College claimed that the 3-D CGL policies covered the losses caused by the gasoline leak because the tanks were improperly installed, which resulted in the gasoline leak. The trial court granted summary judgment in favor of Ohio Casualty.
Holding: The dismissal was affirmed. Although the College demonstrated that physical damage to the tank itself started immediately upon installation due to shifting of the earth, that damage was not covered by the policies due to the “your product” exclusion from coverage. The event that caused loss to the College was the contamination resulting from the failure of the tank some ten years after installation and after the policies had expired. Since the policies had lapsed, this occurrence was not covered.


X. Legal Actions

A. Trespass, Encroachment, Nuisance, Landslide & Water Runoff


Facts: Brack and Grundy owned adjacent waterfront parcels on Johnson Point in Thurston County. Grundy originally brought a nuisance claim against Brack based on Brack’s building a higher bulkhead which Grundy claimed diverted sea water and debris onto her property. The action was dismissed by the trial court based on the common enemy doctrine. The Supreme Court in Grundy v. Thurston County, 155 Wn.2d 1 (2005), held that the common enemy doctrine did not apply to sea water and remanded the case for trial. On remand, Grundy added trespass by water and illegal diversion claims. Grundy requested abatement of the Bracks' raised bulkhead and damages for repair of landscaping following repeated flooding and for mental anguish caused by repeated flooding and the possibility of loss of her home due to
flooding. The trial court found that only minor flooding had occurred and awarded $16,000 in damages and $22,500 in attorney fees.

**Holding:** Grundy’s claim did not allege negligence on the part of Brack, but rather was a complaint for intentional trespass. Intentional trespass requires (1) an invasion of property affecting an interest in exclusive possession, (2) an intentional act, (3) reasonable foreseeability that the act would disturb the plaintiff’s possessory interest, and (4) actual and substantial damages. A property owner is not liable for sea water entering the property of another unless that owner intentionally or wrongfully directs the water onto the neighbor’s property. The fact that the bulkhead caused sea water to enter onto Grundy’s property is not enough to establish liability. Grundy never established that Brack knew or should have known that the increased height of the bulkhead would cause damage to Grundy’s property. Grundy also failed to establish that she had incurred substantial damages; the only evidence of damage was some debris from time to time following heavy storms and discolored grass from sea water. The trial court was reversed.


**Facts:** In 1988, Vance bought a house in Longview, Washington for $205,000. In 2006, XXXL Development LLC began a residential development just to the north of Vance's property and constructed a retaining wall two feet from Vance's property line. The concrete block wall is approximately 25 feet high and more than 100 feet long. December 2006, Vance sued XXXL on several claims, including private nuisance. The trial court granted XXXL's motion to continue the trial date and moved the trial to February 2008. Vance sold her home for $185,000 in December 2007, after the original trial date had passed. She claimed that, absent the nuisance, her house would have been worth $285,000. The trial court dismissed the claim because it concluded that Vance lost her "standing" to bring such an action because she no longer owned the property.

**Holding:** The trial court was reversed. RCW 7.48.020 provides that a nuisance action "may be brought by any person whose property is ... injuriously affected or whose personal enjoyment is lessened by the nuisance." RCW 7.48.180 provides that "the abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence." The Court of Appeals rejected XXXL’s argument that the present tense used in the statute required that the claimant be the owner of the property in order to recover damages. The Court noted that (i) the statute provided that even the abatement of the nuisance does not eliminate the right to damages; (ii) the measure of damages relating to diminution of value may actually be easier to calculate following the sale of the property; and (iii) the extinguishment of the right damages for a continuing nuisance upon sale of the property would lead to absurd results. These factors persuaded the Court that the correct interpretation of the statute was that the sale of the property had no bearing on the right to maintain the nuisance action.


**Facts:** Vig and Trotzer owned adjacent properties. In May or June of 2000, Vig used a tractor to clear a walking trial and mistakenly encroached onto Trotzer’s land. A letter of
apology was sent to Trotzer. During subsequent conversations concerning the necessity of obtaining a survey, Trotzer told Vig that the fence line which separated the properties was the actual boundary. In 2003, Vig did additional work on the path and generally followed the fence line. Trotzer obtained a survey in August, 2003, which showed that the fence line was on the property line and commenced a timber trespass action against Vig in November, 2003. In December, 2004, Vig served Trotzer with a CR 68 offer of judgment to pay him $12,000, plus reasonable attorney fees and costs to that date. Trotzer did not accept the offer. Subsequently, Trotzer amended his complaint to add a claim for quiet title. The trial court dismissed Trotzer’s claims relating to the 2000 trespass as time barred under the statute of limitations and awarded single damages for the 2003 trespass. Since the damages were less than the offer of judgment, Vig was awarded costs incurred following the date of the offer.

**Holding:** The trial court properly dismissed the claims relating to the 2000 trespass. The applicable statute of limitations was three years and no event had occurred with tolled the running of the statute. Trotzer was not entitled to treble damages for the 2003 trespass, since the evidence at trial did not support a finding that the trespass was willful, a requirement for treble damages under RCW 64.12.030. Vig had relied on Trotzer’s statements concerning the location of the boundary line and no evidence to the contrary was presented. The trial court did err in awarded costs to Vig under CR 68 based on the offer of judgment. Vig’s offer of judgment expired when Trotzer filed an amended complaint. Since Vig did not renew the offer of judgment to address the new claims, it was error to award costs based upon the expired offer.


**Facts:** In 1953, James and Annabel Hughes bought the property located at 4821 37th SW, Seattle, WA. At some point prior to 1990, the Hugheses planted three birch trees on their property, adjacent to the sidewalk. On July 28, 2003, Joyce Rosengren walked northbound on the west side of 37th SW. She tripped over a raised section of the sidewalk in front of the Hugheses' home. Rosengren suffered a distal fracture of the right wrist. On July 28, 2006, Joyce Rosengren filed a tort action in King County Superior Court for damages relating to her fall. She named as defendants the City of Seattle (City), Seattle Department of Transportation (SDOT), Grace Cruncian who was the director of SDOT, and the Hugheses. The Hugheses filed a motion for summary judgment, arguing that they owed no duty to Rosengren. The trial court granted the Hugheses' motion for summary judgment as a matter of law and dismissed the Rosengrens' claims against the Hugheses.

**Holding:** The dismissal was reversed. On the issue of causation, viewing the summary judgment evidence in the light most favorable to the non-moving party, the Court of Appeals concluded that the roots of the trees the Hugheses planted in their front yard uplifted the sidewalk, causing a tripping hazard, on which Rosengren tripped and was injured. As to the issue of duty:

We hold that trees planted by a landowner are an artificial condition on the land, and that an abutting landowner has a duty to exercise reasonable care that the trunks, branches, or roots of trees planted by them adjacent to a public sidewalk do not pose an unreasonable risk of harm to a pedestrian using the sidewalk.


### B. Eminent Domain


**Facts**: Noble owned property adjacent to parcels owned by Safe Harbor Family Preservation Trust. Noble was prevented from using an easement across the Safe Harbor parcel, and commenced a private condemnation action under Chpt. 8.24 RCW to acquire a private way of necessity. Safe Harbor asserted in its answer that Noble had an alternative route for access, without naming that precise route or adding any additional parties to the lawsuit. Noble then amended its complaint to add owners in the Plat of Tillicum Beach as additional defendants, asserting a claim over these parcels. Noble’s father owned a parcel in the Plat of Tillicum Beach which was adjacent to the Noble property, and Noble had been using the father’s property as an access point prior to commencing an action against Safe Harbor. The trial granted a way of necessity over the Safe Harbor parcel and ordered Safe Harbor to pay the fees of Tillicum, finding that but for Safe Harbor’s answer, Tillicum would not have been involved in the litigation. The Court of Appeals affirmed.

**Holding**: The Supreme Court affirmed in part and reversed in part. Safe Harbor did not choose to join Tillicum Beach as an alternative condmennee, and was not required to do so. The burden was on the condemnor (Noble) to prove that the Safe Harbor route was the most feasible. The award of attorneys’ fees against Safe Harbor has the effect of improperly shifting this burden of proof. The attorney fee award against Safe Harbor was vacated because “the statute does not support awarding fees against a condmennee where that condmennee does not choose to join any other party as an alternative condmennee.” The reduction of the award to Safe Harbor made by the trial court was affirmed in light of the discretion of the trial court to evaluate the appropriateness of various defenses raised by Safe Harbor and the cost to Noble in responding to those defenses.


**Facts**: After two prior appeals, Union Elevator’s claim for compensation arising from a taking by the Department of Transportation was remanded to determine what additional damages were to be awarded to Union Elevator under the Washington Relocation Assistance Act (Chpt. 8.26 RCW) and whether attorney fees should be awarded under the Equal Access to Justice Act. The trial court denied any interest to Union Elevator under the Relocation Act, denied additional attorney fees under the Relocation Act and awarded $25,000 in attorney fees (the maximum allowable) under the EAJA.
Holding: The Court of Appeals held that Union Elevator was entitled to interest on the award that was payable under the Relocation Act. The payment was required in order for Union Elevator to be fully compensated for what it lost as a result of having to obtain substitute equipment. The trial court was correct in denying attorney fees under the Relocation Act. RCW 8.25.070, which governs award of attorney fees in condemnation actions, did not apply to Relocation Act awards.


Facts: The City of Spokane and Spokane County jointly operate the Spokane International Airport. They entered into an agreement creating the Spokane Airport Board to operate the airport and other facilities. RMA leased property at the airport. The City and County passed condemnation resolutions to acquire the RMA leaseholds in order to construct a new flight control tower. The condemnation action was commenced in the name of Spokane Airports, a Joint Operation with the City of Spokane and the County of Spokane. An agreed order granting possession of the property was negotiated, but RMA claimed that it possessed all of its claims for breach of lease following delivery of possession. The trial court agreed with RMA and the Airport Board appealed.

Holding: On appeal, RMA asserted that the Airport Board lacked the authority to condemn the property. RCW 14.08.200(9) provides that any condemnation action undertaken in connection with jointly administered municipal operations shall be instituted in the names of the municipalities jointly and all property acquired will be held by the municipalities as tenants in common. The Court of Appeals held that the City and County lacked the authority to delegate their powers of eminent domain to the Airport Board. The Board did not have the power to commence the eminent domain proceeding in its name and the action was dismissed.


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C. Adverse Possession/Boundary Disputes


**Facts:** Merriman and Cokeley own adjacent lots abutting Puget Sound off Steamboat Island Road in the Olympia area. Merriman’s live in a house on their lot; the Cokeley lot is undeveloped. Merriman bought the property in 1996; Cokeley bought his lot in 2004. In 1993, the prior owners of the lots had a survey completed. The survey was not recorded; the three markers were placed on the boundary line established by the survey. In 2002, a barbwire strand fence was placed along the line as staked. After Cokeley bought his lot, Merriman installed a privacy fence. Cokeley had the property surveyed again in 2006, and that survey determined that two of the stakes were not placed correctly. A triangle of property on the Merriman side of the privacy fence was within the boundary of the lot purchased by Cokeley. Merriman then sued to quiet title to the disputed portion. The trial court dismissed Merriman’s claims after a trial and also refused to award any relief to Cokeley.

**Holding:** The Court of Appeals reversed. In reviewing the testimony presented to the trial court, the Court concluded that Merriman had established as a matter of law all of the elements required for mutual recognition and acquiescence to the boundary line as staked. The trial court should have quieted title to the disputed property in Merriman.


**Facts:** Smale commenced an adverse possession action to quite title to property that had been on the Smale’s side of a fence separating the adjacent land. Smale named the owner of the property, Noretep, which was a general partnership. After commencement of the action, Noretep sold the land to the Stillaguamish Tribe of Indians. The deed made reference to the quiet title action. Smale added the Tribe as a defendant. The Tribe moved to dismiss based on sovereign immunity. The trial court denied the motion on the grounds that “the Court has jurisdiction over the land.”

**Holding:** The Court of Appeals held that the ruling in *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash.2d 862, 929 P.2d 379 (1996), controlled the outcome of the case. In that case, the Washington Supreme Court held that the subsequent sale of an interest in property that was the subject matter of a partition action to the Quinault Nation did not deprive the trial court of jurisdiction over the dispute. The trial court asserted *in rem* jurisdiction over the property, as opposed to *in personam* jurisdiction over the sovereign entity. The Tribe was unable to adequately distinguish the present case from the *Anderson* ruling and the trial court properly refused to dismiss the Tribe.


**Facts:** Green and Hooper owned adjacent lots on Loon Lake, together with second class shorelands abutting those lots. In January, 2006, Green sued Hooper seeking to quiet title in specific portions of the Hooper’s second class shorelands under a theory of adverse possession. On the last day of trial, Green filed a supplemental trial brief advancing for the first time the theory of mutual recognition and acquiescence as a grounds for quieting title. Hooper objected.
The trial court allowed evidence to be presented in support of this theory. At the conclusion of the trial, the trial court ruled in favor of Green, not based on adverse possession, but based upon the courts inherent equitable powers. However, in the final judgment entered by the trial court, the basis for ruling in favor of Green was the theory of mutual acceptance and acquiescence. Hooper appealed.

**Holding:** The Court of Appeals reversed. The trial court erred by concluding that any surprise or prejudice to the Hoopers caused by the additional claim was cured by the motion for reconsideration and allowing the supplement brief and additional theories on the last day of trial was an abuse of discretion. The Court of Appeals concluded that the doctrine of mutual recognition and acquiescence does not "supplement" adverse possession in the sense that it is contained within a pleaded cause of adverse possession and it is not sufficient, without expressly being pleaded, to give fair notice to a defending litigant where judgment is being sought solely on the theory of adverse possession. The evidence presented by Green did not, as a matter of law, support a finding of mutual acceptance and acquiescence – there was no line fixed by monuments, no acquiescence to a boundary line and no recognition of a delineation of the boundary line - and the judgment quieting title was reversed.


D. **Slander of Title**

*No reported cases in last five years.*

E. **Actions Between Partners**


**Facts:** Thorslund owned a high-end custom home construction firm. Simpson was employed by Thorslund and eventually was handling the day to day management of the firm. Thorslund failed to pay employment taxes and borrowed money from Simpson to keep the business going. Ultimately, the business failed, and Thorslund started a new business and made Simpson his partner. The business was supposed to incorporated, but Thorslund never filed the incorporation documents. The new business was successful for some time, but ultimately failed. Thorslund withdrew disproportionate amounts of cash from the business to fund personal expenses. Simpson finally sued Thorslund for monies owed alleging multiple theories of recovery, including breach of fiduciary duty, fraud, negligent misrepresentation, conversion, breach of contract, unjust enrichment, and non-payment of wages. The trial court entered a judgment in favor or Simpson on numerous claims and awarded attorney fees and costs.

**Holding:** The Court rejected Thorslund’s argument that Simpson’s suit could not proceed prior to a final accounting of the partnership. The Court also rejected the argument that Simpson could not sue for conversion of partnership funds prior to a final accounting. The award of attorney fees was justified by Thorslund's conduct that was egregious and persistent in violating
his fiduciary duties; were warranted as a discovery sanction under CR 37(c) because Thorslund's refusal to make certain admissions when requested, led to substantial additional and unnecessary litigation costs; and because Simpson was successful in his wage claim, he is entitled to an award of attorney fees under chapter 49.52 RCW.


F. Partition

No reported decisions in last five years.

G. Quiet Title

Young v. Young, 164 Wn.2d 477 (2008) – Award for value of improvements made.

H. Government Forfeitures


Facts: Pearson’s property at 414 Newberg Rd., Snohomish, was seized by the Snohomish County Regional Drug Task Force after it was discovered the Pearson was using the property for growing marijuana. Pearson executed a will that left the Newberg Rd. property to his relatives. He died before SRDTF completed the forfeiture proceeding. The heirs intervened in the action to contest the forfeiture. The trial court rejected the claims of the heirs. Pursuant to a settlement between the mortgagee and the SRDTF, the property was ordered sold and proceeds divided between the county and the mortgagee.

Holding: The Court of Appeals affirmed the trial court. The heirs claim that they were entitled to assert the innocent owner defense was rejected. Pearson’s interest in the property was subject to forfeiture and he could not bequeath an interest in the property that was greater than that which he possessed at the time of his death. The county filed a lis pendens against the property, which was record notice of the forfeiture proceedings. Pearson could not avoid the forfeiture by transferring the property to an innocent third party by bequest or otherwise.

Facts: On March 15, 2006, the Snohomish Region Drug Task Force arrested Yatin Jain for transporting 23 pounds of marijuana in his vehicle. Two days later, the SRDTF commenced the first of six forfeiture proceedings in Snohomish County Superior Court. On the same date, the SRDTF also recorded a lis pendens against Yatin's residence, which is located at 20803 Poplar Way, Lynnwood, Washington. Several days later, Yatin conveyed to Vijay by quit claim deed his residence and five other parcels of real property involved in these proceedings. On May 15, 2006, the SRDTF commenced five additional forfeiture proceedings in Snohomish County Superior Court. In April 2007, SRDTF simultaneously moved for summary judgment in all six forfeiture proceedings. The task force claimed that the interests, if any, of Yatin and Vijay in the properties should be forfeited because they failed to notify the task force within the required time period that they claimed ownership or right to possession of the property. The trial court granted the motions and denied the motions for reconsideration.

Holding: The ruling was reversed. According to RCW 69.50.505(5), if an owner or someone claiming ownership notifies the law enforcement authorities within 90 days following the seizure of the property, the individuals are entitled to a hearing on their claims of ownership. On the commencement of each forfeiture proceeding, notices of appearances were filed by counsel for Yatin and Vijay. Although the statute did not prescribe a form of written notice, the Court of Appeals held that the notices of appearances filed and mailed by counsel were sufficient to alert the SRDTF of the claim of ownership asserted by Vijay and Yatin.

XI. Construction Contracts/Disputes

Owners Ass’n v. FHC, LLC, 166 Wn.2d 178 (2009)

Facts: FHC, LLC was formed to be the developer of the Chadwick Farms condominiums. Colonial Development LLC was formed to be the developer of the Emily Lane condominiums. On March 24, 2003, FHC was administratively dissolved by the secretary of state. On August 18, 2004, the Chadwick HOA sued FHC for alleged construction defects in the condominium. On March 24, 2005, FHC limited liability certificate was cancelled since FHC had not sought to reinstate during the two year period following dissolution. In May, 2005, FHC asserted various claims against contractors in the HOA lawsuit. The HOA also sought to amend its complaint against FHA to name the individual members. On December 31, 2004, the members of Colonial filed a certificate of cancellation with the secretary of state. In July, 2005, the Emily Lane HOA sued Colonial and its members asserted claims arising from alleged construction defects. In both cases, the developers moved for summary judgment dismissing the claims based on the cancellation of their respective certificates of formation. The trial court in Emily Lane dismissed all of the claims against the members and certified the question of the liability of Colonial for appeal. The trial court in Chadwick dismissed all claims against FHC and all of FHC’s claims against the contractors. The Court of Appeals in Chadwick reversed the dismissal of the claims against FHC by holding that RCW 25.15.303 applied retroactively to allow claims against cancelled entities, affirmed the dismissal of the claims against the contractors and ruled that the HOA should be allowed to amend its complaint to assert claims against FHC members. In Emily Lane, the Court of Appeals reversed the dismissal of the
members and held that Colonial could still be sued notwithstanding the cancellation of its certificate. Both cases were consolidated on appeal to the Supreme Court.

**Holding:** The Court reversed the Court of Appeals as to the finding in Chadwick that RCW 25.15.303 allowed an action to be maintained against an LLC whose certificate had been cancelled. That statute provided that the dissolution of the LLC did not impair any available remedies for the three year period following the dissolution, but once the certificate is cancelled, the company no longer had the capacity to be sued or to sue. Likewise, in Emily Lane, the Court of Appeals was reversed as to its reinstatement of the action against Colonial, since Colonial’s certificate had been cancelled prior to the commencement of the lawsuit. The HOA did, however, have the right to maintain an action against the members on the ground of impropriety in the dissolution proceeding and failing to establish adequate reserves.

*Cambridge Townhomes, LLC v. Pac. Star, 166 Wn.2d 475 (2009)*

**Facts:** Polygon contracted with Cambridge Townhomes LLC for the construction of a condominium development. The project was constructed in phases. During the first phase, Polygon employed Utley, d/b/a P.J. Interprise, a sole proprietorship, to perform certain work. Later, Utley incorporated as P.J. Interprize, Inc., and continued to perform work as a subcontractor on later phases of the project. The later contracts included an indemnity provision that required PJ, Inc. to indemnify Polygon from all damages arising from PJ’s negligence. The HOA ultimately sued Polygon for damages from construction defects. Polygon settled and then sued various subcontractors, including PJ. In the meantime, Utley had declared bankruptcy, but the bankruptcy court allowed the action to proceed against PJ to the extent of insurance proceeds available to pay the recovery. The trial court dismissed the action against PJ on summary judgment, rejecting a claim of successor liability and denied the Polygon’s motion to amend to add Utley as a defendant. The Court of Appeals reversed the summary judgment.

**Holding:** The Supreme Court held that the theory of successor liability did apply to PJ, even though the incorporation involved a sole proprietorship. The trial court abused its discretion in refusing to allow the amendment to add Utley as a defendant. Finally, the indemnity clause did not apply only to tort claims, but included claims that arguably arose from the negligent performance of PJ’s contractual obligations. The Court of Appeals was affirmed and the matter was remanded for trial.

*Mut. of Enumclaw v. T&G Constr., Inc., 165 Wn.2d 255 (2008)*

**Facts:** In a construction defect dispute, the homeowners association brought claims against the general contractor, who subsequently sued its siding subcontractor (T&G Construction). Mutual of Enumclaw was T&G Construction’s insurer, and they defended the company until the final mediation, when T&G settled. T&G had been administratively dissolved over two years before it was sued, and Mutual of Enumclaw asserted that it had an affirmative defense that the statute of limitations for claims against a dissolved company barred the homeowners’ ability to recover. Both the trial court and the judge at a settlement reasonableness hearing concluded that the statute of limitations argument was without merit.
Holding: The merits of the statute of limitations defense was considered by the parties during settlement discussions and was carefully considered by the judge both at summary judgment and at the reasonableness hearing. An insurer is not entitled to litigate factual questions that were resolved in the liability case by judgment or arm’s length settlement. The damage at issue was properly considered “property damage” (covered by the policy) and not based upon a breach of contract (excluded from coverage). Case remanded to determine whether other policy exceptions may apply and to determine whether attorney fees are available.


Facts: Comet Roofing contract to install a roof on an apartment building owned by Mr. Manina. A dispute over the charges developed, and Comet filed a lien to secure payment. Manina then filed a complaint with the Dept. of Labor and Industries, and DLI issued an infraction alleging that Comet Roofing violated RCW 18.27.114(1)(b) by failing to give Mr. Manina a disclosure statement. Comet appealed the fine to the Office of Administrative Hearings, which affirmed the fine. Comet then appealed to the superior court, which also affirmed the fine.

Holding: The fine was affirmed. The apartment building was a “commercial building” as defined in RCW 18.27.114(1), since it was operated for profit. Manina was not a contractor because he did not engage in any of the activities described in RCW 18.27.010(1), which define a contractor. The Court also rejected Comet’s constitutional challenges to the fine based on vagueness of the statute.


Facts: ADC Properties, LLC, a group of dentists, hired S & S Construction to build a dental clinic. A dispute arose concerning the amount of payment due and S & S sued ADC for final payment. Pursuant to the terms of their agreement, the dispute was mediated and then referred to arbitration. The arbitrator heard three days of testimony and made a final ruling supported by a 20-page explanation of his reasoning. Following the award, S & S sought to set aside the award on the grounds that the arbitrator had a prior relationship with ADC and its counsel. The trial court refused to set aside the award and entered judgment.

Holding: The trial court was affirmed. The Court of Appeals rejected the argument that a failure to render the award within the 30 day period specified in the applicable arbitration rules deprived the arbitrator of jurisdiction over the matter. Counsel for both parties consented to an extension of time for the award and waived any right to object to the proceeding for failure to comply with the time limits. The arbitrator’s prior relationship with ADC and counsel for ADC were disclosed prior to the commencement of the arbitration and S & S did not object. The arbitrator’s relationship with one of the principals of ADC was possibly not disclosed until after the award, but S & S was unable to demonstrate how that relationship was prejudicial to its interests.

Facts: Deacon, a general contractor, hired Gaston as a subcontractor to prepare ground for the construction of a fitness center in north Seattle. After Gaston had been working for several months, a dispute arose as to the amount due under the contract. Gaston recorded a claim of lien. Deacon filed a motion and supporting affidavits for summary removal of the lien under RCW 60.04.081. Deacon contended that the lien was frivolous because the entire amount due to Gaston had already been paid in full and ascribed the confusion as to the contract amount to “a scrivener’s error.” Gaston contended that there were two separate accepted bids totaling $112,000. The trial court granted Deacon's motion, denied Gaston's subsequent motion to reconsider, and awarded Deacon attorney fees. The trial court found the agreement between the parties was encompassed in a single integrated written subcontract agreement for a contract amount of $63,000.

Holding: The trial court was reversed. The central dispute was whether the subcontract was intended to cover all of the work. This was a question of fact that could not be resolved by affidavits. Before declaring a lien to be frivolous and removing it in a summary proceeding, the trial court must make specific findings establishing that the lien is so meritless as to justify depriving the claimant of the opportunity to present live testimony and cross-examine witnesses. The summary procedure provided by RCW 60.04.081 should not to be used as a substitute for trial where there is a legitimate dispute about the amount of work done and money paid.


Facts: Derus Wakefield I, LLC entered into a contract with Sacotte Construction for the development of a condominium project known as Trillium Heights at Issaquah Ridge. Sacotte retained various subcontractors. Each subcontract contained a provision incorporating the arbitration provision contained in the general contract:

Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration.

After completion of the project, the HOA sued the developer and contractor alleging various defects. Sacotte settled and assigned all claims that the general contractor had against the subcontractors to the HOA as part of the settlement. Four of the subcontractors refused the HOA demand for arbitration, and the HOA commenced an action to compel the arbitration. The trial court dismissed the HOA action.

Holding: The general contract required that notice of any claim be provided within 21 days after the party became aware of the claim. The trial court interpreted this provision as a condition precedent to the obligation to arbitrate, and in the absence of the 21-day notice, the arbitration provision was not enforceable. The Court of Appeals reversed, noting that if the controversy was within the scope of the arbitration provision, then whether or not a condition precedent existed was properly a question for the arbitrator.


**Kelly v. Chelan County**, 167 Wn.2d 867 (2010)

**Facts**: Beginning in 1989, permit applications and plans were submitted on behalf of WICO for the development of property on the shoreline of Lake Chelan. The Chelan County hearing examiner determined that standards in effect in 1994 controlled the applications and in August, 2005, a conditional use permit was issued with a condition that all additional approvals had to be obtained within two years. Neighbors contested the permit and the superior court concluded that the plan had to comply with new zoning requirements adopted in 2000. WICO appealed, but did not seek a stay of the trial court decision or their permit’s time limit. In 2007, while the appeal was still pending, the neighbors moved to dismiss the appeal because the two year period had run, and the court of appeal dismissed the action.

**Holding**: The dismissal was reversed. The possibility of litigation revoking a permit is inherent in the development process. A logical response to litigation is to suspend working on the permit applications until the litigation is resolved. Following the trial court decision, WICO had no right to proceed with the application. The developer was not required to continue processing the permit application. When a trial court denies a permit previously granted by a hearing examiner, that permit’s time limit is terminated unless the permit is reinstated on appeal. The matter was remanded to the court of appeals for a decision on the merits.

**Post v. City of Tacoma**, 167 Wn.2d 300 (2009)

**Facts**: Paul Post owned numerous rental properties in Tacoma. Following inspections by the City of Tacoma, many of the properties were found to be substandard and the City issued notices to Post demanding that repairs be undertaken. Post failed to complete repairs for 17 of the properties. The city issued civil fines of $125 per property and later $250 per property. Post untimely appealed some of the fines. Ultimately, Post claimed to have paid over $140,000 in fines. Post sued the City, claiming that the ordinance under which the fines were levied was unconstitutional; the City cross-claimed for an additional $411,000 in fines. The trial court entered judgment for the City. The Court of Appeals held that Post’s claims were barred by LUPA.

**Holding**: The Supreme Court reversed and held the ordinance authorizing the fines to be unconstitutional. LUPA did not apply to Post’s claims, since the fines and notices of violations were not “land use decisions.” The Tacoma ordinance allowed an appeal of only the first fine.
levied by the City. Due process required that Post have an opportunity for a hearing with respect to each violation for which a fine was levied.

It is sufficient to hold that, where local jurisdictions issue infractions (finding violations and assessing penalties), there must be some express procedure available by which citizens may bring errors to the attention of their government and thereby guard against the erroneous deprivation of their interests.

**Abbey Road Group, LLC v. City of Bonney Lake, 167 Wn.2d 242 (2009)**

**Facts:** Abbey Road proposed a 575-unit condominium project of 36 acres in Bonney Lake. A site plan application was submitted on September 13, 2005. Later that day, the City Council passed an ordinance rezoning the property to “residential/conservation district,” which precluded the development. In October 2005, the Planning Director notified Abbey Road that the development did not comply with zoning requirements and denied the site plan application. The hearing examiner affirmed the denial, holding that the filing of the site plan application did not vest the project. The trial court reversed the hearing examiner, holding that Abbey Road’s development rights vested when it filed the completed site plan application. The City appealed and the Court of Appeals reversed the trial court and reinstated the hearing examiner’s ruling.

**Holding:** The denial of the permit was affirmed. The Court, relying on its prior decision in Erickson & Ass’c v. McLerran, 123 Wn.2d 864 (1994) and RCW 19.27.095(1), reaffirmed the principle that a project is vested at the time of submission of a complete building permit application. Abbey Road had the ability to file a building permit application in advance of completion of the site plan review, and failed to do so. The Court declined to expand the vested rights doctrine to include any discretionary decision by the building authority and rejected Abbey Road’s constitutional due process arguments.

**City of Woodinville v. Church, 166 Wn.2d 633 (2009)**

**Facts:** The Northshore United Church of Christ located in Woodinville, sought to allow Tent City 4, a movable encampment for the homeless, to use the Church’s property as a location for the Tent City’s encampment. When the Church applied for permits from the City of Woodinville to allow the encampment, the City refused the permits based on a six-month moratorium on permit issuance, which was subsequently extended of an additional six months. When the Church went forward with its plans to allow Tent City to use the Church property, the City sought and obtained an injunction prohibiting the activity without a valid permit. The Church appealed and the Court of Appeals affirmed the trial court.

**Holding:** The Supreme Court reversed. The enactment of the moratorium which had the effect of refusing to entertain any permit applications for the Church’s proposed activity was an impermissible burden upon the Church’s constitution right to freedom of religious expression. Similarly, the enactment of the moratorium in effect breached a prior agreement between the Church and the City which required the City to seek permit approval prior to allowing the Tent City to locate on Church property. This agreement required the City to process a permit application, and the moratorium justified the Church’s action prior to seeking a permit.
The City violated the Church's constitutional rights under article I, section 11 when it refused to process the Church's permit application based on a total moratorium on temporary use permits in the area. Rather than seeking to impose reasonable conditions on the Church's project to protect the safety and peace of the neighborhood, the City categorically prevented the Church from exercising what the City concedes is religious practice. We therefore reverse the Court of Appeals.

_Citizens v. Yakima County, 152 Wn.App. 914 (2009)_

Facts: Yakima County approved the relocation of a wrecking yard from a flood prone area. In order to complete the relocation, the County acquired an alternative site and granted financial assistance for the relocation. A citizens' group opposed to the new location sued in 2008 to halt the relocation. The trial court dismissed the claim.

Holding: The Court of Appeals rejected the arguments that the relocation constituted a gift of public credit and violated the land swap statute, RCW 36.34.330. The relocation served a valid public purpose to reduce potential damage from flooding. The land swap statute, requiring swaps of land of equal value, was not applicable to the transaction, since the entire relocation plan involved more than a simple land swap.

_Hoggart v. Flores, 152 Wn.App. 862 (2009)_

Facts: Hoggart occupied a house located on 4 acres. He illegally divided the tract into two parcels, and sold a one-acre parcel on which a residence was constructed to Flores. Hoggart then sought a permit to construct a residence on the remaining three acres. The County discovered the prior illegal subdivision during the permit process and required that Hoggart complete a short plat of the original four acres. Hoggart prepared a short plat application and requested that Flores sign the application. Flores refused unless Hoggart agreed not to further subdivide the property for the next 25 years. Hoggart refused and commenced an action to compel the County to accept the short plat without Flores' joinder. The trial court entered an injunction requiring the County to accept the short plat.

Holding: The Court affirmed the ruling. Flores contended that since Hoggart had illegally subdivided the property, Hoggart could not engage in further development without Flores' consent on whatever terms Flores' might demand. RCW 58.17.210 requires that the purchaser of illegally divided property comply with the statute concerning compliance with subdivision requirements and provides alternative remedies for the purchaser. Nothing in the statute prohibits the seller of the property from pursuing remedial action or further subdivision. The injunction issued by the trial court was within the general equity powers of the court.

_Harlan Claire Stientjes Family Trust v. Via-Fourre, 152 Wn.App. 616 (2009)_

Facts: Stientjes and Via-Fourre owned adjacent properties on a marine bluff in Thurston County. Stientjes applied for a permit to build a garage and Via-Fourre objected to certain aspects of the project. Despite certain deficiencies in the application, Thurston County issued a building permit. Via-Fourre did not appeal this decision, but continued to complain to the
County about certain aspects of the project. After work commenced, the County stopped the work based on objections made by Via-Fourre. The stop-work order was lifted, and Via-Fourre appealed to a hearing examiner. The hearing examiner dismissed the appeal, determining that it related to the building permit and was untimely. Via-Fourre appealed to the Board of County Commissioners, which reversed the hearing examiner. Stientjes appealed the BOCC decision to superior court, which reversed the BOCC. The trial court reinstated the hearing examiner’s order.

**Holding:** The Court of Appeals reversed. The BOCC decision was not a final land use decision and under LUPA, the superior court had no jurisdiction to hear Stientjes’ appeal. The BOCC decision did not reinstate the stop-work and did not affirm the hearing examiner’s original order of dismissal. It only remanded the matter to the County for further consideration. Since the BOCC order did not resolve the dispute, it was not a final order and an appeal under LUPA was improper.


**Facts:** Developers sought to undertake four different projects near Birch Bay in Whatcom County. The Fire District providing service to the affected area contended that it was entitled to make a project-by-project determination as to the adequacy of fire protection services. The hearing examiner reviewing the permit applications concluded that until the Community Plan for Birch Bay adopted by the County removed the statement that the fire district was able to provide adequate service, the Fire District was not able to assert a project-by-project review. The District appealed the issuance of the permits and the trial court reversed the hearing examiner.

**Holding:** The trial court was reversed. The District’s objection to the hearing examiner’s finding should have been addressed as an objection to the County comprehensive plan. The District has the obligation to meet the standard imposed by the comprehensive plan and the District cannot challenge the obligations by factual challenges to each permit application.

**Stanzel v. Pierce County, 150 Wn.App. 835 (2009)**

**Facts:** Stanzel owned property in Pierce County that was within the City of Puyallup’s water service area. He sought permits to renovate his property, but the County required that he demonstrate water availability as a condition to processing the permit applications. He sought a letter availability letter from the City, but the City refused to provide this confirmation. The City would only provide water service to properties outside of its boundaries as part of a pre-annexation agreement. Stanzel then brought a proceeding before the hearing examiner, which concluded that the City was obligated to provide water service, but did not order the City to do so. Stanzel then filed a petition under LUPA, and the trial court ordered the City to provide water service.

**Holding:** The Court of Appeals affirmed the order. The Court concluded that the Stanzel was not required to exhaust administrative remedies concerning the water service. The hearing examiner was authorized to hear matters concerning disputes over utility service. The pre-
annexation requirement of the City was improper, since the City code did not contain such a requirement. Finally, the hearing examiner did have the authority to order the City to provide service.


Facts: Belleau Woods II LLC intended to develop 7.39 acres in Bellingham as an apartment complex. The property was located in an area in which the City wanted to establish a pedestrian trail. In 2004, the City and Belleau executed a planned development contract for the site which required Belleau to dedicate a trail easement and pay a park fee, which at that time was estimated to be $8,000. In 2006, the City adopted a new park impact fee ordinance. In the fall of 2006, Belleau applied for permits and was told that the park impact fee would be $111,215.13, which was paid under protest. Belleau then appealed to the hearing examiner. The hearing examiner upheld the fee and an appeal to superior court followed. The trial court reversed the imposition of the fee, holding that the City impact fee ordinance was not applicable since the park impacts had been fully mitigated pursuant to the earlier development contract.

Holding: The Court of Appeals reinstated the hearing examiner’s ruling. The City ordinance exempted imposition of the impact fee on development activities where there had been previous mitigation pursuant to an agreement with the City. The Court rejected Belleau’s interpretation of this section to mean that any mitigation would exempt the development from further fees, and agreed with the hearing examiner that the language required the prior dedication to be in full satisfaction of any mitigation requirement. The prior contract contemplated an additional payment as part of the mitigation. Belleau was not vested as to the amount of the impact fees, which the City could and did increase prior to the issuance of permits.


Facts: North Pacific Design desired to develop an 18.8 acre site in Gig Harbor into a 174 unit residential development. NPD applied for approval of a preliminary plat, a planned residential development and condition use permit in order to obtain the requisite approvals to construct the project. According to applicable zoning regulations, the property could be developed to a density of 8 dwelling units per acre and up to 12 units per acre allowed as a conditional use. NPD applied for a density of 11.75 units per acre. The code also required at lease 30% of the PRD to be set aside as open space. NPD proposed open space of 5.66 acres, but this area included the 20 foot perimeter setbacks that were also a code requirement. The City planning staff recommended approval with several conditions, one of which was that the open space be calculated without reference to the 20-foot perimeter setbacks. The hearing examiner concluded that the perimeter setback areas were improperly included in the open space calculation, but granted the CUP and approved the PRD subject to a revision of the open space. The City appealed the CUP and NPD appealed the conclusion that the setback area could not be included within the open space calculation. The trial court ruled in favor of NPD on both issues, affirming the hearing examiner's interpretation of the code on the density issue and reversing the Hearing Examiner's decision on the issue of open space. The City appealed.
Holding: The Court of Appeals affirmed the trial court. The Court rejected the City’s argument that the CUP amounted to a rezone that only the City council could approve. The underlying code specifically contemplated a density of up to 12 units per acre as a conditional use, and the use granted by the hearing examiner was consistent with the code. The Court also rejected the City’s argument that NPD was combining various code sections in a manner not intended by the City. The language of the code was unambiguous and the Court refused to consider the “intent” of the City in authorizing PRDs. The City’s argument that the perimeter setback areas were to excluded from the calculation of open space relied on equating perimeter setbacks with yard setbacks, since yard setbacks are excluded by the City’s code from inclusion in the calculation of required open space. Under the plain language of the applicable code, the definition of "required yards" did not include "perimeter setbacks” and the City’s position was rejected. The perimeter setback areas were properly included within the area that satisfied the open space requirement.


Facts: Hunter owned 10 acres in rural Pierce County consisting of two parcels, each with an individual tax number. After Hunter’s death, his heirs decided to sell the property. A survey revealed that there were actually seven lots, and on May 31, 2005, the executor sold the seven lots to four different buyers. Two of the buyers, Collins and Becker, submitted for master permits to construct residences. A wetlands study revealed that there were wetlands on the properties to the extent that a building could not be accommodated outside of the wetland areas. Both applied for reasonable use exceptions for the lots. The hearing examiner concluded that the lots qualified for the exception, but Sylvester and other neighbors appealed the decision. Their concern was that the septic systems would not properly percolate. The trial court reversed the hearing examiner, finding that substantial evidence did not support the finding that the lots qualified for the reasonable use exception. Collins and Becker appealed.

Holding: The trial court was affirmed. The trial court concluded that of the requirements in the Pierce County ordinance allowing the reasonable use exception was that the property be “vested” prior to March 1, 2005. The trial court interpreted the vesting requirement to mean that all permit applications had been filed by that date. The hearing examiner had concluded that the requirement only meant that the lots were in existence as of March 1, 2005. The Court of Appeals agreed with the trial court and held that the “vested” requirement of the ordinance (PCC Chapter 18E.20) could not be satisfied in this case because Collins and Becker filed their initial master permit applications in November, 2005, more than 9 months after the date required by the ordinance.


Facts: Bonneville applied for a conditional use permit to operate an appraisal business from his home, which was located in an area zoned as “rural” by Pierce County. To overcome objections from the County, Bonneville suggested and agreed to a right of entry by County officials so that they could determine whether Bonneville was in compliance with the conditions of the CUP. The permit was issued in 2004, and in November, 2006, the code inspection officials accompanied by a sheriff inspected the premises. Three violations were noted, and the
County sought to revoke the CUP. A hearing examiner revoked the permit in April, 2007. Bonneville did not appeal this ruling. In December, 2006, Bonneville sued the County under 42 USC §§1983 and 1985(3), claiming that the County illegally searched his house and unlawfully revoked the CUP. The trial court dismissed the action on a summary judgment.

**Holding:** The trial court was affirmed. The Court rejected Bonneville’s claims that he was coerced into allowing the inspection; that the County failed to verbally inform Bonneville that he had a right to refuse access to the inspectors; and that his property rights in the CUP were taken without due process. The Court also found that no evidence was presented that supported Bonneville’s claim of civil conspiracy.

Griffin v. Thurston County Bd. of Health, 165 Wn.2d 50 (2009) – Requirements for on-site sewer system.

**XIII. Land Use/SEPA**

**Gold Star Resorts, Inc. v. Futurewise, 167 Wn.2d 723 (2009)**

**Facts:** Whatcom County adopted a comprehensive plan as required by GMA in 1997. Subsequent amendments to GMA allowed limited areas of more intensive rural development. Futurewise challenged the adequacy of the County’s restrictions on LAMIRD; Gold Star, a property owner in the County intervened in the appeal before the Western Washington Growth Management Hearings Board. The Hearings Board determined that the County plan did not
conform with GMA and ordered modifications. No further development in rural areas greater than one unit per five acres could be undertaken until the County brought its plan into compliance. Gold Star appealed. The trial court overruled most of the Board’s findings; the Court of Appeals reversed the trial court and reinstated the Board’s decision.

**Holding:** The Supreme Court rejected the claim that collateral estoppel and res judicata principles barred a challenge to the County's failure, during the seven-year review required by the GMA, to review and revise the comprehensive plan to include criteria for LAMIRDs that reflect the 1997 amendments to the GMA. The Court of Appeals' decision that the Board's holdings that the County's comprehensive plan does not comply with the GMA's LAMIRD provisions and that the County was required but failed to revise the plan to include the LAMIRD criteria and then apply them in establishing areas of more intense rural development was affirmed. The Court reversed the holding that the Board did not improperly apply a bright line rule in addressing a challenge to the rural density designations; the Board did in fact rely on a bright line rule of one residence per five acres in rural areas (other than LAMIRDs).

*Kailin v. Clallam County, 152 Wn.App. 974 (2009)*

**Facts:** Dr. Kailin proposed to build a house within 200 feet of the shoreline of Sequim Bay, Clallam County, and within the Clallam County Shoreline Master Program Rural Shoreline Environment. The County granted the permit subject to certain conditions, including a reduction in the footprint of the house to reduce the intrusion into the wetland buffer. Kailin appealed to the shorelines hearings board, which affirmed the County’s permit conditions and concluded that it lacked jurisdiction to review other aspects of the permit. An appeal to the Superior Court followed, and the trial court reversed the hearings board and remanded the matter for further proceedings.

**Holding:** The trial court was reversed. The hearings board did not have jurisdiction to address a reasonable use exception from the County’s critical areas ordinance since the ordinance was not part of the County’s shoreline master program. The Court found that the trial court improperly relied on the plurality opinion in *Futurewise v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 242 (2008). Since the majority opinion in that case was joined by only four justices, with a fifth justice concurring in result only, and four justices signed a dissenting opinion, the rationale of the plurality opinion cannot be relied upon to resolve the issue of the jurisdiction of the hearings board.

*KAPO V Central Puget Sound Growth Mgmt Hrgs Board, 152 Wn.App. 190 (2009)*

**Facts:** Kitsap County updated its critical areas ordinance in light of the requirements of GMA. Several groups challenged the 35-foot buffer around the County’s shorelines proposed in the CAO. The Hearings Board rejected the buffer and ordered the size of the buffer increased. The County increased the buffer to 50 and 100 feet depending upon location; KAPO appealed this requirement to superior court and the trial court upheld the validity of the ordinance and the Board’s order.
Holding: Reviewing various Supreme Court decisions, the Court of Appeals concluded that there was not majority opinion that clarified the interaction of SMA and GMA. The Court of Appeals concluded that shoreline buffers were to be established under the SMA. The trial court was reversed and the matter remanded to the Board with instructions that County CAO be invalidated and the matter be sent back to the County to establish buffers under the SMA.


Facts: In 2004, DOE drafted a general NPDES permit under the federal Clean Water Act covering dairy and other livestock operations, known as concentrated animal feeding operations (CAFOs) in the State of Washington. Nitrate nitrogen in animal manure posed a risk to groundwater and the discharge of this material required an NPDES permit. The Community Association for the Restoration of the Environment (CARE) challenged the general permit and appealed to the Pollution Control Hearing Board. The PCHB affirmed the issuance of the permit and all of its conditions. CARE appealed to the Court of Appeals for direct review.

Holding: The PCHB was affirmed. There was substantial evidence in the record supporting the permit conditions concerning groundwater monitoring. State law did not require that groundwater monitoring be conducted in all instances. The portions of CARE’s appeal relating to the application of the business record exclusion to public information requests was a request for a declaratory ruling with respect to a possible future legal issue, which the PCHB was correct in refusing to render.


Facts: Herman purchased his father’s house located on a hillside above Liberty Lake in 1970. Between 1970 and 1993, Herman constructed various improvements to the property, which, at the time of purchase, consisted of an 11,000 square foot house. In 1993, DOE imposed a penalty on Herman for violations of the Shoreline Management Act. Herman appealed, but the matter was settled by Herman agreeing to remove certain improvements and DOE foregoing a proposed fine. Herman did not remove the improvements and constructed additional modifications to the property. In May, 2004, DOE and Spokane County issued a joint shoreline violation order to Herman requiring removal of certain improvements and imposing a $30,000 fine. Herman appealed to Shorelines Hearing Board, which upheld the order, but provided for a reduction of $10,000 in the fine if Herman complied with the order within one year. Herman appealed to the Spokane County Superior Court. The trial court admitted additional evidence in the form of two expert reports. The trial court ultimately entered findings and an order that concluded many of structures constructed by Herman could not be removed without destabilizing the slope and refused to order the removal of any structure. The issue of whether $10,000 of the fine should be abated was remanded to the SHB.

Holding: The trial court did not admit the declarations and reports submitted by Herman under any of the narrow exceptions provided by the APA, but the court nevertheless relied on those expert declarations and reports to reach conclusions different from the SHB. This was error. The trial court's conclusions of law that the permitting process or requirement for agency approval did not apply to most of the structures on Herman's property were in error and would

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have the effect of disrupting the allocation of political power set forth in the Shoreline Management Act and the APA. The trial court’s decision was reversed and the SHB’s order affirmed.


Facts: Blakely Harbor, Bainbridge Island, is the last harbor in Central Puget Sound that remains largely undeveloped. Following an expiration of a moratorium on issuing permits for private dock construction on Blakely Harbor, the City amended its shoreline management plan by limiting dock and pier development within Blakely Harbor. The amendment prohibited single-use docks or piers in Blakely Harbor, continued to allow the use of mooring buoys and floating platforms, and allowed development of two joint-use docks for up to five boats each and one community dock. DOE approved the amendment. On April 23, 2004, Samson filed a petition for review with the Shorelines Hearing Board challenging both the City's amendment and Ecology's approval of it. Following a hearing on the merits, the Board issued its final decision and order upholding the City's amendment. Samson appealed to the Thurston County Superior Court, which dismissed Samson’s appeal.

Holding: The Court of Appeals affirmed the Board. The Court held that: (1) private docks in Blakely Harbor were not a preferred use; (2) the City’s amendment was consistent with the City's SMP and Comprehensive Plan; and (3) the amendment did not violate the "public trust" doctrine. The Court also rejected Samson’s claim that the amendment violated the due process and equal protection requirements of the State Constitution. The amendment applied alike to all members within the designated class (Blakely Harbor property owners), there were reasonable grounds to distinguish between Blakely Harbor and the other harbors in the City, and the amendment had a rational relationship to the legislative purpose, and the recreational, aesthetic, and natural resource values of the harbor.

Spokane County v. City of Spokane, 148 Wn.App. 120 (2009)

Facts: Spokane County designated the North Metro area as an urban growth area. It designated a portion of the area as a “joint planning area” with the City of “Spokane. The City demanded that the entire North Metro area be designated as a joint planning area and appealed the County’s actions to the Growth Management Act Hearings Board. The Board agreed with the City that the County’s actions violated the GMA and a prior order issued by the Board in 2002. The County was ordered to enter into interlocal agreements with the City covering the entire area. The County appealed.

Holding: The Board’s decision was reversed. The Court rejected the argument that the failure to appeal the 2002 Board order constituted collateral estoppel. The new order of the Board determined that the County had violated the GMA, and it was from that order that the County appealed. GMA did not authorize the Board to order the County to adopt strategies for the transfer of local government to joint planning areas. Since the Board had acted beyond its authority, the order was set aside.


Twin Bridge Marine Park, LLC v. Dept. of Ecology, 162 Wash.2d 825 (2008) – County versus DOE enforcement of SMA.


Interlake Sporting Ass’n v. Wash. State Boundary Review Board for King County, 158 Wn.2d 545 (2006) – Authority of Boundary Review Board.


Habitat Watch v. Skagit County, 155 Wn.2d 397 (2005) – Challenge to granting of special use permit.


King County ex rel. Wastewater Treatment Division v. King County Hearing Examiner, 135 Wn.App. 312 (2006) – Appeal of SEPA conditions.


Glasser v. City of Seattle, Office of Hearing Examin’r, 139 Wn.App. 728 (2007) – Adequacy of SEPA.

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**XIV. Governmental Regulation**

**A. Hazardous Waste**


**B. Water Rights**


**Facts:** Michelson farmed 200 acres in Walla Walla County from 1973 to 1987. He irrigated the land using water from the Walla Walla River pursuant to a surface water certificate. In 1987, the Rural Economic and Community Development Agency foreclosed on the farm. RECD removed all of the irrigation equipment. In 1995, the land was offered to sale as a dry land farm. Pacific Land Partners, LLC purchased the property. PLP contacted DOE concerning the water permit, and based upon documentation supplied concerning the foreclosure proceeding, DOE concluded that the five year period of non-use after which the water right would be forfeited would commence to run upon PLP’s acquisition of the property. PLP did not use the water right, but in December, 2000, PLP applied to change the diversion point for the water right. DOE investigated and concluded that the right had lapsed from non-use since 1983. PLP challenged this ruling with the Pollution Control Hearings Board, which affirmed DOE’s determination based on PLP’s non-use of the right. The Board was affirmed by the Walla Walla Superior Court, except with regard to the determination that the federal foreclosure action was a sufficient excuse for non-use, which the trial court reversed.

**Holding:** Under RCW 90.14.180, a person who holds a water right and who voluntarily fails, without sufficient cause, to beneficially use all or a portion of the right for five successive years will relinquish all or a portion of the right. There are exceptions to this rule, one of which is for legal proceedings which prohibit the exercise of the right. The foreclosure proceedings were not of a nature that prohibited the use of the right, and the trial court was correct in holding...
that the five year period of non-use was not tolled during the foreclosure and ownership by RECD. The Court rejected PLP’s claim that DOE was estopped to deny that the foreclosure proceeding constituted a legal proceeding that excused exercise of the right, since the statements by DOE constituted legal conclusions, and the equitable estoppel does not apply to statements of law, even if the statements are incorrect. Finally, PLP failed to exercise the water right for a five year period without excuse. The evidence established that for a relative nominal investment, the diversion point could have been utilized during PLP’s ownership. The fact that work was required to make the water available did not justify PLP’s voluntary failure to exercise the right.


Facts: Ahtanum Ridge LLC purchased water rights from Washington Beef in 1999. The rights were last used when Washington Beef operated a slaughter house in 1995. Ahtanum and the City of Union Gap entered into negotiations for the sale of the rights to the City. Negotiations dragged on, but in March, 2004, the Yakima County Conservancy Board approved the transfer. The Conservancy Board submitted its decision to DOE for review pursuant to RCW 90.80.080 and DOE denied the transfer. The City and Ahtanum appealed to the Washington Pollution Control Hearings Board. The Board affirmed the denial and, following an appeal to Yakima County Superior court, the trial court affirmed Board.

Holding: The Court of Appeals affirmed the trial court and the Board’s denial of the transfer. Non-use of a water right results in the reversion of the right to the state. The City and Ahtanum relied on two exceptions to this rule – the acquisition of the right for a specific future development and the acquisition of the right for municipal water supply purposes. Relying on R.D. Merrill v. Pollution Control Hearings Board, 137 Wn.2d 118 (1999), the Court concluded that the owner of the right (in this case Ahtanum) was required to have a specific planned future development in order to rely on the first exemption. The acquisition of the right with the intention to sell it to the City did not qualify as a plan for future development. The second exemption was available only to an owner that was a municipality, and required that the right be acquired by the municipality prior to the lapse of the right following non-use for five years. In this case, the City did not acquire the water prior to five years of non-use, and the water right had lapsed.


C. Irrigation Districts

No reported cases in last five years.

D. Archeological Lands

No reported cases in last five years.
E. Mortgage Broker Practices/Appraisers


**Facts:** The DFI, through the Attorney General’s Office, conducted an investigation of the mortgage practices of Ameriquest. In connection with the investigation, Ameriquest loan files were provided to the AGO. The files included the names of borrowers and other borrower-identification information. The DFI investigation was settled, but a private law firm then requested that the records be disclosed under the Public Records Act. Ameriquest sought to prohibit the disclosure, but the trial court refused to enter an preliminary injunction prohibiting the AGO from releasing the records.

**Holding:** The trial court’s ruling was reversed in part. The trial court improperly combined the hearing for a preliminary injunction with a trial on the merits. The trial court also improperly failed to order the AGO to notify the affected individuals whose files were to be disclosed. On remand, the trial court was instructed to conduct a proper preliminary injunction hearing to determine whether the disclosure was allowed under the Graham-Leach-Bliley Act (15 U.S.C. § 6801 et seq.), which the Court concluded pre-empted the Washington Public Records Act (RCW 42.56).


F. Forest Practices

_Dept. of Natural Res. v. Browning, 148 Wn.App. 8 (2008)_

**Facts:** Browning lease land from Drake in Pend Oreille County. On two separate occasions, an inspector from DNR issued stop work notices to Browning based on alleged violations of the Washington Forest Practices Act. Neither Browning nor Drake appealed these orders. DNR then sought and obtained an enforcement order against Drake and Browning, and the trial court entered an injunction prohibiting further logging on the property and awarding attorney fees.

**Holding:** The judgment was affirmed. The failure to appeal the enforcement orders resulted in the orders being final orders of Forest Practices Appeals Board. The failure to appeal the Board’s final order precluded the property owner from contesting the authority of DNR to issue the stop work orders. The Court rejected the arguments of the property owner related to the lack of jurisdiction of the trial court and the unconstitutionality of the action by DNR.


V. Taxation

A. General Real Estate Taxes


**Facts**: Grays Harbor Energy, LLC, purchased a electricity generating facility in Elma, Washington. The facility consisted of three buildings, a cooling tower and five generators. Grays Harbor County initially assessed the facility at $97.4 million at the beginning of 2004. GHE appealed to the Board of Equalization, which reduced the assessment to $21 million. The County appealed to the State Board of Tax Appeals, which reversed the Board of Equalization; GHE then appealed to the superior court, which remanded the case to Board of Tax Appeals for further proceedings and refused to lower the assessed value.

**Holding**: The Court of Appeals reversed the trial court and lowered the assessed value. At issue was whether the turbines were real or personal property. RCW 84.12.280 provides that "all of the operating property other than lands and buildings of electric light and power companies ... shall be assessed and taxed as personal property." It was admitted that GHE was a power company, so the turbines should have been taxed as personal property. The Court rejected the County’s claims that the stature violated the constitutional requirement that all real property be taxed as one class of property. The Court held that it was permissible for the state legislature to define the equipment as personal property rather than follow the common law definition of fixtures which might result in the classification of the equipment as part of the real property.


**Facts**: After Kitsap County started tax foreclosure proceedings against Linda and Daniel Plegers' real estate, they sold their interest in the property to Cumulative, LLC. Part of the sale was a specific assignment to Cumulative of any right to any "overage" (sale proceeds in excess of the delinquent tax amount). The County sold the property in a tax foreclosure sale with a resulting overage of $37,522.02 and Cumulative asked the County for the excess funds from the foreclosure sale. A few months later, Linda Pleger formally applied for the foreclosure surplus. Faced with conflicting claims to the overage, the Kitsap County treasurer deposited the overage funds with the court and interpleaded the Plegers and Cumulative. The trial court granted summary judgment for the Plegers, reasoning that their transfer to Cumulative was void because it violated RCW 84.64.080, which required the County to pay the overage to the Plegers, who were the recorded owners at the time foreclosure proceedings commenced.

**Holding**: RCW 84.64.080 provides that the county treasurer shall pay any overage to the record owner at the time foreclosure proceedings are commenced. The legislative history of RCW 84.64.080 shows that the statute was not intended to determine ownership interests in the proceeds of a tax judgment foreclosure sale. Rather, it was intended to ease the job of the county treasurer because the statute had previously been ambiguous as to whether other creditors have rights to intervene and receive the refund before it goes to the record owner. The Court reversed the trial court and remanded the matter for the trial court to determine who actually owned the property at the time of the foreclosure sale.

**Facts:** Sy Nguyen and Lyly Nguyen owned property consisting of two lots, each a separate tax parcel, in Seattle as tenants in common. They sold the property to Van Nguyen, but the deed contained an erroneous legal description. The result was that title to one of the lots remained vested in Sy and Lyly. No one paid real estate taxes on this parcel for the period of 1999 through 2002. King County sent various notices to Sy and Lyly at the same address, but the notices were returned as a result of change in the address designation. Finally, King County commenced a tax foreclosure proceeding. The notice was sent only to Sy at the same erroneous address. Service was eventually obtained by publication. Miller purchased the lot at the foreclosure sale in 2002 and quit claimed the lot to Homeowners Solutions in 2004. In 2005, Homeowners sought to evict Van from the property, who was unaware of the tax foreclosure. Van, Sy and Lyly brought an action to vacate the foreclosure sale, and the trial court vacated the sale.

**Holding:** The trial court was correct that Sy and Lyly as tenants in common should have received separate notices of the foreclosure from the County. The failure of the County to properly notify Sy and Lyly as required by the statute deprived the court of jurisdiction over the sale, and the sale was void. Where commonly owned property is assessed as a single unit and the County seeks to foreclose on the entirety of the property, notice must be provided to every co-tenant.


**B. LID’s, Assessments & Utility Fees**

**Cary v. Mason County,** 152 Wn.App. 959 (2009)

**Facts:** At the request of Mason County Conservation District, Mason County levied a $5.00 per parcel assessment on all parcels 1 acre or greater in size. The intention was to create a fund dedicated for water resource protection within Mason County. Over a five-year period, more than $1.1 million was levied and collected. Various landowners challenged the assessment as an illegal tax. The trial court concluded that the charge was an illegal tax because there was no relationship between the fee charged and any services provided.

**Holding:** The Court of Appeals reversed. The purpose of the assessment was to provide the landowners with a specific service – improved water quality. The funds were allocated for a regulatory purpose. The funds were used for the management of a specific purpose for the benefit of the citizens of the County, rather than for general governmental purposes. These three
factors favor the conclusion that the assessment is a permissible fee, rather than a tax. The District had the authority under RCW 89.08.400(3) to make the per acre and per parcel charge that was ultimately adopted.


C. Excise Taxes

*Homestreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444 (2009)

**Facts:** Homestreet Bank originated mortgage loans and sold loans in whole or in part into the secondary market. For some of the loans, Homestreet retained “servicing” rights. When it received payments from borrowers, it would remit the portion due the buyer of the loan and retain the remainder, which included a servicing fee. The Dept. of Revenue asserted that Homestreet was required to pay B&O tax on the portion of the payments constituting a servicing fee. Homestreet contended that it was entitled to deduct from its income the entire amount of interest received from borrowers, including that portion of the interest constituting a service fee. Homestreet paid the tax and then sued for a refund. The trial court granted DOR a summary judgment and the Court of Appeals affirmed.

**Holding:** The Supreme Court reversed. The statute allows the taxpayer to deduct from income the amount of income “derived” from interest. The Court focused on the nature of the payment made by the borrower, as opposed to the characterization of the receipt by the bank. Clearly the payments made by the borrower were interest, and were therefore fully deductible without any exclusion for the portion of the interest payment retained by Homestreet as its servicing fee.
The 2010 Regular and Special Sessions of the State Legislature continued to focus on the current adverse economic conditions affecting the residential real estate market in Washington. In addition, the legislature addressed a variety of narrow real estate issues. Below is a brief summary of the legislation that may potentially affect real estate transactions, development and ownership passed during the session. Unless otherwise noted, all measures are effective ninety days following the end of the legislative session, or June 10, 2010.

**EHB 1653, C 107, L 10** – GMA. Integrates planning under GMA with the effect of SMA. Intended to modify the result in *Futurewise v. Western Wash. Growth Management Hearings Bd.*, 164 Wn.2d 242 (2008).

**ESHB 1956, C. 175, L 10** – Land Use. Grants permission for religious organizations to provide shelter for homeless and prohibits municipalities from enacting zoning and permit fee regulations designed to restrict homeless encampments.

**2SHB 2481, C 126, L 10** – DNR. Authorizes DNR to enter into leases of state lands for the sale and conversion of biomas into energy or biofuels.

**ESHB 2538, C 153, L 10** – GMA. Cities are authorized to adopt plans for subarea developments that include provisions for transfer of development rights.

**HB 2564, C 34, L 10** – Escrow Agents. Makes numerous changes to the laws regarding the regulation and licensing of escrow agents, including bonding requirements, prohibited activities and ability of DFI to assume control of escrow company that violates the statute.

**HB 2608, C 35, L 10** – Residential Loan Servicers. Requires registration and licenses for residential home loan servicers that are not otherwise exempt for the Consume Loan Act or the Mortgage Broker Practices Act.

**HB 2657, C 196, L 10** – Limited Liability Companies. Procedure for dissolving and winding up LLCs is modified to clarify effect of dissolution on liabilities and claims against LLC. A procedure to revoke a certificate of dissolution has been established. Bill intended to address issues in *Chadwick Farms* case.

**HB 2697, C 156, L 10** – Real Estate Brokers. Extends authority of DOL to collect $10 annual fee from brokers for five years to fund Washington Center on Real Estate Research.


**SHB 2745, C 158, L10** – Contractors. Persons engaged in modification of homes, child care facilities and schools built before 1978 must meet the requirements for training and certification...
for individuals dealing with lead based paint. This bill is intended to bring state law into compliance with EPA regulations taking effect in April, 2010.

**HB 2935, C 210, L 10** – Land Use Hearing Boards. Reduces and consolidates the number of boards that conduct administrative hearings reviewing environmental and land use decisions, and makes more uniform the timelines for filing appeals. An Environmental and Land Use Hearing Office is established to exercise the functions of the GMA hearing boards. Procedures and new offices become effective July 1, 2011.

**HB 2962, C 200, L 10** – Property Taxes. Allows electronic payment of property taxes.

**HB 2990, C 102, L 10** – Sewer District Taxation. Cities are authorized to levy a gross receipts tax on water and sewer districts that sell services within the city boundaries. Tax authorization expires in 2015.

**HB 3007, C 155, L 10** – Airports. Airports are allowed to make property available for certain community uses at less than fair market rental rates. Bill would authorize SeaTac to make fields available for little leagues.

**HB 3030, C 201, L 10** – Irrigation Districts. Changes regulations concerning certain small works projects for irrigation districts and eliminates review of changes to irrigation district boundaries by the boundary review board for areas with federal reclamation projects.

**ESHB 3040, C 179, L 10** – Appraisers. Establishes licensing requirements for firms engaged in appraisal management services, including a system for resolving disputes between the management company and appraisers. Effective July 1, 2010.

**ESSB 5529, C 129, L 10** – Architects. Regulation and license requirements for architects are modified. Architects licensed in other jurisdictions may, subject to certain restrictions, practice in Washington.

**ESSB 5704, C 131, L 10** – Flood Control Districts. Governance for flood control districts encompassing property from three or more counties is modified.

**ESB 6261, C 135, L 10** – Utility Liens. Public utilities are restricted from asserting a lien for more than four months of past due bills against residential rental property if the owner has provided specified notices to the utility. Failure to give the owner notice of delinquency can also result in a loss of all lien rights for past due utility bills.

**SSB 6271, C 19, L 10** – Annexation. When property is annexed into a city located within a regional transportation authority, the property annexed is automatically included in the RTA and is subject to all applicable taxes. The annexing city must notify the RTA of the annexation.

**SB 6275, C 45, L 10** – Harbor Lines. Allows Harbor Line Commission to change boundaries in any harbor area, and the restrictions prohibiting alteration of certain harbor lines have been deleted.
SB 6286, C 46, L 10 – Flood Control Districts. Flood control districts, diking districts and cities are provided immunity from any liability arising from noncontractual acts or omissions relating to the improvement, protection, regulation and control for flood prevention and navigation of any river and its tributaries.

SSB 6373, C 146, L 10 – DOE. Reporting requirements for establishments emitting greenhouse gases are changed.

SB 6418, C 136, L 10 – Fire Districts. Cities or towns with a population not exceeding 300,000 may be annexed into an adjacent fire district

SSB 6459, C 148, L 10 – Rental Properties. A municipality may require a certificate of inspection from a rental housing operator as a condition to granting a business license. The bill also modifies requirements for unit inspections and appeals from unfavorable inspections.

SB 6481, C 219, L 10 – Forest Practices. Counties required to adopt forest practice regulations under GMA are limited to counties with a population of 100,000 within the county and cities within those counties.

SB 6544, C 79, L 10 – Plats. The time period following the approval of a preliminary plat during which changes of law are inapplicable to the final plat is extended from five years to seven years. The extension expires 12/31/2014.

SSB 6558, C 82, L 10 – Railroads. The procedure for closing railroad crossings and the responsibility for providing SEPA review of the proposed action have been modified.

2SSB 6578, C 162, L 10 – Permitting. An interagency permitting team is established to formulate methods to assist in review of permit applications requiring multiple agency approvals.

SB 6611, C 216, L 10 – GMA. The time period for certain counties to approve comprehensive plans under GMA has been extended. Counties that comply with the new timelines are entitled to receive financial assistance for certain planning activities.

SB 6749, C 64, L 10 – Form 17. Sellers of commercial real estate are required to deliver a Form 17 disclosure to buyers, unless the buyer waives the right to receive the form. The buyer has a three day rescission period after receipt of the form.

SB 6764, C 149, L 10 – Judgments. Interest on tort judgments is increased to the greater of 12% per annum or 4 percentage points over the 26-week federal bill rate.
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